REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 137,138 & 139 of 2016

JANES OTIENO ADIKA……..……..….1ST APPELLANT

FREDRICK OCHIENG OKOA……..…….2ND APPELLANT

JAMES NJUGUNA MUTHONI…….....3RD APPELLANT

VERSUS

REPUBLIC …….……...….RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No.4085 of 2013 delivered by Hon. A.R. Kithinji on 23rd September, 2016).

JUDGMENT

Background

Janes Otieno Adika, Fredrick Ochieng Okoa and James Njuguna Muthoni, the Appellants herein were jointly charged with committing several offences. In the 1st and 2nd counts the Appellants were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 27th August, 2013, at Korogocho slums in Nairobi within Nairobi County jointly with others not before the court while armed with dangerous weapons, namely pangas and rungus robbed John Maina Wagomi of Kshs. 200,000/- in cash, five wheelbarrows, five bicycles, five sewing machines and assorted clothes all valued at Kshs. 300,000/- and at the time of the robbery used actual force against the said John Maina Wagomi.

The particulars of the 2nd count were that the Appellants, jointly with others not before the court, while armed with dangerous weapons, namely pangas and rungus, robbed Johnson Mwema of two phones (branded Nokia and Samsung), a radio and a Affron television set all valued at Kshs. 13,800/- and that at the time of the robbery they threated to use actual violence against the said Johnson Mwema.

In the 3rd, 4th and 5th Counts each of the Appellants was charged with gang rape contrary to Section 10 of the Sexual offences Act No. 3 of 2006. The particulars were that on 27th August, 2013 at Korogocho slums within Nairobi County the Appellants respectively intentionally caused their penis to penetrate the vagina of one D.M. without her consent.

They were also each charged with an alternative charge of committing an indecent act with an adult

contrary to Section 11(A) of the Sexual Offences Act No. 3 of 2006 in that on 27th August, 2013 at Korogocho slums within Nairobi County they intentionally touched the vagina of D.M. with their penis against her will.

After their trial the Appellants were convicted on the first count and acquitted on the rest. They were each sentenced to 10 years imprisonment.

Each Appellant filed an amended memorandum of appeal. The grounds of appeal for the three Appellants were similar in all respects. They were dissatisfied that the charge was defective in that it was not properly framed, that they were convicted based on contradictory, uncorroborated and unreliable evidence, that the learned trial magistrate's judgment did not conform to Section 169(1) of the Criminal Procedure Code, that the death sentence was illegal and that their defence was not considered.

Submissions.

The Appellants represented themselves while the Respondent was represented by Ms. Kimiri.

Similarly, all the Appellants filed similar submissions. On the issue of defective charge sheet, they submitted that the charge was a nullity because it was drawn both under Section 295 and 296 of the Criminal Procedure Code. The case of **Samuel Materu Munialu vs Republic [2007] eKLR** and **Joseph Njoguna Mwaura and 2 others vs Republic [2013] eKLR** was cited in support of this submission.

With regard to compliance with Section 169 of Criminal Procedure Code, they submitted that the judgment of the learned trial magistrate did not emulate points for determination and generally, it lacked substance. They were also of the view that the trial magistrate did not consider their respective defences.

The three Appellants put a lot of weight in submission on identification. They were of the view that none of them was positively identified during the robbery. They stated that the robbery took place between 2300 and 0200 hrs when the conditions for identification were not conducive. This was evidenced by the testimony of PW1 who said that he did not identify or recognize any of the robbers. His further testimony was that his face was tied up which prevented him from seeing his attackers. Even at a point when his eyes were not covered, they were flashed with strong light that prevented him from seeing the assailants. Surprisingly and in contradicting her evidence, PW1 later testified that he knew his attackers by name. If that were the case, according to the Appellants, he would have recorded that she knew them in her statement. Unfortunately, this was not the case. The Appellants were of the view that the conviction was erroneous as it was based on insufficient and contradictory evidence of identification.

Learned State Counsel Miss Kimiri conceded to the appeal mainly on ground of poor identification. She submitted that the learned trial magistrate convicted the Appellants on the strength of the evidence of PW1. The said witness unfortunately in her testimony stated that she had not been able to identify any of the attackers. In any case, the absence of positive identification notwithstanding, none of the Appellants was found in possession of any stolen properties. Further, she submitted that there were no independent witnesses who testified how the Appellants were linked to the robbery. With regard to the second count, her view was that the learned trial magistrate properly acquitted the Appellants because the complainant in that count did not testify. The same applied to counts III, IV and V. She urged that the appeal be allowed.

Evidence.

This is a first appellate court whose duty is re-analyze and re-evaluate the the evidence afresh before arriving at its own independent decision. See: **Okeno v. Republic[1972] EA 32.**

PW1, D.K. lived in Korogocho. She recalled that on 27th August, 2013 she was asleep when at around 2300hrs she heard shouts and realized people were trying to gain entry into the house. They kicked in the door and got into the house. The men informed them that they had refused to move out. They pleaded with attackers to allow them to move out. As they were packing their belongings, the men suddenly tied

her and her husband up. They got hold of their daughter, D.M., who was three months pregnant. They put her on the bed before tearing her clothes off. PW1 told the thugs that they would rather kill her than rape her daughter. One of them hit her with a hammer. Some of the assailants took turns raping her daughter while the rest demolished the house.

She testified that the leader of the gang then arrived and asked the assailants to leave but two of them returned. One of them grabbed her trouser, ask her to remove. She noted she would be raped. She screamed and the men fled carrying away their possessions. She testified that this was around 0300hrs. She was taken to the hospital together with her daughter.

She testified that at around 1500hrs the following day the young men returned to her house. They asked her to identify the person who had raped her. They were wielding knives. She told them they were the culprits. They were then arrested by members of the public. She testified that the 1st Appellant was the one who grabbed her trouser and that the three of them raped her daughter and that she had been able to identify them. They reported the matter at Kariobangi Police Station. Her daughter went underground as their lives were constantly threatened.

In cross examination PW1 insisted that she knew the Appellants both by name and appearance. She stated that she had also positively identified them during the incident.

PW2, John Maina Wagome, he testified that he lived in Korogocho where he operated a business. He recalled that three days before 27th August, 2013 some elderly men, one Peter Mburu and Harry Okello, informed him that his house was to be demolished. However, he informed them that he was not in a position to move given the short notice. He recalled that on the night of 27th August, 2013 he heard voices outside the house and when he peeped out he saw two men giving instructions. Shortly after she heard them pull down the gate and when he ran out he could not see anyone as torch light was being beamed on his face. He testified that his house which was made of iron sheets was demolished and his goods carried away. He was also tied up, covered with a blanket and asked to shut up. He testified that this went on from about 2300hrs to around 0200hrs when he managed to untie himself. He went to check on his tenants who were PW1 and her daughter after hearing screams from them. He found that they were under attack. He struggled with attackers who later fled.

PW2 recalled that PW1's daughter was raped. He was later informed that the Appellants had been arrested and was asked to go and identify them at the police station, but he had not identified them during the robbery.

PW3, CPL Stephen Mulwa testified that on 1st September, 2013 he was on security duty with PC Bett. When they got to Highridge within Korogocho they received information from members of the public that a suspect in a rape and robbery case had been seen in the area. This was one Fredrick Ochieng, 2nd Appellant. They rushed to the house in question and re-arrested him. He testified that the 2nd Appellant informed them he had been hired with others by a village elder to demolish a house.

PW4, PC Judy Muende of Kariobangi Police Station investigated the case. She recorded necessary statements and preferred the charges against the Appellants. Her investigations revealed that PW2 had rented his house to PW1 who was the mother of D.M. who was gang raped. D.M was first treated at Blue Home Hospital. A P3 Form was later filled after an examination by a government doctor.

PW5, Penina Ambweni of MSF Hospital Mathare examined D.M. on 28th August, 2013. She found that she had an injury on her birth canal and her hymen was also injured. She then treated her and wrote a medical certificate. She also filed a post rape care Form which documents she adduced as evidence. **PW6, Dr. Joseph Maundu** Nairobi Police Surgery examine D.M, then aged 20 years on 2nd September 2015 and filled her P3 Form. He observed no physical injuries of her genital organs. They had no tears or lacerations. He also found that her hymen was broken. She also had a white discharge. He produced the P3 Form as evidence.

The Prosecution then closed its case and the court made a ruling that a prima facie case had been established necessitating the Appellants to be put on their defence. All the Appellants gave unsworn statements in defence. **DW1,** the **1st Appellant** said that he resided in Kariobangi where he sold peanuts. He said that he was arrested on 30th August, 2013 as he was trying to sell peanuts by two men who threw him in the cells. He was later charged with two others whom he did not know. **DW2, 2nd Appellant** said that he lived in Ngomongo and that on 1st September, 2013 he woke up and went to church at 0900hrs. He later went to wash a car for a friend when he was arrested and later charged. **DW3, 3rd Appellant** said that on 1st September, 2013 he left church and was on his way to buy a book when he met two police officers who arrested him. He denied committing the offences.

Determination

This court has considered the evidence on record and the respective oral submissions. I have deduced the main issues for determination to be whether the charge was defective, whether the Appellants were properly identified, whether the judgment of the trial court conformed to Section 169 of the Criminal Procedure Code, whether the Appellants' respective defences were considered and whether the offences were proved beyond a reasonable doubt.

I will first address myself on the issue of defective charge. The Appellants submitted that the charge was defective having been drawn both under Sections 295 and 296 of the Penal Code which provide for different offences. I agree with that position because if one count provides for two offences, the charge becomes bad for duplicity. See the case of **Simon Materu Munialu V Republic Criminal Appeal 302 of 2005, [2007] eKLR,** in which the Court of Appeal reasoned thus:

> ***'…the ingredients that the Appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion.***

Further in the case of ***Joseph Njuguna Mwaura & 2 Others v Republic*** **Criminal Appeal No. 5of 2008 [2013] eKLR,** the Court stated that:

> ***'The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge.'***

Before a court declares the trial a nullity for want of duplicity, it must address itself to whether the duplicity occasions any prejudice or injustice to the Appellant. In the present case, the Appellants in the first two counts pleaded to the offences of robbery with violence, defended themselves against the said offence and the prosecution called evidence in support of the said offence. At no time were the Appellants made aware that they were pleading to or defending themselves against two offences. It is my view then that the charge as drafted under the two provisions of the law did not prejudice the Appellants or occasion them any injustice.

On whether the judgment conformed to Section 169 of the Criminal Procedure Code, the Appellants

submitted that the same did not state the points for determination. I have had an opportunity of reading the said judgment. At page 5 of the same, the learned trial magistrate addressed herself to the issues that the prosecution was required to prove, namely; the ingredient of robbery with violence and their identification. That to me constituted points of determination. The submission in that regard fails.

With regard to whether the Appellants' defences were considered, although the learned trial magistrate did not detail an analysis of why she did not believe in their respective defences, she held that their alibi defence was an afterthought and dismissed the same. I do also accordingly dismiss that point of submission.

The Appellants in this case were convicted for committing the offence of robbery with violence after being charged in two counts with the offence. The complainants in the two charges were different parties, namely PW2 in count 1 and one Johnson Mwema in count 2. The complainant in count 2 never testified which necessitated the acquittal. With regard to count 1 the trial court held that it was proved through the evidence of PW1 and the complainant. That conclusion by the trial court unfortunately was not supported by the evidence on record. PW2 who was the complainant in the count testified that he did not identify any of the assailants in his house since he was initially blinded with a torch when he got out of the house before being tied up and covered with a blanket which rendered him unable to see any of the attackers. He testified that a few hours later he got loose and answered cries of help emanating from PW1's compound where he was again unable to identify the assailants. It is therefore clear that the complainant did not identify the Appellants.

The learned magistrate held that the second robbery linked the Appellants to the first robbery. She also was of the view that the Appellants having been identified in the second robbery nailed them to the first robbery. She however failed to take cognizance of the fact that the complainant in the second robbery did not testify. Again the witness who attested to the first robbery was not at the scene of the second robbery. And even if the robberies were in neighborhoods that did not imply that the same robbers who robbed in the 1st incident also participated in the second incident. The evidence on record totally lacks to place the Appellants at the scene of the first robbery for want of a positive identification. I am lost in my mind why the trial court, in the circumstances, arrived at a conclusion that the Appellants participated in the first robbery. Their conviction was not safe at all.

It is trite that the burden of proof always lies with the prosecution to prove their case beyond a reasonable doubt. If this burden is not discharged, or the court entertains the slightest doubt in its mind regarding the strength of the prosecution case, an acquittal is not an option. This threshold ought to have applied in the instant case. The trial magistrate however failed to do so as a result of which this appeal must succeed.

Given the transaction of events on the fateful day, it may be that the Appellants committed the offence. But such an insinuation amounts to suspicion per se. Courts have often held that suspicion however strong can never found a ground for conviction. See: **Sawe v Republic [2003] KLR 364 where Kwach, Lakha & O'Kubasu JJA** sitting in Nairobi held that:

> ***"The prosecution must prove the case against the accused beyond reasonable any doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No. 17 of 1998) (Unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence."***

There is no doubt that robberies were perpetrated against PW2 and the complainant in count II. The elements of the offence of robbery with violence were also established. That is to say that the robbers were armed with knives and other crude weapons, were more than one in number, used actual violence against the victims and robbed the victims of various goods. However, for the aforestated reasons, there is no evidence that the robberies were perpetrated by the Appellants. That *is why this appeal must succeed in any event.*

I would also wish to comment on the acquittal of the Appellants in Counts II, III, IV and V. In my view, the learned trial magistrate properly directed her mind in making a no guilty verdict because the

complainants in the respective counts did not testify. And as rightly submitted by the learned counsel Miss Kimiri, there was no independent evidence to support the charges.

On sentence, the learned trial magistrate also erred in sentencing the Appellants to ten years imprisonment when the law provided for mandatory death sentence. Since the appeal on conviction has succeeded, I shall not disturb the sentence.

In the result, I quash the conviction and set aside sentence. I order that the Appellants be and are hereby forthwith set free unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH MARCH, 2017

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. 1st Appellant in person.

2. 2nd Appellant in person.

3. 3rd Appellant in person.

4. M/s Kimiri for the Respondent.