REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CRIMINAL APPEAL NO.70 OF 2014

GEOFFREY ANAYA ALIAS KIBITO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in the Senior Principal Magistrate's Court at Vihiga; Criminal Case No.182 of 3013 (Hon G.A. Mmasi S.P.M.) dated 2nd December, 2013

JUDGMENT

[1] The appellant, ***Geoffrey Anayo alias Kabito***, was charged with three main counts and two alternative counts. In count I, the appellant was charged with robbery with violence contrary to ***section 295*** as read with ***section 296(2)*** of the Penal Code. Particulars were that on the 18th February 2013 at Kiurungwanyi village in Vihiga County within western province jointly with others not before court, while armed with offensive weapons, pangas, rungus, iron bars and bright torches, robbed ***NNO***, a mobile phone make Nokia, 6kg gas cylinder of Total gas, JVC CD portable, 3 hand bags, two school bags containing books a purse and Kshs.6000/- all valued at Kshs.35,000/- and immediately before the time of such robbery used actual violence to the said ***NNO***. The appellant was also charged with an alternative count of being in possession of stolen goods contrary to section 322(2) of the penal code, in that on 20th February, 2013 at Matsinguru village in Vihiga County other than in the course of stealing dishonestly, retained one JVC CD portable and one school bag containing books knowing or having reason to believe them to be stolen goods.

[2] The appellant faced count 2, gang rape contrary to ***section 10*** of the Sexual Offences Act No.3 of 2006, whose particulars stated that on 18th February, 2013 at (withheld) village in Vihiga County in association with others not before court intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of ***NNO*** without her consent.

[3] The appellant faced an alternative count of indecent act contrary to section 11A of the same Act, in that on the same date, 18th February, 2013, in association with others not before court, he intentionally and unlawfully caused his genital organ namely penis to come into contact with the genital organ, namely vagina of ***NNO***.

[4] The 3rd final count was resisting arrest contrary to section 253 of the Penal Code which stated that on 19th February 2013 at ***Matsunguru*** village in ***Vihiga County*** the appellant resisted arrest by police officers ***CP Mwangi, PC Mathenge, PC Patrick, PC Francisca Njoroge*** among others.

He was convicted of the main counts of robbery with violence, gang rape and resisting arrest and sentenced to death for robbery with violence and 10 years and 3 years for gang rape and resisting arrest

respectively. Sentences in counts 2 and 3, were ordered to remain in abeyance in view of the sentence in count 1.

[5] Aggrieved with conviction and sentence the appellant lodged an appeal to this court on the following grounds:-

> ***(1) THAT the learned magistrate erred in law and in fact when he relied and based her conviction on sole evidence of PW1 who was under difficulty and in-conducive circumstances.***
>
> ***(2) THAT the trial magistrate erred in law and fact by failing to consider that failure by the prosecution to produce expert forensic report, inventory list, recovery form led to a miscarriage of justice.***
>
> ***(3) THAT the trial magistrate erred in law and fact in failing to consider that the prosecution's failure to call essential witnesses was fatal in the prosecution's case.***
>
> ***(4) THAT the learned magistrate erred in law and fact in failing to comply with sections 324 and 329 of the Criminal Procedure Code.***

[6] At the hearing of this appeal, the appellant who was unrepresented, relied on his written submissions, while ***Mr Oroni*** for the respondent opposed the appeal orally.

[7] The appellant's submissions in a nutshell were that he was not properly identified. He pointed at the evidence of PW1, PW2 and PW4 who said the robbers had bright torches but who he submitted did not properly identify him. According to the appellant, PW2 said the appellant, had put on a ***mavin hat*** covering part of his face while PW1 and PW2 (sic) said he had rastas and a bad eye. In essence the appellant's submission was that this evidence was contradictory and inconclusive. The appellant further submitted that the first report did not mention him as one of the robbers. His argument was that the complainant never mentioned to PW3 that the person who robbed him was known to him bearing in mind that it was PW3 who took the complainant to hospital and also called the police.

[8] The appellant further submitted that the evidence of the prosecution was contradictory and pointed out the evidence of PW1 who had testified that the door was broken while PW7 said the doors were not broken. The appellant took issue with the conditions under which the witnesses are said to have identified him saying that it was at night and the only means of light, according to the witnesses, was from torches yet the appellant was said to have put on a mavin.

[9] The appellant, again submitted, that essential witnesses were not called particularly one ***F,*** who was one of the people who went to the scene after a report was made to Administration Police Officers. He asked that an adverse inference be drawn on the prosecution's failure to call this particular witness. The appellant also submitted that he was not subjected to a DNA test to prove that he was the one who raped the complainant thus the offence of rape was not proved beyond reasonable doubt.

[10] ***Mr Oroni***, learned counsel for the respondent, opposed the appeal and submitted that the prosecution proved its case beyond reasonable doubt.

Learned counsel relied on the evidence on record, especially the evidence of PW1, PW2 and PW3 which he submitted, was corroborated by the evidence of PW6. He prayed that the appeal be dismissed.

[11] I have considered this appeal, submissions by both the appellant and on behalf of the respondent as well as perused the record. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluated and analysed it and came to its own conclusions – see ***Okeno v Republic*** [1972] EA 32.

[12] That duly was well stated in the case of ***Eric Onyango Odeng' v Republic*** [2014] eKLR where the Court of Appeal stated:-

"[It] is the first appellate court which by law it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court to determine whether on the basis of those facts, the decision of the trial court is justified."

[13] In the case of ***Joseph Njuguna Mwaura & 2 others v Republic*** [2013] eKLR, the Court of Appeal again stated:-

"It is common place that the first appellate court is mandated to re-consider and re-evaluate the evidence on record bearing in mind that it did not see or hear the witnesses, before making a determination of its own."

[14] PW1 ***NNM,*** told the court that on the morning of 18th February 2013 at about 1.00 am, she was sleeping, when about six (6) men armed with pangas and bright torches, broke into and entered her house. They proceeded to the bedroom, tied her hands and legs and demented money from her. She obliged and gave them Kshs.6,000/-. They also took a radio, JVC, CD and compact, meko gas, 3 hand bags and children books. They ordered her to lie down and raped her in turns. She told the court that five members of the gang raped her and she was able to identify the appellant who was the second person to rape her. When done, the assailants left with their loot. PW1 called her 11 year old son who went and untied her. She went to the sitting room and raised an alarm. A neighbour responded came and took her to hospital. A report was made and police officers visited her at the hospital. PW1 told them what had happened and informed them that she had recognised the appellant during the attack. After being discharged from hospital, she accompanied police officers to the appellant's place where he was arrested and a number of her stolen items recovered from him. They included the radio, children books a Geometrical mathematical set and a school bag. PW1 was then issued with a P3 form and post rape care form.

[15] PW2 ***S K***, told the court that on the morning of 18th February 2013 at about 1.45 a.m. he heard screams and went outside to find out what was happening. He saw about 6 armed people jump the fence from PW1's compound. They wanted to cut him with pangas but he ran away. One of them flashed a torch and he was able to identify the appellant. Later PW3 came to where he was hiding and together they went to call administration police officers who came and assisted in taking took PW1 to hospital.

[16] PW3, ***D M***, told the court that on that morning at about 1.00 am he heard screams outside and went out to check what was happening. The screams and commotion were coming from his neighbour ***J O*** when he went to that house, he found the neighbour's wife having been attacked, robbed and raped. He rang police officers who came and with the assistance of PW5 they took PW1 to Mbale hospital where she was admitted.

[17] PW4, P.A. a minor, told the court that on that morning, he was sleeping when the door to their house was broken and several people armed with pangas and torches entered the house, while flashing torches. They went to his mother's bedroom and he heard them demand money. PW4 attempted to run away but one of the robbers ordered him to go to his room. He managed to identify and recognise the appellant who had dreadlocks and a bad eye. After the robbers left, his mother called him. He went to her room and untied her. They screamed attracting neighbours' attention. Police officers also came. Later that morning, they went to the appellant's home where police officers recovered their radio that had been stolen together with exercise books and a school bag belonging to his brother.

[18] PW5, ***No.2007/12206 APC Dominic Kenei*** told the court that on 19th February 2013 at 8.30 pm he was called by ***sergeant Murungi*** and briefed on an impending arrest that they were to conduct in conjunction with regular police officers. They joined by ***PC Mathenge*** and ***PC Ngugi*** and proceeded to the appellant's compound. They found him but he turned violent and resisted arrest. They struggled with him, overpowered him and arrested him. They recovered a radio JVC, two small school bags with exercise books as well as text books which the complainant identified as those stolen from her.

[19] PW6, ***45645 PC Ambrose Mathenge,*** on his part told the court that on 19th February 2013 at about 8.00 p.m. he and CPL ***Elizabeth Mwangi*** were instructed to proceed to Gisambai Administration Police

camp and assist in the arrest of a robbery with violence suspect. He proceeded to the camp and joined ***APC Nyongesa*** and went to the appellant's home. They found the appellant, arrested him and also recovered a radio, JVC, school bags with text books and took the appellant to the police station. He produced the radio as PEx1, school bags, P|Ex2, exercise books and textbooks as PEx3, geometrical set as PEx4.

[20] PW7 ***No.858774 CPL Elizabeth Mwangi,*** told the court that on 18th February 2013 at about 12 pm she was instructed by the OCS instructed to investigate a case of robbery. She went to Vihiga District hospital and found PW1 who had been admitted. Upon being discharged, they went to PW1's house. PW1 informed her of the robbery and rape and the fact that she had recognised one of the assailants. PW7 then commenced investigation and later they proceeded to the appellant's home in the company of PW1 and apprehended him although they faced resistance from the appellant and his family. They recovered a radio (JVC) and a school bag with exercise books which PW1 identified as those stolen from her house. The appellant was then charged in court.

[21] PW8, ***Sammy Chelule***, a clinical officer told the court that he attended to PW1 who had a history of gang rape. She had whip marks on her lower back which was also swollen, and bruises on the right leg. Examination of her genitals revealed bruises on the hymen, and swollen and reddened labia. Urinalysis revealed pus cells. He concluded that there was penetration which was forceful. He signed the P3 form on 21st February, 2013 which he produced as PEx6. Post rape care form was produced as PEx7.

[22] At the close of the prosecution is case, the appellant was put on his defence, and in his sworn defence, the appellant testified that on 18th February 2013 he was at his brother's house when people he identified as the chief and police officers emerged from a banana farm and grabbed him. He screamed attracting the attention of his family members who came to his rescue. They searched him and took Kshs.30,000/- from him. They beat him up and took him to Vihiga Police Station and charged with robbery with violence which he never committed. The appellant denied raping PW1 and maintained that nothing was recovered from his house.

From that evidence the trial court found the appellant guilty of the main counts, convicted him and sentenced him, prompting this appeal.

[23] In his first ground of appeal, the appellant has faulted the trial magistrate for relying on the evidence of PW1, a single identifying witness as a basis for conviction. In essence, the appellant argued that conditions under which he was identified were difficult to enable PW1 to properly identify him.

[24] The position in law is that where the only evidence against an accused is that of a single identifying witness, the court should exercise great caution and carefully scrutinise that evidence before making it the basis of a conviction due to the likelihood of a miscarriage of justice. In the case by ***John Mwangi Kamau v Republic*** [2014] eKLR, the Court of Appeal observed:-

> ***"Time and time again this court has emphasised that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested."***

[25] In the English case of ***R v Turnbull and others*** (1976) 3 ALLE 2549 it was held:-

> ***"First, wherever the case depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for caution before convicting the accused and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly the Judge should direct the jury to examine closely the circumstances in which the identification by such witnesses came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the***

witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"

[26] The same position was taken in the case of ***Cleophas Otieno Wamunga v Republic, Criminal Appeal No.20 of 1989*** where the court stated:-

"Evidence of visual identification in Criminal cases can bring about a 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 learned trial magistrate considered the evidence before her and stated in her judgment as follows:-

"... the complainant knew the accused quite well as she used to see him at Gisambai market where she operates her business. The complainant therefore positively recognised the accused that night while the accused in the company of others attacked her, robbed her and raped her. PW2, a neighbour to PW1 also identified the accused and saw him and he was a person well known to him, he saw him armed and in the company of 6 other persons, they were armed with bright torches and pangas (machetes)"

[27] The appellant's conviction was without a doubt, based on the evidence of identification by recognition. PW1 told the court that during the robbery and rape, she was able to identify the appellant. The assailants had torches and she identified the appellant when one of the assailants had shone a torch on his face during the rape ordeal. PW1 even identified the appellant as the second person to rape her. The complainant further told the court that the appellant was from within the locality and she had seen him on several occasions around the market. She identified his special features as a deformed eye and dreadlocks. PW2 told the court that he also identified the appellant and recognised him on that material night when gang members were approaching where he was hiding as they flashed torches about. He also told the court that he used to see the appellant within the area. PW4 again told the court as much that he too had recognised the appellant.

[28] Although the conditions might have been difficult being at night, the witnesses gave the description of the appellant which showed that indeed they had seen and recognised him. Secondly, after the robbery, PW1 mentioned to the police one of the persons who had robbed and gang raped her. The police went to the appellant's home and on searching his house, recovered the items that had been stolen just two days earlier from PW1's house.

[29] On the basis of the above evidence, I am satisfied that the appellant was positively identified as one of the people who robbed the complainant. The fact that stolen items were found in his possession soon after robbery, that alone was sufficient to connect him with the offence. As was held in the case of ***Maina v Republic, Criminal Appeal No.11 of 2003,*** evidence of recent possession of a stolen item alone is sufficient to found a conviction for the offence of robbery with violence.

[30] The appellant was also charged with the offence of gang rape. Rape is committed when:-

(a) one intentionally and unlawfully commits an act which causes penetration of another person's genital organ with his or her genital organ,

(b) without consent of the other person or

(c) where such consent is obtained by force or by means of threats or intimidation of any

kind.

[31] ***Gang rape*** on the other hand is committed when a person commits rape in association with another or where a person with common intention with others commits rape.

[32] PW1 testified that she was raped in turns by five men. She identified the appellant as the second person to rape her. This happened after she had been tied both legs and hands. She did not consent to this sexual intercourse because it was achieved by means of force and threats. PW8, the clinical officer who examined her, testified that he found the labila swollen, red inside and painful on touch. He concluded that there was penetration. The P3 (PEx 6) also showed that there were bruises on right labila, and inflammation, confirming that there had been penetration. PEx7 PRC form contained similar findings. Medical evidence was therefore conclusive that indeed PW1 had been raped.

[33] The appellant has argued that the prosecution did not conduct a DNA test hence the issue or rape was not proved conclusively. The law is now settled that rape or defilement is not proved by medical examination or DNA test but by way of evidence. In the case of ***AML v Republic*** [2012] eKLR, the court stated:-

> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

A similar position had been taken in the case of ***Kassim Ali v Republic*** [2006] eKLR where the court stated:-

> ***"The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim or by circumstantial evidence."***

And again in the case of ***Fappyton Mutuku Ngui v Republic*** [2014] eKLR the Court of Appeal stated:-

> ***"In our view such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2's testimony which ws trustworthy as to the person who had defiled her."***

[34] In the case of ***Benjamin Mbugua Gitau v Republic*** [2014] eKLR the court stated that there was no necessity for DNA test as penetration which is the main element of the offence was proved. Te same issue was dealt with in ***Dennis Osoro Obiri v Republic*** [2014] eKLR. The Court of Appeal re-emphasised the above position thus:-

> ***"The appellant secondly has contended that there was no medical evidence adduced to link him with the defilement of PW1. In our view, such evidence was not necessary the moment the trial court found that there was sufficient medical evidence to prove that the complainant had been defiled and that the complainant's evidence was trustworthy as to the identity of the person who defiled her."***

[35] The above decisions are clear on one point that, where there is sufficient evidence to prove defilement or rape and trustworthy evidence as to the identity of the sexual attacker, medical examination or DNA test on the appellant is not necessary in such circumstances.

[36] Taking guidance from the above decisions, I am satisfied as the trial court ***was*** right in finding that there was sufficient medical evidence to prove rape and primarily that the complainant (PW1) was positive that the appellant was one of the people who raped her. The submission that there should have been a DNA test is not meritorious.

[37] The appellant's other complaint is that the prosecution did not call essential witnesses to prove its case particularly one ***F.*** In the case before the trial court, the prosecution called a total of eight witnesses. The law is clear that there is no fixed number of witnesses the prosecution must call in order to prove its case unless the law so requires (see ***section 143*** of the Evidence Act Cap 80 Laws of Kenya).

This position was stated in the case of ***Benjamin Mbugua Gitau v Republic*** [2011] eKLR where the Court of Appeal stated:-

> ***"This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires. See*** *section 143* ***of the Evidence Act, Cap 80 Laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the four boys."***

[38] In a criminal trial, it is the duty of the prosecution to call witnesses it deems necessary to prove its case. In the case of ***Julius Kalewa Mutunga v Republic*** [2000] eKLR the Court of Appeal stated:-

> ***"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion, unless for example, it is shown that the prosecution was influenced by some oblique motive."***

[39] ***F***, was one of the Administration Police Officers who went to the scene and took the complainant to hospital, but was not called to testify. Failure to call her to testify, in my view, did not cause prejudice to the appellant or affect the prosecution's case. The prosecution called a witness who went to the scene with the said ***F*** and he testified. I do not therefore think the absence of ***F's*** testimony was fatal to the prosecution's case, or occasioned prejudice to the appellant in any way. Neither do I think there was oblique motive on the part of the prosecution to exclude her.

Finally, the appellant complained that the prosecution's case had contradictions and/or inconsistencies which the trial court should have resolved in his favour. He pointed out to the evidence of PW1, PW3 and PW4 saying that those witnesses differed on the number of robbers, where some said they were either six, or even five. According to the appellant, this contradiction was material and the trial court was wrong in failing to address it.

[40] In a trial where discrepancies are alleged to exist in evidence, the trial court has a duty to resolve them, and where it fails to do so, the appellate court has a duty to weigh whose inconsistencies and see if they are fundamental as to affect the conviction or sentence or if they caused prejudice to the appellant. The court can ignore minor contradictions if they are not material. In the case of ***Twehanga M Alfred v Uganda, Criminal Appeal No.139 of 2001*** [2003] UGCA, it was held:-

> ***"With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

The issue on discrepancies was again the subject of consideration by the Court of Appeal in the case of ***Joseph Maina Mwangi v Republic*** [2000] eKLR where the court stated:-

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by section 382 of the Criminal Procedure Code <u>viz</u> whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."***

The Court of Appeal once again re-stated the above position in the case of ***Njuki & 4 others v Republic*** [2002] KLR 771 thus:-

> ***Where the discrepancies in the evidence do not affect an otherwise proved case against an accused the court is entitled to ignore those discrepancies."***

[41] The appellant has submitted that there was discrepancy on the number of robbers who attacked PW1 with some witnesses saying they were four, five or eight. And that PW1 said the doors were broken

while PW7 said they were not. According to the appellant, these contradictions were material and should not have been ignored.

[42] In my view, the fact of robbery was proved because the appellant was identified, arrested and stolen items recovered from him. For the offence of robbery with violence to be proved, it must be established that the appellant was armed, or was in the company of more than one person or that he threatened to use violence against his victim. Whether the robbers were six, eight or even five, did not in any way affect the conviction or sentence of the appellant. As to whether the door was broken or not, this did not matter. The appellant and his group gained access into PW1's house and committed the offences of robbery and rape. The fact remains they gained forceful entry into PW1's house. I do not find merit in this complaint.

[43] I have carefully considered this appeal, perused the record, re-evaluated the evidence and analysed it myself. The conclusion I come to is that this appeal is devoid of merit and is hereby dismissed.

Dated and delivered at Kakamega this 7th day of September, 2016.

E.C. MWITA

JUDGE