REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 521 OF 2010

HARUN BARAZA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. Ole Tanchu, Senior Resident Magistrate, delivered on 29th November, 2010 in Mombasa Chief Magistrates Court Criminal Case No. 2748 of 2009).

JUDGMENT

1. The appellant was convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on the 14th day of February 2009 at Shimanzi area in Mombasa District within Coast Province, jointly with another not before court while being armed with an offensive weapon namely a knife robbed CKM [name withheld] of one mobile phone make Nokia 2610 valued at Kshs. 4,000/= and at or immediately before or immediately after such robbery used actual violence against the said CKM.

2. He was also convicted for the offence of rape contrary to Section 3(1)(a) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 14th day of February 2009 at Shimanzi area in Mombasa District within Coast Province, intentionally and unlawfully caused his penis to penetrate the vagina of CKM [name withheld] without her consent.

3. The appellant was sentenced to death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The sentence for the offence of rape was held in abeyance. He was dissatisfied with the said conviction and sentence as a result of which he filed a petition and grounds of appeal on 15th December, 2010.

4. On 13th March 2019, he filed amended grounds of appeal, with leave of the court. He raised the following issues:-

(i) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing him without considering that the conditions at the scene of crime were not favourable for a positive identification thus relying on visual identification which could not warrant a conviction;

(ii) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing him while relying on the evidence of the uncalled witness whose evidence would have proved that no such robbery took place and it was just a mere fabrication;

(iii) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing him without establishing the real of source of arrest;

(iv) That the Learned Trial Magistrate erred in law and fact in not adequately considering his defence evidence; and

(v) That the Learned Trial Magistrate erred in law and fact in not adequately considering that Section 200 of the Criminal Procedure Code was not complied with thus prejudicing the appellant.

5. In his written submissions, the appellant challenged his identification by PW1 and said that the offence occurred at night and there was no evidence adduced to indicate the lighting conditions. He stated that PW1's evidence was to the effect that when they were walking, they passed by places that had light and she had an ample opportunity of seeing the appellant. He cited the case of **Maitanyi vs Republic** [1986] eKLR to support his submission that the nature of light, and its position from the scene of crime were not explained.

6. He further submitted that PW1 failed to give a description of her assailants such as height, colour and type of clothing when she made the

first report. He stated that the matter was only reported to the Police after the appellant was arrested vide OB No. 2/7/8/09.

7. The appellant also cited the case of **Republic vs Turnbull** [1976] 3ALL ER 549 on the need to test with care evidence appertaining to identification. He submitted that PW1 said that she did not know him but she noted he had marks on his face, wore a police jacket and he took her phone. He cited the case of **Nabiswa vs Republic** [1998] eKLR Mombasa to assert his submission that identification by PW1 was not free from the possibility of error.

8. The appellant submitted that the Investigating Officer was not called which means that the case was never investigated. He relied on the case of **Kenneth Onyango Odhiambo vs Attorney General and 2 Others** [2006] eKLR. He also stated that the Doctor who examined PW1 was not called to testify yet there was an allegation of rape. He also stated that the Security Guards at Magadi Soda Company who gave PW1 refuge on the night of the incident were not called to court to testify. He also said that the Chief was not called as a witness. He relied on the case of **Bukenya and Another vs Uganda** [1972] EA 549 to show that the prosecution is under obligation to call witnesses who can shed light on what they know about the charge facing an accused person.

9. The appellant contended that his source of arrest was not established. He also contended that his defence was not considered yet there was a grudge between him and PW2, who was the husband of PW1.

10. The appellant argued that the Magistrate who convicted him failed to comply with the provisions of Section 200 of the Criminal Procedure Code. He prayed for the appeal to be allowed.

11. Ms Ogweno, Principal Prosecution Counsel filed her written submissions on 19th March, 2019 and conceded to the appeal. She stated that the alleged offence occurred at 10:48p.m., and there was no proper lighting and as such circumstances for identification were difficult. She submitted that no description and intensity of lighting was given or if identification was based on voice or other means. It was argued that PW1 did not explain the facial marks that the appellant had which made him stand out from any other person. She contended that the arrest of the appellant 6 months later, without any incriminating item that was stolen from PW1 having been recovered, could have been as a result of mistaken identity. She relied on the case of **John Muriithi Nyagah vs Republic** [2014] eKLR and **Peter Mwangi Mungai vs Republic** [2002] eKLR on the need of a court to be satisfied that the testimony of a single witness was free from the possibility of error.

12. Ms Ogweno also submitted that no medical evidence was adduced to confirm that PW1 was raped hence the charge in Count II was not proved beyond reasonable doubt. She prayed for the appeal by the appellant to be allowed on the two Counts.

ANALYSIS AND DETERMINATION

13. The duty of the first appellate court is to analyze and re-evaluate the evidence that was tendered before the court below and come to its own conclusion. It must however bear in mind that it has neither seen nor heard witnesses testify and make an allowance for that fact. In **David Njuguna Wairimu vs. Republic** [2010] eKLR, the Court of Appeal reiterated this duty as follows:-

> ***"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

14. PW1 was CKM [name withheld]. Her evidence was that she was going home on 14th February, 2009 at 10:45 p.m. She had left Mombasa village with her husband. They were walking. She stated that on reaching Castle Royal Hotel, her shoe strap got cut and she bent to tie it. At that time her husband was 50 metres ahead of her. She testified that suddenly, someone dressed in police uniform got hold of her. She stated that they were 2 men and they came from Castle (sic). They were police officers. She told them not to arrest her and that she was with her husband. Her husband being oblivious to what was going on continued walking. She stated that the 2 men told her they would take her to Makupa Police Station where her husband would pick her the following day. She was however taken to Sauti ya Kenya Road leading to Casablanca. They walked until they reached Shimanzi.

15. It was her evidence that the 2 men held her hands. She stated that the one dressed like a police man was the appellant. He was wearing a blue trouser and a white shirt. He was the one talking. He told her that they would take her to the house of Jane, who was a criminal at Bondeni and that she would knock on the door to the said house and once it was opened, they would let her go.

16. PW1 recounted that she was led to a house at Shimanzi. She knocked at the door but no one opened. As she was doing so, the person in uniform held her throat and said he was not a policeman but a thug. She was ordered to remove her phone and the cash she had. She removed Kshs. 1,200/= and a Nokia phone worth Kshs. 4,000/=. As one man held her throat the other one started removing her clothes. The appellant removed a knife. She stated that wherever she would attempt to scream, he would pinch her throat.

17. PW1 further testified that the one in uniform ordered his colleague to stand aside to watch out for anyone and warn him. When her clothes were fully removed, she was made to lie down and the appellant started raping her. She could not scream as her throat was being pinched. After some time, the other person warned the appellant that someone was walking towards them. She explained that the process of being undressed, being raped and the rapist being warned took about 6 minutes. PW1 stated that the appellant woke up quickly, dressed and ran away.

18. PW1 further testified that the person who was approaching reached where she was and found her still undressed. She explained to him what had happened and he took her to Security Guards of Magadi Soda Company and left her there after explaining to them about her ordeal. At 5:00 a.m., they took her home in Mwembe Tayari and explained to her husband what happened. He did not believe her and he chased her out. She went to the Chief the following day and explained to him. He called PW1's husband. They then took her to Al Faidez, a private

hospital, where she was treated.

19. PW1's evidence was that on 6th August, 2009 at 6:00p.m., she came across the appellant and recognized him from the marks on his face. She stated that he greeted her. She asked him if he could remember what he did to her. He told her that he could recall and that he still had her phone. PW1 explained to a handcart pusher about her ordeal in the hands of the appellant. He started asking the appellant questions. She explained that members of the public milled around and started beating the appellant. PW1's husband was called and he told them to take the appellant to Central Police Station.

20. PW1 in her evidence explained that when she and the appellant were walking, they passed by places which had light and she had ample opportunity of seeing him. She identified the person who was dressed in police uniform as the appellant and said that she did not know him before the incident. She stated that she was given a P3 form at Central Police Station which was filled at Coast Province General Hospital (CPGH).

21. PW2, MGM [name withheld], was a husband to PW1. He confirmed that they had gone to Mombasa Village on 14th February, 2009 which was Valentine's Day. They left the said place at 10:45 p.m. He stated that he was 40 metres ahead of his wife. He indicated that he was drunk and left her behind, knowing that she was following him. He said that he checked behind and saw her but he was in a hurry to reach home. On reaching home, he opened the main gate and stood by it and waited for her for about 5 minutes as he wondered why she had not reached there.

22. He retraced his footsteps up to Mombasa Village and looked for her in vain. Since his phone battery was low, he asked his friend for a phone. He tried to call her but could not reach her on phone. He looked for her in other places but could not find her. He went home at around midnight. It was his evidence that around 5:30a.m., 2 people went with PW1 to their house and introduced themselves as G4S Security Guards who guard Magadi Soda Company at Shimanzi. They explained to him that his wife had sought help from them as 2 people dressed in police uniform had kidnapped and raped her. The 2 Security Guards were Robert and Ochieng. The latter gave him his cell phone number.

23. PW2 testified that he was angry with his wife and he chased her away. She went to the Police Station. He was summoned by the Chief. PW2 said that 3 days after the incident, he took PW1 to a private hospital after the Chief advised him to take her to hospital. He indicated that when they were at Mombasa Village, PW1 had a Nokia phone which she did not have when she went back home.

24. PW2 further testified that on 6th August, 2009 he was called by one Juma who told him to rush to Mwembe Tayari where his wife had seen the person who kidnapped and raped her. He found PW1, the appellant, Juma and other people at the scene. PW1 told him that the appellant is the one who had stolen from her. He was taken to the Police Station.

25. On being re-examined by the Court, PW2 said that his wife had told him that her attacker had a scar on the eyebrow.

26. In his sworn defence, the appellant stated that he was a Driver and that on 5th August, 2009 he was given a vehicle to drive to Eldoret but M [name withheld] (PW2), who was drunk broke the windscreen. The appellant said he reported the matter to the Police who took PW2 to the Police Station. The appellant further said that the OCS wanted to release PW2 but he informed the OCPD who gave him a letter to take to the OCS. PW2 was forced to pay Kshs. 16,000/= to fix the windscreen. The appellant stated that on 6th August, 2009 he returned to go on safari and at Nawal Centre he met PW2 who claimed that he had oppressed him. PW2 and 2 others started assaulting him. He denied knowing PW1 and said that PW2 gave evidence that was untrue.

27. The issues for determination are:-

(i) If the appellant was positively identified;

(ii) If Section 200 of the Criminal Procedure Code was complied with;

(iii) If the prosecution proved its case beyond reasonable doubt; and

(iv) If the sentence imposed was harsh or excessive.

If the appellant was positively identified

28. The offence of robbery with violence contrary to Section 296(2) of the Penal Code and that of rape contrary to Section 3(1)(a) of the Sexual Offences Act, 2006 allegedly took place on the night of 14th February, 2009. It is of critical importance therefore to establish from the evidence adduced if the circumstances were ideal for positive identification.

29. The law as regards identification under difficult conditions is well settled. In the case of **Cleophas Otieno Wamunga vs Republic** (1989) KLR 424, the Court of Appeal stated as follows:-

> ***"We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized the appellant***
>
> ***among the robbers who attacked and robbed them ..... What we have to decide now is whether that evidence was reliable and free from the possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification***

in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well-known case of R vs Turnbull [1976] 3 ALL ER 549 at page 552 where he said:-

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

30. In this case, the appellant and another accosted PW1 outside the Castle Royal Hotel at night as she was tying her shoe strap. The man who was dressed in police uniform got hold of her. She thought that the two men were Police Officers and she pleaded with them not to arrest her and told them that she was with her husband. She explained that her husband (PW2) was walking about 50 metres ahead of her. She testified of how she was not taken to a police station but they went through Sauti ya Kenya Road leading to Casablanca until they reached Shimanzi where she was robbed of Kshs. 1,200/= and a Nokia 2310 phone worth Kshs. 4,000/=. She was then raped by the man in uniform as the other one kept watch. She testified that it was the other man who removed her clothes when the man dressed in uniform whom she identified as the appellant, removed a knife and held her throat. The 2 of them took off when the appellant's partner in crime warned him that someone was approaching the scene. She explained that the process from being undressed, being raped and the appellant being warned of the person who was approaching took 6 minutes.

31. Almost 6 months later, on 6th August, 2009 she came across the appellant at Mwembe Tayari and alerted a man by the name Juma Salim about what the appellant had done to her. PW1 stated that the appellant greeted her. She asked him if he could remember what he did to her and he said he did and that he still had her phone. The appellant was arrested and taken to Central Police Station.

32. In this court's view and from the evidence adduced by PW1, she spent a considerable amount of time with the appellant and the other man from the time they accosted her outside the Castle Royal Hotel up to the time they reached Shimanzi where they walked to.

33. It was PW1's evidence that when they were walking, there was light and she had ample opportunity of seeing the appellant. She stated that she identified him from the marks on his face. On cross-examination she remained consistent as to having been able to identify the appellant from the marks on his face.

34. PW2 on examination by the Trial Court said that PW1 told her that her assailant had a mark on the eyebrow. There was therefore something peculiar about the facial features of the appellant that left a lasting impression in the mind of PW1 about his appearance.

35. The Hon. Magistrate considered the evidence adduced by PW1 with regard to the appellant's identification. He took judicial notice of the area from where PW1 was accosted and stated as follows:-

"I take judicial notice of the said area of Mombasa Town from Castle Hotel to the area of Casablanca Hotel where there are many buildings and lights from various said buildings".

36. The Hon. Magistrate agreed with PW1 that the lighting was sufficient for one to be able to see and recognize a person and be able to register the appearance and facial marks in his/her memory and be able to identify the person at a later date.

37. This court too takes judicial notice of the area where the Castle Royal Hotel is situate which is at a distance from Casablanca and with business premises which are well lit. A walk from Castle Royal Hotel to Shimanzi is not a short one. Like the Trial Magistrate, I am satisfied that although the offence occurred at night, the circumstances were ideal for positive identification. It is not therefore surprising that 6 months later, PW1 was able to identify the appellant when she saw him at Mwembe Tayari. They even spoke to each other. She could remember him from the marks on his face. I am satisfied that PW1 positively identified the appellant as her attacker as the circumstances were ideal for positive identification.

If Section 200 of the Criminal Procedure Code was complied with

38. The appellant submitted that Section 200 of the Criminal Procedure Code was not complied with, when his case was taken over by another Magistrate. The proceedings of 1st April, 2010 show that when Hon. Ole Tanchu took over the hearing of the case the he stated as follows:-

" ..... Matter to proceed from where it has reached as the accused has no objection to the same.

39. The above implies that the appellant was informed of his rights and he had no objection to the case proceeding from where it had reached with Hon. Makungu, Senior Resident Magistrate. The provisions of Section 200 of the Criminal Procedure Code were compiled with.

If the prosecution proved its case beyond reasonable doubt.

40. I do note that the Investigating Officer, a member of the public by the name Juma and the 2 Security Guards who took PW1 home on the morning of 15th February, 2009 were not called as witnesses. I note that the said witnesses were not present when the offence was

committed. They only played roles afterwards. In my considered view, failure by the prosecution to call them does not weaken the prosecution's case.

41. Apart from the evidence of PW1, PW2 did confirm that he was with his wife on the night of 14th February, 2009. Instead of PW2 walking with her like a good husband should do, he walked ahead of her, not knowing that danger was lurking behind. She fell victim to predators. PW2 testified that he did not see his wife when he waited for her at the gate to their house. He retraced his steps but did not find her that night. She was taken home at 5:30 a.m., by 2 G4S Security Guards. PW1 explained to him about what had befallen her but he did not believe her.

42. PW1 was robbed of her Nokia phone and cash Kshs. 1,200/=. Her assailants were 2. The appellant pulled out a knife at one point in time in the course of the robbery. The appellant used actual violence against her by pinching her throat whenever she tried to scream. It is my finding that the ingredients of robbery with violence as provided under the provisions of Section 296(2) of the Penal Code were proved beyond reasonable doubt. Although PW1 was the only eyewitness to the commission of the crime, the Hon. Magistrate was of the considered view that her evidence was consistent and was left unshaken by the accused person even on cross-examination. He found PW1 to be a truthful witness and had no good reason to disbelieve her evidence.

43. The appellant's defence cannot hold and I find it to be false. He talked of PW2 having broken the windscreen of a motor vehicle the appellant was to drive to Eldoret. He said PW2 was ordered to pay Ksh. 16,000/= for replacement of the windscreen and therefore PW2 had a grudge against him. The appellant however never cross-examined PW2 on the aspect of the alleged broken windscreen. I find his defence to be untruthful.

44. With regard to Count II, the charge of rape was not proved as no P3 form was produced in court. I acquit the appellant in Count II.

45. I note that the Principal Prosecution Counsel, Ms Ogweno, conceded to this appeal. This court is of a different point of view. After analyzing the evidence on record and the applicable law, I hold that the evidence tendered by the prosecution witnesses was overwhelming and that the appellant was properly convicted of the charge of robbery with violence contrary to Section 296(2) of the Penal Code. I uphold the conviction against the appellant for the said offence.

If the sentence was harsh or excessive

46. The appellant was sentenced to death in Count I, on 29th November, 2010. Since then, the Supreme Court in **Francis Karioko Muruatetu & Another vs Republic,** Supreme Court Petition No. 16 of 2015 (Muruatetu case), held that the mandatory nature of the death sentence is unconstitutional for depriving the courts the discretion to impose an appropriate sentence depending on the circumstances of each case. The Supreme Court stated as follows:-

> ***"Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a court listens to mitigating circumstances, but has, nevertheless, to impose mandatory sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under Article 25 of the Constitution; an absolute right."***

47. *In* **William Okungu Kittiny vs Republic** [2018] eKLR, the Court of Appeal applied the holding in the **Muruatetu case** in an appeal where an appellant had been charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The said Court stated as follows:-

> ***".....we hold that the findings and the holding of the Supreme Court particularly in paragraph 69 applies Mutatis Mutandis to section 296(2) and 297(2) of the Penal Code. Thus the sentence of death under section 296(2) and 297(2) of the Penal Code is a discretionary maximum sentence."***

48. In applying the above reasoning to the present appeal, I note that the appellant has been in custody since 20th August, 2009 when he was arraigned in court. A period of almost 10 years has gone by since then. Bearing in mind the circumstances of this case and in exercise of my discretion, I set aside the death sentence imposed against the appellant. I hereby substitute it with a sentence of 15 years imprisonment. The said sentence includes the period that the appellant was in remand undergoing trial in the Magistrate's court. The appeal succeeds only to the above extent. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **5th** day of **July, 2019.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Marindah, Prosecution Counsel for the DPP

Mr. Mohamed Mahamud - Court Assistant