REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 32 OF 2015

FORMERLY NAKURU CRIMINAL APPEAL NO. 256 OF 2014

(BEING APPEAL FROM ORIGINAL CONVICTION AND SENTENCE IN THE CHIEF MAGISTRATE'S COURT AT NAROK CRIMINAL CASE NO. 739 OF 2012 BY A. K. ITHUKU - SPM)

JUSTUS KIPCHUMBA……...APPELLANT

-VERSUS-

REPUBLIC……...RESPONDENT

J U D G M E N T

1. On the night of 30/6/2012 **Hellen Ngaiwatei** the complainant herein was asleep with her three (3) children in her house at Ololunga Nkareta Village in Narok. At 11.00pm someone knocked at her door prompting her to inquire who the night visitor was. No answer came, instead an object, likely a stone, was thrown in through the bedroom window prompting her to flee to the sitting room and to raise an alarm.

2. Afterwards she sensed that the intruder entered the house through the bedroom window. The Complainant opened the door and ran out of the house. Behind her in hot pursuit was the intruder who soon caught up with her and wrestled her to the ground, throwing himself of top of her. He held the Complainant by the neck attempting to strangle her.

3. In the moonlight the complainant recognised her assailant as one "Metto". In the ensuring struggle the man bit her fingers on the right hand and scratched her eyes. Neighbours were drawn to the home by the commotion soon arrived. Taking the Complainant's phone **Nokia 6080**, the assailant fled the scene.

4. Good samaritans gave her first aid. The matter was reported to police on the next day and the Complainant escorted to hospital. Members of the public arrested "Metto" about 2 days later and he was charged initially with Attempted Rape Contrary to section 4 of the Sexual Offences Act. The charge was later substituted with the offence of Robbery Contrary to Section 296 (2) of the Penal Code. Particulars state that on the 1st day of July 2012 at Ololunga Nkareta Village in Narok South District within Rift Valley province, he robbed Hellen Ngaiwatei of her mobile phone make Nokia 6080 valued at time of Kshs 6,000/= and immediately after the time of such robbery wounded the said Hellen Ngaiwatei.

5. The foregoing is the gist of the prosecution case against the Appellant at the trial. The Appellant when called upon to make a defence stated in an unsworn statement that the Complainant was his lover for 3 years, even though she was married. That she made false allegations of robbery against

the Appellant after her husband discovered the affair. He denied the offence.

6. The trial magistrate after analyzing me evidence was satisfied that the prosecution had proved the charge against the Appellant. He was convicted and sentenced to death on 30/9/2014. The Appellant now appeals to this court against both conviction. His original petition listed 12 grounds of appeal.

7. These grounds were abandoned on the day of the hearing and substituted with five amended grounds as follows:-

   "1) That trial magistrate erred in law and fact not finding the adduced evidence did not support the charge with regard to decided or deceived s/s 214 CPC.

   2) The trial magistrate erred in law and fat not fading that the variance thereof between the adduced evidence and the charge goes t the root of the charge and hence incurable contrary to section 382 of CPC Cap 75.

   3) The trial magistrate erred in law and fact not discharging its duty adequately to find that on 1st July 2012 Appellant known to complainant as neighbor and have an affair could not both be mistaken did not met each other to commit the crime and find case not proved beyond doubt Contrary to Section 3 (4) evidence Act Cap 80.

   4)That trial magistrate erred in law and fact not finding on 30/06/2012, crime was committed, same not in the charge and was at night and could act on belief that Appellant being a bad character could easily implicate him.

   5) That trial court failed in law and in fact not to inquire to be informed whether PC Ihaji, PC Langat and PC Mercy were gathered." (sic)

8. As can be seen, it is not very easy to discern the actual purport of the grounds due to the poor language. Be that as it may, from the written submissions, the Appellant complained that there was a variance between the charge and the evidence as to the date of the offence. He faulted the identification evidence of the Complainant, asserting that it was unreliable: that it was night time, that the Complainant did not say how bright the moon was; that she was under distress and did not state the distance between her and the Appellant or what he wore. He therefore contends that since he had a bad reputation as per complainant's evidence, he was framed up.

9. The last ground relates to the competence of the police prosecutors who handled the case. This issue can be disposed off right away. The Appellant clearly relied on the provisions of Section 85 of the Criminal Procedure Code before the amendment introduced thereto by the Statute Law Miscellaneous Amendment Act of 2007. Section 85 of the Criminal Procedure Code presently reads:

   "Power to appoint Public Prosecutors

   The Director of Public Prosecutions, by notice in Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.

1. **The Director of Public Prosecutions, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, to be a public prosecutor for purposes of any case.**
2. **Every public prosecutor shall be subject to the express directions of the Director of Public Prosecutions."**

   Nothing therefore turns on the final ground.

10. On his part, the Director of Public Prosecutions through Ms Waweru opposed the appeal and reiterated the prosecution evidence, pointing out that the Complainant recognised the Appellant during the struggle between them and that her evidence was corroborated by the first witness on the scene, **Julius Ngaiwatei** (PW3) who heard the complainant call the Appellant by name and saw him at the scene of struggle.

11. On a first appeal, the Appellant is entitled to have the court review the evidence afresh and draw its own conclusion (**Okeno -Vs- Republic [1972] EA 32**). The court will not ordinarily interfere with findings of facts made by the trial court that are based on the credibility of witnesses, unless the same are plainly wrong and no tribunal could have come to such findings. (**Francis Otieno Oyier –Vs- Republic Criminal Appeal No. 158 of 1984 2 (UR**)).

12. There was no dispute that the Complainant, her immediate family and the Appellant were well known to each other prior to the material date. The Complainant stated that she started screaming on sensing that an intruder was at her bedroom window and ran out of the house when the intruder entered through the window. It was about 11.00pm, a clear challenge to identification. The Complainant maintained that there was moon light by which she saw the Appellant and recognised him and called him by name. The latter evidence is corroborated by PW3 who upon arrival met the Appellant lying atop the Complainant calling his name – "Metto" -, the alias used by the local people in reference to the Appellant.

13. PW3, it is admitted by the Appellant was a friend of his. The trial magistrate considered this evidence at some length and observed

> **"I have relied on the case of Regina –versus- Turnbull (1973) WLR 445 where the court set out conditions to be satisfied before proper identification can be made. At the time of the attack it was dark. The complainant says there was moonlight although it was not stated how long the incident took, one can infer from the evidence that it took a while. PW3 was called on phone and rushed to the scene. He still found the attacker on top of the complainant. The attack involved strangling and scratching and biting of fingers by the accused. This was a very close range. Being on top of the complainant the faces were almost touching ……The accused was somebody well known to the complainant……"**

14. The learned trial magistrate cannot be faulted in his analysis of that evidence. However his further statement that this was a case of identification by one witness is inaccurate as PW3 clearly stated that he too recognised the Appellant, and heard the Complainant calling his name. The witness who did not have a chance of see the Appellant was Kisianani Ngaiwatei (PW4). He arrived after PW3, the Appellant having fled. However this witness said that the complainant told her on his arrival that "Metto" was the attacker who had also taken her phone. The witnesses saw fresh injuries on the Complainant which were confirmed through medical evidence.

15. The Appellant did not suggest to any of these witnesses (PW2, 3, and 4) that the Complainant was his lover and framed her because the relationship was discovered by her husband. Even if the court were to believe that the Complainant could have framed the Appellant, an explanation would be required for injuries she sustained on the material night. Did she inflict them on herself? That is as unlikely as the possibility that she raised an alarm to summon neighbours, thereby risking the exposure of her paramour at her home. The Appellant's suggestion to this effect cannot be believed.

16. In **Anjononi –Vs- Republic [1980] KLR 59** the Court of Appeal while considering the weight to be attached to evidence of recognition stated:-

> **"……recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because, it depends upon the personal knowledge of the assailants in some form or other."**

17. In this case, the Complainant was well known to the Appellant, not only physically but also by his alias – Metto. Having engaged him in the struggle that took place outside her home under moonlight and, at close quarters, she had every opportunity to identify him inspite of her distressed state. Her evidence is well corroborated by an eye witness PW3 who came to the scene while the Appellant was still lying on top of the Complainant, before fleeing. We agree with the finding of the trial magistrate that in the circumstances described by the witnesses there was no possibility of error.

18. On the complaint that there was variance between the charge and evidence, nothing turns on that matter. The attack occurred at 11.00pm on 30/6/2012 and the incident may well have ended at or past midnight. Section 214 (2) of the Criminal Procedure Code states that:

> **"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."**

19. There was no need for altering the charge as anticipated under Section 214 (1) of the Criminal Procedure Code. The Appellant took part in his trial and clearly understood the nature of the charges facing him and was not in any way prejudiced (See Section 382 of the Criminal Procedure Code). We can find no merit in this appeal and will dismiss it in its entirety. In the result we uphold both the conviction and sentence.

Delivered and signed at Naivasha, this 6th day of November, 2015.

In the presence of:-

State Counsel : Kibelion/Ms Waweru

For the Appellant : N/A

C/C : Steven

Appellant : Present

M. A. ODERO **C. MEOLI**

JUDGE **JUDGE**