REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 121 OF 2017

(Arising from the conviction and sentence by Hon. C. Kemei in Githongo Criminal Case No. 31 of 2016 delivered on 13th October 2017)

(CORAM: F. GIKONYO J.)

JULIUS KIRIMA KIRIMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

[1] The Appellant, JULIUS KIRIMA KIRIMI, was charged with two counts: (1) *Robbery contrary to Section 295 as read with Section 296(2) of the Penal Code; and (2) Rape contrary to Section 3(1) (a) (b) as read with Section 3(3) of the Sexual Offences Act No. 3 of 2008.* The trial court found him guilty on both counts;convicted and sentenced him to death on count I and 10 years imprisonment for count II. The trial magistrate put the jail term in abeyance as it should be. The Appellantfiled this appeal on the following grounds:

1. ***THAT the trial magistrate erred in law and fact by failing to find that the circumstances obtaining at the time of commission of the alleged offences could not favour a positive identification.***

2. ***THAT the trial magistrate erred in law and fact by failing to find that the identification parade was a sham and its outcome could not be relied upon,***

3. ***THAT the trial magistrate erred in law and fact by failing to find that there was no evidence placing the appellant at the scene of commission of the alleged offence,***

4. ***THAT the trial magistrate erred in law and fact by failing to properly evaluate the evidence of recovery of the stolen phone in the light of the explanation tendered by the accused/ appellant in defence.***

5. ***THAT the trial magistrate erred in law and fact by failing to find that there was no evidence to connect the accused/appellant with the alleged offence of rape.***

6. ***THAT the learned trial Magistrate erred in law and fact in failing to properly evaluate the defence of insanity which was well grounded and thereby grant the accused/appellant the benefit of doubt, and***

7. ***THAT the conviction and sentence by the learned trial Magistrate is against the law and weight of evidence on record.***

Particulars

[2] Particulars of the Robbery were that the appellant on 5th day of June 2015 at Mugambane village Gatimbi location Imenti Central district within Meru County being armed with dangerous weapon stones robbed A K M of her mobile phone make Nokia 1600 valued at Kshs. 2,000/-, cash money 3700 and a torch and at or immediately before or immediately after the time of such robbery beat the said A K.

[3] Of Rape; that on the 5th Day of June 2015 at Mugambone village, Gatimbi location, Imenti Central district within Meru County intentionally and unlawfully had sexual intercourse of A K M without the consent of the said A K which was obtained by means of force.

Arguments by the appellant

[4] The appeal was canvassed by way of oral submissions. Mr. Kariuki for the appellant collapsed the grounds into three, namely:

identification, recovery and insanity. With regard to identification counsel submitted that the complainant allegedly identified the appellant using a torch light and headlight of a moving vehicle. He argued that the trial magistrate did not evaluate the intensity of the light, type of torch, angle at which the torch was held, how long the torch was held against the attacker and number of flashes. He continued to submit that the motor vehicle came from behind the appellant and complainant and it was not possible for her to have seen the appellant who is said to have been behind her. In any case, it was at night. According to counsel, the complainant stated that he knew the appellant and his mother and where he lived of which she could have given his description to her daughter, the person she met first. The identification was a sham and worthless as complainant already knew the appellant. With regard to the possession of the mobile phone the appellant stated that the phone was given to him by **PW2.** On the issue of insanity, it was affirmed that the appellant laid down evidence that he suffered from a disease of the mind which was confirmed by **DW2** and **DW3** which was not controverted. For those reasons, counsel beseeched court to allow the appeal.

Prosecution argued…

[5] Mrs. Mwathi for the Respondent submitted on identification that; **PW1** stated that she was able to identify the assailant on the torch light as well as that of the passing vehicle. She urged that PW1 described the ordeal and did not lose consciousness at any point of the attack. Chronology of events shows that even though she had seen him many times in the market she did not actually know him. ID Parade was appropriately conducted and the complainant touched the accused from persons paraded. On the issue of the phone, it was found in the possession of the accused which he had stolen from the complainant. On the defence of insanity, the state counselsubmitted that no evidence was submitted to show insanity at the time of the offence.

Duty of court

[6] I know my obligation. In a first appeal, the court should evaluate the evidence and come to its own conclusions except it is reminded that it neither saw nor heard the witnesses when they gave their testimonies. On this see ***SELLE vs. ASSOCIATED MOTOR BOAT COMPANY [1968] E.A. 123 at page 126.***In this exercise, the court is not beholden or compelled to adopt any particular style. However, it must avoid merely rehashing of evidence as was recorded. Instead, it should employ a style imbued with judicious emphasis and alertness, have an eye for symmetry or balance and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony and the applicable law. Such style insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Then I will express overall impression of the evidence, facts and the law applicable in absolute clarity and directness. I shall so proceed.

Issues

[7] The grounds of appeal were collapsed into three issues which: identification, possession and insanity.

Identification

[8] No doubt that the complainant was attacked, assaulted raped and robbed. But by whom? **PW1, A K,** the complainant, stated that on 5th June 2015 at around 8.00 PM as she was walking she saw somebody walking behind her as a car passed. When the man caught up with her she moved aside to pave way. But, she realized that the man was following her. She turned back and flashed her torch at him and clearly saw the man. He held her tightly and pushed her to the ground laying on her. They struggled a lot and screamed but he hit her head on the head and caused her injury. The man then cut her panty and inserted his penis into her vagina. The man used no protection. When he finished, he took her phone and torch and fled. PW1 made a report of the offence to the police. Six months later, she was informed that a suspect had been arrested. She went to Kariene police station on 10th January 2016 and identified the accused from nine (9) people who had been paraded for identification.

[9] From the evidence of PW1, she was able to see clearly who her attacked was on the material day. She flashed her torch unto the person who was following her and clearly saw his face. She also stated that she had seen the appellant by use of lights from a passing vehicle. Counsel for the Appellant has attempted to discredit this kind of identification by arguing that the intensity of the torch light and number of flashes at the attacker were not established; and that, the vehicle was coming from behind and so she could not have used the light to see the attacker. PW1 stated that she turned back and saw the man who was following her. She even told her family members that she could identify the attacker if she sees her. This is a man she had seen before at the market. She therefore was able to pick him from the nine persons in the parade on 10th January 2016.

[10] I have seen the Report on identification parade conducted on 10th January, 2016. It was produced as Prosecution exhibit 5. What does the law say about identification parade?

Identification parade

[11] Identification parade was conducted. Phineas, PW2 was also in the parade. PW1 testified that she did not look at the any other but went straight and pointed the accused person. She also stated that **PW2** Phineas was there at the parade but according to **PW5** and **DW1** Phineas was not in the parade. According to the case of **John Mwangi Kamau v Republic [2014] eKLR** the Court of Appeal enunciated on how identification parades should be conducted, that is:

> ***"15. Identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68& 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003; the assailants' were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, this Court observed:-***

"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."

16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade."

[12] In our case, details **PW5** stated that when the complainant came to report the matter she stated that she did not know the assailant since she did not know his name. But she could identify him if he saw him. **PW1** asserted that he knew the accused for he had seen him several times at the market. The parade was properly conducted and the accused was positively identified by PW1 as the person who attacked her. The parade was therefore properly grounded and conducted. The appellant was also positively identified by PW1 as the person who attacked her.

[13] In any event, the evidence of PW1was that this is a person she had seen several times before at the market only that she did not know his name. She learnt that he was a son of a person she knew at the time of identification parade. Therefore, this is a case of recognition. See what the Court of Appeal in the case of **Peter Okee Omukaga& another v Republic [2011] eKLR** said, that**:**

***"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance* as *"neighbours from the village"; that they had played football with them long time ago; and that their voices were also familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen articles did not in any way point to the innocence of the appellants"** *(Emphasis Added)*

[14] It bears repeating that, although the incident happened at about 8.00 PM. **PW1** was categorical that she turned to see who was following her; she flashed her torch light on the person and clearly saw him. She also saw him under the light of a vehicle which passed by. And using the test in the case of **R –vs- Turnbull & Others (1976) 3 ALL ER 549**, the complainant was not under any delusion; she positively identified the appellant as the person who attacked her on the material day. See the Court of Appeal in the case of **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** where, in upholding the evidence of recognition at night held as follows:-

"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -

> ***"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."***

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

Possession

[15] In **ARUM V REPUBLIC (2000) 1KLR 233** the court of Appeal held;

"1. Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, there must be positive proof;

> ***(a) That the property was found with the suspect***
>
> ***(b) That the property was positively the property of the complainant.***
>
> ***(c) That the property was stolen from the complainant***
>
> ***(d) That the property was recently stolen from the complainant.***

2. The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

[16] In this case, the phone which was recovered from the Appellant was proved to be the same one that was stolen from the complainant during the incident. The phone was Nokia 1600 and belonged to the complainant; record thereto was produced. It was found barely six months after the incident. Except, however, the line that was in use in the phone was registered in the name of Phineas, PW2. The Appellant claimed that Phineas gave him the phone for he had several phones. But according to Phineas**, PW2,** the appellant who was his good friend approached him and told him that he had lost his identity card but he was in the process of replacing it. The Appellant then requested PW2 to give him his identity card so that he could use it to register his line. PW2 agreed; went with the Appellant and the Appellant registered the line. PW2 took the police to the home of the Appellant where the Appellant was found in possession of the phone. This account is believable and I believe it. The phone that was stolen from PW1 is the phone that was recovered from the Appellant but the line used therein was registered in the name of PW2. This connects the Appellant to the crime of robbery.

Defence of insanity

[17] Under section 11 of the Penal Code:

> ***Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.***

The Appellant pleaded insanity and that has to be proved as at the time of the commission of the offence. Section 12 of the Penal Code states that:

> ***"A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."***

[18] Therefore, a person cannot be held liable for an act or omission of an act if, *at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission.* According to **DW4** who is a holder of a Bachelor of Medicine, Bachelor of Surgery and Masters in medication and psychiatrist and a consultant psychiatrist at Meru Teaching and Referral hospital stated that he has been seeing the accused at the mental unit since 2015 with a mental disorder. According to a letter dated 31st July 2017 which was produced in court he stated that:

> *"The above named has been followed up in our family for a mental disorder since 15/9/2015."*

[19] **PW2** stated that he has known the accused since their school days and he has never heard that he is mad or insane. **DW2** and **DW3** testified that the accused has had a mental condition since his tender age. However, **DW2** did not produce any hospital documentation to show that the Appellant suffered from a disease of mind from tender age and that she took the Appellant to hospital several times. Based on the evidence adduced before this court, the Appellant started to see a psychiatrist on 15th September 2015, that is, about three months after the incident herein. **Dr. Andrea Makenda Mwikambia** said that the Appellant is normal while on medication and can differentiate right from wrong. When on remission memory is perfect. In sum, it has not been shown that as *at 5th day of June, 2015, the time of doing the act, he is, through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act.* The trial court properly evaluated this defence and came to the correct conclusion. I find the defence not to hold sway. He was criminally liable for his actions on the fateful night.

[20] **DW1 Julius Kirimi Kirima**, the Appellant also merely stated that he cannot recall; where he was on the material day; when he was arrested or what he was charged with; whether he was with Phineas at the station; whether he saw **PW1** there; whether he met or assaulting **PW1** and taking her items; whether he was paraded with PW2. But he recalled that Phineas had several phones and he offered to give him one but he cannot recall when he gave it to him. He also stated that he did not know PW1 before and had never seen her before. These were mere denials and characterized by selective amnesia.

Conclusions

[21] From the evidence, on 5th day of June 2015 at Mugambone Village, the Appellant; Stole a phone make Nokia 1600 from the complainant, and, at or immediately before or immediately after the time of stealing it, he used actual violence to the complainant in order to obtain or retain the phone or to prevent or overcome resistance to its being stolen or retained. He hit the complainant and inflicted deep injury on her head and took the phone away. The evidence by**PW4 Ibrahim Hassan Abdi** the medical doctor at Githongo Sub- district hospital established that force was used unto PW1 as a result of which she sustained injuries. The rape was also executed with brutal force. See also evidence on a cut wound on the left parietal region 5cm length x 2cm deep and bruises on both cheeks. The injuries were classified as grievous harm. Accordingly, the crime of robbery was proved beyond any reasonable doubt. See section 295 and 296(2) of the Penal Code which provides that:

> ***295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***

Section 296 of the Penal Code which provides as follows:

> ***296. (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.***
>
> ***(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.***

[22] Similarly, the evidence by PW1 shows that the Appellant intentionally and unlawfully caused penetration of the complainant's genital organ, namely vagina with his genital organs namely penis. **PW4 Ibrahim Hassan Abdi** the medical doctor at Githongo Sub-district hospital corroborated this. That the complainant's inner underwear was stained and lower limb was swore. There was a cut wound on the left parietal region 5cm length x 2cm deep and bruises on both cheeks. As a result of rape, her genitals had bruises on the left labia minori but no tears were found. She also had injuries on her head which were serious since there were cuts. These injuries were classified as grievous harm. The complainant did not consent to the said penetration. And the medical report show that the penetration was brutal, forceful, through coercion and by means of physical assault. Other evidence such as by **PW5 No. 83737 Corporal Jerioth Mambo** confirmed that a report was made on 5th June 2016 at 9.30 PM. When she visited the scene there was blood all over the ground. Therefore, the offence of rape has been proved

beyond any reasonable doubt. See section 3 of the sexual offences Act which provides:

> ***3. Rape***
>
> ***(1) A person commits the offence termed rape if -***
>
> > ***(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;***
> >
> > ***(b) the other person does not consent to the penetration; or***
> >
> > ***(c) the consent is obtained by force or by means of threats or intimidation of any kind.***
>
> ***(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.***
>
> ***(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.***

The appeal fails on conviction.

Sentence

[23] On sentence, the Appellant was treated as first offender. He sought for leniency. The trial magistrate sentenced him to suffer death and correctly held the 10 year jail term for count II in abeyance. Now, following the decision by the Supreme Court in **PETITION NO. 15 OF 2015 (AS CONSOLIDATED WITH PETITION NO 16 OF 2015) FRANCIS KARIOKO MURUATETU. & ANOTHER vs. REPUBLIC [2017] eKLR,** the court has unfettered discretion in sentencing in all cases. This case will have the benefit of the law as is. Accordingly, taking into account the circumstances of the offence, I sentence the Appellant to 20 years' imprisonment for count I and 10 years for count II. The sentences shall run concurrently. I set aside the death sentence imposed by the trial magistrate. It is so ordered.

Dated,signed and delivered in open court at Meru this 16th day of May, 2018.

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F. GIKONYO

JUDGE

In the presence of:

M/s. Muna holding brief for Kariuki advocate for

Appellant

Mr.Namiti for State

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F. GIKONYO

JUDGE