



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.117 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. W. Ngumi – Ag. SRM delivered on 21st May 2013 in Githunguri SM. CR. Case No.1208 of 2012)

JOHN MUCHEKE WAMBUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

John Muccheke Wambui, the Appellant herein was charged with the offence of **rape** contrary to **Section 3 (1) (a) (b) (3)** of the **Sexual Offences Act**. The particulars of the offence were that on the 25th to 26th October 2012 at [Particulars withheld] area in Githunguri District of Kiambu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of M W N without her consent. He was in the alternative charged with the offence of **committing an indecent act with an adult** contrary to **Section 11 (a)** of the same **Act**. The particulars of the offence were that on the night of 25th to 26th October 2012 in the same place, the Appellant intentionally and unlawfully touched the vagina of M W N with his penis against her will. The Appellant was further charged with **robbery** contrary to **Section 296 (1)** of the **Penal Code**. The particulars of the offence were that on the night of 25th to 26th October 2012 in the same place, the Appellant robbed M W N of her Techno T331 mobile phone and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said M W N. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted on the first count of **rape** and sentenced to serve thirty (30) years imprisonment. He was also convicted on the second count of **robbery** and sentenced to serve ten (10) years imprisonment. The sentences were ordered to run concurrently. The Appellant was aggrieved by the conviction as well as the sentence and filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for convicting him on the basis of a fundamentally defective charge sheet. He further faulted the trial court for failing to find that there were inconsistencies and contradictions in the evidence of the prosecution witnesses. He took issue with the fact that he was convicted yet the prosecution had not established its case to the required standard of proof beyond any reasonable doubt. He complained that that the trial court failed to comply with the requirements of **Section 211** of the **Criminal Procedure Code**. The Appellant was also concerned that the trial court ignored his defence without giving reasons and thus violated **Section 169** of the **Criminal Procedure Code**. Finally, he was aggrieved that the sentence that was imposed on him was excessive. In his amended/supplementary grounds of appeal filed without leave of court (this court will however consider

them), the Appellant challenged the reliability of the evidence of identification by the complainant who was a single identifying witness. The Appellant also raised an issue regarding the time frame of his arrest after the complainant made the report to the police. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. A response to the Appellant's submission was made by the Learned State Counsel, Ms. Kimiri. The Appellant submitted that the trial court erred in relying on the evidence of the complainant to convict him without approaching her evidence with the necessary caution when she was a single identifying witness. He criticized the complainant's identification evidence as being unsatisfactory in several respects. He argued that although the complainant testified that she was able to identify her attacker from the light of the torch flashed by the attacker, she did not elaborate on what kind of torch it was, the intensity of the light or how long the attacker kept the light on. The Appellant further argued that given the circumstances of the attack, it was not possible for the complainant to have clearly identified her attacker since she was raped in the dark and was in fearful and confused state during the ordeal. He submitted that a further unsatisfactory aspect of the complainant's evidence was the fact that crucial witnesses were not called to testify. The Appellant submitted that since the complainant testified that after the ordeal, she borrowed a mobile phone from a neighbour and called her husband to inform him of the incident, the failure by the prosecution to call either the said husband or the neighbour as witnesses to confirm his identification rendered the evidence of identification suspect.

In regard to the issue of the lapse of time from the time the complainant made the report to the police to the time he was arrested, it was the Appellant's submission that, because of the complainant's insinuation that she knew him well and also knew where he was staying, it would be expected that she would have taken the police to his house immediately after reporting the incident. It was his submission that the fact that he was arrested ten (10) days after the incident was reported further cast doubt on the complainant's evidence of identification. He further submitted that the complainant's identifying evidence was not also sufficient to be relied upon since no identification parade was carried out. He was of the view that it would have been prudent for the prosecution to arrange an identification parade in the circumstance since the complainant was said to have recognized her attacker's voice. For these reasons, the Appellant submitted that the prosecution did not prove its case beyond any reasonable doubt. He cited the cases of *Mbelle –versus- Republic [1984] eKLR, R –versus- Turnbull [1976] 3 ALLER 549 at pg. 552*, and *Oscar Waweru Mwangi –versus- Republic , Criminal Appeal No. 2 of 1999 (unreported)* in support of his submissions.

Ms. Kimiri for the State opposed the appeal. She submitted that the charge sheet was not defective. She argued that in any event, if the defect according to the Appellant is that the words “*as read with*” were not incorporated into the charge sheet, then the omission did not prejudice the Appellant in so far as the presentation of his case was concerned. She argued that the substance of the charge and every element thereof was read to and explained to the Appellant who upon being asked whether he admitted or denied the same stated that he was not guilty. She further argued that the Appellant participated in the proceedings indicating that he understood the offence he was charged with. As to whether the prosecution proved its case against the Appellant beyond any reasonable doubt, it was the Learned State Counsel's submission that all the essential elements requiring proof beyond reasonable doubt in the offence were established. She submitted that the prosecution led evidence during trial showing that the Appellant had sexual intercourse with the complainant without her consent. She further submitted that the medical examination carried on the complainant established penetration of the complainant's vagina.

According to the Learned State Counsel, although no identification parade was held, the complainant recognized her assailant's voice as that of the Appellant and was also able to observe him because the Appellant lit a torch when he entered her bedroom. On the issue of whether or not the trial court complied with **Section 211** of the **Criminal Procedure Code**, the learned State Counsel reiterated that it did. As regards the sentence meted on the Appellant, it was her submission that the same was legal. She therefore urged the court to disallow the Appellant's appeal.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to afresh evaluation with the objective of ascertaining whether the conviction of the Appellant ought to stand. In doing so, this court must take cognizance of the fact that it neither heard nor saw the witnesses as they testified and must therefore give due regard in that respect (see **Okeno –vs- Republic (1972) EA 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charges of **rape** contrary to **Section 3(1)(a)(b)(3) of the Sexual Offences Act** and **robbery** contrary to **Section 296(1) of the Penal Code** to the required standard of proof beyond any reasonable doubt.

Before giving reasons for this court's decision, it is imperative that the facts of this case be set out. The complainant is M W N. The incident took place on 25th October 2012. The complainant testified that on the night in question (at about midnight), someone entered her bedroom where she was sleeping. She testified that she woke up and observed that there was light in the room. She saw someone standing beside her bed holding a torch and a panga. Her assailant then held her by her neck and threatened to harm her if she raised an alarm. He told her that he had been sent by 'Jeshi' to kill her and her family. The man then got onto her bed and forced her to suck his penis. He then undressed her and had sexual intercourse with her. When he finished, he demanded the complainant's cell phone. When she told him that she did not have one, he demanded to be given money. The complainant testified that the man then ransacked her house and found the cell phone. He took the same when he left the house. He told her to go back to sleep and remain on the bed. She could hear that there were other people in her living room.

When the complainant was certain that the assailants had left, she got up and raised alarm. She testified that nobody responded to her call for help. She therefore remained inside her house. She waited until dawn when she went to her neighbour's house to borrow a cellphone. She informed her husband of the incident. She later went to Nairobi Women's Hospital to seek medical attention. The complainant testified that she recognized the Appellant who was her neighbour as her assailant. She stated that she identified his face through the light from the torch that the Appellant had kept on and also by his voice which she was familiar with. According to her, the ordeal lasted for about two (2) hours. The complainant reported the incident to Ngewa Police Patrol Base.

PW2 Corporal Collette Mutua was at the Police Patrol Base when the complainant made the report on the incident. She testified that the complainant reported that she had been raped by her neighbour. PW2 recorded the complaint and referred the complainant to Githunguri Health Center. At the hospital, the complainant was examined by PW3 Sabina Njeri, a clinical officer. PW3 testified that the complainant informed her that she had been treated at Nairobi Women's Hospital. She examined the complainant's external genitalia and observed that it was normal. She also carried out a vaginal swab on the complainant which detected presence of spermatozoa and concluded that the complainant had indeed been sexually assaulted. She testified that she relied on the treatment notes from Nairobi Women's Hospital to fill a P3 form in respect of the complainant. It was produced into evidence as **Prosecution's Exhibit No. 2**. The treatment charts were also produced into evidence as **Prosecution's Exhibit No. 1**. The Appellant was subsequently arrested in connection with the incident. When he was put on his defence, he denied committing the offence. He stated that the prosecution had not adduced evidence linking him with the offences he was charged with.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the grounds of appeal filed by the Appellant and the submissions made by both the Appellant and the Learned State Counsel on behalf of the State. In the present appeal, it is evident that the Appellant's conviction was based on the sole evidence of the complainant implicating the Appellant with the offences. The complainant's evidence was that the Appellant broke into her house and proceeded to rape her before robbing her of her cellphone and money. The Appellant testified that she recognized the Appellant, her neighbour, as her assailant because she could see his face with the help of a torch that the Appellant used during the incident. She also testified that she recognized the Appellant by his voice as he spoke to her at length. Unfortunately, the complainant did not record the physical description of her assailant in the first report that was made to the police.

The prosecution's case revolves around the identification of the Appellant by a witness with prior

knowledge of him. The Appellant argued that the evidence of identification was not watertight nor was it sufficiently corroborated. The Court of Appeal in **Peter Gatiku Kariuki –vs- Republic [2014]** eKLR cited with approval the case of **Michael Kimani Kungu –vs- Republic CA CR. Appeal No.686 of 2010** where it was held:

“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 one or more 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. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well-known case of R VS TURNBULL (1976) 3 ALL ER 549 at page 552 where he said-

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

When relying on the sole evidence of identification, the prosecution must ensure that the evidence is watertight to prevent the possibility of mistaken identity. The courts have come up with rules which must be followed when the prosecution is presenting evidence of identification. The circumstances under which the identification was made must be properly explained. In cases where the criminal offence took place at night, the source of light must be explained. The intensity of the light must also be stated. The position of the identifying witness *vis-à-vis* the person identified must be noted. It is also important that in the first report made to the police, the identifying witness must give the physical description of the assailant. This will enable a comparison to be made between the physical description made in the first report and the actual physical description of the accused upon his arrest. As was held in **Simiyu & Anor –vs- Republic [2005] 1 KLR 192:**

“In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.”

From the evidence on record, there is no other evidence that was adduced by the prosecution to corroborate the evidence of identification. The cell phone that was said to have been stolen from the complainant was not recovered in possession of the Appellant. An identifying witness should be asked to give detailed description of their assailant when reporting the incident to the police. This strengthens the reliability of the identification evidence. This information is absent in the instant case. It is trite that the court is required to treat the evidence of a single identifying witness with caution before convicting an accused person on such evidence. In the present appeal, this court is not convinced that the evidence of identification was watertight as to exclude the possibility of mistaken identity. The complainant testified that she was frightened and in fear during the entire ordeal. She said that she is recognized the Appellant as her assailant. However, it was evidence that the complainant did not give the name of the Appellant in the first report that she made to police. The circumstances of this case raised reasonable doubt that the complainant positively identified the Appellant as her assailant.

The upshot of the above is that that the prosecution did not adduce evidence which established the guilt of the Appellant on the charges brought against him to the required standard of proof beyond any reasonable doubt. The Appellant’s appeal has merit and is hereby allowed. His convictions are quashed. It is hereby ordered that he be set at liberty forthwith and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF MARCH 2017

L. KIMARU

JUDGE