



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.139 OF 2017

JOHN OKEMWA AUKAAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Ojoo (PM) delivered on

1st March 2017 in Kibera CM CR. Case No. 1076 of 2014)

JUDGMENT

The Appellant, John Okemwa Auka was charged in count one with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 2nd October 2013 at [particulars withheld] in Langata within Nairobi County, the Appellant, jointly with others not before court robbed EWN of cash Ksh.800/-, two mobile phones make Samsung Duos and Samsung Ace all valued at Ksh.28,800/- and after the time of such robbery used actual violence to the said EWN.

The Appellant was charged in count two with the offence of rape contrary to Section 3(1)(a)(b) & (3) of the Sexual Offences Act. The particulars of the offence were that on 2nd October 2013 at [particulars withheld] in Langata within Nairobi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of EWN without her consent. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted as charged in count one and sentenced to death. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was of the view that the prosecution's case was not proved to the required standard of proof beyond any reasonable doubt. He was aggrieved that his right to fair trial was violated by the trial court. He faulted the trial magistrate for convicting him based on inconsistent evidence adduced by the prosecution witnesses. He was further aggrieved that the trial court failed to exhaustively consider his defence in arriving at its decision. He asserted that his identification was unsafe. He took issue with the trial court's decision stating that the prosecution failed to call material witnesses to give evidence. The Appellant was of the opinion that the exhibits tendered by the prosecution were not of any evidentiary value. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral submissions by Mr. Swaka for the Appellant and Ms. Sigei for the State. Mr. Swaka submitted that the Appellant's identification was unsafe. He asserted that the complainant failed to give a description of the assailant in the first report that he made to the police. He pointed out that no identification parade was conducted by the police when the Appellant was arrested. The Appellant's identification by the complainant amounted to dock identification. Mr. Swaka averred that the robbery occurred at night. The prosecution did not give evidence as to the strength of the light that was used to identify the assailants. He was of the view that the trial court failed to warn itself of the dangers of relying on the evidence of a single identifying witness. He submitted that the people mentioned in the mobile phone communication, who were crucial prosecution witnesses, were not availed to adduce evidence. He asserted that the charge as drafted was duplex since the Appellant was charged under Section 295 and Section 296(2) of the Penal Code. The Appellant's right to a fair trial was violated. He therefore urged this court to allow the Appellant's appeal.

Ms. Sigei for the State opposed the appeal. She stated that the defect in the charge sheet was not fatal. It was her submission that the complainant positively identified the Appellant. She used the security light from a nearby hotel known as HQ Inn to identify her assailants. There was also light emanating from vehicles which were passing by. The complainant conversed with her assailants as they walked together. Learned State Counsel maintained that the Appellant's conviction was safe. She averred that the complainant's phone was found with one Duke Butch who implicated the Appellant. She submitted that circumstantial evidence linked the Appellant to the offence. She was of the view that the prosecution established the Appellant's guilt on the charge preferred

against him to the required standard of proof beyond any reasonable doubt. In the premises, she urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: The complainant, EWN, was on her way home on the night of 2nd October 2013. It was about 8.00 p.m. She alighted at Uhuru Gardens, Langata. She crossed over to the other side of the road. As she was walking towards her house, two men approached her. One of the men had a gun. She stopped. Two other men joined them. They took her phones and her bag. They asked her to walk with them. They were walking towards the Southern Bypass. Three of the men walked ahead as one walked with her. The men stopped when they got to the bypass. They ransacked her bag. She only had Ksh.800/-. The men asked her where she worked and why she did not have a lot of money. She told them that she worked at Central Bank of Kenya. The assailants inquired whether she was able to secure a job for them. After conversing for a while, three of the men left. She was left with the man who was earlier walking with her. He told her that he would escort her back to the main road. Before they got to the main road, the man ordered her to lie down. He sexually assaulted her. When he was done, he started escorting her back to the main road. The three men who left earlier suddenly re-appeared. They claimed that she lied about not having any money. They started searching for money all over her body. They did not find any money on her. They left.

The complainant found her way back to the main road and went home. She told the incident to her neighbour, PW3 BNB. Her neighbour took her to Nairobi Women's Hospital. While at the hospital, she received a call from one of the assailants. He was using one of her phones that had earlier been stolen from her. The phone had her Airtel line. She had requested the robbers to give her back her Safaricom Sim card from one of the phones, which they did. They called her through the Safaricom line. They called her twice while she was at the hospital. She reported the incident at Langata Police Station the following day. She also went to Kilimani Police Station and reported that she has been receiving calls from the robbers. The man who raped her kept calling her to apologize. The assailant was calling from a YU line No.0xxxxxxx. He was also inquiring whether she can help him get a job.

The complainant gave the police her Airtel phone number as well as the second phone number that the robbers used to contact her. About five months later in March 2014, the police informed her that they were able to track one of the assailants who had called her. She recorded her statement on 17th March 2014. She stated that she was able to identify her assailants. She told the court that there was a security light from a nearby hotel known as HQ Inn. Two of the assailants were wearing caps. She could identify the two men who were not wearing caps.

Her neighbour, BN (PW3), told the court that on 2nd October 2013 at about 10.00 p.m., the complainant came to her house. She was crying and appeared in distress. The complainant told her that she met four men, a few meters from where the apartments were located. The men robbed her. One of the men also raped her. PW4 and her husband took the complainant to Nairobi Women's Hospital. She also gave the complainant a phone to use since the robbers had given her back her Safaricom line.

The complainant was examined by PW2 Dr. Joseph Maundu at the Police Surgery and Dr. Limo. Dr. Limo examined the complainant on 2nd October 2013 at Nairobi Women's Hospital at about 11.00 p.m. PW4, Dr. Nguku, adduced evidence on behalf of his colleague, Dr. Limo. The complainant alleged to have been sexually assaulted. Her external genitalia was normal. Her vaginal lining was normal. Her hymen was broken with old tears. There was presence of vaginal discharge. He confirmed that indeed the complainant had been sexually assaulted. PW2, Dr. Joseph Maundu, was based at Nairobi Police Surgery. He examined the complainant on 19th March 2014. Her hymen was broken with old tears. She did not have any vaginal discharge.

PW5, Cpl. William Saiyanga, was the arresting officer. He testified that the complainant reported a robbery at Kilimani Police Station on 4th October 2013. She had earlier made a report at Langata Police Station. The complainant narrated to PW5 how four men accosted her in Langata and robbed her. One of the men also raped her. The robbers made away with her phones and Ksh.800/-. The complainant informed him that the assailants had been calling her on her mobile phone. PW5 sought assistance from a Safaricom Liaison Officer in tracking the complainant's stolen mobile phones. They were able to get three contacts that had used one of the complainant's phones. The said contacts were 07xxxxxxx registered to Grace Emali, 07xxxxxxx registered to James Omosa Obwagi and 07xxxxxxx registered to Grace. PW5 stated that they were able track down Grace (07xxxxxxx). She led to the arrest of the Appellant. PW5 interrogated the Appellant. The Appellant informed him that the YU line 07xxxxxxx belonged to his wife Grace Emali. The Appellant said that he got the complainant's phone from a person known as Duke Buch. The said Duke Buch was however dead. The Appellant told him that he had given out the phone to another person and was no longer in possession of the same.

PC Janet Sitienei (PW6) was the investigating officer in the present case. She was based at Langata Police Station. She was asked to investigate the present case on 17th March 2014. The Appellant was in custody. He was arrested on 14th March 2014. PW6 recorded statements from witnesses. PW5 informed her that the Appellant used the complainant's phone immediately after the robbery occurred. After her investigations, PW6 charged the Appellant with the present offences.

When the Appellant was put on his defence, he testified that he resided in Lindi Area in Kibera. On 14th March 2014, he went to work at International Life House. His supervisor, Grace, came with two police officers. The police officers arrested him and took him to Kilimani Police Station. He was transferred to Langata Police Station the following day. He was later charged with the present offences. The Appellant denied robbing or raping the complainant. He stated that he was not arrested in possession of any items belonging to the complainant. He told the court that his wife's name was Scarlet Mokeira. He testified that he did not know anyone by the name Grace Emali or James Omosa Obwagi.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See *Okeno vs Republic* [1972] EA 32). In the present appeal, the issue for determination is whether the prosecution established the charges of robbery with violence contrary to Section 296(2) of the Penal Code, against the Appellant to the required standard of proof beyond any reasonable doubt.

It was evident from the facts of the case that the prosecution relied on the direct evidence of identification and circumstantial evidence to secure the conviction of the Appellant. As regard evidence of identification, the complainant (PW1) was the only identifying witness. Evidence of a single identifying witness must be examined carefully to ensure that it is watertight before a conviction can be founded on it. In the case of Kiilu & Another vs. Republic [2005] eKLR the Court of Appeal stated thus:

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.”

The complainant stated that the robbery occurred at 8.00 p.m. She was approached by two men. One of them had a gun. Two other men joined them. They took her phone and bag. The complainant stated that there was a security light from a nearby hotel known as HQ Inn. She also used lights from vehicles that were passing by on Langata Road to identify her assailants. She told the court that two of the robbers wore caps. She stated that she was however able to identify the two men who were not wearing caps. This court is not persuaded that the complainant was able to properly look at her assailants and memorize their physical features. She told the court that the men were armed with a gun. When they approached her, they took her phone and bag and ordered her to walk with them. She therefore did not have ample time to identify her assailants at the point where they accosted her.

The men ordered her to walk with them. The complainant stated that three of the men walked ahead as the fourth man walked with her. The court was not informed if the path they used was well lit. The assailants stopped near the bypass. They started ransacking the complainant's bag as they conversed with her. The complainant did not state whether there was any source of light at that place to enable her positively identify her assailants. This court notes that the complainant did not give a description of her assailants in the first report made to the police. Indeed she recorded her statement with the police five (5) months after the robbery incident. This was after the Appellant's arrest. The court would have been convinced that the complainant positively identified her assailants if she had given their description in her first report that she made to the police.

The Appellant was arrested on 14th March 2014, about five (5) months after the robbery occurred. The Appellant was not known to the complainant prior to the robbery incident. The police failed to conduct an identification parade for the complainant to identify the Appellant as one of her attackers. Her subsequent identification of the Appellant before court amounts to dock identification which is deemed worthless (See Gabriel Kamau Njoroge –vs- Republic [1987] eKLR).

The prosecution adduced other circumstantial evidence against the Appellant. The robbers took two phones from the complainant. PW5 told the court that he sought assistance from a Safaricom Liaison Officer to track the complainant's stolen phones. **He was able to get three contacts that had used the complainant's phone after the robbery. The three contacts were 07xxxxxxx registered to Grace Emali, 07xxxxxxx registered to James Omosa Obwagi and 07xxxxxxx registered to Grace. PW5 stated that they were able track down Grace (07xxxxxxx). The said Grace told him that the user of 07xxxxxxx was her colleague. The said user was the Appellant. This court notes that the said contact was registered under James Omosa Obwagi and not the Appellant. PW5 arrested the Appellant. He testified that the Appellant informed him that the YU line 07xxxxxxx belonged to his wife Grace Emali. The Appellant also told him that he got the complainant's phone from a person by the name Duke Buch. The said Duke Buch was however dead. The Appellant informed him that he was no longer in possession of the said phone. He had given the phone to another person.**

The Appellant in his defence stated that he did not know anyone by the name James Omosa Obwagi or Grace Emali. He stated that his wife was known as Scarlet Mokeira. He told the court that he has never been in possession of the complainant's phone. This court is of the view that the prosecution failed to adduce any evidence that linked the Appellant to the complainant's phone. The phone number that the assailants used to call the complainant after the robbery was **0750*****. The same was registered under the name Grace Emali. PW5 alleged that Grace Emali was the Appellant's wife. PW5 and the investigating officer (PW6) did not put any effort to locate the said Grace Emali. They did not adduce any evidence to show a connection between the said Grace Emali to the Appellant. None of the said phone numbers recovered by PW5 were registered in the Appellant's name. There is no evidence pointing to the fact that the Appellant used the complainant's phone exclusively after the robbery incident. Indeed, the investigator confirmed that the person the Appellant said he got the complainant's phone from was a robber who the police had shot dead in the course of another robbery. The Appellant was not arrested in possession of the said phone. He stated that his wife was known as Scarlet Mokeira and not Grace Emali. The prosecution failed to discharge their burden of proof to the required standard of proof beyond any reasonable doubt.**

No other evidence was given before this court connecting the Appellant to the robbery. None of the stolen items were recovered in his possession. The Appellant in his defence denied being involved in the robbery. As stated earlier in this judgment, the evidence of identification on its own, taken into totality is not watertight and free of error to support the conviction of the Appellant. This court therefore finds merit in the appeal lodged by the Appellant. The Appellant's appeal is hereby allowed. The trial court's conviction of the Appellant is hereby quashed. His sentence is set aside. The Appellant is set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF JUNE 2019

L. KIMARU

JUDGE