



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 20 OF 2016**

**CORAM: D. S. MAJANJA J.**

**BETWEEN**

**BRAMWEL MATENDEJERO AGANYANYA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. C. M. Maundu, SPM*

*dated 25<sup>th</sup> February 2016 at Chief Magistrate's Court at Kwale in Criminal Case No. 748 of 2013)*

**JUDGMENT**

1. The appellant, **BRAMWEL MATENDEJERO ANGANYANYA**, was charged and convicted of two counts. The first was robbery with violence contrary to **section 295** as read with **section 296 (2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars were that on 27<sup>th</sup> June 2013 in Kwale County, armed with a dangerous weapon namely a knife and a metal rod robbed LWN of her mobile phone make Nokia C1 and at or immediately before or after such robbery used actual violence on the said LWN.

2. The second count was one of rape contrary to **section 3(1) (a) (b) and (3)** of the *Sexual Offences Act*. The particulars were that on 27<sup>th</sup> June 2013 in Kwale County, the appellant intentionally caused his penis to penetrate the vagina of LWN without her consent.

3. The appellant was sentenced to death on the first count while the sentence on the second count was held in abeyance. He now appeals against conviction and sentence. The thrust of the appellant's case as set out in his petition of appeal, supplementary grounds and written submissions is that the prosecution failed to prove its case beyond reasonable doubt.

4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic [1972] EA 32*).

5. The complainant, PW 1, testified that on 27<sup>th</sup> June 2013 at 10:00am, she was walking to work when she met the appellant who was carrying a metal rod ahead of her. The appellant grabbed her by the shoulder, pulled out a knife and dragged her to a bush while pointing the knife at her. He told her he would stab her. She told him that she would cooperate and so she removed her clothes. He then proceeded to forcefully have sexual intercourse with her. Thereafter she went to inform her friend and they went to the construction site where she talked to the man who had spoken to the man who had raped her. The man at the construction site told her he would assist her in looking for the assailant. In cross examination, PW 1 told the court that she had her phone when the appellant asked her the time and that she walked with him for about 10 minutes before she was assaulted.

6. PW 2, who was working at a construction site on the material day, recalled that he knew the appellant and had been with him two days prior to the date of the incident as they were working together at the site. On the material day he saw the appellant with the metal rod at about 10:00am and he greeted him. The appellant told him he was going to look for work. At the time the appellant was walking with a girl he did not know. After about two hours, PW 1 came and asked him whether he knew the appellant. She told him that the appellant had offered to show her directions but had instead raped and stolen from her. He offered to assist her look for the appellant. In cross examination, PW 2 told the court that he saw the appellant walking with PW 1.

7. A foreman at the construction site, PW 3, recalled that on the material day at about midday, PW 2 came to where he was in a taxi together

with PW 1 and another lady and the taxi driver. PW 2 asked him whether he had seen the appellant. PW 3 recalled that the appellant had worked at the site for the last two days and he is the one who had given him the metal rod which he had not returned. PW 2 asked him to assist PW 1 who had been raped. He proceeded with them to the police and informed them that he knew where the appellant resided. He assisted to arrest the appellant in his house on 31<sup>st</sup> June 2013.

8. PW 4, testified that PW 1, who was her friend, came to her house on the material day crying and informed her that a man had pretended to show her directions but had instead raped her. PW 4 took her to the nearby medical centre and thereafter they went to a building site to inquire about the suspect. One of the people at the construction site told them he knew the appellant and would assist in tracing him.

9. PW 5, a police officer and the investigating officer recalled that on 27<sup>th</sup> June 2013, PW 1 reported the rape incident. He talked to her and she told him that a man had forceful sex with her and took her phone. She also said he was armed with a metal bar. The appellant was arrested two days after the incident. He produced the metal bar which was identified in evidence by PW 1, PW 2 and PW 3.

10. The clinical officer, PW 6 who examined the appellant on 27<sup>th</sup> June 2013 recalled that when PW1 was brought to the hospital under police escort, she was in shock. Her genitalia were normal but with bruises and the hymen was broken. He confirmed that there was penetration.

11. In his unsworn statement, the appellant gave an account of his arrest. He told the court that on 29<sup>th</sup> June 2013 he was at a club in Ukunda where he had been asleep the whole night and was arrested on the next morning.

12. I have considered the evidence and I am satisfied that the evidence of PW1 established both offences of rape and of robbery with violence. The offence of robbery with violence under **section 296(2)** of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR*, *Oluoch v Republic [1985] KLR 549* and *Ganzi & 2 Others v Republic [2005] 1 KLR 52*).

13. In this case the suspect was armed with a metal rod. He also threatened her with a knife before he sexually assaulted her. PW 1 testified that he took her phone. She confirmed that her phone was stolen in cross examination and in subsequent reports she made to PW 2, PW 3, PW 4, and PW 5. The totality of the facts support the charge of robbery with violence. The fact of rape was also proved by the fact that the sexual intercourse was under the threat of force as the appellant had a knife and had threatened to stab her. PW 1's testimony was clear and consistent and did not require corroboration under the proviso to **section 124** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* which allows the court to convict a person of a sexual offence without corroboration where the court, for reasons to be recorded, believes the victim to be telling the truth. Nonetheless the medial evidence from the examination done so soon after the incident shows that PW 1 had bruises on her vagina consistent with penetration. I therefore find and hold that the act of penetration was without her consent.

14. The key issue in this matter is whether the appellant was the person who robbed and raped PW 1. PW 1 identified that the assailant was a stranger to her. However, the incident took place in broad daylight and the interaction between the assailant and appellant was for a sufficient period of time from the time the appellant volunteered to show her direction to the time he raped her. I have no doubt that in the circumstances, PW 1 would recognize him, if she saw him. This case was, in my view, a proper case for an identification parade to be conducted to test the identity of the assailant. However, I do not think that the circumstances of identification in this case would lead to mistaken identity for several reasons.

15. The appellant was known to PW 2 and had worked with him at the construction site. PW 3 had also worked with the appellant and had given him the metal rod which he was seen with on the material morning by PW 1 and PW 2. PW 2 had seen PW 1 and the appellant together having no doubt that PW 1 and the appellant were close together at about the time the rape and robbery took place. The fact that PW 1 was able to identify the appellant is evidenced by the fact that she went back to the construction site and sought assistance from PW 2 who recalled he had seen them together and who had even greeted him when he was with PW 1. After PW 1 and PW 2 told PW 3 what had happened, PW 3 was able to assist in his arrest by taking the police to his home.

16. The chain of evidence from the time the appellant and PW 1 were seen together to the time the appellant was arrested after being identified by PW 3 leaves no doubt that it is the appellant who did the felonious acts. I therefore hold that it was unnecessary to conduct an identification parade. The convictions are affirmed.

17. The Supreme Court in *Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017]eKLR* declared the mandatory death sentence for the offence of murder unconstitutional. In *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018]eKLR*, the Court of Appeal extended and applied the ratio in that case to **section 296(2)** of the *Penal Code* which mandates the death penalty in cases of robbery with violence. I therefore quash the sentence of death imposed in the first count. Considering the facts of the case, that the appellant was considered a first offender and taking into account guideline judgments from the court of appeal (see *Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR* and *Paul Ouma Otieno alias Collera and Another v Republic KSM CA Criminal Appeal No. 616 of 2010 [2018] eKLR*), I sentence the appellant to **fifteen (15) years** imprisonment.

18. As regards the second count of rape, the trial magistrate did not impose the sentence but merely held it in abeyance. The minimum sentence prescribed under **section 3** of the *Act* is **ten (10) years** imprisonment. I therefore sentence the appellant to ten (10) years imprisonment.

19. Both sentences shall run concurrently from the date of sentence in the trial court.

20. Save for the sentences, the appeal is dismissed.

**DATED and DELIVERED at MOMBASA this 7<sup>th</sup> day of September 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Ogega, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.