REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 81 OF 2017

(CONSOLIDATED WITH CRIMINAL APPEAL NO. 82 OF 2017)

MKK ALIAS K ALIAS B.....1ST APPELLANT

DAN CHEBUS WANANDA.....2ND APPELLANT

VERSUS

REPUBLIC.....APPELLANT

(*Being an appeal from the original conviction and sentence in criminal case number 1104 of 2013 in the Senior Principal Magistrate's Court at Kimilili – D. O. Onyango (SPM) on 28th June, 2017.*)

JUDGMENT

1. Two appeals arose from the decision of the Senior Principal Magistrate's court in Kimilili in criminal case number 1104 of 2013 namely Bungoma Criminal Appeal No. 81 of 2017 and Criminal Appeal No. 82 of 2017. The two appeals were consolidated by the order of the court of 7th September, 2018 which order made Criminal Appeal No. 81 of 2017 the lead file.

2. The two appellants herein were convicted for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** and sentenced to suffer death in accordance with the law. The facts of the charge were that on the 23rd day of July, 2013 at about 2000 hours in Mt. Elgon District within Bungoma County, jointly with others not before the court and while armed with dangerous weapons to wit riffles, they robbed KCS of cash Kshs. 1,000/- and a mobile phone make Techno all valued at Kshs. 5,000/- and during the time of such robbery shot dead the said KCS.

3. The Appellants were also individually charged on Count II and III respectively with the offence of gang rape contrary to **section 10** of the **Sexual Offences Act No. 3 of 2006**. Upon conviction, the sentence on this charge was held in abeyance awaiting a determination with respect to the death sentence.

4. Aggrieved by the decision of the trial court, the Appellants filed the present appeals against both conviction and sentence of the trial court. In their grounds of appeal, the Appellants argued that: their constitutional rights were violated since they were arraigned in court after the prescribed 24 hour period; they were convicted on the uncorroborated evidence of PW1 and PW2; the evidence of the prosecution was unsatisfactory; the case was not proved beyond reasonable doubt and their defence was rejected without cogent reason.

5. The state opposed the appeal through learned state counsel Mrs. Njeru who submitted that the prosecution had proved the offence of robbery with violence against the Appellants to the required standard and urged the court to dismiss the two appeals on the two counts and let the conviction and sentence for each Appellant on each count stand.

6. Sitting as the first appellate court, I have reconsidered and re-evaluated the evidence to make my own findings and draw my own conclusions. In so doing, I have made allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses which I did not have. See – **Ngunu vs. Republic [1984] KLR 729.**

7. In the first ground the 2nd Appellant argued that he was arrested on 27th July, 2013 and arraigned in court on 1st August, 2018 after the lapse of the twenty-four (24) hour period stipulated in the Constitution. That this factor was not considered by the trial court when he took plea or when passing the judgment in the matter. On this Mrs. Njeru submitted that the Appellants should have raised this issue before the trial court as the arresting officers were better placed to answer to it.

8. An arrested person has the right to be brought before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested; or if the twenty-four hour period ends outside court hours, or on a day that is not an ordinary court day, the end of the next

court day as provided under **Article 49(1)(f)** of the **Constitution**.

9. From the record, it is shown that the Appellants were arrested on 24th July, 2013 as shown in the charge sheet and confirmed by PW15 CIP Justus Njeru who was the OCS Kaptama Police Station at the time. The said 24th July, 2013 fell on a Wednesday. The charge sheet further shows that the Appellants reported to court on 26th July, 2013 which fell on a Friday. They however took plea on 1st August, 2013, one week after their arrest.

10. I note that from the testimony of PW17 PC Richard Towett and that of the Appellants, it is clear that the Appellants were first arraigned at Sirisia Law Courts on 26th July, 2013 during which time the prosecution requested the court to allow them to detain the Appellants for a period of one week to enable them complete their investigations. The magistrate at Sirisia Law Courts granted the prosecution's request and also referred the case to Kimilili Law Courts. The record also demonstrates that separate identification parades were conducted for the Appellants on 31st July, 2013 whereupon both of them were identified. PW6 CIP Dalmas Ondere who conducted the identification parade produced both identification parade forms before the trial court. After they were positively identified, they were arraigned at the Kimilili Law Courts on 1st August, 2013 to take plea.

11. From the foregoing, I find that the Appellants' argument that their right under **Article 49(1)(f)** of the **Constitution** was contravened because they took plea one week after their arrest is misguided. It is noteworthy that **Article 49(1)(g)** of the **Constitution** allows the detention of an arrested person without trial as long as he is informed of the reason for his continued detention and the detention is made with leave of court, both of which were done in the present case.

12. Whereas there was a one day delay in the arraignment of the Appellants in court, I note that the Appellants did not raise this issue before the trial court. Further there is nothing on the record to demonstrate that the one day delay had an effect on the trial process and as a result caused prejudiced to the Appellants. In any event, there are remedies available to accused persons who are taken to court later than provided for as observed in the case of **Julius Kamau Mbugua vs. Republic Criminal Appeal No. 50 of 2008** where the Court of Appeal, while deliberating on **section 72(6)** of the former Constitution which is **Article 49** in the 2010 Constitution, rendered itself thus:

> **"Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in section 72(6). That is the appropriate remedy which the appellant should have sought in a different form."**

13. This position was reaffirmed by the Court of Appeal in its recent decision in **Evans Wamalwa Simiyu vs. Republic Criminal Appeal 118 of 2013 [2016] eKLR** where the appellate court cited the case of **Julius Kamau Mbugua vs. Republic [2010] eKLR** and stated *inter alia* that where an Appellant is not produced in court within twenty-four hours it would not automatically result in his acquittal. Instead, the Appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights. In the premise therefore, I find no basis to consider the issue fatal to the prosecution's case.

14. In the second and third grounds, the Appellants complained that they were convicted on the uncorroborated evidence of PW1 and PW2, and that the evidence of the prosecution was unsatisfactory. In his written submissions, the 1st Appellant argued that he was not positively identified since PW1 JCS stated that he lived with them from the year 1999 to 2000. He urged that if at all he was known to PW1 there would have been no need to conduct an Identification Parade. He argued that the prosecution witnesses gave contradictory evidence as they referred to him using varying names and gave different locations as his residence. On his part, the 2nd Appellant submitted that from the evidence of PW1 it was doubtful whether she was able to identify him. That there was not enough light at the scene of crime and further that PW1 only described him as tall and dark skinned.

15. Mrs. Njeru submitted on the two pronged grounds and stated that the attack occurred at around 7.00 p.m. and PW1 had a lamp lighting up the kitchen where she was and another lighting up outside where her deceased husband sat. That PW1 identified the Appellants from the light of the lamps. She urged that the 1st Appellant was known to PW1 as he had previously lived with them, and whereas the 2nd Appellant was a stranger to PW1, she identified him because of the light of the lamps and the duration they took in the home. That she marked his features and was able to positively identify him at the ID parade.

16. It is trite law that a fact can be proved by the testimony of a single witness. There is however, need for testing with the greatest care the evidence of a single identifying witness respecting identification, especially when it is known that the conditions favoring a correcting identification were difficult.

17. In testing the evidence of PW1 as a single identifying witness, I made careful inquiry into the nature of the light available, conditions prevailing and whether she was able to make a true impression and description. I also warned myself of the danger of relying on the evidence of a single identifying witness. See the decision of **Maitanyi vs. Republic Criminal Appeal No. 60 of 1986 [1986] KLR pg. 198**.

18. I note that in relying on the evidence of PW1 as the sole identifying witness, the trial court noted that evidence of identification must be watertight to justify a conviction. The trial court found that PW1 was a credible and reliable witness who was firm in her evidence that she positively identified the Appellants and that she gave their names and descriptions to close relatives and policemen who spoke to her after the incident.

19. PW1 stated that she saw the Appellants using the light and even though they were wearing mavin hats their faces were bare. Further that they were together for about 15 minutes during which time she noted their features. She urged that she knew the 1st Appellant whom she referred to as "K" as he was her husband's nephew. She however met the 2nd Appellant for the first time on the day of the offence.

20. The testimony of PW3 KS, PW1's brother-in-law, lends credence to the testimony of PW1. In his testimony he stated that:

> *"She was then interrogated she said she knew Accused 1 who had lived with us earlier. He is my cousin…At the time of the incident, he had moved. He had lived with us 2 years (sic).We later heard he had been arrested at Endebess. Accused 1 is the one called "K". He was arrested with Accused 2."*

On cross-examination by the 1st Appellant he stated thus:

> *"You lived in our home in 1999. You lived in our house. We even shared meals. Your home is Matumbei. I don't know where you live now. I know you by appearance."*

21. Further, PW5 CMS, the mother-in-law to PW1 and mother to the deceased herein, stated that on the material day at about 7.30 p.m. she was in her house when her grandson went to her house and reported that there were people beating his father. she then had gunshots from the deceased's house after which PW1 went to her house and reported that she had been raped after the assailants killed her husband. She asserted that PW1 positively identified K, the 1st Appellant, whom she quickly identified as a boy she had lived with before.

22. In his testimony, PW15 CIP Justus Njeru also informed the court that PW1 had informed them that the deceased called the 1st Appellant by his name before the 1st Appellant shot him. The evidence on record demonstrates that PW1 disclosed the name of the 1st Appellant whom she identified during the robbery.

23. Whereas the 2nd Appellant was unknown to PW1 prior to the incident, she positively identified him during the identification parade as the one of the people who attacked her husband and raped her. PW6 CIP Dalmas Ongere who conducted the identification parade testified that PW1 positively identified both Appellants by touching their back. He produced the Identification Parade forms before the trial court.

24. In the case of **David Mwita Wanja & 2 Others vs. Republic Criminal Appeal No.117 of 2005 [2007] eKLR**, the Court of Appeal (R.S.C. Omolo, P.N. Waki & W.S Deverell) emphasized on the importance of conducting an identification parade properly and stated thus:

> **"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R vs. Mwango s/o Manaa (1936) 3 EACA 29."**

It is noteworthy that in the present case, the identification parade was conducted in accordance with the police force standing orders. There are 13 parade rules provided in the Kenya Police Force Standing Orders which were highlighted in the case of **Republic vs. Mwango s/o Manaa (1936) 3 EACA 29** as follows:

> **1. The accused person will always be informed that he may have a solicitor or friend present when the parade takes place.**
>
> **2. The police officer in charge of the case, although he may be present, will not conduct the parade.**
>
> **3. The witnesses will not see the accused person before the parade.**
>
> **4. The accused person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.**
>
> **5. The accused person will be allowed to take any position he chooses, and will be allowed to change his position after each identifying witness has left, if he so desires.**
>
> **6. Care will be exercised that the witnesses are not allowed to communicate with each other after they**
>
> **7. Every unauthorized person must be excluded.**
>
> **8. If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, this should be done. As a cautionary measure the whole parade be asked to do this.**
>
> **9. See that the witness touches the person he identifies.**
>
> **10. At the termination of the parade or during the parade, the officer conducting it should ask the accused if he is satisfied that the parade is being conducted in a fair manner and make note of his reply.**
>
> **11. In explaining the procedure to a witness tell him that he will see a group of people who may or may not contain the suspected person. The witness should not be told "Pick out somebody", or be influenced in any way whatsoever.**

12. The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably.

25. The parade forms in the record coupled with the testimony of PW6 demonstrate that the identification parade passed the acid test in the case of **Mwango**. Further the identification parade was conducted one week after the robbery when the events were still fresh in PW1's mind. Both Appellants signed their respective parade forms saying they were satisfied with the manner in which the parades were conducted.

26. In considering the evidence of identification I find guidance in the case of **Joseph Ngumbau Nzalo vs. Republic [1991] 2 KLR pg 212** in which the Court of Appeal observed thus:

> **"A careful direction regarding the condition prevailing at the time of identification and the length of time for which the witnesses had the accused person under observation, together with the need to exclude the possibility of error was essential."**

In the present case, the robbery occurred at around 8.00 p.m. and lasted for about 15 minutes according to PW1. There were two sources of light. There was a lantern in the house where PW1 and the deceased had been ordered to go to and a tin lamp in the kitchen where the assailants asked the children to remain. The Appellants beat PW1 and her now deceased husband. Further the faces of the Appellants were not masked as the mavin hats they wore did not conceal their faces and one of them was well known to her. In my view, in the circumstances set out above, PW1 had ample time to see and identify the attackers as they were in close proximity to her.

27. In ground four, the Appellants argued that the prosecution failed to prove their case beyond reasonable doubt. On this, Mrs. Njeru submitted that the case was proved because the prosecution demonstrated that the Appellants demanded a sum of Kshs. 400,000/- from the deceased and when he could only produce Kshs. 1,000/- they shot him dead. Further that they both threatened and assaulted PW1.

28. The ingredients of the offence of robbery with violence were elaborated by the Court of Appeal in the case of **Oluoch vs. Republic [1985]** where it was held that the offence can be committed in any of the following circumstances:

> **1. The offender is armed with any dangerous or offensive weapon or instrument; or**
>
> **2. The offender is in company with one or more other person or persons; or**
>
> 3. **At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.**

29. In her testimony, PW1 told the court that the Appellants hit her on the head with a gun and ordered her to stop looking at them before she and the deceased were herded to the main house. This was corroborated by PW2, a son to both PW1 and the deceased, who testified that the assailants hit both PW1 and the deceased on their heads with a gun on noticing that they were looking at them. PW1 also told the court that the Appellants demanded a sum of Kshs. 400,000/- from the deceased but when he produced Kshs. 1,000/- he was shot dead. They then dragged PW1 towards River Kamukuywa where they raped her in turns. A P3 form was filled and produced in this regard.

30. Whereas the riffle used was not recovered, PW15 testified that two spent catridges were recovered from the scene of the crime. Further PW13 who conducted a postmortem on the deceased testified that the cause of death was cardio pulmonary arrest due to heart and lung injury from bullet injuries. She produced a postmortem form filled in this regard. Whereas therefore any one of the ingredients above on its own would have sufficed to sustain a conviction for the offence of robbery with violence, in this case all three ingredients were proved.

31. Lastly the Appellants complained that their defence was rejected without cogent reason. It is trite law that the burden to prove the guilt of an accused person always lies with the prosecution and at no time does an accused person assume the burden to prove his innocence as observed by Etyang J in the case of **Republic vs. Gachanja Criminal Case 37 of 1997 [2001] eKLR 425**. Once the prosecution discharged its duty and established a *prima facie* case, the Appellants in the present case were put on their defence as by law required. Both Appellants did not however cast doubt on the prosecution's case as all they did was deny the charges and narrate the events surrounding their arrests and consequent arraignment in court.

32. From the record, it is evident that the learned trial magistrate examined the Appellants' evidence together with that of the other witnesses on record and found that it was the evidence tendered by the prosecution witnesses which was credit worthy. He summed it up in his judgment as follows:

> *"It is worth noting that the 1st accused is her relative with whom she claimed to have stayed for about 2 years. Though an identification parade was not entirely necessary for the 1st accused, PW1 proceeded to positively identify the 1st accused and she equally identified the 2nd accused at the identification parade. Having examined the evidence as a whole, I find that PW1 was a credible and reliable witness. I find that the evidence regarding identification of the 1st and 2nd accused has not been impeached. I find that she positively placed the 1st and 2nd accused at the scene of robbery. She was also categorical that the 2 raped her. I therefore find that the prosecution have proved beyond reasonable doubt the two charges of robbery with violence contrary to section 292(2) of the Penal Code and gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006."*

33. I have anxiously considered the evidence of the Appellants in the context of the rest of the evidence on record, bearing in mind that this being a criminal case, there was no burden whatsoever on the Appellants to explain their innocence. I find the 1st Appellant's argument that he was framed totally unconvincing in the context of all the other evidence on record especially because he did not raise this issue at trial during the cross-examination of the prosecution witnesses or in his defence testimony. In my considered view, it is an afterthought intended only to exculpate the Appellant and not to dislodge the prosecution's evidence.

34. That being the matrix of this case, I find that the trial court, directing itself to the evidence before it and the law applicable, reached the correct conclusion. On the sentence, the learned trial magistrate sentenced the Appellants to death as by law prescribed and ordered that the sentence with regard to gang rape remain in abeyance. I therefore find that both the conviction and the sentence were proper. As a result the appeal lacks merit and is dismissed.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 14TH DAY OF DECEMBER 2018.

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H. K. CHEMITEI

HIGH COURT JUDGE