REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.207 OF 2009 & 348 OF 2008

(An Appeal arising out of the conviction and sentence of G.W. Macharia (SRM) delivered on 8th October 2008 in Kiambu CM. CR. Case No.1351 of 2007)

BENSON GITHERU NJENGA.....1ST APPELLANT

PETER NJAU KOIBITA.....2NDAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Benson Gicheru Njenga (1st Appellant) and Peter Njau Koibita (2nd Appellant) were jointly charged in the first count with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code.** The particulars of the offence were that on 6th June 2007 at [particulars withheld] in Kiambu District, the Appellants, jointly with another not before court, being armed with offensive weapons namely knives robbed JWN of one mobile phone make Motorolla C261 and cash Ksh.2,000/- all valued at Ksh.7,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said JWN.

The Appellants were jointly charged in the second count with the offence of **attempted rape** contrary to **Section 4** of the **Sexual Offences Act.** The particulars of the offence were that on 6th June 2007 at [particulars withheld] in Kiambu District, the Appellants attempted to have carnal knowledge of JWN without her consent. In the alternative, the Appellants were jointly charged with the offence of **committing an indecent act with an adult** contrary to **Section 11(A)** of the **Sexual Offences Act.** The particulars of the offence were that on 6th June 2007 at [particulars withheld] in Kiambu District, the Appellants unlawfully and indecently assaulted JWN (the complainant) by touching her vagina.

When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, the Appellants were convicted as charged on the first count and on the alternative charge in the second count. The Appellants were sentenced to death in the first count. The sentence with regard to the alternative charge in the second count was suspended. The Appellants were aggrieved by their conviction and sentence. They each filed a separate appeal to the High Court. Their appeals **(High Court Criminal Appeal Nos.207 & 208 of 2009)** were heard and determined by a bench comprising of Hon. Lady Justice Mbaru and Hon. Justice Rika of the Employment and Labour Relations Court. The Court of Appeal by dint of an order dated 8th November 2017 remitted the appeal back to the High Court for retrial on the ground that the said bench lacked jurisdiction to hear the Appeals. The appeal is now before this court.

In their petitions for appeal, the Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They were of the opinion that the evidence presented by the prosecution was not sufficient to sustain a conviction. They faulted the trial court for finding that the ingredients of the charge were proved to the required standard of proof beyond any reasonable doubt. They were aggrieved that the trial magistrate relied on the evidence of a single identifying witness to convict them. They complained that the trial court failed to consider their alibi defence in arriving at its decision. They urged the court to allow their respective appeals.

During the hearing of the appeal, this court heard oral submission made by Mr. Ogesa for the Appellants and by Ms. Sigei for the State. Mr. Ogesa submitted that the Appellants were not at the scene of crime when the robbery occurred. They were at Banana Hill. They could therefore not have committed the crime that took place in Kiambu. A defence witness stated that he saw the Appellants seated outside a hotel in Banana Hill. DW3 and DW4 corroborated the Appellant's alibi defence. Counsel for the Appellants stated that evidence relating to collection of the prosecution exhibits was contradictory. He was of the view that the complainant was not a sincere witness. She claimed that the incident occurred in a public place. However no one witnessed the Appellants assault her. He asserted that the trial court was misdirected in relying on the evidence of the complainant, who was the only identifying witness. He was of the view that the trial court erroneously failed to consider the Appellants' alibi defence. He therefore urged this court to allow the Appellants' appeals.

Ms. Sigei for the State opposed the appeal. She made oral submissions to the effect that the ingredients of the charge of **robbery with violence** were established. The offence occurred in broad daylight. She asserted that complainant knew the Appellants. The identification of the Appellants was by recognition. She further submitted that the complainant narrated in detail how the Appellants attacked her. They robbed her and sexually assaulted her. Learned State Counsel averred that PW2, PW3 and PW4 corroborated the complainant's evidence. She pointed out that the complainant sustained injuries occasioned by the Appellants. The medical evidence adduced validated the complainant's testimony. She submitted that the investigating officer collected the prosecution exhibits from the scene where the incident occurred. She maintained that the evidence relating to collection of the exhibits was consistent. She was of the view that the Appellants' alibi defence was an afterthought. They failed to address the same when they cross-examined the prosecution witnesses. In the premises therefore, she urged this court to dismiss the Appellants' appeals.

The facts of the case according to the prosecution are as follows: The complainant was on her way to work. She was a manager at [particulars withheld]. It was about 8.10 a.m. She met three men; both Appellants and a third man. She recognized the Appellants since they worked at the factory as night guards. The third man was a stranger to her. The 1st Appellant asked her if she was going to work. He told her that he needed to have a word with her. The 2nd Appellant and the third man walked ahead of them. She was left with the 1st Appellant. He asked her to accompany him down a path. She obliged. She stopped when they reached a spot that had napier grass. The 1st Appellant insisted they walk further down that path. She declined. He suddenly hit her at the back of her head. She fell down. The 2nd Appellant and the third man appeared. They held her and dragged her into a bush. She screamed. The 2nd Appellant kicked and hit her all over her body. The third accomplice was holding a knife. They removed her skirt and biker shorts. The 2nd Appellant poured oil on her head. He then removed her underwear. The 2nd Appellant and the third accomplice opened her legs apart. They poured a liquid into her vagina. They also poured soil into her vagina. The third accomplice ordered her to sit up. He slapped her on her face. He threatened to kill her. He asked her to surrender all her valuables. She gave him her mobile phone and Ksh.2,000/-. The men afterwards disappeared.

The complainant raised an alarm hoping someone would come to her rescue. She crawled on her knees looking for an exit from the bush. Luckily she met PW2. She instructed him to rush to the factory and get PW4 who would take her to the hospital. PW3 and PW4 rushed from the factory to the scene where the incident took place. They found the complainant's body covered in oil. They were unable to lift her since the oil made her body very slippery. PW2 got a wheelbarrow from his farm. They put her on the wheelbarrow and managed to get her to the main road. They stopped a pick-up vehicle on the road which offered to take them to Karuri Police Station. They afterwards took the complainant to hospital.

When the Appellants were put to their defence, they denied the charges against them. They told the court that they worked as night guards at [particulars withheld]. They stated that the factory chairman informed them that they were to attend a meeting on 6th June 2007. The meeting was to address theft of items that had been stolen at the factory. The complainant was implicated in the said theft. They left the factory at 8.00 a.m. that morning. The meeting was to be held at 8.30 a.m. at Banana. They stated that they did not meet the complainant on the way. They arrived at the meeting at 8.30 a.m. On arrival, they met the factory's vice-chairman, treasurer and district co-operative officer. They greeted them and left.

They went to a nearby hotel to have some tea. They met DW3 who offered to buy them tea. The chairman called them back to the meeting. They went back and sat at the waiting room. At about 11.00 a.m., the secretary informed them that the complainant had been attacked by thugs. The chairman and vice-chairman went to check on the complainant at the hospital. The chairman and vice-chairman came back at 4.00 p.m. The chairman informed them that the meeting would be held at a later date since the complainant was indisposed. They were told to report back to work. The 1st Appellant stated that he reported back to work later that evening at 5.00 p.m. The 2nd Appellant reported at 6.00 p.m. They were arrested the following day. They denied meeting the complainant on that day.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the trial court. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and therefore cannot make any comments with regard to the demeanour of the said witnesses. (See **Njoroge vs Republic [1987] KLR 19).** In the present appeal, the issue for determination is whether the prosecution proved its case on the charges brought against the Appellants to the required standard of proof beyond any reasonable doubt.

It was evident from the facts of the case that the prosecution relied on direct evidence of identification to secure the conviction of the Appellants with regard to the charge of robbery with violence. This was a case of identification by recognition. The complainant and the Appellants worked at the same coffee factory. She was therefore in a position to recognize them. The incident occurred in broad daylight at about 8.10 a.m. The complainant and the Appellants exchanged pleasantries before they proceeded to attack her. The conditions were therefore favourable for positive identification to be made. The courts have previously held that the recognition of an assailant is more satisfactory and more reliable than the identification of a stranger (See **Anjononi & Others vs R [1981] eKLR).**

The complainant narrated to the court how she met the Appellants on her way to the factory. The 1st Appellant asked her to walk with him as he had something to tell her. When she refused to go any further, he hit her on her head. She fell down. The 2nd Appellant, the third accomplice dragged her into a bush. They assaulted her. They removed her skirt, biker shorts and underwear. They poured oil all over her body and in her vagina. They afterwards robbed her of her mobile phone and Ksh.2,000/-. PW2, PW3 and PW4 stated that when they found the complainant, she was covered in oil over her body. They were unable to carry her since her body was slippery. They had to use a wheelbarrow to get her to the main road. The complainant informed them that it was the Appellants who had attacked her.

Medical evidence adduced indicated that the complainant's body was covered in oil. She was unconscious. They also found oil, gravel and stones in her vagina. She had soft tissue injuries on her chest. The medical evidence corroborated the complainant's evidence of the assault occasioned on her by the Appellants. The investigating officer (PW6) visited the scene of crime on 7th June 2007. He found the complainant's handbag, biker shorts and underwear at the scene. They had oil stains on them. He also recovered a plastic container which was also covered in black oil. His testimony corroborated the complainant's evidence.

It was the Appellants' case that the complainant orchestrated the whole incident. They claimed that the complainant was set to appear before

the factory management that morning to answer to theft allegations made against her. The theft was reported by the Appellants. They Appellants submitted that she stage- managed the incident so as to ensure that the meeting did not take place. They claimed that she framed them of the present offences because they reported the said theft. This court is not convinced that the complainant would go as far as inflicting the injuries she sustained on herself just to avoid a disciplinary meeting. The prosecution witnesses corroborated her evidence. Even though PW3 was known to her, she did not know PW2 prior to the robbery. PW2 was the first person who reported at the scene of the robbery after he heard her cry for help. She asked PW2 to call PW3 since she needed someone to take her to the hospital.

The Appellants stated that they were at Banana when the incident occurred. They stated that they left the factory at 8.00 a.m. The complainant was attacked at about 8.10 a.m. The point where the complainant met the Appellants was about 150 meters from the factory. There was therefore a possibility that the Appellants met the complainant at the material time since they had just left the factory. The witnesses availed by the Appellants were not able to give an account of the Appellants whereabouts at the material time when the incident occurred. DW3 stated that he met the Appellants at about 8.45 a.m. DW4 saw the Appellants at about 9.45 a.m. Therefore none of them were with the Appellants at the material time when the complainant was attacked.

This court has re-evaluated the evidence adduced by the prosecution in contrast with that presented by the Appellants. It is clear that the evidence adduced by the prosecution was overwhelming against the Appellants. The trial court was right in finding that the Appellants were positively identified and placed on the scene where the robbery occurred. The defence put forward by the Appellants does not dent the otherwise strong evidence adduced by the prosecution connecting them with the offence. The ingredients of the aggravated offence of robbery as described under ***Section 296(2)*** of the ***Penal Code*** include evidence that there was theft, that the offenders are armed with offensive weapons or offenders are more than one (See ***Oluoch v Republic [1985] KLR 549*****).** In the present appeal, the Appellants were in company of a third accomplice who was not before court. The medical evidence as well as that of the complainant established the use of personal violence occasioned on PW1 by the Appellants and their accomplice. The Appellants were also armed with a knife which is a dangerous and offensive weapon. The ingredients of the offence of robbery with violence were therefore established by the prosecution.

From the above analysis of the evidence, this court is of the view that the prosecution established its case against the Appellants on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to required standard of proof beyond any reasonable doubt. Their conviction on the same by the trial court is hereby upheld.

The Appellants were also convicted of the alternative charge in the second count with the offence of **committing an indecent act with an adult contrary to Section 11(A)** of the **Sexual Offences Act.** The particulars of the charge indicated that the **Appellants unlawfully and indecently assaulted the complainant by touching her vagina. Section 2** of the **Act** defines the term ***"indecent act"*** as follows:

> ***"indecent act" means an unlawful intentional act which causes-***
>
> ***(a) Any contact between the genital organs of a person, his or her breasts and buttocks with that of another person.***
>
> ***(b) Exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration."***

In the present appeal, the complainant stated that the Appellants forcefully removed her underwear. They then held her legs apart. They poured oil in her vagina. They also poured soil in her vagina. This court notes that there was no evidence adduced by the complainant of any contact between any of the Appellants' body parts with her vagina. She did not state in her testimony that the Appellants touched her vagina. She testified that they poured oil and soil in her vagina. The evidence adduced did not disclose the offence charged. This court is of the opinion that the element of contact between any of the Appellants' body part and the complainant's vagina was not established. The prosecution failed to establish the ingredients of the offence of **indecent act with an adult** contrary to **Section 11(A)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt. However, this court will convict the Appellants of the disclosed offence of **sexual assault** contrary to Section 5(1)(ii) of the **Sexual Offences Act.**

With regards to the sentence in the first count, following the recent decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, this court has discretion to re-sentence the Appellant on the basis of severity of the offence. In the present appeal, the Appellants robbed the complainant and in the process, seriously injured her. The evidence adduced by the prosecution showed that actual violence was used. This court also notes that the Appellants have spent ten (10) years in lawful custody since they were convicted by the trial court. In the premises, this court sets aside the death sentence meted by the trial court. The same is substituted by an order of this court sentencing the Appellants to serve five (5) years imprisonment with effect from the date of this judgment. With regard to the second count, this court holds that the Appellants have served their sentence. This court has taken into account the period that the Appellants have been in prison since the commencement of the trial and after their convictions. It is so ordered.

DATED AT NAIROBI THIS 2ND DAY OF APRIL 2019

L. KIMARU

JUDGE