REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 136 OF 2011

(From the original conviction and sentence in criminal case no. 122 of 2011 the Chief Magistrate's Court at Malindi before Hon. D. W. Nyambu – SPM)

K C N .....…..…….…….…… APPELLANT

VERSUS

REPUBLIC.....….....RESPONDENT

JUDGMENT

1. The appellant, K C N was charged with two offences before the Lower Court. In the first count he was charged with Robbery with violence contrary to Section 296(2) of the Penal Code. The particulars stated that on 27th day of August, 2010 at ***[Particulars withheld]*** Village of Odha Location in Tana Delta District within the Coast Province while armed with an offensive weapon namely a panga, he robbed K T M of Kshs. 1000/- and at or immediately before or immediately after the time of such robbery wounded the said K T M.

2. The second count was Rape contrary to Section 3(1) (a) of the Sexual offences Act, in that on the 27th day of August, 2010 at [Particulars withheld] Village of Odha Location in Tana Delta District within the Coast Province he willingly and unlawfully caused the penetration of his male genital organ into the female genital organ of K T M without her consent. The Appellant denied the charges.

3. Following a full trial before the learned Principal Magistrate, he was convicted on both counts. A death sentence was meted out in respect of Count 1 while the sentence on count 2 was correctly held in abeyance. Aggrieved with the decision of the Lower Court, the appellant lodged the present appeal citing four grounds as listed in the Amended grounds of Appeal. The gist of the grounds and the written submissions is that the conviction was based on inadequate evidence. In particular the appellant attacks the identification evidence relied upon by the prosecution at the trial.

4. The appeal was opposed by the state through Mr. Nyongesa reiterating the prosecution evidence at the trial. As the first appellate court we are mandated to re-evaluate afresh the evidence of the trial and to draw our own inferences. (See **Njoroge v R Cr. Appeal No. 149 of 1986**) In so doing the court must bear in mind that the trial court had the advantage of seeing and hearing the witnesses testify. Secondly, the appellate court will not interfere with the trial court's finding based on credibility of witnesses unless it is clear that no reasonable tribunal could make such a finding or that the finding is clearly wrong. (See **R V Oyier (1985) KLR 353**).

5. The prosecution case was as follows. The complainant herein, K T B (PW1) was aged 70 years at the time of the offence and lived at [Particulars withheld] village, Odha, Garsen where she was a farmer and charcoal dealer. She was grandmother to the appellant and mother to the appellant's mother S N (PW3). The three resided in the same homestead in separate houses. On the 27th august, 2010 the appellant beat and chased away PW3 from the homestead accusing her of committing "adultery" (the husband was deceased). In the evening the complainant was at her house when the appellant visited. He exchanged pleasantries with her and informed PW1 that he had returned a bicycle she had borrowed from one R N to ferry charcoal. The appellant had some rat poison which he asked PW1 to keep for him. He then rose and left for his house.

6. The complainant entered her house and eventually retired to bed for the night. She had hardly slept when she felt some hand grappling at her throat, she saw and recognized the appellant as the attacker and asked why he wanted to kill her. He replied that it was not "K" (appellant) but the bicycle owner (N). At that moment the complainant also identified his voice. The appellant demanded that she hands over Kshs, 40,000/- to him. The complainant had no such money but she removed one shs. 1000/- note from her lesso and gave it to the appellant who proceeded to arm himself with a panga before dragging the complainant from the house into a bush. In the bush the appellant inflicted cuts on the complainant before raping and sodomising her, leaving her for dead. She however managed to crawl back to the homestead and a fellow villager who spotted her on the next morning called police who took her to hospital where she was admitted for several months.

7. Meanwhile PW3 returned home on the morning of 28th August, 2010 only to be met by a hostile appellant who chased her away saying that her mother (PW1) had been killed or assaulted by N. Upon reaching the hospital where PW1 was admitted, PW3 was told by the former that it was the appellant who had robbed and sexually assaulted her. Initially N was arrested by a group of people including the appellant and handed over to police at Odha Police Station. He was charged before the Principal Magistrate's court. During the trial of N, the court upon hearing PW1's evidence ordered the arrest and prosecution of the appellant.

8. The appellant gave a sworn defence statement. He said he resides at [Particulars withheld] Village and was a farmer. He testified that he was alerted by neighbours concerning the attack on his grandmother on the next morning. He went to the home and found PW1. She allegedly said the bicycle man (N) had attacked her. After taking the complainant to hospital, he organised the arrest of N, the bicycle owner. The suspect was identified by the complainant while in hospital. He said that due to an existing grudge between himself, his siblings on one hand, and their mother (PW3) on the other, PW3 convinced PW1 to "frame" him for the offence. When he attended court to testify against N, he was arrested instead. He claimed that he had chased PW3 away from her home because she was involved in an open adulterous relationship with her lover. The appellant's wife K C gave evidence on the events of the morning following the attack and asserted that PW1 said she was attacked by "the person who owns a bicycle".

9. In her analysis of the evidence the learned trial magistrate had no difficulty finding on the basis of the medical evidence before her that the complainant was assaulted including sexually. Secondly, that she was also robbed on the material night. The sticking point was the question of the identity of the culprit as the offence occurred at night and the prosecution relied on the identification by a single eye witness. She correctly proceeded to warn herself as required (see **Maitanyi v R [1986] KLR 198**) in the following words:

> ***"I have warned myself as I am bound to ….of convicting an accused based on the evidence of a sole identification witness. It falls upon me to be absolutely certain that the conditions for identification were free from any possibility of error or mistake."***

10. We have evaluated the trial court's treatment of the visual identification leading to the conclusion that the "conditions for identification were perfect". With respect, we cannot agree with that finding. The evidence of the complainant does not contain any description of the prevailing

conditions or state whether there was any light, its nature, source, proximity etc. Recently the Court of Appeal restated the applicable principle in such cases in the case of **Joseph Muchangi Nyaga & Anor v R (2013) eKLR** by stating:

> ***"Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently."***

The complainant's evidence on visual identification clearly fails this test and the learned trial magistrate fell into error by failing to apply this test despite having correctly warned herself.

11. What of the evidence on voice identification? The learned trial magistrate accepted the complainant's evidence that she was able to identify the appellant's voice during the attack. She also rightly questioned why a robber would introduce himself to his victim during an attack. In the case of **Choge v R [1985] KLR 1** the court stated that:

> ***"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the accused's voice,t hat the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it."***

12. It is not in dispute that the appellant and the complainant were living in one homestead or at least in close proximity and relating frequently as grandson and grandmother, respectively. Pw1 was categorical that the appellant visited her early in the evening of the attack and conversed with her about N's bicycle. He gave her rat poison to keep before leaving the house. Later the complainant retired to bed and had almost fallen asleep when the intruder came in and attempted to strangle her.

13. The appellant questioned the complainant at length on these aspects during her testimony. The cross-examination yielded the following answers:

> **"You are K C. You demanded for Kshs, 40,000/= from me. You spoke to me in Kiswahili saying "nipe pesa, nipe pesa..." You are Giriama by tribe...not Sanya...I also told police the truth. I do not know why you were not arrested by police. You were arrested in court (during N's terminated trial) after I testified. I would not tell you that I had recognized you because I was afraid that you would kill me. Another boy had been arrested. He was released after I testified. He is not the one who committed the offence. You did. You framed R N for this offence. If the name Robert appears in my statement its because I was semi conscious. I am sure its not Robert who violated me. You did."**

14. Regarding voice recognition the Court of Appeal held in **Karani v R [1985] KLR 290 at page 293**

> ***"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and he recognised it and that there were conditions in existence favoring safe identification."***

15. The complainant spelt out some of the exact words that were part of her conversation with the appellant - "nipe pesa, nipe pesa" - and the language he spoke. While it is true she feared being strangled, she obliged, got up and removed her Shs. 1000/- from the leso to give to the appellant. Thereafter the appellant dragged her to the bush where he slashed her and assaulted her sexually.

There was no suggestion of the presence of a second man but the complainant said the appellant retorted when she called out his name, that it was "the owner of the bicycle" i.e N.

16. It is telling that within hours the appellant organised for some neighbours to arrest N, who was handed over to police at Odha Police Station. He also told his mother (PW3) upon her return home that morning that the complainant had been killed/assaulted. That N had assaulted the complainant. It is not clear how the appellant gathered this as the complainant was rescued that morning in a bad state – and was semi conscious or in a critical state according to PW3, the clinical officer (PW2) who admitted her on 28th August, 2010 and the investigator Pc. Vincent Ndumba (PW4).

17. The appellant stated in his defence that when he learned of the attack on the grandmother, he proceeded to her home and found PW1 unconscious but asserted that she told him that "the man who owns a bicycle had cut her up". It is remarkable that the police officer PW4 fell into the obvious ruse and escorted N upon his arrest to the hospital where the complainant lay semi conscious and purported to have her identify N. Clearly, the originator of the suspicion against N was the appellant, right from the moment of the commission of the offence. The answer regarding his motive, I think lies in the fact that this N was apparently his mother's lover. His mother (PW3) testified that N's "bicycle was used to fetch water and ferry charcoal it was making my home work easy....R N is not my relative."

18. In addition to casting suspicion on N by mentioning his name to the complainant on the night of the attack, the appellant had him arrested by members of the public. His conduct when PW3 returned home on the next morning is anything but strange. Having slapped and chased his mother (PW3) away on the previous night, the appellant should at least have mellowed sufficiently by the next morning upon discovering his badly injured grandmother. Instead he was hostile and chased PW3 away saying her mother was dead and that N was responsible. The accused's proven conduct is in my opinion strong corroboration of the voice identification evidence by the complainant.

19. In her judgment the learned trial magistrate stated:

> **"The accused is the one who caused the arrest of R N. The accused was arrested after the complainant testified before me in a case against R N. (Pw4) explained that the complainant was semi conscious at the time R N was arrested."**

She found him guilty of the robbery and rape and convicted him. The trial magistrate was perfectly entitled to dismiss the appellant's defence as a sham. The appellant's defence only dwelt on the events of the morning after the attack. In that defence and even during cross-examination of PW1 and PW3 the appellant consistently disclosed his animus towards the two women and stated that the mother (PW3) had embarrassed him and his siblings by committing "adultery in open", with N and that he took it upon himself to evict her from the home to go live with her boyfriend. Thus she decided to 'frame' him for the attack on PW1.

20. While there was clearly no love lost between mother and son in this case, it is inconceivable that PW3 organised for a horrid attack on PW1 for the sole purpose of 'fixing' the appellant. Besides, she was not even in the home on the material night having been evicted by the appellant. To our mind, the appellant had the stronger necessary motive and opportunity to carry out the vicious attack on the complainant and to attempt to frame N for it. N, on the face of it had no plausible cause whatever to harm the complainant who was apparently complicitous of his affair with PW1.

21. On our part we are satisfied, having reviewed the evidence by the prosecution that the appellant was properly convicted on the two counts. The evidence displaced his defence. His appeal has no merit and we dismiss it accordingly. The conviction is confirmed and sentence upheld.

Delivered and signed at Malindi this **12th** day of **March, 2014.**

C. W. Meoli

JUDGE

O. Angote

JUDGE