



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.64 OF 2013

W C B.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(An Appeal arising out of the judgment in Kimilili SRM CR.C.No.1103 of 2011 delivered by G.R Sagero SRM on 24th April 2013)

J U D G M E N T

1. W C B (The Appellant) was on 5th October 2012 convicted of two counts of Robbery with Violence contrary to Section 296(2) of the Penal Code and one count of Gang rape contrary to Section 10 of The Sexual Offences Act. The Appellant was after conviction placed on Probation for 2 years in respect to each Count and the period was to run concurrently. That sentence was however on 24th April 2013 revised to a prison term of 2 years on each of the counts with the sentences running consecutively. This Appeal is against both conviction and the latter sentences.
2. It had been alleged that on 02.11.2011 at 11.00p.m at [particulars withheld], while armed with offensive weapons namely: pangas and knives he and E W K and C W W jointly while armed with offensive weapons namely pangas and knives robbed P S K one mobile phone make Vodafone valued at kshs.1,000/= and radio sonitech valued at kshs400/= and cash 2000/= and the said robbery threatened to use actual violence. On a 2nd count, they were charged that on the same night they violently robbed N N E and stole from her one mobile phone Nokia 1200 valued at Kshs.2,500/= and cash of kshs.350/=. In a third count, the Appellant was charged alongside one E W K of jointly intentionally and unlawfully causing their penis to penetrate the vagina of N N E without her consent.
3. P S K (PW1) and R S N (PW2) are man and wife. They spent the night of 2nd November 2011 in their house at [particulars withheld]. It is a one roomed house. At about 11.00 pm while in their sleep, they were rudely awoken by the forceful entry of three people into their house. The three gained entry by breaking the door to the house. One of them had a spotlight.
4. One of the entrants attacked PW1 with a panga as they demanded for money. PW1 directed them to his long trouser which had ksh.2000/=. The assailants ordered PW1 and PW2 to lie down and to remain quiet. They searched the house, collected two sacks of maize and a bicycle. At the same time, one of them escorted PW2 and raped her. PW1 managed to escape from the house and started to scream on distress. Members of the public responded to the distress call but the assailants escaped. As they made away, they left behind the maize and bicycle but took a mobile, radio and ksh.2000/=. PW1 and PW2 stated that using the spotlight they were able to see and recognize that E K, a neighbour was one of assailants.
5. In a second incident of the night, some four people forced their way into the house of N N (PW 3). The witness put that time at about 10.30pm. Each of them had spotlights and one was armed

- with a panga. One of them took her mobile. She was then raped in turns by two of them. She told Court that they were the Appellant and E K.
6. On the following morning at about 7.00 pm, members of the public attacked and beat up the Appellant on allegations that he was involved in crimes committed on PW1, PW2 and PW3. APC Isaac Mwendwa (PW 4) intervened and saved the suspect. He also arrested him. That upon his arrest he mentioned E K as a co-prepetrator. This led to his arrest. It then fell to Francis Mungai (PW 5) to investigate the Complaints.
 7. As part of those investigations PW5 issued P3 Forms to the 3 Complainants. Zakayo Kwendo (PW 6), a Clinical officer stationed at Kakamega Provincial Hospital, examined the three. On PW1, he found him with a cut wound to the skull and bruises to his left hand. PW2 had a cut wound on the left side of her eye. She also had bruises on her genital. As for PW3 she had pain on her head, and a loose tooth on the lower and upper jaws. The genital was normal but there was evidence of friction, suggestive of possible rape as given in the history.
 8. In his defence, the Appellant denied the charges but did not say what he did or where he was on 2nd November 2011. His evidence concentrated on the events of 3rd November 2011. That on that day, after packing some eggs he left his house at about 11.00am for the market. At the gate, he was stopped by some 3 boys who told him that he was wanted at the Administration Police Camp, Kamukuywa. He accompanied them to the camp where he was arrested and taken to Kimilili Police Post. He was later charged for the offences for which he was later convicted.
 9. In the Memorandum of Appeal which is the basis of this Appeal, the Appellant raises 6 grounds. As we understand them ,the grounds can be said to be:-

1. That the Complainants did not describe the Appellants to the Police when they first made their report.
2. That there was no evidence of use of any weapon whether offensive or dangerous.
3. That the Prosecution evidence was insufficient, speculative, and fabricated.

In his oral address to Court, the Appellant pointed out that he was 16 years old when he was first charged and so he should have been treated as a minor during the trial.

- 10.The State Counsel emphasized that throughout the trial, the Court dealt with the Appellant as a minor. It was also submitted by the State Counsel that the Appellant was positively identified by PW1, PW2 and PW3. That the Appellant was a neighbour. The State Counsel argued that the Prosecution evidence was overwhelming, corroborative, coherent and sufficient.
- 11.We have already given the abridged version of the evidence we must re-evaluate in detail with a view to returning our own conclusion. That is what we are obliged to do as a first Appellant Court but keeping in mind that we did not have the advantage of seeing and hearing the witnesses testify first hand and for that reason give some allowance. (**Republic –vs- Okeno [1932]E.A. 32**).
- 12.Count 1 is in respect to the robbery at the home of PW1 and PW2. The only direct evidence in respect to this incident came from PW1 and PW2. On evidence of recognition PW1 testified.

“I recognized one using the spotlight by head (sic). I saw him at his face. The spotlight – the light was sufficient to see and recognize. I saw one E K, he was known to me, he is a neighbour, he was a schoolmate.”

E K was a co-accused to the Appellant. The latter testified that it was E who led them to arrest Accused 3 and the Appellant. We have carefully looked at the record of the Trial Court and are unable to find any evidence whatsoever of whether and if so how PW1 was able to identify or recognize the Appellant.

- 13.As for the evidence of PW1’s wife who was present during the robbery, her evidence was even more equivocal on the non-identification of the Appellant. In her evidence, she repeatedly said that she recognized E (the 1st Accused) as one of the robbers and the person who raped her. In respect to the Appellant she said,

“I do not know Accused 2 and Accused 3 I do not know how Accused 2 and 3 were

arrested in connection with this case.”

Accused 2 is the Appellant. Under cross-examination from her, she answered.

“I do not know you.”

In the circumstances there could not have been a basis for the Learned Trial Court to return a conviction of guilty against the Appellant in respect to Count 1.

14. Our attention now turns to the evidence in respect to the robbery and rape of PW3. These are the offences in Counts 2 and 3 respectively. On what PW3 says on recognition of the Appellant, we had to look at the handwritten proceedings as the typed proceedings were not intelligible on this part.

The witness states:

“ A2, I saw him as he was trying to undress me lay (sic) use a spotlight hence saw him and recognized him. He used to walk with Accused 1 to my place of work.

I only saw recognized the two A1 and A2. I did not see or recognize A3.”

On the following day, the witness went to the AP Camp where the Appellant was already under arrest. The Appellant had been arrested by members of the public and then re-arrested by the AP. It is not clear on what basis the members of the public arrested the Appellant as none of them testified. As to the PW4, it seems that he re- arrested the Appellant because he was already under civilian arrest.

15. PW4 then says this about the identification of the Appellant,

“W C and E W were identified by the Complainants.”

W Cis the Appellant. For some reason, no evidence was led as to how the Complainants identified the Appellant to PW4. Even the Investigating officer (PW 5) does not say whether PW3 identified the Appellant to the Police.

16. We think that the Police overlooked or left out an important aspect of the investigation. Although PW3 says that she had prior to the incident seen the Appellant, she did not know him by name. There is no evidence that she described the Appellant to the Police in any other manner. For this reason, it was necessary, in our view, for an identification parade to be conducted. The incident at the house of PW3 happened at night. The witness says that she used the spotlight to identify and recognize the Appellant. But then there was no evidence that she described the Appellant to the members of the public who arrested him. In the circumstances, an identification parade would have helped remove any doubt of mistaken identity. We think and hold that the evidence on record was not sufficient to found a safe conviction.

17. The upshot is that the conviction against the Appellant is hereby quashed and sentence set aside.

F. TUIYOTT

A. MABEYA

J U D G E

J U D G E

COUNTERSIGNED, DATED AND DELIVERED AT BUNGOMA THIS 12TH DAY OF NOVEMBER 2014

IN THE PRESENCE OF:

GILBERT WANYON’GO.....COURT CLERK

IN PERSON.....FOR APPELLANT

MR KAMAU.....FOR STATE