



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO.25 OF 2015

BETWEEN

HENRY OTANAAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the conviction and sentence of G.A Mmasi Ag. S.P.M in the Principal Magistrates Court at Vihiga Cr. Case No.339 of 2013 delivered on 3/2/2014)

J U D G M E N T

Introduction

1. The appellant in this appeal was charged with three offences before the Senior Principal Magistrate's Court at Vihiga. In count 1 he was charged with robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.
2. The particulars were that the appellant on the 28th day of March 2013 at [particulars withheld] in Vihiga County within Western province jointly with others not before Court while armed with dangerous weapons namely pangas robbed E A ten iron sheets all valued at kshs.8000/= and immediately before such robbery used actual violence to the said E A. In the alternative the appellant was charged with the offence of handling of stolen goods contrary to Section 322 (1) as read with Section 322(2) of the Penal Code.
3. The particulars of the alternative charge were that the appellant on the 29th day of March 2013 at [particulars withheld] in Vihiga County within Western Province, otherwise than in the course of stealing dishonestly retained ten iron sheets knowingly or having reasons (sic) to believe them to be stolen goods.
4. The 2nd Count was gang rape contrary to Section 10 of the Sexual offences Act No.3 of 2006, particulars of which were that the appellant on the 28th day of March 2013 at [particulars withheld] in Vihiga County within Western Province, in association with others not before Court intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of E A a woman aged 54 years without her consent.
5. The alternative charge to count II was Indecent Act with an adult contrary to Section II (A) of the Sexual Offences Act No.3 of 2006 particulars of which were that the appellant on the 28th day of March 2013 at [particulars withheld] in Vihiga County within Western Province in association with others not before Court intentionally and unlawfully caused his genital organ namely penis to contact with the genital organ namely vagina of E A a woman aged 54 years old.

6. In Count III the appellant was charged with Assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of this charge were that on the 28th day of March 2013 at about 00.00 hours at [particulars withheld] in Vihiga County unlawfully assaulted SHAVIN SALENGA thereby occasioning him actual bodily harm.
7. The appellant pleaded not guilty to the charges and after a full trial during which the Prosecution called eight (8) witnesses the appellant was found guilty on all the three (3) Counts and sentenced on Count 1 he was sentenced to suffer death while in Count II and III he was sentenced to ten (10) years and two (2) years respectively, which sentences were to be served in abeyance.

The Appeal

8. Being dissatisfied with both the conviction and sentence, the appellant preferred this appeal on the following home-made grounds:
 1. THAT the learned trial Magistrate erred in law and in facts (sic) when relying and putting much reliance on the sole identification evidence of PW1 and PW2 under difficult and unconducive circumstances.
 2. THAT the source of light mentioned by PW1 and PW2 was not cogent to sustain a conviction.
 3. THAT the trial Magistrate erred in law and in fact when he failed to evaluate that the Prosecution never proved the primary or secondary evidence before Court under Section 46 of the Evidence Act.
 4. THAT the learned trial magistrate failed to comply with the provisions of Article (sic) 324 as read with Section 329 [of the] C.P.C.
9. The appellant therefore prays that the appeal be allowed conviction quashed and the sentence set aside.

Submissions

10. At the hearing of the appeal, the appellant relied on his written submissions and also briefly stated orally that even though the complainant (PW1) alleged that she knew him very well, she did not give his name when she went to record her statement and that the Investigating officer did not write his name in the first report.
11. Mr. Omwenga for the State opposed the appeal. He submitted that identification of the appellant was proper as PW1 positively identified the appellant as the assailant with the aid of the torches the assailants were flashing at each other further and that PW1 knew the appellant very well since childhood and she knew him by his nickname Susu. Counsel also submitted that the incident took place on the 28/03/2013 and the ten (10) iron sheets stolen during the robbery at PW1's house were recovered from the appellant's second home on 29/03/2013 which shows that the appellant had a hand in the robbery and rape of the complainant. Lastly Mr. Omwenga submitted that the Clinical officer who examined the complainant confirmed that the complainant had been sexually attacked and a P3 form to that effect was produced as PExhibit 3.
12. He therefore urged us to find that both the conviction and sentence were well founded, and dismiss the appeal.

Duty of the 1st Appeal Court

13. Being a first appeal, this Court has a duty to look at the evidence adduced at the trial Court afresh, evaluate the same and come up with its own independent conclusion bearing in mind that the Court did not have the opportunity to see and observe the demeanor of witnesses who gave evidence during trial. See **Okeno –vs Republic [1972]E.A 32 Mohamed Rama Alfani & 2 others –vs- Republic Criminal Appeal No.233 of 2002.**
14. Before evaluating the evidence afresh this Court will first look at the evidence by the Prosecution and the defence as recorded by the trial Court.

Prosecution Case

15. The Prosecution called a total of eight (8) witnesses to prove their case. PW1 E A who is the complainant herein told the Court that on the night of 28/3/2013 while she was asleep in her house with her grandson (PW5) she was attacked by the appellant and another person she did not recognize. She explained that the attackers were armed with pangas and they had carried with them torches which they were flashing around and which enabled her to see the appellant whom she identified by the nickname "Susu". She further explained that the appellant, together with his accomplice raped her in turns several times and she got injured. She was able to struggle with them and escape to the home of PW3 NORAH NYANGAZI OMUTEMA who gave her clothes. PW3 is the Assistant Chief of Emativini sub location.
16. When the complainant went back to her house together with the village elder she found her ten (10) iron sheets had been stolen. Her grandson escaped from the house through the window but not before being stabbed by the attackers on the buttocks. She went to Emagada Police Post where she reported the incident. She was then sent to Eshiarabatsi Health Centre where she was treated.
17. The appellant was later arrested and the village elder recovered the iron sheets which she identified. She produced receipts to show purchase of the ten (10) iron sheets exhibits before Court. She also showed the P3 form as exhibit.
18. PW2 M O of Eubayyi location testified that on the night of 28/3/2013 at 1.20 a.m. PW1 in the company of PW3 went to her house and told her that PW1 had been attacked, raped and her iron sheets stolen by the appellant. She accompanied the two back to the complainant's house and found nobody not even PW1's grandson. The next day she saw PW1's grandson who had been stabbed on the buttocks. They took both of them to Magada Police Post where they reported and were referred to hospital. PW2 went back and started tracing the appellant who they arrested. PW2 was together with the Assistant Chief PW3 when the appellant was arrested. They demanded from him the iron sheets but he escaped. They called the Chief and asked him to come with Police. The Police responded. The Police in the presence of the appellant's brother Hosea recovered the ten (10) iron sheets from appellant's house. PW1 identified the iron sheets which were marked as PMFI 1. PW1 also produced the cash receipt with which she had paid for the iron sheets.
19. PW3 NORAH NYANGAZI OMUTEMA the Assistant Chief of Emativini sub location testified how PW1 went to her house screaming on the night of 28/3/2013 at 1.15a.m. She explained to the trial Court about the complainant's (PW1) condition that night and how she (PW3) assisted her. The complainant told her that she had been raped by the appellant. They then went to PW2's home and they moved together as explained both by PW1 and PW2. They reported the incident to the Magada Police Post and took the complainant and her grandson to hospital. The ten (10) iron sheets were thereafter recovered from the appellant's house and the complainant confirmed that they were hers as per the purchase receipts. Later, the appellant was arrested.
20. PW4 JERETINE MAZUI LIHERETI told the Court that she got the information of the incident from the area Assistant Chief on who called her on 28/3/2013 and told her that the complainant had been beaten thoroughly. She went to the complainant's house and the complainant told her of the ordeal and also told her that it was the appellant who had raped her.
21. PW5 S S the grand-son to PW1 a class seven (7) pupil told the trial Court that on the night of, 28/03/2013 at 1.00a.m as he was sleeping he was woken up by a loud bang before the appellant and another person entered the house. He testified that he saw the appellant with the help of the torches which the appellant and his accomplice were flashing about. That the two attackers were armed with pangas which the appellant used to stab him on the left buttock. He claimed that appellant went and grabbed his grandmother as he also demanded for his Alcatel Mobile phone which he (appellant) took. He saw the appellant pull his grandmother to the sitting room before slapping him and calling him a hyena. PW5 stated he escaped through the window and went to a neighbour's house where he slept till 6.00a.m. In the morning he went back to their home. He told the Court that ten (10) iron sheets were stolen. The matter was reported at Magada Police Base and then to the hospital where he was treated together and discharged. PW1 was also treated and discharged. He showed his treatment notes PMF I (5) and P3 form PMFI (6) and identified the 10 iron sheets recovered, PMF I (2), and also pointed out the appellant in the dock.
22. PW6 Paul Opiayo the Chief of Eubayyi location received information of the incident at PW1's home from PW3. The next day the complainant told him that it was the appellant who had

- attacked her. He then sent PW3 to go and arrest the appellant but the appellant escaped. He then called the brother to the appellant by the name Hosea who took them to a house where they recovered the ten (10) iron sheets. The appellant was later arrested. The iron sheets were identified by the complainant who produced the receipt of payment. PW6 also identified the appellant and the complainant's ten (10) iron sheets.
23. PW7 MAINA AGGREY AMBETSA a Clinical officer based at Emuhaya District Hospital examined E A, the complainant herein and filled the P3 form. From his observations he formed the opinion that the complainant was raped and injured. He produced the P3 form PExh 3 and the treatment notes as exhibit PExh 3 (2).
24. PW7 also examined S S aged 13 years. He observed that he had injuries on the left buttock. The injuries were 12 days old by the time the P3 form was filled. He said the probable type of weapon used to stab him was a sharp object. He produced the treatment notes PExh 5, P3 form PExh 6.
25. Cpl Mohamed Suleiman no.77666, PW8, partly investigated this case after receiving the report from PW1. He was instrumental in the recovery of the ten (10) iron sheets and the re-arrest of the appellant. He produced the iron sheets PExh 1 and the receipt PExh 2 and pointed out the appellant in the dock as the person he had arrested in connection with the offences committed against PW1 and PW5.
26. The Prosecution closed its case at this juncture and the trial Court found that a prima facie case had been established against the appellant who was placed on his defence.

Defence Case

27. In his defence, the appellant who did not call any witness maintained that on the 28/3/2013 he spent the whole day at his house and only left the next day to assist his Aunt to plant when he was arrested. He was then taken to Magada Police Post and later to Vihiga Police Station before being arraigned in Court and the charges read to him, which he denied.

Analysis of the Evidence

28. From the evidence on record, PW1 and PW5 were injured during the attack on the 28/3/2013. It is not in doubt that they were attacked on the night of 28/3/2013 as this was confirmed by the evidence of PW2, PW3, PW4, PW6 and PW8. The evidence of the Prosecution is well corroborated. PW5's evidence who is a minor has not been shaken. The events were spontaneous as the PW1 after being attacked escaped and ran straight to PW3's home screaming.
29. PW3 responded and assisted her and they went to PW2's home. PW2 being a vigilante/community Police for the area also responded and they managed to go back to the complainant's home where they found that the complainant's iron sheets had been stolen and PW5 was also not at home.
30. The evidence on record especially from the Clinical officer PW7 shows that PW1 was raped and her grandson PW5 stabbed on the buttock with a sharp object. PW1 had ample time to see her rapists because the rapists took their time in doing their act. As she testified she told the Court that she was able to see the appellant with the help of the torches which her attackers were flashing around while raping her in turns. She stated that while the appellant raped her three times, the other person raped her twice. She said there was also moonlight. It was even easier for her to identify the appellant because she recognized him. She even called him by his nick name "Susu" and testified that the appellant whom she had known since his childhood was her neighbour.
31. The complainant had receipts which she produced before the Court and which showed that she had bought ten (10) iron sheets. The iron sheets were recovered at the appellant's home in the presence of his brother by PW2, PW3 and PW8 together with some Police officers. The appellant has not denied that the iron sheets were found in his place. His only evidence was that he was at his home on the day of the incident and that he helped his Aunt to plant.

Issues for Determination

32. Having made the above analysis there are only three issues for determination in this appeal:-

1. Whether there was a positive identification of the appellant.
 2. Whether there was sufficient evidence to convict the appellant for the offence of robbery with violence.
 3. Whether the trial Court failed to comply with the provisions of Section 324 and 329 of the Criminal Procedure Code.
33. On the first issue of identification, this Court is aware of the dangers of convicting an accused person on the basis of the evidence of a single identifying witness made in difficult circumstances. From the evidence of PW1 and PW5, the attackers had torches which they were flashing around as they robbed them and assaulted them. PW5 was able to see the appellant whom he recognized and on the other hand and as earlier analyzed PW1 had ample time to see her assailants. As stated by the Court of Appeal in **Anjononi and others –vs- Republic [1976 – 1980] KLR 1566** when it comes to identification the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.
34. In this case, PW1 testified that she knew the appellant by name and even his nick name “Susu” and that she saw him on the material night during the attack and recognized him. PW1 told all those who assisted her that it was “Susu” who attacked her and she never minced her words. This was therefore a case of recognition and not identification. Furthermore, the iron sheets were found in the appellant’s house only some hours after PW1 complained about losing iron sheets which she identified as hers. We therefore find that the identification of the appellant was reliable and safe in the circumstances.
35. On the second issue as to whether there was sufficient evidence to convict the appellant with the charge of robbery with violence this Court is guided by the provisions set out in Section 296 (2) of the Penal Code. The offence of violent robbery is proved if the prosecution adduces evidence proving any one of the following:-
- i) if the offender is armed with any dangerous or offensive weapon or instrument, or
 - ii) if the offender is in company with one or more other person or persons, or
 - iii) if at or immediately before or immediately after the time of the robbery, he wounds beats, strikes or uses any other personal violence to any personal.
36. The Court is alive to the fact that proof of any one of the above ingredients is enough to found a conviction under Section 296 (2) of the Penal Code as was held in **Oluoch –vs- Republic [1985] KLR 549**.
37. In the present case PW7 testified as to the injuries suffered by both PW1 and PW2 resulting from the robbery. PW1 and PW5 also testified as to the fact of the robbery and PW1 stated that her iron sheets were stolen and recovered at the appellant’s house. The requirements of robbery and use of violence were therefore proved in the present case and it is our finding that there was sufficient evidence of commission of the offence of robbery with violence in this regard.
38. Lastly the appellant complained that the trial Magistrate erred in law in not complying with Section 324 as read with Section 329 of the Criminal Procedure Code. Section 324 of the CPC gives power to an accused person before sentence to arrest judgment on the ground that the information does not state an offence which the Court has power to try. It was necessary for the appellant to invoke the said provisions of Section 324 of the Criminal Procedure Code during trial. He did not do so and cannot do so now. As for Section 329 the record shows that the appellant was allowed to mitigate and his mitigation was duly considered by the trial Magistrate. This complaint by the appellant is therefore unfounded.

Conclusion

39. The upshot of what we have said above is that the appellant’s appeal lacks merit. There is sufficient evidence placing him squarely at the scene of crime and proving all the three counts. We therefore dismiss the appeal in its entirety and confirm the judgment of the learned trial

Court.
40.The sentence in counts II and III will be held in abeyance.
41.Right of appeal within 14 days from this judgment.

Orders accordingly.

Judgment delivered dated and signed in open Court at Kakamega this 9th day of March 2016.

RUTH N. SITATI

NJOKI MWANGI

J U D G E

J U D G E

In the presence of:-

Appellant in person for Appellant

Mr. Ngetich for Respondent

Mr. Anunda - Court Assistant