



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 81 OF 2017

BETWEEN

ELIUD KIMUTAI AGUI APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. H. Barasa, PM dated 30th March 2016 at Eldoret Magistrate's Court in Criminal Case No. 4968 of 2012)

JUDGMENT

1. The appellant, **ELIUD KIMUTAI AGUI** and his co-accused were charged and convicted on two counts of the offence of robbery with violence contrary to **section 296 (2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the were that on 15th November 2012 in Uasin Gishu County, jointly with another not before the court while being armed with a piece of wood robbed **JK** of his mobile phone make Nokia 1110 valued at Kshs. 2,000/- and immediately after that time of such robbery killed the said **JK**. They also robbed **JC** of her mobile phone make Nokia 1110 valued at Kshs. 1100 valued at Kshs. 2,000/- and at the time of such violence wounded the said **JC**.
2. The appellant was also charged and convicted of the charge of gang rape contrary to **section 10** of the *Sexual Offences Act* that at the same time and place, he, in association, with another person before the court intentionally and unlawfully caused his penis to penetrate the vagina of **JC** without her consent.
3. Although the appellant contested the conviction and sentence, at the hearing of the appeal, he stated that he was only appealing against the sentence as it was harsh and excessive. He urged the court to review it in light of the abolition of the mandatory death sentence. Notwithstanding what the appellant has stated, I have reviewed the evidence afresh as required by the first appellate court and come to my own independent conclusion that the conviction on all the counts was well founded on the evidence.
4. The prosecution called four witness. **JC** (PW 1), PW 2 and PW 3, the deceased's cousins, PW 4 who was the investigating officer, the doctor who conducted the post mortem and the doctor who examined PW 1, PW 5 and PW6 respectively. The prosecution case was based on the testimony of PW 1 who recalled that on the material night, the appellant, his co-accused and another assailant barged into his house while dragging her husband, **JK**, who they had beaten severely. She lit the tin lamp as the assailants started demanding Kshs. 3,500/- from the deceased. She knew the appellant and one other assailants as they were neighbours and they used to burn charcoal. She told the court that the deceased had paid them Kshs. 2,000/- leaving Kshs. 1,500/- which they demanded. The appellant took a stick and hit the deceased on the head. She pleaded with them but to no avail. She even gave them her and her husband's phone but they continued to beat him. The appellant and accomplices then dragged PW 1 outside, removed her clothes and proceeded to rape her in turns. She was able to raise alarm when the assailants left. The neighbours came and took the deceased to hospital where he died on arrival.
5. PW 2 was informed of the incident in the morning. He went to the hospital where he confirmed that **JK** had passed away. He proceeded to PW 1's home and found her. She told him that she knew the assailants and name the appellant and his co-accused. When he went to report that incident to the police station, he found that they had been arrested. He was present at the deceased's post mortem where he identified the deceased's body. PW 3 also went to the PW 1's home when he heard of the incident. PW 1 told him he could identify the assailants as they were neighbours. He recalled that after receiving the information, he assisted in searching for the assailants who were arrested while harvesting maize. He called PW 2 who came to pick the appellant and his co-accused and took them to the police station. He also attended the post mortem.
6. PW 4 testified that he received PW 1's complaint on 16th November 2011 at about 11.00am. She told him she had been raped in turns and that the assailants had taken her phone and her husband, **JK**, had been injured and taken to hospital. While at the scene, he was informed that

the assailants had been arrested. He collected a piece of wood which PW 1 identified as the weapon the assailants used to assault the deceased. He organized for a postmortem to be done by PW 5 who confirmed that the deceased died as a result of intra-cranial bleeding due to a severe head injury due to blunt trauma. The P3 medical form was produced by PW 6 on behalf of the doctor who examined PW 1. She noted that PW 1 had tenderness on the chest and upper back, a fresh laceration at the posterior with redness and the remnants of the hymen and brownish discharge from her vagina.

7. In his sworn defence, the appellant denied the offence and told the court that he was working for one John Karanja from 24th October 2012 to 17th November 2012 where he was arrested while harvesting maize. He stated that he was beaten by the crows before being arrested.

8. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at, immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, *Oluoch v Republic* [1985] KLR 549 and *Ganzi & 2 Others v Republic* [2005] 1 KLR 52).**

9. The offence of **gang rape** is provided for under **section 10** of the **Sexual Offences Act** which states;

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

10. The essential element of gang rape is rape committed in association with two or more persons. The ingredients of rape which the prosecution must prove are set out in **Section 3(1)** of the **Sexual Offences Act, 2006**;

A person commits the offence termed rape if –

(a) He or she intentionally or unlawfully commits an act which causes penetration with his or genital organs.

(b) The other person does not consent to the penetration; or

(c) The consent is obtained by force or by means of threats or intimidation of any kind.

11. I am satisfied the prosecution established the elements of the offence of robbery with violence and gang rape. PW 1 gave graphic and clear evidence on how she was assaulted by three assailants who had come into the house with her husband. Her phone and that of her husband were stolen and the accused being more than two in number while armed with a piece of wood, assaulted her and her husband. Her evidence was corroborated by the medical evidence showing that she sustained blunt injuries and the fact that the deceased died from head injuries. Likewise, she gave clear and consistent evidence that she was subjected to penetration by the appellant and his accomplices acting in association with each other.

12. The main issue for consideration is whether the appellant was one of the assailants. The incident took place at night in less than ideal circumstances for positive identification. In these circumstances, our courts have called for careful consideration of the evidence in order to avoid miscarriage of justice. In ***Paul Etole & Another v Republic* NRB CA Criminal Appeal No. 24 of 2000 [2001]eKLR**, the Court of Appeal summarized the law as follows:

Such evidence (of visual identification) can bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when a witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. When the quality is good, and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality the greater the danger.

13. In order to establish the circumstances of identification the court ought to inquire into the nature of lighting, its brightness or intensity, whether the witnesses view was impeded, the size of the room, the distance of from the light and the time spent with the assailant. This is not an exhaustive list and the court must examine all circumstances and weigh the evidence in order to determine whether the identification is free from error (See ***Anjononi v Republic* [1980] KLR 54, *Regina v Turnbull* [1976] 3 ALL ER 549, *Maitanyi v Republic* [1986] 2 KLR 75, *Karanja & Another v Republic* [2004]2 KLR 140 and *Wanjohi & Others v Republic* [1989] KLR 415).**

14. I have examined the facts of the case in light of the principles I have outlined and I find that the appellant was a person well known to PW 1. He was from the neighbourhood and according to the testimony of PW 1, he and the other assailants had dealt with the deceased and he owed them money. Though the house was lit by a tin lamp, the circumstances of identification were enhanced due to the close interaction in the room between PW 1 and the assailants and the fact that they dragged her outside and proceeded to rape her. That she knew them and identified them is fortified by the fact that she named them to PW 2 and PW 3 leading to their arrest on the day after the incident. The positive identification, in my view, displaced the alibi defence by the appellant. In any case, the incident took place at night and the appellant did not account for that time in his defence.

15. I am satisfied that the identification of the appellant was positive and free from error and the prosecution proved all the elements of the

offence of robbery with violence and gang rape. I affirm the conviction.

16. The appellant was sentenced to death on the Count 1 and the other sentences held in abeyance. The mandatory death sentence was found unconstitutional by the Supreme Court in *Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR*. The same principle was applied to the offence of robbery with violence under **section 296(2)** of the *Penal Code* by the Court of Appeal in *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018]eKLR* hence I set aside the death sentence.

17. I have considered the circumstances of the robbery and the fact that the not only did one person die but another person was raped. It was particularly aggravated as the appellant knew the victims. In the appellant's favour is the fact that he was first offence.

18. I affirm the conviction and allow the appeal only to the extent that I set aside the death sentence and substitute it with the following sentences which shall run concurrently from **20th November 2012**:

- (a) Count 1 – **twenty (20) years** imprisonment.
- (b) Count 2 – **twenty (20) years** imprisonment.
- (c) Count 4 – **fifteen (15) years** imprisonment.

SIGNED AT KISII

D.S. MAJANJA

JUDGE

DATED and DELIVERED at ELDORET this 3rd day of June 2019.

H. A. OMONDI

JUDGE

Appellant in person.

Ms Oduor, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.