



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 11 OF 2017

BETWEEN

WICKLIFF MONG'ARE BICHANGAAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. Mwaniki – SPM dated 1st March 2017 at the Principal Magistrate's Court at Keroka in Criminal Case No. 1516 of 2015)

JUDGMENT

1. The appellant, **WICKLIFF MONG'ARE BICHANGA**, was charged and convicted of one count of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* and one count of rape contrary to **section 3** of the *Sexual Offences Act*. The particulars of the offence were as follows:

Count 1: On the 30th day of October 2015 at [Particulars withheld] Sub-location in Masaba South within Kisii County, jointly with others not before court, armed with dangerous weapons namely pangas and knives robbed FKC of her cash 3,700, 15tins of beans and 10Kgs of KTDA fertilizer all valued at Kshs. 7,070 and immediately before or immediately after the time of such robbery wounded the said FKC.

Count 2: On the 30th day of October 2015 at [Particulars withheld] Sub-location in Masaba South within Kisii County, intentionally caused your penis to penetrate the vagina of FKC without her consent.

2. The appellant was sentenced to serve 30 years' imprisonment on each count to run concurrently. The appellant now appeals against conviction and sentence based on his petition of appeal and written submissions. He contends that the prosecution did not prove its case beyond reasonable doubt. The respondent's position was that all elements of the offence were duly established.

3. As this is a first appeal, the duty of this court is to evaluate the evidence afresh and reach its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.

4. The complainant (PW 1) recalled that on the night of 30th October 2015 at about 10.00 pm, she saw some lights and realized that the appellant was the intruder. He demanded cash while placing a knife on her throat. She told him to take Kshs. 3000/= in the drawer. She also handed over Kshs. 700/= in her jacket. When he demanded more money, she told him to take beans and fertilizer instead.

5. PW 1 further testified that the appellant raped her by first removing her pants but she protested. He then cut her with the knife he had and proceeded to rape her. After he left, she raised alarm causing neighbours to come to her aid. She was taken to Ibacho Hospital. She reported the incident at Ibacho and then Ramasha Police Station. PW 1 told the court that the appellant was her neighbour and she knew him.

6. As the appellant was running away, the complainant's son, PW 2, saw him with a panga. He recalled that he had a torch which he switched on when he heard PW 1 screaming. He saw PW 1 with cut wounds on the legs. He recalled that he had seen the appellant earlier in the day and had known him for two years prior to the incident.

7. The area assistant chief, PW 3, recalled that a baraza on 5th October 2015, he attended a baraza at [Particulars withheld] Village when the villagers called out the appellant as one who had robbed and raped PW 1. As villagers wanted to lynch him, he was saved and taken to the police station.

8. A Clinical Officer at Nyamira Hospital PW 4, examined PW 1 on 8th November 2014. She had a cut wound on the legs and bruises on the vagina. He produced the P3 form.

9. In his sworn testimony, the appellant denied the offence. He recalled that on 5th November 2015, he was at work when over 10 people came to take him to a baraza where he was accused of robbing and raping PW 1. He stated that he had a difference with her over money as he had not paid her.

10. Based on the evidence outlined the trial magistrate was satisfied both counts were duly proved. 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*).

11. I am satisfied that the evidence of PW 1 and PW 2 that the appellant attacked. The assailant used violence on her by cutting her with a knife and raping. He took her money, fertilizer and beans from her house. PW 1 alluded to the fact that she heard other people talking outside as if directing the assailant. All these facts satisfy the elements of the offence of robbery with violence.

12. As regards rape, **section 3(1)** of the *Sexual Offences Act* provides that rape is established if:

1. The accused intentionally and unlawfully commits an act which causes penetration of the victim's genital organs,
2. The other person does not consent or,
3. The consent is obtained by force or by means of threats or intimidation of any kind.

13. PW 1 gave evidence on how the assailant held her, tore her trousers with a knife and proceeded to rape her. Although PW 1 did not use the words that demonstrate penetration of her vagina with a penis. The word 'rape' implies sexual intercourse in common parlance and it involves penetration. In this case, there was no doubt that penetration did take place as this was also corroborated by the medical evidence by PW 4 that PW 1 had bruises on her vagina and her thigh. The penetration was clearly without consent and was in fact by force. I therefore find that the offence of rape was proved.

14. I now turn to the key issue in this appeal and it is whether the appellant was identified as the assailant. The incident took place at night and this calls for careful consideration of the evidence. This case was one, not of identification of a stranger, but of recognition as PW 1, PW 2 and PW 3 knew him as he lived in the neighbourhood. Even where the assailant is known, the court should also be cautious to avoid mistaken identity.

15. I am satisfied that the appellant was properly recognized as he was with PW 1 in the small confined space of her room. He interacted with her for a considerable period and according to PW 1 he had lit his torch which he never switched off. PW 1's testimony is corroborated by PW 2 who also knew the appellant and saw him as he was leaving the house after PW 1 had raised alarm. Based on the testimony of this two witnesses, I am satisfied that the appellant was the assailant.

16. Since the appellant was known, it was expected that he would be arrested immediately. In this case PW 1 insisted that she reported the incident at Ibacho Police Post immediately on the same night and recorded a statement in which she named the appellant. The appellant was arrested on 5th November 2011 at a baraza called by PW 3. In her evidence she explained that she the Chief had requested for time to track the appellant and effect arrest.

17. The fact that the appellant was arrested later does not diminish the clear evidence of PW 1. She denied any grudge when the issue was put to her and the appellant said nothing of the events of the night of 30th October 2015 in his defence. I am therefore satisfied from the totality of evidence that it is the appellant who robbed and raped PW 1. I affirm the conviction.

18. I now turn to the issue of sentence. Considering that the mandatory death sentence was declared unconstitutional, the trial magistrate had the discretion to impose an appropriate sentence. Based on the facts and decided cases for example *Paul Ouma Otieno alias Collera and Another v Republic KSM CA Criminal Appeal No. 616 of 2010 [2018] eKLR* where the Court of Appeal imposed a sentence of 20 years imprisonment where a firearm was used, I find the sentence of 30 years' imprisonment excessive. I sent it aside and impose a sentence of 15 years' imprisonment for the offence of robbery with violence.

19. As regards the offence of rape, the minimum sentence under **section 3(3)** of the *Sexual Offence Act* is 10 years' imprisonment. I therefore impose 10 years' imprisonment.

20. I therefore dismiss the appeal for the reasons I have stated save that the sentence is quashed and substituted with fifteen (15) years imprisonment on Count I and ten (10) years imprisonment on Count II. Both sentences to run concurrently from **9th November 2015**.

Dated and delivered at Kisii this 3rd day of December 2018.

D.S MAJANJA

JUDGE

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

Appellant in person.