



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 68 OF 2017

BETWEEN

HILLARY OTINDO Alias ELVIS MULAAAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence dated 30th June 2017 by Hon. E. Malesi, Senior Resident Magistrate in Kakamega CMC Criminal Case no. 3353 of 2015)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein, was charged alongside one Moses Kimanzira Obaga with various counts or **robbery with violence contrary to section 296(2) of the Penal Code, Cap 63 of the Laws of Kenya**. They were also separately charged with various counts of **gang rape contrary to section 10 of the Sexual Offences Act no. 3 of 2006**. The appellant was the second accused person.
2. In Count I, the appellant together with his co-accused was charged that on the 4th November 2015 at [particulars withheld] Village of Kakamega North Sub-County within Kakamega County, jointly with others not before court, while armed with dangerous weapons namely runkus, machetes and knives, robbed LUKE SHIKANGA OTIPO of his mobile phone make R7 worth Kshs.23,000/-, a mobile phone make Kaduda valued at Kshs.1000/-, three pairs of shoes valued at Kshs.6,000/-, one laptop make Dell valued at Kshs.48,000/-, assorted clothes and cash Kshs.25000/-, all valued at Kshs.123,000/- and immediately before the time of such robbery, threatened to use actual violence against the said LUKE SHIKANGA OTIPO.
3. The particulars of the robbery charge in count II are that on the 4th of November 2015 at [particulars withheld] Village of Kakamega North sub-county within Kakamega County, jointly with others not before court while armed with dangerous weapons namely runkus, machetes and knives robbed EAM of cash Kshs.150/- and immediately before the time of such robbery threatened to use actual violence against the said EAM.
4. In count III the appellant and his co-accused were charged that on the 4th November 2015 at [particulars withheld] Village of Kakamega North sub-county within Kakamega County, jointly with others not before court, while armed with dangerous weapons namely runkus, machetes and knives robbed DM of her mobile phone make Techno valued at Kshs.2,000/- and immediately before the time of such robbery threatened to use actual violence against the said DM.
5. Count IV was one of **gang rape contrary to section 10 of the Sexual Offences Act, no. 3 of 2006**. The allegations were against the appellant's co-accused who is not a party to the present proceedings.
6. In count V, the appellant was charged with gang rape, the particulars being that on the 4th November 2015 at [particulars withheld] Village within Kakamega North Sub County within Kakamega County in association with MOSES KIMANZIRA OBAGA and others not before the court, intentionally caused his penis to penetrate the vagina of EAM without her consent.
7. Count VI was one of gang rape against the appellant's co-accused who was acquitted of the offence. In count VII, the appellant was charged with gang rape, the particulars thereof being that on 4th November 2015 at [particulars withheld] Village of Kakamega North Sub-

county within Kakamega County, in association with MOSES KIMANZIRA OBAGA and others not before court, intentionally caused his penis to penetrate the vagina of DM without her consent.

8. In count VIII, the charge was against the appellant's co-accused acting in association with the appellant where it was alleged that on 4th November 2015 at [particulars withheld] Village of Kakamega County in association with the appellant and others not before the court, caused his penis to penetrate the vagina of DM without her consent.

9. The appellant and his co-accused pleaded not guilty to all the counts and as a consequence the prosecution marshalled evidence of six(6) witnesses in its endeavour to prove the charges against the appellant and his co-accused.

10. PW1 was Luke Shikanga Otipo, the complainant in count I followed by EAM as PW2, and complainant in Counts II and V. Triza Njambi testified as PW3 while number 235435 CI Samson Kipruto who conducted the identification parade testified as PW4. The chief Clinical Officer, Kakamega County General Hospital, Patrick Mambili, testified as PW5. The last witness, PW6 was number 86272 CPL Sophia Ibrahim. She is the one who investigated the case.

11. At the close of the prosecution case, the appellant and his co-accused were both put on their defence. Testifying as DW2, the appellant gave sworn evidence in which he denied committing the offence. He did not call any witnesses.

Judgment of the Learned Trial Court

12. After a lengthy and exhaustive analysis of the evidence that was placed before it, the learned trial court was satisfied that the prosecution case against the appellant on counts I, II, IV and VI beyond reasonable doubt. His co-accused was acquitted of the offences. The appellant was sentenced to suffer death in counts I, II and IV. The sentences in counts II and IV were to remain in abeyances. In respect of count VI, the appellant was sentenced to serve 20 years imprisonment. That sentence was to be served pending execution in count I.

The Appeal

13. The appellant was aggrieved by the whole of the trial court's judgment. He filed his petition of appeal on 11th July 2017. There are eight grounds of appeal as follows:-

a) THAT the learned trial magistrate gravely erred in law and facts in placing inordinate reliance on the evidence of identification which were conducted in breach of force standing orders chapter 46 part 6.

b) THAT the learned trial magistrate grossly misdirected himself in law and facts in believing the evidences of PW1 and 2 regarding identification without considering that the identification parades conducted against me were not preceded by first hand descriptions as is ordinarily the practice.

c) THAT the learned trial magistrate gravely erred in law and facts in excluding the evidence of the prosecution witnesses from error and doubt without inquiring and/or confirming that the conditions were conducive and favourable for positive identification.

d) THAT the learned trial magistrate grossly misdirected himself in law and fact in placing inordinate weight on the evidence of a purported Safaricom printout without observing that the same was not produced in court by an expert from Safaricom as required the under the Evidence Act.

e) THAT the learned trial magistrate erred in law and facts in sentencing me to death as well as twenty years without setting the latter in abeyance.

f) THAT the learned trial magistrate erred in law and facts in convicting me on evidence which was far-fetched, inconsistent, uncorroborated, flimsy and fabricative and further in entering into the arena by finding nexus in a Safaricom communication not linked to me.

g) THAT the learned trial magistrate heavily misled himself in law and fact in convicting me for the offence of gang rape in the absence of conclusive medical evidence, especially DNA results.

h) THAT the learned trial magistrate erred in law and fact by shifting the burden of proof on the appellant thereby ignoring my plausible defence.

14. The appellant prays that his appeal be allowed, convictions be quashed and sentences set aside so that he can be set free.

15. As this is a first appeal, this court has to remember that its duty is to analyze afresh and re-evaluate the evidence which was adduced during the trial and satisfy itself as to the correctness of the conclusions arrived at by the learned trial court. The court has however to remember that it has no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. Generally see *David Njuguna Wairimu versus Republic [2010] eKLR* and *Okeno -vs- Republic [1972] EA 32*.

The Prosecution Case

16. In brief, PW1 testified that at around 9.00pm on 4.11.2015, he was in his house at KEFINCO Estate in Kakamega town after returning

home from work. He was together with his wife PW2. While PW1 worked on the computer, PW2 read the Bible. They were both sitting in the living room. At the material time, the couple's house girl was in the kitchen preparing supper when suddenly PW1 heard the house-girl screaming from outside. Soon after hearing the scream, a band of young men stormed into the living room from the side of the kitchen. The young men who were between 8 – 10 were all armed with rungas, knives and pangas. As soon as PW1 and PW2 saw the intruders, they started screaming but the gang warned them of dire consequences of death if they continued to scream; so the two of them chose to keep quiet.

17. PW1 was then held by the hands at the back and made to sit down, as Kshs.10,000/- which he had in his shirt pocket was removed by one of the assailants. PW1's two mobile phones which were on the table were taken, a Tecno and Kaduda. PW1 was asked whether he had any money in the Mpesa and Mshwari accounts. He answered in the affirmative with regard to Mpesa but in the negative with regard to the Mshwari. The intruders also took PW1's ATM card for Equity Bank and asked for the pin which he gave them.

18. The intruders also took PW2's handbag and ransacked it for money. They took Kshs.150/- which was in the bag, before leading PW2 and the house-help to different bedrooms. PW2 was pushed by one of the intruders onto the bed, ordered to remove her inner wear and open her legs wide, just like she would do for her husband. The men then raped her in the glare of the lights which were on in the bedroom. PW2 stated she clearly saw the faces of the three men who were in the bedroom with her as they ordered her to undress and bend and also as they asked her for money.

19. A second man tried to rape PW2, but he did not get an erection. He then ordered her back to the sitting room where PW2 saw PW1 still lying on the floor with his hands tied at the back using his own tie which he (PW1) had put on one of the chairs in the living room after they got home. The intruders then asked PW1 and PW2 about a neighbour who operated a petrol station and an Mpesa shop. They also took clothes, the laptop and other items from the house such as shoes and clothes.

20. In the course of the robbery and after taking PW1's ATM card and also after being furnished with the PINS, some of the members of the gang went to town to take the money using the ATM. They sent back communication by calling others and confirmed that they had succeeded.

21. One hour later the intruders who went to town returned to PW1's house with the money. While trying to share out the money, a fight broke out among them, but PW1 intervened and urged them not to fight. After sharing the money, the robbers bundled PW2 and the couple's house-help into PW1's vehicle and drove off. Since they were many some of the robbers walked on foot to PW1's neighbour's home. They forced the gate open. They also forced the door to the house open after they gained entry through one of the windows which they smashed with a stone.

22. Once inside the neighbour's house the robbers demanded money. They eventually stole Kshs.150,000/- from the neighbour's house after which they left the neighbour's house, gave the car keys back to PW1 before running away with their loot.

23. After the robbers fled, PW1 and PW2 went and reported the matter to the police whom they encountered near Fracet Filling Station. PW2 and the house help were taken to Kakamega County General Hospital for examination and treatment. PW1 stated that the robbers remained in his house for about 3 hours, but took about 30 minutes in the neighbour's house. On the following day, PW1 went and made a report to the police. He also testified that since only one of the attackers had covered his face, he (PW1) was able to identify all the other attackers during the robbery, adding that there was adequate light from 2 florescent tubes in the living room. He also stated that for almost the entire time of the robbery, he was conversing with the robbers, as if they were friends.

24. PW5, Patrick Mambili testified that on 5.11.2015, he saw PW2 at Kakamega County General Hospital under O/P no. 007298/2015; with complaints that she had been raped by persons who also robbed her and her husband on 4.11.2015. On examination, PW5 established that PW2 had pain in her vaginal area. She also had bruises on the *labia majora*. He sent PW2 to the lab for urinalysis and high vaginal swab. The laboratory examination revealed red blood cells as well as epithelial cells. PW5 filled the P3 form which he produced in evidence as Pexhibit 4. He also filled the PRC form which he produced as Pexhibit 3. PW5 also produced similar documents for DM in court. According to PW5, PW2's vagina had been penetrated.

25. PW6 was the investigating officer. She received the report concerning the robbery on 4.11.2015 from PW1. PW6 stated that PW1 informed her that Kshs.10,000/- was stolen from him during the robbery in addition to Kshs.150/- stolen from PW2 and withdrawal of Kshs.15000/- from his (PW1's) account at Equity Bank through the ATM and a further Kshs.1050 from Mpesa.

26. PW6 visited the scene. The appellant in this case was arrested on 8.11.2015 and found in possession of the telephone handset for sim card number 0790 184 280, IMEI number 357266053270970. PW6 also obtained a bank statement from PW1's account at Equity bank and confirmed withdrawal of Kshs.15,000/- Pexhibit 2 on the day of the alleged robbery.

27. PW4 conducted identification parades for the appellant and his co-accused. During the parade, the appellant was identified by three witnesses.

The Defence Case

28. As earlier indicated, the appellant gave sworn evidence in which he denied committing the alleged offences. He stated that he was arrested on 8.11.2015 for reasons that were not clear to him. Thereafter he was charged with offences he knew nothing about. He also testified that he participated in an identification parade. He alleged that the three people who identified him had been shown his photographs by the police. He also denied any knowledge of his co-accused.

29. During cross examination, the appellant testified that PW2 did not give a description of him to the police in her statement. He also stated that the participants in the parade did not have similar features; since he was the only one with missing teeth.

Issues for Determination

30. Under **section 296(2) of the Penal Code**, the offence of robbery with violence is proved in any one of the following circumstances:-

- a. if the offender is in the company of one or more other persons;
- b. if the offender is armed with dangerous or offensive weapons;
- c. if immediately before, at or immediately after such robbery, the offender beats, wounds or uses any other form of violence upon the victim.

31. The Court of Appeal in ***Oluoch versus Republic [1985]KLR 549*** stated clearly that proof of any of the three circumstances above cited would be proof of the offence or robbery with violence. In addition, the offender must be positively identified as having participated in the crime – see ***Wamunga versus Republic [1989]KLR 424*** in which the Court of Appeal behooved trial courts to remember that, “***Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.***” Also see ***Maitanyi versus Republic [1986]KLR 198***.

Analysis and Determination

32. I have now carefully reconsidered and evaluated the evidence afresh and from the said analysis, my findings are the following:-

a. Whether the ingredients of the offence of robbery were proved

There is no doubt from the evidence given by PW1 and PW2 that the number of persons who stormed into their house were between 8-10 and were all armed with rungs, knives and pangas. All these weapons are among those described as dangerous. Even stones and sticks which are intended to be used or are used during a robbery fall within the definition of dangerous weapons. See ***Joseph Kaberia Kalunga & 11 others versus Attorney General [2016]eKLR***.

33. PW1 and PW2 also stated that when they tried to scream, the attackers warned them that they would be killed. Clearly these threats uttered by the attackers were to the effect that if PW1 and PW2 continued screaming, they would use actual violence on them. The prosecution thus proved beyond any reasonable doubt that an offence of robbery with violence was committed in the home of PW1 and PW2 on 4.11.2015.

b. Whether the appellant was among the attackers

34. The next and more intricate question is whether the appellant was among the 8-10 men who attacked PW1 and PW2 on the material night. The appellant submitted that the circumstances under which the alleged offences were committed were difficult for his proper identification, partly because, he argued, PW1 and PW2 gave contradictory evidence of how he was dressed, and secondly because according to the appellant, the identification parades during which he was identified by both PW1 and PW2 were a sham. The appellant contended that his photographs which were taken by the police were shown to the witnesses before the parade and that it was thus easy to identify him. The appellant also alleged that members of the parades were not of the same appearance because he was the only one who had a gap in his teeth.

35. Regarding visual identification during the robbery, PW1 and PW2 stated clearly that when the robbers struck, the lights (electric) from two fluorescent tubes were on, and that at no point did the lights go off. PW2 further stated that even during her rape ordeal in the bedroom, the lights were on. PW1 stated that in total, the robbers spent 3 hours in his house; and 30 minutes at the neighbours house where PW1 had been taken by the robbers. PW1 also stated that except for only one robber the rest had not covered their faces and were clearly identifiable. He also testified that during all that time, he was talking with the robbers and by the time they were leaving PW1's house for the neighbour's house, he had talked with the robbers as if they were friends, and that it was this length of time that enabled him to easily identify the appellant during the parades.

36. During cross examination, PW1 stated that the parade on which he identified the appellant had a mixture of different people, tall, short and plump, and that the appellant was the only one who had missing teeth. PW1 denied that the police officer Kimutai told him that he would find a person without teeth in the parade or that Kimutai showed him pictures of the appellant. PW1 also admitted that he did not give a description of the attackers when he made his report to the police.

37. PW2 stated that one of the reasons why she was able to identify the appellant was the fact that he had sunken lips though the appellant did not open his lips for her to see the gaps in his teeth. During cross examination, PW2 stated that she did not give the description of her attackers when she made her first report to the police. She however denied being shown any pictures of the appellant before she was led to the parade. She also testified that she did not give the description of her rapist to the doctor.

38. In the case of ***Terekali & another versus Rex[[1952]EACA*** the Court held that:-

“Evidence of a first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statements may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others.....”

39. In the instant case, and from the evidence of PW1 and PW2, this court finds that though the two witnesses had ample time with the

appellant and the other robbers, neither of them gave a description of the appellant to the police with the first report. In fact the evidence detailing the appearance of the appellant came out during cross examination, and such evidence in my considered view, is not of much probative value. I also find that the evidence of the identification parade was not good because the parade comprised people of different statures and shapes. In conclusion, the appellant was not properly and positively identified as being one of the robbers, though most likely he was there. But as the sages say, if he was there, his fortieth day is yet to come.

c. **Whether there is any other evidence linking the appellant to the crime**

40. Having reached the above conclusion, the next question is to consider whether there is any other evidence linking the appellant to the alleged offence. This other evidence can only be circumstantial evidence. In *Mwendwa versus Republic [2006] KLR 133*, the court held, *inter alia*, that:-

“To prove a case based on circumstantial evidence only, every element making up the unbroken chain of evidence that would go to prove the case must be adduced by the prosecution. Secondly as is now settled law, the chain must never be broken at any stage.”

41. In *Ndunya versus Republic [2008]KLR 135*, the court held, *inter alia*, that:-

“Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person's guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference.”

42. In effect, what the courts were saying in the above two cited cases is that there should be no lingering possibility that the offence may have been committed by a person other than the appellant. This court must therefore consider whether the facts connecting the appellant with the alleged offence are incompatible with his innocence and incapable of explanation upon any other hypothesis than that of guilt. Also see *Mwathi versus Republic [2007]2EA 334*.

43. The evidence in the present case is that the money that was withdrawn from PW1's Mpesa account at the command of the robbers was received by one Elvis Tendenyi Mulaa on mobile phone number 0790 184 280. The amount withdrawn from PW1's mobile number 0723 124 457 was Ksh.1050/-. According to investigations by PW6, the IMEI number from mobile number bearing the sim card number 0790 184 280 was 357266053270970. The handset with the said IMEI number was recovered from the appellant during his arrest on 8.1.2016, which was about a month from the date of the alleged robbery. Though the appellant denied this connection, the prosecution adduced evidence to show that telephone number 0728 849 404 which is the number admitted by the appellant to be his was in communication with mobile number 0790 184 280 the recipient of the Mpesa proceeds, during the time of the alleged robbery. In this regard, this court is satisfied as the trial court was, that the appellant herein was involved in the robbery against PW1 and PW2. Both PW1 and PW2 testified that the robbers were in constant communication with each other on telephone during the robbery. There is also evidence to show that from the date of the alleged offence to the date of his arrest, the appellant herein was using the recovered mobile phone. The documentary evidence of the Mpesa statements from Safaricom, which were produced by PW6 as Pexhibit 1 confirmed that fact.

44. I am thus satisfied that the circumstantial evidence highlighted above firmly connects the appellant with the robbery incident during which Kshs.1050/- was transferred from PW1's phone at the command of the ring leader of the gang. It also follows that the hooded man, whom PW2 said appeared to be the one who was the commander of the gang and was the one issuing commands to other gang members, was the appellant.

45. This now brings me to the question of the offence of rape against PW2. I am satisfied that based on the above findings, the learned trial court was right in concluding that the appellant and his accomplices gang raped PW2 during the robbery. The medical evidence confirmed that PW2 was indeed raped.

46. At this juncture I wish to digress a little and point out that this is one of those cases in which the investigating officer or perhaps the trial court should have ordered for a DNA immediately upon the arrest of the appellant. The results of such an examination would have greatly assisted the prosecution's case not only with regard to the robbery with violence charges but also with regard to the rape charges. It is my considered view that as crime becomes more and more complex, the police investigators in this country, must begin to think more seriously of including DNA evidence, as a matter of course, and especially in capital offences as well as sexual offences.

47. The final issue for determination is one on sentence. The appellant submitted that the learned trial magistrate erred in law and facts in sentencing him to death as well as a sentence of 20 years without letting the gang rape sentence remain in abeyance pending execution of the death sentence. After the judgment was delivered, the appellant in mitigation told the court -

“I have stayed in custody for a long time. I have a family at home.”

48. The appellant did not show any remorse nor did he ask to be treated with leniency. However, where an accused person is sentenced to death, any other sentence in respect of any other offence must remain in abeyance pending execution or otherwise of the death sentence. The trial court thus fell into error in ordering that the appellant serves the twenty (20) years imprisonment pending execution of the death penalty.

49. What about the death sentence itself? The position is that following the Supreme Court declaration in 2017 that the death sentence is unconstitutional, courts are no longer bound to impose the death sentence even in capital offences. See *Francis Kariokor Muruatetu versus Republic [2017]eKLR*. The Supreme Court reasoned that since trial courts have a discretion to impose sentences depending on the gravity of

the circumstances of the case, then that discretion is also exercisable in capital offences.

50. The above being the position, and considering the circumstances of this case, I would set aside the death penalty an in lieu thereof, sentence the appellant to thirty five (35) years imprisonment from the date of original conviction.

Conclusion

51. In conclusion, I make the following orders in this appeal:-

- a. The appeal on conviction be and is hereby dismissed on all the counts.
- b. The appeal on sentence for the robbery crimes in counts I and II is set aside and in lieu thereof, the appellant is sentenced to thirty five (35) years on each of the two counts.
- c. The sentences shall run concurrently together with the twenty (20) years imprisonment for gang rape.

52. Orders accordingly.

Judgment written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 9th day of October, 2019.

WILLIAM M. MUSYOKA

JUDGE