REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO 161 B OF 2018

(Consolidated with Criminal Appeal No.s 161A and 161 C)

GRANIUS ABWANJO.....1ST APPELLANT.

FRANCIS OSOTSI.....2ND APPELLANT.

ISAAC BERNARD OKUTO.....3RD APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(**Being an appeal from the Judgment of J.A. Orwa Principal Magistrate in Vihiga**

PMCCR's S.O. NO. 13 of 2017 formerly Maseno S.O. No. 7 A of 2016).

JUDGMENT

1. The Appellants herein were charged with the offence Gang rape contrary to section 10 of the Sexual Offences Act .Particulars being that on the 9th September 2016 within Vihiga County they caused their penises to penetrate the vagina of JOP without her consent. They also faced an alternative Charge of Committing an indecent act with an adult Contrary to Section 11 A of the Sexual Offences Act. Particulars being that on the 9th September 2016 within Vihiga County, they intentionally touched the breasts and buttocks of JOP with their hands against her will.

2. They were also charged in Count II with the offence of Robbery with Violence contrary to section 295 as read with 296 (2) of the Penal Code .The particulars being that on the 9th September 2016 being armed with pangas they robbed JOP of a mobile phone ,purse ,national identity card ,passport ,Cooperative bank ATM card ,Safaricom Sim card and Ksh 19,000/= cash all valued at Ksh 26,500/= and immediately before or after the said robbery wounded JOP.They faced an alternative charge of Handling stolen property contrary to section 322(2) of the Penal code particulars being that on 21st September 2016 within Vihiga county , they otherwise in the course of stealing dishonestly retained and or received one pant knowing or having reason to believe it to be stolen goods the property of JOP.

3. The Trial Magistrate convicted all the Appellants of the offence of gang rape contrary to section 10 of the Sexual Offences Act (count 1) and sentenced them to serve 15 years imprisonment. She also convicted and sentenced each to death for count II.

4. Being dissatisfied with the conviction and sentence, each of them filed appeals being Kakamega High Court Criminal Appeal Nos 161 A,161B and 161C' of 2018 respectively. The same were on the 2nd September 2019 consolidated and the Criminal Appeal No 161 B selected as the lead file.

They raised the following common grounds of Appeal.

i. That the trial Magistrate erred in law and in fact in convicting them based on inconclusive evidence of identification.

ii. That the Trial magistrate erred in law and in fact in failing to consider the significant grievous and material contradiction and inconsistencies that impeached the credibility of the witnesses hence fatal to the case.

iii. That the trial court convicted them on inadequate evidence due to failure to call prime and essential witnesses.

iv. That the Trial Magistrate based her conviction on extraneous evidence of possession and ownership.

v. That the Trial magistrate derogated the principle of equality in its trial and violated their right as envisaged in Article 27 (1) and Article 50 (2) (k) of the constitution as the evidence was not corroborated by way of DNA tests.

vi. That the sentence is inhumane, manifestly harsh degrading and unconstitutional in reference to Article 50(2) (p) and Article 24 (1)(e).

5. The Prosecution called four witnesses. The complainant JOP testified as PW1. Her evidence was that on the 9th September 2016 while she was walking home at about 7.00pm,in the company of her brother Pw2 who was a few meters ahead of her, she met the Appellants who were well known to her. She stated that the 1St and 2nd Appellants were armed with pangas and that the 2nd Appellant asked her to put her purse on the ground, which she did.

6. The 1st Appellant, hit her on the rear of her head as the 2nd Appellant collected the purse, and the phone, which he kept in a bag he had carried.The 1st Appellant then hit her on her forehead with a panga and she lost consciousness. When she regained consciousness, she found herself in a bush and saw the 1stappellant putting on his trousers. The 2nd and 3rdAppellants then removed their trousers and raped her, in turns.

7. When they were done the 1st Appellant cut her on her left hand and they dragged her up to the road. The bush where she was raped was near the 3rd Appellant's home. When she managed to get up, She went to the 1stAppellant's grandmother's home and she reported the ordeal to her only for her to claim that she was implicating the 1st Appellant. She was joined there by her brother and father.

The incident was later reported at Luanda police station and PW1 treated at Dolphine Nursing and maternity home.

8. She testified that the Appellants robbed her of her purse which had her cooperative bank ATM, identity card,passport size photo,Ksh 19,000 and her phone worth Ksh 10,000/=.She emphasized that the incident took place at 7.00 pm and there was moonlight .She confirmed that the Appellants were well known to her as the 1st and 2nd Appellants are their immediate neighbors, her age mates and village mates while the 3rd Appellant's home was just 200 meters from their home.

9. She also recalled that at the time of the ordeal, She was wearing a marron jacket which was found in possession of the 1 st Appellant on the 21st September 2016 during his arrest so was her pant and brassier.

10. In cross examination she insisted that she recognized the appellants whom she knew well and they had not disguised their faces. She could not tell what transpired after she lost consciousness. One Ken who had come to her aid was injured on the hand by the Appellants. She further confirmed that her brother witnessed this incident.

11. **Pw2 JMT**, testified that on the date of the alleged offence, while he was walking home with his sister (PW1) at 7.00pm, they met the Appellants. He was a few meters ahead of PW1 and that he by passed he, and greeted the Appellants who never responded. He heard his sister PW1 raise an alarm.

12. He turned to check and saw the 1st Appellant holding PW1's right hand. The Appellants had surrounded the complainant and took her purse and phone. He stated that he fled to a nearby bush where he witnessed the Appellants drag PW1 to another bush. On seeing him, they warned him not to raise an alarm or else they would kill her. He then fled home after attempting to struggle with the appellants in vain.

13. In cross examination, he confirmed that he recognized the Appellants on that day as they were known to him as their immediate neighbors. He stated that he saw the Appellants dragPW1 to a bush and that he saw the 1st Appellant unzip his pants and sit on PW1 as the others held her on the ground.

14. **Pw3 Philip Alinyo,** a medical practitioner at Dophine Nursing home confirmed that PW1 was treated at the facility on the 9th September 2016.He stated that she had a swelling on her forehead and right eye .She also had bruised upper limbs with a painful left shoulder joint. The lab tests disclosed that PW1's vagina had live and active spermatozoa with a colorless discharge. In cross examination he confirmed that the presence of spermatozoa confirmed penetration. The laboratory tests and the P3 Form were produced inevidence as Exhibit 1 and 2 respectively.

15. **Pw4 CPL Jared Atoni** the investigating officer confirmed that the incident was reported on the 9th September 2016 at 7.30pm.PW1 gave him an account of the incident and informed him the her assailants were well known to her as they were her neighbors a fact that he confirmed upon visiting the scene. He explained the Appellants' arrest and the fact that PW1's jacket was recovered at the 1 st Appellant's home while her pant was found at the 3rd appellant's house.

16. When placed on their defence, the 1st Appellant elected to give a sworn statement with no witness to call. He denied taking part in the robbery and rape. He denied knowing neither PW1nor being found with her Jacket.

17. In cross examination he confirmed that he has been staying with his grandmother since birth but that he doesn't know her neighbors. The 2nd Appellant also denied committing the offence and denied knowing PW1.The 3rd Appellant similarly denied the charges. He stated that PW1was well known to him as she is his aunt and also a neighbor.

18. The Appellants filed written submissions in support of their appeal. The issues they raise are similar and I will outline them together. They generally challenged the prosecution's evidence on identification.

19. They contended that PW1 did not state the intensity of the moon light and the fact that it was dark. They further submitted that PW1 did not properly identify the 2nd Appellant during dock identification. They also submitted that the evidence had several contradictions with regard to what PW1 was wearing at the time of the incident, and where the Jacket was found. They allege that the evidence adduced in court and that in the statements to the police, was not the same.

20. They further submitted that there was no proof of ownership of the items that PW1 the Complainant claimed were robbed from her. They relied on the case of **Terekali&anorVr Republic (1952) EACA and Arum Vs Republic (2006) KLR**. They also challengedPW1's evidence as to the value of the phone that was allegedly stolen. They further submitted that the prosecution failed to call PW1's father and one Ken who they deemed to have been crucial witnesses. That the failure to do so was fatal to the prosecution's case.

21. It was their submission that a DNA test ought to have been carried out to establish and link them to the spermatozoa found during the vaginal swab. They also prayed for revision of the death sentence claiming the samewas excessive and unconstitutional.

22. The State through Mr Mwaura, opposed the appeal. He submitted that the ingredients of the offence had been proved and that identification was proper as the same was based on recognition and that the conditions were suitable for identification.

23. The duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. See **OKENO VS REPUBLIC [1972] EA 32**.

In **KIILU &ANOTHER VS. REPUBLIC [2005]1 KLR 174**, the Court of Appeal stated thus:

> ***"1. An Appellant on a first appeal 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.***
>
> ***2. 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; Only then can it decide whether the Magistrate's findings should 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."***

24. The same was reiterated in the case of **DAVID NJUGUNA WAIRIMU V – REPUBLIC [2010] e KLR**where the court of appeal stated:

> ***"The duty of the first appellate court is to analyze the 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 appellant 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 decisions."***

Analysis and determination

25.Upon a careful consideration and evaluation of the evidence on record, grounds of appeal and taking into account all the submissions made by both parties and further upon careful consideration of the law, the following issues arise for determination;-

a) Whether the prosecution evidence was contradictory.

b) Whether the prosecution's failure to call the complainant's father and one ken was fatal to their case.

c) Whether the trial court erred in law in failing to order for a DNA test to establish the real perpetrators.

d) Whether the Appellants were clearly and positively identified as the Complainant's assailants during the robbery.

e) Whether in the final analysis the prosecution proved the case against the appellant beyond any reasonable doubt.

f) Whether the sentence meted out on the Appellant's was excessive and unconstitutional.

Issue no. (a) Whether the prosecution evidence was contradictory.

26. The Appellants took issue with the Prosecution evidence contending that it was so contradictory, inconsistent and full of discrepancies. They cited contradictions as to the evidence of what the complainant was wearing on the night of the robbery, where the jacket was recovered, the value of the mobile phone, where Pw2 schools, as well as the date when the prosecution witness statements were recorded.

27. The Court of Appeal, in **Joseph MainaMwangi –Vs- Republic Criminal Appeal No. 73 of 1992**, made it clear that:

"An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence".

In the more recent case of **Philip NzakaWatu vs. R [2016] eKLR** the Court of Appeal held that:

"...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

28. Odunga J in **Michael MumoNzioka v Republic [2019] eKLR** observed that

"The general rule as regards the effect the discrepancies in the evidence of witnesses have in discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling, substantial or deliberate. See Law of Evidence (10th Ed) Vol. 1 at 46. ……

86. Where there are differences in the narration of events by prosecution witnesses, especially as to recounting or recollecting the dates of the events, which are mere discrepancies that would not avail the accused person, because some of such discrepancies are expected as being natural (The State vs. Sunday DioDogo (Alias Sunday Idogo) HSO/3C/2012, Oboh J in the High Court of Nigeria)……

It therefore follows that each case must be considered on its own peculiar circumstances. There are cases where the inconsistency is so minor that clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony."

Issue no.(b) Whether the prosecution's failure to call PW1's father and Ken was fatal to its case.

29. The Appellants submitted that PW1's father and one Ken who allegedly tried to save PW1ought to have been called to testify.

In regard to the choice of witnesses, the court of appeal in **Sahali Omar V Republic[2017]eKLR** stated that:

Section 143 of Evidence Act provides that:-

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

The principle used to determine the consequences of failure to call witnesses was succinctly stated in Bukenya& Others v Uganda [1972] EA 549; where the Court held that:-

"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

30. The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turns out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (**see. Keter v Republic [2007] 1 EA 135).**

31. In this case, the testimony and evidence adduced by the four prosecution witnesses including an eye witness was sufficient to prove the prosecution case.It should be noted that as per the evidence of PW1 her father had passed on at the time the trial was taking place and Pw4 confirmed that the said Ken declined to testify against the Appellants. As such, the situation hardly called for the drawing of an adverse inference with regard to the 'missing' witnesses. PW1's father could not therefore be called to testify from the grave.

32. As stated in the aforesaid authority, the Prosecution reserves a right to decide which witness to call. The appellants have no right to elect which witnesses they deems as crucial or not to the prosecution's case. I find that ground to lack merit.

Issue no.(c) Whether the trial court erred in law in failing to order for a DNA test to establish the real perpetrators.

33. The Appellants submitted that the trial magistrate erred in convicting them without the DNA tests to link them to the offence of gang rape. They stated that it was a violation of their rights as envisaged in Article 50 (k) of the Constitution which grants them the right to adduce evidence.

Section 36 of the Sexual Offences Act provides that

> ***"(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."***

34. In **Evans WamalwaSimiyu vs Republic [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

> ***"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."***

In **AML vs. Republic [2012] eKLR** the Court expressed the view that:

> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

35. PW1 testified that she was gang raped and she gave elaborate evidence of how the incident took place. The same was corroborated by the evidence of **PW2**and **PW3** who confirmed that there was penetration. The offence of gang rape and robbery with violence was committed by the same people. If these people are well identified then the issue of the DNA will be a non-starter.

d) Issue no.(d) Whether the Appellants were clearly and positively identified as the Complainant's assailants during the robbery.

36. The appellants contend that they were not positively identified as the assailants as it was dark and that PW1 did not state the intensity of the moonlight. PW1 'sevidence was that the Appellants were well known to her as they were her neighbors and that they had grown up together in the same village.Her evidence was corroborated by Pw2 (her brother). The 3rdAppellant in his evidence also stated that PW1 was his aunt and he knew her. The prosecution evidence on identification was therefore based on recognition.

37. In **Anjononi and others V Republic (1976 – 1980) KLR 1556 at 1568** the Court of Appeal stated as follows:-

> ***"The recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other."***

In the recent case of **Eric OduorOdhiambo&another v Republic [2019] Eklr t**he Court of Appeal clarified this as follows:-

> ***"Of importance is the caution in Anjononi& Others vs Republic (1976-80) 1 KLR 1566, that although recognition of an assailant is more satisfactory than identification of a stranger, the possibility of someone making a genuine mistake even in recognition of someone known to him particularly in circumstances that are not favourable for identification cannot be ruled out, and therefore there is need to test and weigh the evidence of identification."***

38. It is thus proper for the circumstances during the robbery to be analyzed to enable the court to make a finding as to whether the circumstances were favorable for a positive identification.PW1 stated that the incident took place at about 7.00pm and that she could see her assailants using the moonlight. She did not state the intensity of the moonlight. Was that fatal to the prosecution case?

39. In **Francis KariukiNjiru& 7 others v Republic [2001]e KLR**, the Court of Appeal stated that;

> ***"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all"***

40. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (***see Maitanyi v Republic [1986] KLR 198 and R v Turnbull [1967] 3 ALL ER 549).*** The Court of Appeal was categorical in **Kiarie v Republic [1984] KLR 739**, that reliance on such evidence of identification must be "absolutely watertight" to justify conviction. See **Daniel Oginga& 2 others v Republic [2019] eKLR**.

41. Although the trial court did not mention the circumstances under which PW1 was able to see the Appellants, or rather question the intensity of the moonlight, it noted that the Appellants were well known to the complainant having grown up as neighbors and also the fact that she and Pw2 named them in their initial report to the police as the assailants. (emphasis). There was no reason given as to why the two would implicate the Appellants.

42.When faced with similar circumstances the Court of Appeal in **Johnstone BarasaMulongo& another v Republic [2019] eKLR**observed that

> ***"It is appreciated that both courts below did not address their minds to the intensity of the moon light, but that failure notwithstanding, we have no doubt the intensity of the moonlight was sufficient to enable PW1 recognize a familiar face. That is why he named the 1st appellant in his report to police and also led police to arrest him. There was also no reason for PW1 to falsely implicate the 1st appellant in the commission of the robbery. We therefore find as did the two courts below that the circumstances prevailing at the scene of the robbery were conducive to positive identification. The 1st appellant's conviction is therefore safe. We affirm the same."***

The Appellant's were well known to the complainant .They were her neighbors as well as her age mates. It is impossible for her not to recognize a face that she had seen all her life. This coupled with the fact that they raped her and got so close her ruled out the possibility of mistaken identity.

43. I do find that the moonlight was sufficient for PW1 to recognize the Appellants familiar faces. They took time to rob and rape her in turns. The time was sufficient.

Issue no. (e) Whether in the final analysis the prosecution proved the case against the appellant beyond any reasonable doubt.

44. The Appellants were convicted on the count of robbery with violence and that of gang rape. The offence of robbery with violence is a creation of Sections 295 and 296(2) of the Penal Code.

The offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

> (a) The offender is armed with any dangerous or offensive weapon or instrument, **or**
>
> (b) The offender is in the company of one or more other person or persons, **or**
>
> (c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

45. Proof of any of these ingredients is sufficient proof of the offence of robbery with violence. **See DonaldAtemiaSipendi V R 2019 eKLR.**

46. In the instant case there is credible evidence that the Appellants were in a group of three when they attacked PW1 and hence executed a common intention. ***(See Section 21 of the Penal Code Chapter 63 of the Laws of Kenya,and the case of Njoroge v. Republic (1983) KLR 197.***

They were also armed with a panga which they used to inflict injuries on her. PW3 confirmed that Pw1 was treated at Dolphine Nursing Home, Luanda and that she had a swollen forehead, eye and bruises on the hands. The P3 Form EXB2 which was produced confirmed that.

47. As to whether there was theft, there is evidence to that end. PW1 lost a total of Kshs.19,000/=, a mobile phone and other items in her purse. These items were never recovered. It is therefore reasonable and believable that PW1 lost her items in the attack and that constitutes theft. I therefore find the charge of robbery with violence having been proved against all the Appellants.

48.With regard to the offence of gang rape, the offence is provided for under **Section 10 of the Sexual Offences Act** which provides that: -

> ***" 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 fifteen years but which may be enhanced to imprisonment for life."***

49. The key ingredients of the offence of Gang rape therefore include proof of rape or defilement and proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not per se commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.

50. PW1 stated that after being hit she fell down unconscious. On regaining consciousness she saw the 1st Appellant putting on his trousers. It was then that the 3rd and 2nd Appellants removed their trousers and in turns inserted their penises inside of her. The never sought her consent. The fact of penetration was confirmed by the doctor(PW3) who found active spermatozoa in her. I therefore find that all the elements of the offence of gang rape were proved.

51. In an upshot, I find that the prosecution proved both offences to the required standards and the conviction on both counts is safe.

52.The Appellants were each sentenced to suffer death on the count of robbery with violence and 15 years imprisonment, on the count of gang rape.

53. During sentencing the trial magistrate considered their mitigation and gave them the mandatory death sentence for robbery with violence which was the law then. The offence of gang rape attracts a minimum sentence of 15 years which could be enhanced to life imprisonment. The trial court was hence right in passing the said sentences, at the time. However, due to a change in law courtesy of the Supreme Court decision in **Francis KariokoMuruatetu&Another V R 2017eKLR** sentencing courts now have discretion on conviction of capital offenders.

54. I have considered the circumstances of this case and the mitigation tendered by the Appellants in the trial court. I have also considered that the Appellants were first arraigned in court on 22nd September, 2016 and they remained in custody. I hereby set aside the death sentence imposed on the 2nd count.

55. i. The result is that the Appeal on conviction on both counts is dismissed. The conviction on both counts is therefore upheld.

ii. The sentence of fifteen (15) years on the 1st count of gang rape is upheld.

iii. I substitute a sentence of twenty (20) years imprisonment for the 2nd count.

iv. Sentences to run concurrently.

Delivered, signed and dated this 12th day of September,2019 in Kakamega.

H. I. ONG'UDI

JUDGE