REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO 67 OF 2018 .

WYCLIFFE ASAVA.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(Being an appeal from the Judgment dated 4th April,2018 by Hon. M.Nabibya , Senior Resident Magistrate at Hamisi SRM's Criminal Case No 13 of 2016)

JUDGMENT

1. **Wycliffe Asava** the appellant herein was charged with the offence of Robbery with violence Contrary to Section 295 as read with 296 (2) of the Penal Code.Particulars being that the appellant on the 23rd December 2015 at Itando sub location in Bukulunya location within Vihiga County jointly with others not before court, being armed with offensive weapons namely big stone, pangas andrungus robbed Judith Jemo of her mobile phone make Tecno black in colour ,3 sufurias ,3 plastic basins and cash Ksh 3000/= total value Ksh 11,000.

He was charged on count 11 with the offence of defilement contrary to Section 8 (1) (4) of the Sexual Offences Act, particulars being that on the 23rd December 2015 at [Particulars withheld] sub location in Bukulunya location within Vihiga County jointly with others not before court intentionally caused his penis to penetrate the vagina of S.K. a girl aged 16 years.

He was also faced with an alternative charge of indecent act with a minor contrary to section 11 A of the sexual offence act. Particulars being that on the 23rd December 2015 at [Particulars withheld] sub location in Bukulunya location within Vihiga County jointly with others not before court intentionally caused his penis to make contact with the vagina of S.K a minor aged 16 years without her consent.

2. After a full hearing the learned trial magistrate convicted him for the offence of Robbery with Violence Contrary to Section 295 as read with 296 (2) of the Penal Code and sentenced him to death. He was acquitted of count II and the alternative charge.

3. Being dissatisfied with the conviction and sentence, the appellant filed a petition of appeal dated 16th April 2018 raising the following grounds:

> ***1. That the learned Magistrate erred in both law and in relying on the evidence of a single identifying witness to convict the appellant herein when the said evidence did not meet and satisfy the laid down legal threshold standards of pointing guilt to the appellant.***
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> ***2. That the learned Magistrate erred in both law and by not directing its mind to effect of the witness failure to properly identify the appellant in the moment of the incident.***
>
> ***3. That the learned Magistrate erred in both law and in failing to note that the complainant knew the appellants being neighbors in the same compound but she did not disclose his name to the police in the initial report hence the magistrate applied the wrong principles of the law convicting the appellant.***
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> ***4. That the learned Magistrate erred in both law and in considering issues that were not brought out in evidence instead concentrated on extraneous issues and conjectures therefore arriving on a wrong decision on convicting the appellant.***
>
> ***5. That the learned Magistrate erred in both law and in relying on evidence of recognition yet the evidence adduced by the prosecution was of identification as the offence was committed at night under difficult circumstances ,therefore the court deviated from the evidence adduced before and considered irrelevant issues not before court.***
>
> ***6. That the learned Magistrate erred in both law and in failing to note that the trial was a violation of the constitutional rights of the appellant and further that the evidence adduced before court was circumstantial and not fulfilling the requirements set out in***

criminal liability.

7. That the learned Magistrate erred in both law and fact in convicting on the prosecution evidence which fell far short of the probative value to convict in criminal law.

4. The Prosecution called five witnesses.

PW1 **JJ**, testified that on the 23rdDecember 2015 at about midnight while she was sleeping in her house she heard her door break and saw sharp spotlights in her house.She stated that the assailants went to her room, tied her up with her daughter S.K and started ransacking the house.She said she was able to see the appellant as one of her assailants who took S.K. to another room where they defiled her. They also stabbed her in law one M who was with them in the house.

5. She explained that the assailants made away with her phone, a radio six cushions, 4 sufurias, cups, plates, clothes and Ksh. 4000/=. The incident was reported at Kilingili police station and later at Chavakali police station. She stated that the appellant was well known to her as she had seen him on that day pass by her compound. Further, she recognized him at the time of the attack when he demanded for money she was using to construct a toilet.

6. In cross examination she confirmed that she saw the appellant using the spotlight he had and that she recognized his voice. Her evidence was corroborated by PW2 (S.K) who testified that assailants broke into their house on that day at midnight and tied them up. She stated that they demanded formoney and they took her to another room and defiled her. She said that she was able to identify the appellant who she had seen pass their compound severally. In cross examination she confirmed that she knew the appellant well and that she saw him using the light from the spotlights.

7. PW4, **Douglas Obare**a Clinical Officer at Vihiga referral hospital confirmed that he examined PW2 after the incident. He stated that she was in a **fair general condition** and told him that she was in her menses. He testified that from the examination, there was no evidence of penetration and that her hymen had scars meaning this was not her first time to engage in sex.

8. PW5 inspector **Bornes Kipkemboi** the investigating officer,testified that he received the report of the incident and recorded the statements of the complainants and their witnesses. He stated that the complainants identified the appellant as one assailants in their initial report and that based on thathe made the arrest.

9. When placed on his defence the appellant gave an account of his arrest and denied having any involvement in the robbery.

10. During the hearing of the appeal the appellant submitted that his rights as envisaged under Article 50 (2) (j) (m) of the constitution were violated as he was not supplied with witness statements before the hearing of the case. He stated that he did not understand the proceedings as the same were not in a language he understood.

11. He further challenged the evidence on identification stating that the same was contradictory. He also submitted that the circumstances were not conducive for positive identification and that the complainants did not describe him in their initial report.He contended that some crucial witnesses had not been called. He argued that the sentence was excessive and unconstitutional.

12. The state through learned prosecuting counsel, Mr. Mwaura submitted that the prosecution had proved their case to the required standard and prayed that the appeal be dismissed.

Analysis and Determination

13. This court is a first appeal and this court has a duty 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."

14. 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."

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

a) Whether appellant's rights as envisaged under article 50 (2)(j) and (m) of the constitution were contravened and consequences of such contravention if any.

b) Whether in the offence of robbery with violence was proved.

c) Whether the prosecution failed to call crucial witnesses and whether the court should make an adverse inference against the prosecution for failing to call certain witnesses.

d) Whether the appellant was clearly and positively identified as one of robbers in this case.

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

a) Whether appellant's rights as envisaged under article 50 (2)(j) and (m) of the constitution were contravened and consequences of such contravention if any.

16. Article 50 (2) of the Constitution provides as hereunder: Every accused person has a right to a fair trial which includes the right:

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language usedat the trial;

17. The right to be provided with copies of the documents and statements that the prosecution intends to rely on in a case was emphasized by the Court of Appeal in **Thomas Patrick Gilbert Cholmondeley Vs Republic Nairobi CA Criminal Appeal No. 116 of 2007 (2008) eKLR,** where court observed that:-

"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under …. our constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."

18. The Court of appeal further reiterated this in the case of **AhamadAbolfathi Mohammed & another v Republic [2018] eKLR**where they stated as follows:

"Our reading of Article 50(2) (j) of the Constitution does not grant the appellants the blanket right to access all the information in possession of the police including intelligence reports. What the appellants were entitled to was the evidence that the police intended to rely on at the trial, and of course any other evidence in possession of the police that could have exonerated them from the charges they were facing, even though the police did not wish to use that evidence. Indeed, even the right to access the evidence that the police intend to rely on is not totally unfettered; it is qualified by the constitutional requirement that the access should be reasonable, the determination of which must depend on the circumstances of each case."

19. The appellant contends that he was never supplied with the witness statements.According to the records the court on the 18th April 2016 ordered that the witness statements be supplied to the appellant upon his request. When the matter came up for hearing on the 13th June 2016 the appellant indicated to court that he was ready to proceed.He did not raise any issues with regard to the statements and the same was never raised again during the trial.

20. When faced with similar circumstances, Wendo J in **Francis KanyiKirunda v Republic [2019] eKLR** observed that,

"The appellant also complained that his fundamental rights under Article 50(2)(j) and (k) were breached. The appellant alleged that he was not supplied with witness statements. Article 50(2)(c) provides that an accused has right to have adequate time and facilities to prepare his defence while (j) provides that an accused has a right to be informed in advance of the evidence that the prosecution will rely upon.

I have perused the court record. On 27/10/2014 when the appellant appeared before the trial court for plea, the prosecution indicated that there were 5 witnesses to be called of 7 pages and the court directed that the appellant be supplied with witness statements at the court's cost. Thereafter, there was no mention of witness statements. The appellant never complained that the court had not supplied him with witness statements. I believe the appellant was supplied with statements because he would have complained during the hearing. He cannot be heard to complain now when he would have done so in the trial court."

The appellant herein did not make any attempt to get the statements that he alleges were not granted to him. The trial court made the orders for the supply and his silence and willingness to proceed with the issue indicated that he was supplied with the same. I find no merit in this ground.

21. With regard to violation of his rights under Article 50 (2) (m). It is clear from the proceedings that the trial was conducted in Kiswahili

the language elected by the appellant. At no point during trial did he complain that he did not understand the proceedings and as a matter of fact he was able to cross examine all the witnesses. I do not find that that the said violation has not been established and thus cannot stand.

Issue No.(b)Whether the offence of robbery with violence was proved.

22. The ingredients of robbery with violence are as set down in section 296 (2) of the Penal Code, as follows:

> ***"296. Punishment of robbery***
>
> ***(1) ……..***
>
> ***(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

23. In determining whether the ingredients of the offence of robbery with violence are proved, the evidence on the theft, and either the number of attackers is more than one or the attacker was armed with a dangerous weapon or the complainant was injured are determinant.

The Court of Appeal in the case of **Odhiambo& Anothervs Republic [Omolo, Githinji & DeverellJJA] [2005] 2 KLR 176** explained the ingredients of the offence of robbery with violence as follows:

> ***"The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295."***

In **Suleiman Kamau Nyambura vs Republic [2015]eKLR** the Court of Appeal held:-

> ***"Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction under Section 296 (2) of the Penal Code. See Oluoch vs Republic [1985] KLR 549."***

24. In the instant case there is credible evidence that the attackers were in a group of three when they attacked the complainant and hence executed a common intention. (***See HellenAnyangoOloo and 2 Others V Republic (2018) eKLR).***

The complainants testified that the attackers were also armed with pangas and rungus and that they used a big stone to break the door. There is evidence PW1lost a mobile phone and other household items which were never recovered. I therefore find that the robbery with violence occurred.

Issue No.(c) Whether the prosecution failed to call crucial witnesses :

25. The appellant contends that the Prosecution ought to have called the area assistant chief and those who arrested him to testify. There is no law that requires the prosecution to call all witnesses who know about a case. It's duty is to avail sufficient witnesses to prove its case. The whole idea is for the court to have sufficient evidence to enable it arrive at a just decision.

See the case of **Republic Vs Cliff Macharia Njeru** where Lessit J. opined that:

> ***"The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. It is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favourable to the prosecution or not."***

26. The court of appeal in **SAHALI OMAR V REPUBLIC [2017] EKLR** stated thus :

> ***"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."

27. 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).**In this casethe assistant chief and the members of the public who arrested the appellant were not eye witnesses and they did not play any investigative role. Failure to call them cannot attract any adverse inference.

Issue No.(d)Whether the Appellant was clearly and positively identified as one of the robbers in this case.

28. The appellant contends that the complainants did not identify him owing to the fact that it was dark.He challenged his identification by recognition and stated that the same was not sufficient.

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 .The Court of Appeal clarified that

"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."

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 identification. PW1 stated that the incident took place at midnight and that she could see her assailants using the sharp spotlight that they had carried.

29. 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 scrutinized 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"

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.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 aconviction.

30. The main evidence on identification was tendered by PW1 and PW2. They stated that they knew the appellant as he used to pass on their compound on a daily basis. That he had helped in the construction of their toilet and kitchen. They further stated that they had seen him during the day on this fateful night. They were quick to add that they knew and recognized his voice. Infact the two witnesses gave the court the names of the appellant as Wycliffe Asava.

31. The only question that needs an answer is this "Did PW1 and W2 give any description plus the name of the attacker to the police when they reported the case?"

In the case of **Simiyu& Another V R. 2005 IKLR 192**, the Court of Appeal held thus:

i. In every case in which there is a question as to me identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description ad purport to identity the accused, and then by the person or persons to whom the description was given.

ii. The omission on the part of the complainants were not sure of the attacker's identity.

iii. In the present case, neither of the two courts below demonstrated any caution. Further, there was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. In the absence of any inquiry, evidence of recognition may not be held be free form error

32. PW5No.**234869 Inspector BornesKipkemoi** in his evidence stated this at page 9 line 5 – 7:

> ***" On 23.12.2015, I read through the O.B. and saw complainant's mother Judith had reported a robbery case, together with defilement of her daughter Samantha. I recorded statements and referred them to hospital".***

At lines 9-12 he said:

> ***"We thereafter commenced investigations to the matter. Samantha Kajaira said she confirmed one of the assailants as the man who had been employed to make their kitchen. She had seen him during the day. That the man's voice was recognized during the day and night. The accused was thereafter recognized and arrested and thereafter charged incourt.***

33. From the evidence of PW5 there was no description nor names of the assailant or assailants given vide the OB. It is just the robbery report that was made by PW1. According to PW5 it is only Samantha who said that she recognized one of the attackers as a man who had been employed to make their kitchen. That she recognized his voice too. He did not make any mention of PW1 having told him such things.

34. Besides telling him that, PW2 did not give him any description or names. So how was the appellant arrested? PW5stated that the appellant was arrested by members of the public. It has not been shown as to who these members of the public were and who identified the appellant to them for them to effect arrest. Was it PW1 or PW2 who identified him? The answer is "NO"

35. It has been said again and again that recognition is more reliable than identification. However even in cases of recognition the court is enjoined to examine such evidence carefully and be satisfied that it is free from error.

see***Wamunga V R 1989 KLR 424; Osiwa V R 1989 KLR 469***.

36. From PW1's evidence, she was asleep in her house with her children in one room while her brother in law Maxwell *(who never testified*) was sleeping in the sitting room when the door to the house was broken. The only source of light was the torches that were being flashed by the attackers. Nothing of PW1 was recovered from the appellant. The only evidence that tends to link him is the evidence of recognition.

37. Since PW1 and PW2 did not give any description or names of the appellant to the police or even in the OB it was imperative for the alleged recognition to be tested. The only way this could have been done would beby a properly organized identification parade, for PW1 and PW2 to pick the person they claimto have recognized and identified that night.

38. As was stated in the Wamunga case (supra)

> ***"Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made".***

Further, in the case of ***Francis KariukiNjiru& 7 Others V R*** (2001) eKLR, the Court of Appeal stated thus:

> ***" The Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized 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".***

39. After analyzing all the evidence and the circumstances of this case, I have come to the conclusion that the recognition evidence relied on by the learned trial magistrate to convict was not complete in the absence of an identification parade.The evidence of PW1 and PW2 could only have been sufficient if the two had given a description and/or names of the assailants to the police when they made the report and recorded statements, or if they had been subjected to identification parades.

40.I therefore find that the prosecution failed to link the appellant to any of the offences he was charged with. I find merit in the appeal which I hereby allow. The conviction is quashed and sentence set aside.

Orders accordingly.

Delivered, signed and dated this 13th day of September, 2019 in open court at Kakamega.

H.I. ONG'UDI

JUDGE