



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 71 OF 2017

NICHOLAS MOCHECHE ROGAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. E.K Nyutu, PM

dated 22nd March 2017 at the Principal Magistrate's Court

at Nyamira in Criminal Case No. 1257 of 2014)

JUDGMENT

1. The appellant, **NICHOLAS MOCHECHE ROGAGA** was charged with two counts as follows;

Count 1: Robbery with violence contrary to section 296(2) of the Penal Code.

On the night of 18th and 19th December 2014 at [particulars withheld]village, Magwagwa Sub-location in Nyamira North District within Nyamira County jointly with others not before the court while armed with dangerous weapons namely a panga, hammer and rungun robbed BNO of two mobile phones make Nokia valued at Kshs. 3,000/- and Bird valued at Kshs. 3,000/- and a radio make Sony valued at Kshs. 1,500/- all amounting to Kshs. 7,500/- and immediately before the time of such robbery used actual violence on the said BNO.

Count 2: Gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006.

On the night of 18th and 19th December 2014 at [particulars withheld] village, Magwagwa Sub-location in Nyamira North District within Nyamira County in association with others not before the court and with common intention, he unlawfully caused the penis of another to penetrate the vagina BNO.

2. The appellant was convicted on both counts. He was sentenced to death on the first count and to fifteen (15) years imprisonment on the second count. The latter sentence was held in abeyance. He now appeals against conviction and sentence.

3. As this is a first appeal, I am required to re-appraise the evidence and reach an independent conclusion as to whether to uphold the conviction and sentence always bearing in mind that I neither heard or saw the witnesses testify. In order to proceed with this task, it is appropriate to set out the facts leading to this case.

4. BN, PW 1, testified that on the night of 18th and 19th December 2014 as she was asleep a gang of people came into their home armed with pangas and rungun and started to hit her. One of the people held her neck while another proceeded to insert his penis into her vagina. She recalled that the robbers were not known to her but when they were arrested the next morning, she was able to recognize the appellant as the one who held her by the neck. In reexamination PW 1 sated that she used to see the appellant who was a boda boda rider, and he was known as *Amos*.

5. PW 2, aged 10 years old, told the court that she was asleep with PW 1 in the same room when the assailants came and took her to the sitting room. She saw three men armed with hammers and rungun and some had torches. She stated that she was able to recognize the

appellant, "Nicholas Mocheche" who was a boda boda rider and who used to carry them. She recalled that she told the police that she had seen the appellant.

6. PW 1's mother, PW 4, testified that she was informed of the incident on the material night. She quickly went to the police station where PW 1 was. After treatment, as they were going home with police officers, PW 1 identified the appellant as the person who broke into her house and sexually assaulted her. She also stated in cross examination that the appellant street name was *Amos* and they only learnt his real name upon arrest.

7. PW 6, the investigating officer testified that after the incident had been reported, he proceeded to Magwagwa Police Post he found PW 1 and PW 4. They proceeded together to the house where they found PW 2. According to PW 6, PW 1 told her that PW 2 was in the house at the time of the incident. He recalled that the child pointed to them a person who had dropped the area chief at the home. She identified the boda boda rider as the assailant who the chief proceeded to arrest him.

8. The appellant does not dispute the fact that a robbery and gang rape took place, he contests the conviction on the basis that he was not the person identified as the assailant. I have set out the key evidence concerning identification of the appellant which is the main and substantial issue in this case. It is clear that this was a case concerning identification in difficult circumstances. Our courts have emphasized that to avoid miscarriage of justice due to mistaken identity, the evidence of identification must be analysed carefully and be absolutely watertight to support a conviction (see *Kiarie v Republic [1984] KLR 739*).

9. The evidence against the appellant is inconsistent and cannot stand scrutiny. The key witnesses PW 1 and PW 2 told the court that they knew the appellant as a boda boda rider in the community. It is not clear that they named him at the earliest opportunity which would have led him to be arrested. At any rate the Assistant Chief who carried out the arrest was not called to give evidence.

10. The testimony of PW 1 and PW 4 was that PW 1 identified the appellant as they were going home but PW 6 stated that it is in fact PW 2 who pointed out the appellant when he dropped the chief. According to his testimony, PW 1 did not know the assailant and it is PW 2 who identified him. This is contradictory to the testimony of PW 1 and PW 4 who stated that they knew the appellant.

11. I agree with the learned counsel for the State that this inconsistent evidence cannot support the conviction based on eyewitness testimony in circumstances that were not favourable for positive identification. The conviction was not safe.

12. I accordingly allow the appeal, quash the conviction and sentence. The appellant is ordered released unless otherwise lawfully held.

Dated and delivered at Kisii this 12th day of October 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.