REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 64 OF 2018

(From Original Conviction and Sentence in Criminal Case No. 709 of 2013 by the Senior Principal Magistrate's Court at Mumias)

SHABAN OKUMU ACHESA..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon TA Odera, Senior Principal Magistrate, of robbery with violence contrary to Section 296(2) of the Penal Code, Cap 63, Laws, and was accordingly sentenced to death, and also of rape under section 3(1)(a)(b)(3) of the Sexual Offences Act No. 3 of 2006 and was sentenced to ten years' imprisonment execution of which sentence was to be withheld in view of the death sentence.

2. At the trial court five witnesses had testified against the appellant. The complainant and her boyfriend had hired the appellant to ferry them on his motorcycle to their destinations. He dropped off the boyfriend first, and was left with the complainant. Instead of taking her to her destination he detoured, attacked her, robbed her of money and a phone, and raped her.

3. He was aggrieved of his conviction and sentence and he lodged an appeal. In his petition of appeal, he alleged that section 198(4) of the Criminal Procedure Code, Cap 75, Laws of Kenya, had been violated, the court conducted a trial without proper coram, conducting a rushed trial before the appellant had been furnished with the prosecution evidence and rejecting his defence. The said grounds were elaborated in the appellant's written submissions where he addressed such issues as evidence of identification, reliance on flimsy and doubtful evidence, amendment of the charge sheet, key witnesses not called and a charge that was defective.

4. The appeal was argued on 30th January 2019. Both the appellant and counsel for the state, Mr. Ng'etich, addressed the court. The appellant argued that he was a student and not a *boda boda* rider. He denied being the complainant's neighbour saying that she relied on information from a person who was not called as a witness. He further submitted that he was not found in possession of anything connected to the offence charged. He also said the complainant lied about the various places they visited on the material night. On the mobile phone, he submitted that no evidence was presented to show that the complainant had the phone

5. Mr. Ng'etich opposed the appeal, saying that the state discharged its burden. He submitted that the appellant had been properly identified by the complainant, pointing out the various factors which in his view supported his proposition. He submitted that the charges were not defective, and if any defects existed, the same were minor and could be cured by section 302 of the Criminal Procedure Code. On key witnesses allegedly not called he submitted that the state called witnesses who were sufficient and who established the ingredients of the charges. He submitted that the appellant had ample time to cross-examine the witnesses but his efforts did not displace their evidence.

6. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> *"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."*

7. The first issue related to section 198(4) of the Criminal Procedure Code. The appellant has elaborated on what he means by saying that this provision was not complied with. It says as follows: "(4) The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili." It is not disputed that the official languages of the court are English and Kiswahili, but with room for other languages where the accused or the witnesses are not familiar with the two official languages. The record indicates that plea was taken in

Kiswahili. It is also indicated that the witnesses testified in that language. There is nothing on record to suggest that the appellant was not comfortable with the language employed for the purpose of the trial. In the circumstances it cannot be said that the appellant was in anyway prejudiced in that regard.

8. The other issue is that the court proceeded with the matter without proper coram. I have scrupulously perused through the record. I have noted that the court proceeded in the presence of the trial magistrate, the court assistant, the prosecutor and the accused. These were the key players. The appellant did not have an advocate appearing for him. I note that there was an order on 29th June 2017 that he be allocated a *pro bono* advocate, but it would appear that nothing came of it. In any event the appellant has not sought to demonstrated how and when the court proceeded when it was not properly constituted.

9. He argues that the trial was rushed, so much so that it commenced without him being furnished with the prosecution's evidence. Plea was taken on 30th January 2017, PW1 testified on 9th March 2017. PW2 followed on 6th November 2017. Between the date of plea and the first hearing date there were three mentions. The hearing started in earnest on 9th November 2017, by that time the matter had been mentioned several times. The appellant had raised the issue of being furnished with state witnesses' statements, and the record indicates that the state confirmed on 3rd August 2017 that the statements had been supplied to the appellant on 30th January 2017, the day he took plea. It cannot be said in my view that the trial was rushed and that by the time the trial commenced the appellant had not been furnished with the state's evidence.

10. He complains that his defence was not considered. The record reflects that his testimony was narrated in the judgement. He gave an unsworn statement, and therefore he was not subjected to cross-examination. The evidence by the prosecution was clear, cogent and flowing. He had a chance to test it on cross-examination. His own evidence was not under oath and was not tested by way of cross-examination. His testimony cannot therefore be put on the same plane with the sworn testimonies of the state witnesses that were subjected to cross-examination. It is of very low probative value. It did not shake or displace the state evidence. It made no difference to the state's case.

11. He submitted that his identification was weak. I understood him to be saying that PW1 did not properly identify him as her assailant. From the evidence on record, PW1 and the appellant were individuals who used to interact before the material day, but not at a personal level. PW1 testified that she knew appellant by sight, as she used to see him within their locality, and even sold fruits to him. The person who brought them together on the material day was her boyfriend, PW2, who testified that the appellant was a *boda boda* operator that he knew before the said date. The appellant rode on the same motorcycle with PW1 for quite some time that day. They first dropped off PW2, and then the two were left together. PW1 talked of the appellant carrying them at 8.00 PM and PW2 put the time at 9.00 PM. PW1 says that she was with the appellant till 3.00 AM when he let her go. That would mean that they were together for six hours. She says that he raped her, ejaculating into her vagina. The very act of sexual intercourse meant that the two were really close up enough for identification purposes. There can be no merit in the argument that the appellant was not properly identified. In fact, I am persuaded that this was a case of recognition.

12. He describes the evidence as flimsy and doubtful, yet he has not pointed to any aspects of the evidence that he identifies as being so flimsy and doubtful. He has not demonstrated in any way that the said evidence was so flimsy and doubtful. In my view the evidence presented by the state was damning.

13. He argued that the charge was amended in a manner that did not comply with section 214 of the Criminal Procedure Code. The provision states:

> *"214. Variance between charge and evidence, and amendment of charge*
>
> *(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that—*
>
> *(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;*
>
> *(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.*
>
> *(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.*
>
> *(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary."*

14. The provision in my understanding allows amendment of the charges by the prosecution with leave of court at any time before close of the prosecution's case. Upon such amendments being effect, the same should be read to the accused so that he can plead to the altered charge. The accused also has a right to demand recall of witnesses for cross-examination on the aspects of the charge introduced through the amendment. Of course in compliance with the spirit of the provision the court can recall such witnesses without prompting from the accused if the court feels that that would meet the ends of justice,

15. The idea of amending the charges was mooted on 9th March 2017 in the middle of PW1's testimony in chief. The court felt that the evidence coming out revealed elements of the offence of robbery with violence. The state then applied for adjournment to allow it time to amend the charges. The appellant opposed the move, but the court indicated that he would have opportunity to cross-examine the witnesses. The amended charge introduced the count on robbery with violence, it was read and explained to the appellant on 15th March 2017. He pleaded not guilty to it. The matter was adjourned thereafter till 19th July 2017 when PW1 took the witness stand for further examination in chief. She was thereafter cross-examined by the appellant. In my view there was compliance with section 214 of the Criminal Procedure Code. The appellant has not demonstrated the alleged noncompliance.

16. He raised issue with the omission by the state to call a witness that he said was key. His case was that the state ought to have called *boda boda* riders. He has not explained why he would have wanted them to be called. The law is that the prosecution need not call any number of witnesses to prove their case. What is required is for them to call such number of witnesses as would suffice to establish the charge that the accused faces. The principal witness in the instant case was PW1, she was the one who alleged that she was robbed and raped. PW2 was key, he was the one who allegedly brought the appellant into the picture, and was the last person to see PW1 and the appellant together before the commission of the alleged offences. If the appellant felt that any *boda boda* rider would have helped his case, he was at liberty to call him as his witness.

17. On the claim that the charge was defective, I have read and reread the charge document and I have not noted any defects. The appellant has not helped the matter, for he has not pointed out in his written submissions the aspects of the charge that makes the same defective in his view.

18. The robbery was allegedly committed with respect to money and a mobile phone that PW1 says was taken away from her by the appellant. He complains that not adequate evidence was adduced to show that she had such a phone. I tend to agree. In such cases the type and brand of the phone ought to have been pleaded in the charge, including the serial number of the phone. Phones are not bought off the street like fruits. Receipts are issued and often warranties issued. There must be some documents in existence that would have linked PW1 to the alleged phone. In the absence of such evidence it ought to be concluded that there was no proof that she owned or possessed such a phone, and therefore there was inadequate evidence that she was robbed of the same.

19. Regarding the offence of robbery with violence, what ought to be established is that there was theft where the assailant used some degree of violence or was accompanied by another or was armed with a dangerous weapon. In the instant case, PW1 says that money was taken from her by force by the appellant. I see no reason to disbelieve her narrative on that. Although he was not armed with a dangerous weapon nor accompanied by another, he tore her clothes, hit her on the face and threatened her with death. To my mind these acts of violence that accompanied or followed or preceded the theft, and establish the offence of robbery with violence.

21. On rape, she testified that he tore her biker and underpants and inserted his penis into her vagina, and even ejaculated into the vagina. She was attanded to medical personnel later on the morning of the assault. PW3 established that her vagina had been penetrated. He found spermatozoa and epithelial cells in her vagina which was sufficient evidence of recent sexual activity. The evidence on record is clear that she had not consented to the sexual activity with the appellant. He forced himself on her against her will, amidst threats of death. That had all the hallmarks of rape.

21. On the whole I am satisfied that the offences in all the three counts were proved. The appellant was therefore properly convicted. The appeal should fail on that score. The sentences imposed were also lawful and fitted the offences established.

22. However, in view of the recent decision of the Supreme Court in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR, the trial court can exercise some discretion in sentencing where the statute has prescribed mandatory sentences. Robbery with violence is a mandatory capital offence whose statutory penalty is death. The appellant was considered as a first offender at the sentencing hearing on 25th April 2018. As such he should be handled with some measure of leniency. He also appears to be a young person. The decision in *Francis Karioko Muruatetu & another vs. Republic* (supra) should be applied to his favour. The spirit in *Francis Karioko Muruatetu & another vs. Republic* (supra) appears to be that where an appellate court finds that resentencing is necessary it should remit the matter to the trial court for that purpose. I shall, accordingly, direct that the trial file in Mumias SPMCCRC No. 3 of 2017 be remitted to the Mumias Senior Principal Magistrate's Court for the resentencing of the appellant with respect to count I. It is so ordered.

23. The appellant has a right of appeal to the Court of Appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14th DAY OF June, 2019

W MUSYOKA

JUDGE