



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 64 OF 2018

BETWEEN

STEPHEN OTIENO GUTHA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Maseno Criminal Case No. 1229 of 2015 by Hon. R.S.Kipngéno (SRM) on 14th June, 2018)

JUDGMENT

Background

1. **STEPHEN OTIENO GUTHA (Appellant)** has filed this appeal against his conviction and sentence on a charge of attempted rape contrary to section 4 of the Sexual Offences Act. (*the Act*) and robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. The offences were committed against **PMN** on 16th May, 2015.

The prosecution's case

2. The prosecution called 4 witnesses in support of the charges. **PW1 MOSE JONES**, a clinical officer examined complainant on 18.05.15 which was two days after she was allegedly raped, robbed and wounded. He found that complainant had bruises on the cheek with swelling, small cut on the lower lip, multiple cuts on palms, shallow cut on the legs and bruises and small tear on anterior vaginal wall. He produced complainant's P3 form as **PEXH. 2**.

3. **PMN**, the complainant stated that on 16th May, 2015, she and her friend **GW** arrived at the Maseno University late in the night. She recalled that at about 04.30 am, they requested the services of the Appellant, a bodaboda that she knew having travelled on his bike many times and he agreed to drop them in her friend's hostel. It was her evidence that after her friend was dropped first with the luggages after which the rider picked her. True to his word, the rider picked her but on the way ordered her to alight and after she gave him Kshs. 100/-, he stated that he wanted something more. She said she became fearful, ran but the rider caught up with her, stabbed her on the shoulder, left knee and left cheek, raped her and robbed her of Kshs. 4,000/-. She reported the matter to police and was treated at Chulaimbo sub-county hospital and later identified the Appellant as the person that raped and robbed her. It was her evidence that there were street lights at the scene that the rider picked her from and that he used to operate from Total Petrol Station and as well-known to him. She stated that on the material night, Appellant was wearing a black rain coat, black trousers and black gumboots and had no helmet.

4. **PW2 GW** stated that on 16th May, 2015, she arrived at the Maseno University late at about 04.00 am and found complainant waiting for her. She recalled that at about 04.30 am, they requested the services of the Appellant a bodaboda rider that she knew having travelled on his bike and having seen him severally at Total Petrol Station where he used to operate from him. It was her evidence that Appellant dropped her and the luggage outside the gate of her hostels and went back to pick the complainant. She recalled that while at the gate, she heard screams and called the hostels caretaker who opened the gate and immediately thereafter, the complainant who was crying and bleeding was dropped at the gate by the Appellant. She stated that after complainant narrated that Appellant had raped and robbed her, she, the caretaker one Evans and a neighbour escorted her to Maseno Police Station and was thereafter treated at Chulaimbo sub-county hospital. She recalled identifying the Appellant at the police station as the person on whose motor cycle they had travelled on the material night. It was her evidence that there were street lights at the scene that the rider picked and dropped her from and that he recognized him. She stated that on the material night, Appellant was wearing brown trousers and military green and brown jacket.

5. **PW3 CPL RAEL AMASA**, investigated the complainant's complaint on 16.05.15 and referred her to Chulaimbo sub-county hospital for

treatment. It was her evidence that Appellant was later arrested CPL Chepchumba arrested the Appellant but he allegedly escaped and as re-arrested on 03.08.15 from Siaya and charged.

The Defence Case

6. In his unsworn defence, Appellant denied that he was a bodaboda rider. He stated he was picked from Siaya Prison and charged with offences that he did not commit.

7. *In a judgment dated 14th June, 2018*, the Appellant was convicted and sentenced to 15 and 30 years' imprisonment for rape and robbery with violence respectively.

The Appeal

8. The conviction and sentences provoked *this appeal*. From the 6 grounds of appeal, amended grounds of appeal and written submissions filed on 12.11.19, I have deduced the following issues for determination: -

1) Plea was not taken

2) Witnesses did not testify under oath

3) Post Rape Care Form was produced

4) His right under Article 50 (2) (k) was violated

5) The court erred when it holding that an identification parade was properly conducted

9. *When the appeal came up for hearing on 12.11.19, Appellant stated that he was wholly relying on the grounds of appeal and written submissions filed on 12.11.19. The state through Ms. Gathu, Senior Prosecution Counsel opposed the appeal and relied on written submission also filed on 12.11.19.*

Analysis and Determination

10. This being a court of first appeal, I am guided by the Court of Appeal's decision in the case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 OF 2005** which held as follows: -

“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.

11. In order to consider this appeal, I will consider the grounds of appeal vis a vis the key ingredients necessary to establish rape which are the lack of consent, penetration and identity of the offender.

Was plea taken

12. The court record demonstrates that plea was taken on 09.12.15 to which Appellant pleaded not guilty to both counts.

Did witnesses testify under oath

13. Section 151 of the Criminal Procedure Code (*CPC*) provides: -

“Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.”

14. Elaborating on the complaint by the Appellant, in respect of all the five witnesses called by the prosecution, the record of the trial magistrate demonstrates that only PW3 was sworn before testifying.

As is abundantly clear from **section 151** of the *CPC* all witnesses in a criminal trial or cause must be examined on oath. (See **Samwel Muriithi Mwangi v Republic [2006] eKLR**).

15. The issue is put in this way in **ARCHBOLD, CRIMINAL PLEADING EVIDENCE & PRACTICE**, 2002 Edition: -

“II. swearing of witnesses.

B. OATH:

(1) General.

The general common law rule is that the testimony of a witness to be examined viva voce in a criminal trial is not admissible unless he has previously been sworn to speak the truth. Counsel has no privilege from being sworn, even if he acts only as an interpreter: R v. Kelly (1848) 3 Cox 75. This general common law rule is subject to important statutory exceptions (post., 8 – 31 et seq.) The witness must be sworn in open court; R v Tew (1855) Dears 429.”

16. I have already said that the record of the trial magistrate shows that only PW3 was sworn. The state did not make any submission on this very important issue. The usual practice of all the courts in Kenya is, of course, to show in the record that a witness has taken an oath before testifying. In the record before me, there is no way in which I can determine, one way or the other, that the witnesses were or were not sworn before they gave their evidence. Most likely, they took the oath before giving evidence. But there is also the probability that they might not have taken the oath and if that be the position, it would mean that the Appellant was convicted on evidence which was not sworn. That would be in violation of Section 151 of the CPC which is not curable under section 382 of the CPC. To be convicted and sentenced to 30 years' imprisonment on evidence that is not sworn must of necessity, be prejudicial to an Appellant.

17. In the event, I am satisfied that the trial of the Appellant was a nullity because I am unable to exclude the probability of his having been convicted on unsworn evidence.

18. Having found that the trial of the Appellant was a nullity, I need not belabor on the other grounds of appeal. What orders then should this court make. There is no doubt that the crimes allegedly committed against the complainant are grave. The complainant was raped, wounded and robbed and apart from the issue that witnesses might have given unsworn evidence before the magistrate, such evidence, if it had been received according to law, was substantial and a conviction might well be had upon it.

19. I am, in the circumstances, inclined to order a retrial. I accordingly allow the Appellant's appeal, quash the conviction recorded against him, set aside the 15 and 30 years' imprisonment and order that he be tried *de novo* before a different magistrate. Those shall be the orders in the appeal.

DATED AND SIGNED THIS 05th DAY OF December 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - Amondi

Appellant - Present in person

For the State - Ms. Gathu