



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO.121 OF 2016**

**(From C.M's Court at Bungoma Cr.No.2015 of 2014 by: Hon. C.L. Yalwala (SRM))**

**ABBAS MOHAMED BACHOHI.....APPELLANT**

**- V E R S U S -**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**Abbas Mohamed Bachohi** was charged with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge are that on 10/8/2014 at Bondeni Estate within Bungoma County, jointly with others not before the court, while armed with offensive weapons, namely knife, robbed MNL of cash Kshs.600/= a mobile phone, name Itel all worth Kshs.3,100/= and at the time of the said robbery, used actual violence on the said MNL.

The appellant also faced a charge of gang rape contrary to Section 10 of the Sexual Offences Act and an alternative charge of committing an indecent act contrary to section 11(1) of Sexual Offences Act. He was acquitted of both the second charge and the alternative.

The appellant was convicted on the first charge and sentenced to death. The appellant is aggrieved by both conviction and sentence on count I and preferred this appeal based on the following grounds:

- 1. That he was not positively identified;**
- 2. That no identification parade was conducted;**
- 3. That the prosecution evidence was full of contradictions;**
- 4. That the charge was defective;**
- 5. That the appellant's fundamental rights under Article 50(2) of the Constitution were breached;**
- 6. That the sentence is harsh and excessive.**

The appellant filed submissions in addition to the grounds and urged this court to quash the conviction and set aside the sentence.

The appellant filed written submission which he relied upon. He reiterated the grounds and added that it was not possible that the complainant was able to identify the assailant using moonlight and that the complainant's evidence was not corroborated by any other evidence, that there was no medical evidence to support the charge. He urged the court to acquit him because of the glaring doubts in the prosecution case.

Lastly, the appellant submitted that the court breached his fundamental rights which are guaranteed under Article 50(2) of the Constitution by sentencing him to death.

The appeal was opposed by learned counsel for the State, Ms. Njeru who submitted that the appellant was charged together with others and was convicted on the main charge of Robbery with Violence but was acquitted of the offence of gang rape; counsel further submitted that the offence occurred at 11.00 p.m. when the complainant was coming from picking money from her husband who was watching football; that when at [particulars withheld] Area, a watchman warned her that a lady had been attacked there and as they talked, 3 men emerged, attached her and she was able to identify them because there was moonlight and electric lights; that the watchman tried to assist the complainant but was threatened; she was robbed of her Itel phone and Kshs.600/=.

This being a first appeal, the court is required to examine all the evidence tendered before the trial court, analyze it and arrive at its own conclusions see *Kiilu v Republic (2005) KLR 174*. This court will of course bear in mind that it did not see the witnesses in order to weigh their demeanor.

The prosecution called a total of five witnesses in support of its case. **PW1, MNL** recalled the night of 11/8/2014 about 10.00 p.m. when she went to get some money from her husband AF who was watching football at [particulars withheld]. On her way back home, and on arrival at [particulars withheld] area, a watchman (PW2) guarding a shop informed her that a lady had been robbed there. As they talked, three men ran towards her. One got hold of her collar and demanded to know what she had and she gave her mobile and Kshs.600/=. The person put a knife to her throat, took her behind a storey building; one person held her by her jeans trouser from the back; that the person who held her first made her remove her trouser and raped her and so did the two other men. They then released her after the said ordeal. PW1 said that when the watchman (PW2) tried to intervene, he was threatened and he retreated; that there were electric lights where she met the people as well as moonlight and she was able to see the robbers well; that one had a long coat and a cap while the two others had jumpers and T-shirts; that the three had an argument over the phone and cash and one was called Abbasi. Upon release, she passed by her friend's home N, whom she informed what had happened. On the way to hospital, they met a police vehicle which took them to Bungoma Hospital where she was treated and later reported at the police station. Next day, she described the assailants to some young man (youth) and they went in search of the people and later the man and members of public arrested the appellant who was called Abbasi. That the other two were not found and the one arrested was handed over to police.

**PW2 FM**, a watchman at [particulars withheld] shop was on duty on the night of 10/5/2014 about 10.00 p.m. when he saw Abbasi with 2 others approach the complainant; that they got hold of PW1. He tried to intervene but was warned; that the people led the complainant away and she came back later and informed him that she had been gang raped and robbed of her money and mobile; that her clothes were dirty and she was crying.

**PW3 AM**, husband to PW1 confirmed that he called his wife, PW1 to go collect money from him at [particulars withheld]. He gave her Kshs.600/=. After 20 minutes he tried to find out if she had reached home safely but could not trace her. He went to check at their house but she was not there. He looked for PW1 and later found her with one N and he was informed of her ordeal; that a police vehicle arrived and took PW1 to hospital while he went in search of the attackers but did not get them.

**PW4 Cpl. Petronilla Chesang** of Bungoma Police station re-arrested the appellant from members of public on 11/8/2014 and recorded PW1's statement.

**PW5 Elias Adoka** a Clinical Officer at Bungoma Hospital produced a P3 form filled by Dr. Chemonges who examined the complainant on 14/8/2015. The doctor did not find any injuries in the complainant's private parts nor was there any trace of spermatozoa as the complainant had taken a bath.

When called upon to defend himself, the appellant denied committing the offence. He claimed to have been found at his place business, selling his wares when a crowd went there and asked him to accompany them; that on 10/5/2014, he was at the stage selling his wares till 5.00 a.m.

I have now considered the grounds of appeal, the rival submissions on record and the evidence adduced in the trial court. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of *Oluoch v Republic (1985) KLR* where the court held:

***“Robbery with violence is committed in any of the following circumstances:***

***(a) The offender is armed with any dangerous and offensive weapon or instrument; or***

***(b) The offender is in company with one or more person or persons; or***

***(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.....”***

The complainant testified that she was accosted by three men who held her, took her money and phone before leading her behind a storey building. PW2 corroborated PW1's evidence that he saw three men accost the complainant. PW1 said that she was threatened, and a knife being put to her throat while PW2 said that he saw the men were armed with pangas. Whatever the weapons, the three men were armed with some dangerous weapons. I am satisfied that two of the ingredients listed in the above cited case were satisfied and the offence of robbery with violence was therefore committed.

The next question then is who committed the offence or whether the appellant was positively identified as the offender.

This incident occurred at night at about 10.00 p.m. According to PW1 and 2, it happened at Dallas Area where PW2 guards shops. Both PW1 and 2 testified that there was moonlight and also electric lights at the scene. It is not clear whether PW1 knew the appellant before but she told the court that he wore a long coat and a cap and was the first to get hold of her and demand whatever she had. PW1 further said that an argument arose amongst the three assailants, who referred to the appellant as Abbasi. PW2 told the court that he also heard the appellant being referred to as Abbasi and that PW2 was seated where there was a street light and was able to see the appellant though others had covered their faces.

The trial court was satisfied that the appellant was properly identified as one of the assailants by his name which led to his arrest and PW1 confirmed he was the one, upon arrest on the next day.

The appellant questioned why no identification parade was carried out. PW1 told the court that after he described the appellant and how he was dressed, the members of public left and came back with the appellant and it is then that PW1 confirmed him to be the one. It was therefore unnecessary for the police to conduct an Identification Parade for PW1 to identify the appellant. However the police could have held a parade in respect of PW2 who witnessed the incident. That notwithstanding, I am satisfied that the circumstances were such that the two witnesses were able to ably identify the assailant by appearance due to the proximity to the appellant and the fact that they were near electric lights. PW1 was held by the appellant and PW2 even tried to intervene but was threatened. The robbery was on 10/5/2014 and the appellant was arrested next day on 11/5/2014. The event was still fresh in the minds of PW1 and 2 even if a parade was not done, the circumstances were conducive to proper identification. I am satisfied that the appellant was properly identified.

The appellant also complained that his fundamental rights under Article 50(2) of the Constitution were breached in that he was handed a very severe sentence. The appeal did not specify which sub Article of Article 50(2) was breached. That ground was vague and unsubstantiated.

As to the allegation that there were contradictions in the prosecution evidence, the only contradiction alluded to is that PW3 denied that there is a place known as Dallas whereas PW1 & 2 stated that the incident occurred at [particulars withheld] Area.

In fact, PW2 said that he works at [particulars withheld]. It may be that PW3 does not know that the place is called [particulars withheld]. In any event that contradiction is not of material importance to the charge.

The trial court did not address the appellant's defence. However; find the defence to be a mere denial. The appellant said that he was arrested for no apparent reason yet in his cross examination, he claimed to have been arrested at night while at his place of work at the bus stage where he stays till 5.00 a.m. This in itself is contradictory. He was either at work or at home.

In the end, I find that the prosecution proved its case to the required standard of beyond reasonable doubt. I hereby uphold the conviction.

On sentence, the appellant was said to be a first offender. He told the court that he is a single parent. The death sentence is no longer mandatory following the decision in ***Francis Kariuki Muruatetu & another v Republic Pet.15/2015***. The court can exercise its discretion in sentencing under Section 296(2) of the Penal Code.

I hereby sentence the appellant to 35 years imprisonment.

**Signed and Dated at NYAHURURU this 7<sup>th</sup> day of May, 2019.**

.....

**R.P.V. Wendoh**

**JUDGE**

**Delivered by S. Riechi (J) at BUNGOMA this 20<sup>th</sup> day of May, 2019.**

**PRESENT:**

Ms. Nyakibia - Prosecution Counsel

Wilkister - Court Assistant

Appellant - present