



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 2 OF 2014

BETWEEN

MICHAEL LEPARAN KENI.....1ST APPELLANT

S R P2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. A. K. Mkoros, SRM

dated 18th June 2014 at Senior Resident Magistrates Court

at Kilgoris in Criminal Case No. 409 of 2013)

JUDGMENT

1. The appellants, **MICHAEL LEPARAN KENI** and **S R P**, faced the following charges before the subordinate court:

Count I: Robbery with violence contrary to **section 295** as read with **296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**:

On the night of 11th day of June, 2013 along Esoit-Shartuka Road in Transmara West District within Narok County, jointly while armed with dangerous weapons, pangas, rungus, metal bars and knives robbed MN cash money Kshs 525/- mobile phone Tecno valued at Kshs 1,800 and Sport Eight valued at Kshs 150/- all valued at Kshs 2,475/- and at the time of such robbery used actual violence to the said MN.

Count II: Gang rape contrary to **section 10** of the **Sexual Offences Act**:

On the night of 11th day of June 2013 at about 9:30 p.p. along Esoit-Shartuka road in Transmara West District within Narok County Jointly intentionally and unlawful caused their pennies to penetrate the vagina of MN in turns without her consent.

Count III: Robbery with violence contrary to **section 295** as read with **296(2)** of the **Penal Code**:

On the 12th day of June 2013 at about midnight along Esoit-Shartuka Road in Transmara West District within Narok County, jointly while armed with dangerous weapons pangas, rungus, knut bolted rungus and knives robbed TM Kshs 900/- and at the time of such robbery used actual violence to the said TM.

Count IV: *Failing to apply to be registered as Kenyan Citizen contrary to **section 14 (a)** of the **Registration of Persons Act Cap 107 Laws of Kenya**:*

Michael Leparan Keni and S N K were on 12th June 2013 at Shartuka area in Transmara West District within Narok County, they were found not to have registered as Kenyan Citizens after having attained the age of 18 years.

2. Based on the evidence, the trial magistrate convicted them on all counts except the offence of gang rape. They were sentenced to death on Count I and III while the sentence on Count IV was held in abeyance. Being dissatisfied with both conviction and sentence the appellants lodged this appeal.
3. The key issue raised in this appeal is that of identification of the appellants as assailants. Counsel for the appellants, Mr Bigogo, submitted that the trial magistrate did not properly consider the evidence of PW 3 as there was no evidence of flashing torch on the assailants. It was dark so PW 1, PW 2 and PW 3 could not recognize the assailants or identify them. He also submitted that PW 1 was a crucial witness who lied as PW 9 testified that there were no signs of rape which had earlier been alleged by PW 1 and that the trial magistrate acquitted both appellants on the charge of gang rape. He contended that the issue of dangerous weapon was not proved the appellants were only found with walking sticks. Mr Orinda, learned counsel for the respondent, conceded the appeal for reasons that the evidence of possession is doubtful as is the evidence of identification.
4. Notwithstanding the concession by the State, this court is not bound by the observations of the parties and will proceed to analyze the evidence and make its own independent findings as this is the duty of the first appellate court.
5. MN (PW 1) testified that on the material day at around 9.00pm she was in the company of TO (PW 3) when they were approached by some people demanded cash. She lit her torch she was asked to switch it off and hand it over to them. The assailants were armed with a stick, knife and a metal rod. PW 1 gave them Kshs 200/-. Since PW 3 did not have any money, they beat him up and he ran away. Unfortunately, PW 1's phone rang and the assailants set upon her as she had lied to them about the phone. They took her phone and an additional Kshs 300. PW 1 testified that she was raped by both assailants. She was later informed that some people had been arrested at Shartuka where she went and was able to recognise the appellants as the assailants.
6. PW 3 testified that when he was with PW 1, the assailants ordered them to switch off their torches. They took their torches and demanded cash. He recalled that PW 1 gave them Kshs 200/-. When the assailant's started beating him, he ran away and sought for help. When he returned to the scene, PW 1 told him that she had been assaulted and raped. He too was informed that he was informed that some people had been arrested at Shartuka and when he proceeded there, he was able to identify them.
7. TM (PW 2) testified that on the material night at about midnight she was in the company of AB (PW 4) and JM (PW 5) when they met two people, one who took their donkeys and started walking away with them. The other person told them to surrender their cash and phones while hurling a stone at them. PW 2 was beaten by the assailant as they demanded cash. They took the Kshs. 900/- which was her pouch and ran away. PW 4 recalled that they were attacked at around midnight when the 1st appellant asked them to switch off the torch. He threw a stone at them and she ran up to LL's (PW 6) house and asked for help. PW 6 came and arrested the two appellants.
8. PW 5 recalled that while in the company of PW 2 and PW 4 at around midnight they met two assailants, one of whom had his torch on. The 1st appellant picked up a stone and threw it at them. He ran and hid in the bushes and heard the 1st appellant demand for cash and phone. He testified that he knew the appellants as he had seen them before. He left and went to a hotel along the way and heard PW 4 screaming. He ran back to the spot and found the appellants had been arrested.
9. PW 6 recalled on the material day at about midnight, PW 4 came to his house, knocked the door and when he opened she identified herself and explained her ordeal. Together with PW 4, they returned to the scene and as neared the place, he switched off his torch and someone also lit his torch. He was able to identify the 2nd appellant who was his neighbour and who started hurling stones at him. The 1st appellant appeared and started demanding that the 2nd appellant to be let free. The 1st appellant took the panga which PW 6 had and they started wrestling. When arresting the appellants, they recovered a Nokia phone and tobacco which they handed over to the area Chief of Shartuka (PW 8).
10. RT (PW 7) testified that he was woken up by a woman screaming that PW 6 was being killed. He went to the road and found two people wrestling with PW 6. He was able to identify the two of them as neighbours. PW 6 and PW 7 were able to overwhelm them, called for ropes with which they tied them before calling the area chief. The area chief, PW 8, testified that at around 2.30am, he received information that two people had been arrested by members of the public. He went to the scene and escorted the appellants to the police station where they were searched by the police. The police recovered a torch and a pouch with Kshs 900/- which had a cloth resembling one of the victim's torn blouse.
11. The clinical officer from Transmara District Hospital (PW 9) filled the P3 forms for both PW 1 and PW 2. Upon examination of PW 1, he found that she had suffered soft tissue injury and indicating that a blunt object was used. He did not find any evidence of rape. PW 2 injuries were on her cheeks, thorax, lower limb and upper limb. A blunt object had been used and the degree of injury was harm.
12. The investigating officer, PW 10, a police constable attached to Kilgoris Police Station testified that the robbery and rape incident was reported by PW 1 and PW 2 on 12th June 2013. He recalled that the incident had been reported to Shartuka AP Camp earlier and the complainants examined at Shartuka Health Center before being referred to Kilgoris Police Station. He testified that there was no need for an identification parade as the appellants were identified by the witnesses and the complaints as there was moonlight and torch which was sufficient lighting.
13. In his unsworn statement, the 1st appellant stated that that after work he went to drink at PW 6's place where he was joined by the 2nd appellant and they left at around 9.00pm. He went home and shortly after he heard screams, when he confirmed that it was the 2nd appellant. When he went to ask why some attackers were beating the 2nd appellant, who was drunk, he was also attacked and arrested.
14. In his unsworn statement, the 2nd appellant recalled that he drank alcohol with the 1st appellant before leaving for home. When he reached some thickets, PW 6 asked him who he was and if he had attacked his customers. They started to argue and PW 6 started assaulting him whereupon the 1st Appellant came and asked why they were assaulting him. He stated that they were both assaulted and thereafter

arrested. The appellants called three witnesses, DW 1, DW 2) and DW 3 who all asked the court to show the appellants leniency.

15. From the charges against the appellants, two distinct but related incidents of robbery were alleged. The first one concerned PW 1 and PW 3 and the second one, PW 2, PW 4 and PW 5. The appellants were arrested after they attacked PW 2. It is common ground that resolution of this appeal depends on the identity of the appellant as assailants. In **Wamunga v Republic [1989] KLR 424**, the Court of Appeal cautioned that:

Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of mere identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.

16. In **Kiarie v. Republic [1984] KLR 739**, the Court of Appeal held that where the evidence relied on to implicate an accused is entirely on identification, such evidence should be watertight to justify a conviction and that it is possible for a witness to be honest but mistaken. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see **R v Turnbull [1967] 3 ALL ER 549**).

17. As regards the first incident, PW 1 stated that as the assailants approached her she lit the torch, shone it at them and switched it off after they demanded that she give it to them. From the evidence, the time which she saw them was short and not favourable for positive identification without the prosecution leading any other evidence. On the part of PW 3, he told the court that he knew both appellants as he had previously seen them though he did not know their names. In cross-examination, he stated that he was able to see both appellants briefly. He also explained that the 2nd appellant told him to lift up his arms while the 1st appellant searched him then the 2nd appellant moved to PW 1 while the 1st appellant hit him with a stick before he chased him away. Coupled with the fact that PW 3 was familiar with the appellants, I am satisfied that the close interaction were circumstances favourable for positive recognition.

18. Counsel for the appellant, apart from the issue of identification, attacked the conviction on Count I on the basis that PW 1 was not truthful as she lied she was raped yet the appellants were acquitted of gang rape. I disagree with the contention by counsel for the appellants as the acquittal on charge of gang rape was not necessarily based on the fact that PW 1 lied but on the fact that the prosecution failed to prove penetration. The trial magistrate found that the medical evidence by PW 9 did not disclose any injuries to the private parts that would confirm penetration. It has been held that medical evidence, in cases of sexual violence, is merely corroborative as the court may convict if it believes that the victim was telling the truth. The tenor of PW 1 evidence was that that she was raped, the prosecution did not lead her in evidence to confirm whether in fact there was penetration of the nature that would cause injury to the private parts. That notwithstanding that trial magistrate found as a fact that the witness was telling the truth. Even if I discount her testimony, the evidence of PW 3 on visual recognition was sufficient to place the appellant at the scene where PW 1 was assaulted and her items stolen.

19. The case in respect of Count III is grounded on the evidence of identification by PW 2, PW 4 and PW 5. PW 2 did not give evidence on how she identified the appellant, however she told the court that one of the assailants tore her pouch from her blouse which was later recovered. PW 4 told the court that she had a torch which the assailants demanded she switch off and hand over. It is not clear from the evidence how she identified them while PW 5 stated that he knew then and that he saw the appellants when they shone their torches. He further stated that he knew the 1st appellant. Although the evidence of the appellants on identifications is shaky, the appellants' complicity was augmented by the fact that the appellants were arrested at the locus in quo immediately after PW 6 came to the scene after being woken up by PW 4.

20. PW 6 came to the scene where the complainants had been attacked. His testimony on this issue was as follows;

We went towards the torch and torch switched off and we continued on for about 50 metres and someone shown a spotlight on us and I asked who he was. And I also shown a torch on him. I then saw it was S R who is a neighbour and relative. He had a stone and a stick he threw the stone at us but missed. And then he threw a second stone towards the movement and they ran. I then hid behind a tree to avoid injury. I shown the torch on his eyes and he started to ran and I followed and arrested him. The lady came back and identified him and said there was one who had a shawl and a white vest was still at large. As we stood the 1st accused, Michael Laparan appeared and started to demand for 2nd accused. I asked him whether he knew him. And he grabbed the panga that I had. And I saw that if he got the panga he would cut me. I wrestled with him.

21. This evidence is important because, it discounts the appellant's defence that they had been drinking with PW 6 and that the 2nd appellant found the 1st appellant being beaten before they were both arrested. In cross-examination, PW 6 stated that he did not drink with any of them during the day and the other witnesses reject any suggestion that they were drunk. I reject their defence and I hold that the fact that they were found in the locus in quo together taken together with other evidence proves that they were complicit in the robbery.

22. The prosecution also relied on the doctrine of recent possession which posits that upon proof of the unexplained possession of recently stolen property, the trier of fact may draw an inference of guilt of theft or of offences incidental thereto. Both counsel for the appellants and respondent assailed the evidence on the ground that it was unclear that stolen items were found on the appellants. In **Arum v Republic [2006] 1 KLR 233**, the Court of Appeal set out conditions that must exist before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case. These include proof that:

- (a) The property was found with the suspect;
- (b) The property was positively the property of the complainant;

- (c) The property was stolen from the complainant;
- (d) The property was recently stolen from the complainant.

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

23. PW 1 gave clear evidence that her blue torch was stolen while PW 2 testified that her pouch containing Kshs. 900/- was torn from her blouse. PW 8 gave an account of the recovery after the appellants were arrested and taken to the police station, the yellow pouch torn from PW 2's dress was recovered from the pocket of the 2nd appellant. Both the pouch and the blouse from which it was torn were produced in evidence leaving no doubt that the pouch belonged to PW 1. As regards, the blue torch, the evidence from PW 8 is that the appellants were found with it when they were arrested by members of the public. No one testified as how it was recovered and from whom hence I would give the appellant the benefit of doubt and discount the application of the doctrine of recent possession on this account. The totality of this evidence is that 2nd appellant was with an item belonging to PW 2 soon after his arrest. It was a unique item torn from PW 2's dress. He neither claimed it nor gave any reasons for its possession.

24. 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*).

25. In conclusion and taking the entire evidence together, I find that PW 1 and PW 2 were robbed by the appellants. They were two in number and they assaulted both of them in the cause of the robbery. Their injuries were confirmed by PW 9. The appellant also had weapons which they used to inflict those injuries. Counsel for the appellants contended that the accused were found with walking sticks which could not be considered weapons. On this issue the trial magistrate rightly pointed out that a walking stick, while innocuous in nature, is capable of causing injury hence it was a dangerous weapon. Indeed, the witnesses testified that they were assaulted with the sticks. I agree with the definition of adopted by the trial magistrate that from *Blacks Law Dictionary (8th Ed)*, that a dangerous weapon is, "*an object or device, that because of the way it is used is capable of causing serious bodily injury.*"

26. On my own re-evaluation of the evidence, I am satisfied that the conviction on Count I was supported by evidence of recognition by PW 3 while the complicity of the 2nd appellant in Count II was supported by the doctrine of recent possession in that he was found with PW 2's pouch that he tore from her blouse. Both appellant and incidents are tied together by the fact that both appellant were apprehended so soon after they had committed the second act. Their defences, were at best, light weight when considered alongside the entirety of the evidence.

27. The conviction of the offence Count IV was not proved beyond reasonable doubt as the Registrar of Persons was not called to testify that the appellants had not registered as citizens. They could not be called upon to disprove the prosecution case without a proper evidential basis being laid by the prosecution.

28. Having independently evaluated the evidence, I reject the concession by the respondent of this appeal. I find the appellant guilty on Counts I and III and therefore affirm the conviction. I allow the appeal on Count IV and consequently quash the conviction and sentence imposed.

29. At the time the appellants were convicted, the mandatory death sentence for the offence of robbery with violence under **section 296(2)** of the *Penal Code* was still in force. 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. The Court of Appeal applied the same decision to the offence of robbery with violence in *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR*. I therefore set aside the sentence and call upon the appellant to make their mitigation.

DATED and DELIVERED at KISII this 4th day of December 2018.

D.S. MAJANJA

JUDGE

Mr Bigogo, Advocate for the Appellants.

Mr Orinda, Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.