REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCRA NO. 58 OF 2015

(CORAM: J. A. MAKAU – J.)

HABEL OMONDI ONYANGO ………………………………………………… APPELLANT

VERSUS

REPUBLIC ……………………………………………………………… RESPONDENT

(Being an appeal against both the conviction and the sentence dated 23.7.2015 in Criminal Case No. 226 of 2014 in Ukwala Law Court before Hon. R.M. Oanda – SRM)

JUDGMENT

1. The Appellant **Habel Omondi Onyango** was charged with an offence of **Robbery with Violence contrary to section 296 (2) of the Penal Code**. The particulars of the offence were that on the 7th day of August 2013 at ***[particulars withheld]*** in Ugenya District within Siaya County, the appellants and others not before court robbed R W A of one Radio, one mobile phone, a solar lamp, and cash KShs 3000/= and immediately before and immediately after the time of such robbery wounded the said R W A. The Appellant also faced Count II of **Rape contrary to Section 3 (1) (a) (b) (3) of the Sexual Offences Act No. (1) of 2006**. The particulars of the offence are that on the same day at the same time, intentionally and unlawfully caused his penis to penetrate the vagina of RWA without her consent. The Appellant also faced an alternative charge of **Committing an indecent act with an adult contrary to Section II (1) of The Sexual Offences Act No. 3 of 2007 (2006).** The particulars of the alternative charge are that on the same day and same place intentionally touched the vagina of RWA with his penis against her will.

2. After full trial the appellant was found guilty of Count I and Count II and sentenced to suffer death on Count 1 whereas sentence on Count II was put at abeyance.

3. The conviction and sentence provoked the appellant to prefer this appeal setting out 5 grounds of appeal which can be summarized as follows:-

> **(i)** ***That the trial magistrate erred in law and fact in committing the appellant on contradictory and inconsistent evidence.***
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> **(ii)** ***That the conditions were not favourable for positive identification of the assailants.***
>
> **(iii)** ***That the prosecution failed to prove their case beyond reasonable doubt.***

4. The Appellant appeared in person whereas M/s. Mourine Odumba, learned State Counsel appeared for the State.

5.. At the time of hearing of the appeal the appellant relied on his written submissions which he submitted to Court. He urges the prosecution case is riddled with inconsistences and contradictions, that the appellant was never furnished with witnesses statements contrary to **Article 50 (2) (c) and j) of the Constitution,** that this charge is defective and that his defence was not considered.

6. M/s. Mourine Odumba conceded the appeal on the grounds that the appellant was not positively identified as the appellant stated she could identify the assailant as son of H but did not say which son of H nor did she say H, had only one son, that there was no other evidence to connect the appellant with the offence, that the appellant gave defence of alibi and called two witnesses who confirmed his defence, the defence of alibi was not challenged, that appellant's defence was not considered, that there was no circumstantial evidence to connect the appellant with the offence, that the complainant did not state when she become HIV+ to link the same to the alleged rape.

7. I am first appellate court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 KLR 174 where the court of Appeal** held thus:

> ***"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."***
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> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

8. The facts of the prosecution case form part of the record of appeal and I need not reproduce the same, I shall however summarize the prosecution's case and defence.

9. The facts of the prosecution case are as follows:- that PW1, Regina Were Ayaya, the complainant, left the market on 7.8.2013 at 7.00 p.m. and arrived home safely. That time she was alone at home as her worker was away attending a funeral. PW1 after taking tea decided to go and lock the chicken in the kitchen. She returned in the main house and found while she was away someone had entered into the main house. That as PW1 was entering the kitchen in the main house somebody held her at the back of her neck, dropped her to the ground telling her he was going to kill her unless she gave him money. PW1 said she had money to give. She proceeded to the bedroom and gave him KShs.3000/=. That the person was still holding her by her neck as she proceeded to the bedroom. That after he was given some money he took, the radio, solar lantern, PW1's phone Nokia and pushed her out of the house through the back door. He held her by her head and asked for her Mpesa Pin number which PW1 gave. The assailant told PW1 he wanted to sleep with her to which she screamed forcing him to throw her on the ground. He then raped the complainant. It was dark outside the house. PW1 cannot remember how long it took as she was forcefully raped. The complainant testified he was able to identify the assailant when he was raping her as son of H as she knows the family of H. That PW1 used to know the accused as he was frequently visitor in the area. Thereafter the assaillant was through he jumped over the fence and ran away. The matter was reported to the Assistant Chief that night, PW1 went to Sihayi AP Camp and Police accompanied her to the accused's house and found nobody there. PW1 then proceeded to report the matter to Ukwala Police Station and was referred to Ukwala Health Centre. P3 form MFI – P 1 was filled. PW1 recorded statement on 8.8.2013. The Appellant was arrested in February 2014. PW1 was later taken to hospital at Mombasa Jocham Hospital and the record indicated that she is HIV+. She stated that her husband died long time ago and identified the treatment chits marked as MFI – P3.

10. The Appellant denied the charge and gave a defence of alibi. The appellant defence is that when the incident took place on 7.8.2013 he was at Mombasa. That when the appellant came from Mombasa on 23.4.2014 he got information of being connected with the commission of the offence of robbery and rape,

of the complainant herein. On 27.4.2014 he proceeded on his own volution to talk to OCS Sihayi Police Post The OCS told him they were looking for one Jared and told the appellant to wait but he was later arrested. The village elder of the appellant was called and said they were looking for Jared and not the appellant. That a Police vehicle from Ukwala came and the appellant was then taken to Ukwala Police Station and later charged with this offence.

11. The first crucial issue that comes out of this appeal for consideration is whether the conditions on the fateful night of robbery and rape of the complainant were conducive for positive and favourable identification of the assailant? Before I consider that issue, it is worthy to establish from the evidence, whether an offence of robbery with violence is established by the facts of this case. A charge under **Section 296 (2) of the Penal Code** has three essential ingredients that must be proved**.** In the case of **Martin Mung'athia V Republic CRA No. 56 of 2013 (Nyeri)** the Court of Appeal quoted with approval from the case of **Johana Ndungu V R Criminal Appeal No. 116 of 1995, t**he ingredients of the charge of Robbery with violence to be as follows:-

> ***"(a) if the offender is armed with any dangerous or offensive weapon or instrument or***
>
> ***(b) if he is in company with one or more other person or persons or***
>
> ***(c) if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.***

12. I have perused the evidence of the complainant PW1, and it is noted that PW1 in her testimony. stated the assailant was alone and he was not armed at all. PW1 never mentioned the appellant being armed with any dangerous or offensive weapon or instrument or being in company with one or more other persons. The evidence of PW2 that the person was armed with a knife and being accompanied by two other persons contradicts the evidence of PW1. That if PW1 had seen her attacker being armed or being in company of another she would have been the first person to state so in her evidence. In view of the prosecution having not satisfied the ingredients of the offence of Robbery with violence the appellant should not have been convicted of robbery with violence but with theft from a person. I find therefore the ingredients of robbery with violence were not satisfied in this case.

13. I will now turn to examine whether the assailant was positively identified?. The offence took place at night. The evidence against the appellant is the testimony of a single witness which was not coupled with circumstantial evidence relating to his arrest. In the case of **Charles Maitanyi V R (1986) KLR 198,** the Court of Appeal addressed itself thus:-

> ***"Although it is trite law that a fact may be proved by a testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification."***

14. I will now proceed to examine whether the trial Court warned itself and tested the evidence with the greatest care. Regarding identification I am guided by the case of **Paul Etole and Another V Republic CR A 24 of 2000 (VR) page 2 & 3** where the court stated thus:

> ***"The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution, before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and***

friends are sometimes made.”

15. In the instant case the offence took place at night. PW1 did not say the source of lighting, its intensity, if there was any, lighting in her house at the time of the attack. The attacker, attacked her from the back holding her by neck and after robbing her from the house took her outside where it was dark and where PW1 was raped. She testified it was dark outside, however she stated she was able to identify the attacker as son of H as she knew the assailant’s family. PW1 never stated what lighting enabled her to see and identify the assailant in a dark night and know the assailant, was son of Handa.

16. There is another point to consider in cases of identification, thus the first Report. The complainant in her evidence states she identified her assailant as son of H because she knew the family. She did not state which particular son of H she was able to identify in her testimony. In **Maitonyi V Republic (Supra) the Court of Appeal** while testing identification evidence expressed itself as follows:-

> ***“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailant, to those who came to the complainant’s aid or to the Police. …….”***

17. PW1 claimed to have identified the appellant and was a person well known to her. Being a person known to her she should have given his name or description in her first report. In the case **of Lesarau V R (1988) KLR 783 where the Court of Appeal** emphasized that where identification is based on recognition by reason of close acquaintance there is no better mode of identifying than by name.

18. In the instant case PW1 reported to PW2 that same night of robbery and rape. In her first report PW1 did not give the name nor the description of her assailant to PW2 the investigating officer. PW2 never mentioned being told by PW1 that she was robbed and raped by some one known to her. She should have told PW2 her assailant was son of H. That if the appellant was a person well known to PW1, who she used to know and was a frequent visitor of their area and she knew him as son of H, one wonders what was so difficult telling PW2 so. I find the failure to do so was because the condition at the material night were so unconducive for the complainant to recognize and identify her assailant. I therefore hold that the appellant was not identified as the assailant by PW1 at the material night.

19. The Appellant contends that the complainant’s evidence was riddled with inconsistencies and contradictions which were not considered. The appellant urged that the evidence was in variance with the charge sheet, in that the particulars of the charge where the offence is alleged to have taken place on 7th August 2013 whereas PW1, the complainant testified that the offence took place on 7.8.2013 and when recalled she stated it took place on 6.8.2013. That PW3 on being pressed further stated the offence took place on 6.8.2013 which was contradictory to the charge sheet. I have perused the proceedings and the evidence of PW1, PW2 and PW3 and indeed as submitted by the appellant the evidence is in variance with the charge sheet and which the trial magistrate noted before the closure of the prosecution case.

20. Section 214 of the Criminal Procedure Code provides:

> ***“214. (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***
>
> ***Provided that –***
>
> ***(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***
>
> ***(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the***

accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."

In view of the above variance between the charge and evidence related to time at which the alleged offence was committed, failure to have the charge ammended was not material and the appellant was not prejudiced by such failure. **Section 214 (2) of C.P.C**. clearly states variance between the charge and the evidence adduced in support of it with respect to the time of which the alleged offence was committed is not material and charge need not be amended for that variance if it was proved that the proceedings were infact instituted within the time. (if any) limited by law for the institution thereof.

21. The appellant contends his constitutional right to a fair hearing were violated as he was not supplied with the witnesses statements.

Article 50 (2) (c) and (j) provides thus:

"Section 50 (2) (c)) and (j) of the Constitution of Kenya 2010 provides:-

(2) Every accused person has the right to a fair trial, which includes the right—

(c) to have adequate time and facilities to prepare a defence;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"

Fair trial envisages a situation in which the prosecution is supposed to disclose the evidence it intends to rely on in the trial against the accused. It is a Constitutional right for the accused to be supplied with witnesses statements and documentary exhibits whether the accused requests for them or not as of right and under no conditions. In these case **of Patrick Gilbert Cholmondley V R CRA No. 116 of 2007**, the appellate Court held:

"***There is imposed upon the prosecution the duty of disclosing to the defence all the evidence to be used against them, whether asked for or not, to enable the court to arrive to a fair conclusion of the case, being a right flowing from the accused constitutional right to a fair trial." The judges further noted that the trial in a criminal proceeding is in the nature of a contest and when one of the contestants fails to disclose the evidence to be used before hand, the contest can neither be equal nor fair."***

None compliance with **Article 50 (2) (c) and (j) of the Constitution** is not only unconstitutional but suppression of justice. It is a source of silent injustice to accused person and should at all costs be rejected at this error of our new and progressive constitution.

22. I have perused the court's proceedings and I have noted at the time PW1was giving evidence the appellant had not been supplied with the copy of the charge sheet and witnesses statements. Similarly when PW2 gave evidence the Appellant had not been supplied with the witnesses statements. That even after PW2 had given evidence and had been cross-examined, the court ordered the appellant to be supplied with witnesses statement at his own cost. The proceedings were conducted without the appellant being supplied with the witnesses statement. That when the court ordered the Appellant to be supplied with witnesses statement it ordered he be supplied at his own costs. This in my view amounted to unfair hearing and was a blatant infringement of the appellant's Constitutional rights to a fair hearing. I herein, however find that as the appellant's request for PW1 and PW2 to be recalled for cross-examination was allowed and he was able to cross-examine them fully, armed with a copy of the charge sheet and

witnesses statements, the earlier breach was atoned and he had a fair trial at the end however courts should not allow such situation to arise.

23. The appellant gave a defence of alibi. In a case where a defence of alibi is raised the accused person does not assume the burden of proof the defence of alibi. In criminal cases the burden of proof is squarely on the prosecution except in the cases where the Section creating the offences specifically places some evidential burden on the accused to establish a fact or rebut a presumption or prove a defence of a particular kind. It is the duty of the prosecution to disprove of alibi defence as an accused puts forward unless it appears to the court that the alibi cannot be sustained or was raised at a time which did not give room for the prosecution to check it out and disapprove it (see the case of **Njuki and 2 Others V R (2002) 1 KLR 771)**.

24. I have evaluated the Appellant's defence of alibi and I have perused the proceedings at the trial Court, and I have found that the prosecution did not disapprove of any of the Appellant's alibi defence. The trial court did not consider the defence of alibi by the Appellant. The prosecution witnesses evidence did not dislodge the appellant's defence of alibi as no single witness produced evidence placing the appellant at the incident of robbery nor was there any forensic evidence or otherwise putting the appellant at the scene of the crime. The trial court was in error in failing to consider the defence of alibi and in dismissing the Appellant's defence of alibi.

25. The State Counsel concedes this appeal and having considered all the grounds raised by the Appellant, I find that the State Counsel properly conceded the appeal.

26. **Having come to the conclusion that I have, I find that the prosecution failed to prove the charges of robbery with violence and the charges of rape against the appellant to the required standard of proof beyond any reasonable doubt. In the circumstances I find the appeal has merits and should be allowed. Accordingly, the appeal is allowed, conviction quashed and sentences meted against the appellant set aside. The Appellant is set at liberty forthwith, unless otherwise lawfully held.**

DATED AND SIGNED AT SIAYA THIS 17TH DAY OF NOVEMBER, 2016.

J.A. MAKAU

JUDGE

Delivered This 17th Day of November, 2016.

In Open Court in the Presence of:

Appellant present in person.

M/s. M. Odumba for State.

C.A.1. K. Odhiambo

2. L. Atika

J. A. MAKAU

JUDGE