



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**(CORAM: G. K. KIMONDO & C. W. GITHUA JJ)**

**CONSOLIDATED CRIMINAL APPEALS 22 & 24 OF 2012**

**MOHAMED SALIM.....1<sup>ST</sup> APPELLANT**

**YUSUF KIBOR.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 1562 of 2010***

***Republic vs Mohamed Salim and another in the Senior Resident Magistrate's Court at Eldoret***

***by D. K. Kemei, Senior Resident Magistrate dated 1<sup>st</sup> February 2012.)***

**JUDGMENT**

1. The appellants were convicted on two counts of robbery with violence contrary to section 296 (2) of the Penal Code. They were sentenced to death. They were also convicted on further counts of gang rape contrary to section 10 of the Sexual Offences Act, No. 3 of 2006. The appellants had also been charged with alternative counts of committing indecent acts with an adult contrary to section 11(6) of the Act. The appellants were sentenced to serve fifteen years imprisonment on each count of the gang rape. As they had already been sentenced to death for the robbery, the latter sentences were held in abeyance.

2. The particulars of the charge of robbery with violence against the first complainant read as follows-

*“On the night of 27<sup>th</sup> February 2010 in Uasin-Gishu District within the Rift Valley Province, jointly with others not before court, while armed with offensive weapons namely daggers, robbed M B W of a mobile phone make Vodafone valued at Kshs. 2,000 and at or immediately after the time of such robbery threatened to use actual violence to the said M B W.”*

3. After the robbery, the appellants raped the complainant in turns. The particulars of the charges were that on the same night and place they intentionally and unlawfully caused their penises to penetrate the vagina of the complainant. They also faced the alternative counts of committing acts of indecency with the complainant. The particulars were that on the same night and place, they touched the vagina of the complainant.

4. The appellants were charged on the respective second counts that on the same night, in the same location, armed with the same offensive weapons, and with others not before the court, they robbed Vincent Luswa Wanyama of cash, a pair of sports shoes, socks and a mobile phone all valued at Kshs 7,195 and at or immediately after the time of such robbery threatened to use actual violence on him.

5. As we pointed out, the appellants were found guilty on all the counts. The appellants are aggrieved by their conviction and sentences. They lodged separate appeals. As they had been charged and tried together in the lower court, we consolidated the appeals. The 1<sup>st</sup> appellant sought to rely on amended grounds. As no leave had been obtained under section 350 of the Criminal Procedure Code, we declined to admit them.

6. The primary grounds in the appeals can be condensed into seven. First, that identification of the appellants was inconclusive and based on a single identifying witness; secondly, that the identification parade conducted by the police was irregular; thirdly, that the conviction of the second appellant was erroneously founded on information from his co-accused; fourthly, that the investigations in the case were shoddy; fifthly, that the medical evidence did not support the charge of rape; six, that the dagger produced at the trial was recovered in dubious circumstances. On that point, the 1<sup>st</sup> appellant's position is that the exhibits were planted on him. The seventh ground is that the evidence submitted was contradictory and unreliable. In a nutshell, the appellants' case is that the charge was not proved beyond reasonable doubt.

7. At the hearing of the appeals, the appellants relied largely on their hand-written submissions. One issue raised by the 2<sup>nd</sup> appellant was that he was denied the opportunity to mount his defence. He thus contends that there was non-compliance with section 211 of the Criminal Procedure Code. The submissions by both appellants dealt at great length on contradictions in the evidence on identification (particularly between PW1, PW2, PW3 and PW8), recovery of the weapons, the veracity of the medical evidence (including blood sampling) or the procedures adopted at the identification parade. The appellants also submitted that at some point, PW1 was stood down by the prosecution; and that when she resumed her testimony, it was clear she had been coached.

8. The State contests the appeal. The position of the State is that all the key ingredients of the offences were proved beyond reasonable doubt. In particular, the State submitted that there was positive identification of appellants; that the dagger was recovered from a thicket into which the 1<sup>st</sup> appellant led PW3 and PW8; that the 2<sup>nd</sup> appellant offered not to lead any defence to the charges. The State submitted that failure to call a witness from the Government Chemist was not fatal in view of the clear evidence of the complainant. In any case there is the evidence of PW6, the Government Analyst that corroborates the evidence of PW1. Furthermore, the State submitted that the 1<sup>st</sup> appellant was caught after a chase by PW3 and PW4. The complainant identified him as the assailant. The 1<sup>st</sup> appellant then led the police to the 2<sup>nd</sup> appellant's house and to where the weapon had been hidden in the thicket. In a synopsis, the State submitted that the appeals lacked merit and should be dismissed.

9. This is a first appeal to the High Court. We are required to re-evaluate all the evidence on record and to draw our own conclusions. In doing so, we have been careful because we have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.

10. PW1 was the first complainant. She was a second year student at [Particulars withheld] Institute. On the material night, at about 9.00 pm, she was on her way to the hostel near the institute. She was in the company of a male colleague. As they were crossing the railway line, three men accosted them and stole her mobile phone. The men were armed with a knife. They threatened to kill her if she raised an alarm. They dragged her to a thicket. They asked her to remove her clothes. She pleaded with them that she was on her monthly period; but they went ahead to rape her in turns. They then insisted that she accompanies them. One of them was pressing the knife to her abdomen and saying they had killed many people. As they approached a business premises known as *Poa Place*, they saw three people approaching. Her assailants realized that the approaching persons were policemen. The thugs took off. She narrated her ordeal to the police. Two of the policemen, PW3 and PW4 gave chase. One policeman remained behind

with the complainant. The two policemen (PW3 and PW4) caught up with the 1<sup>st</sup> appellant. When they returned with the 1<sup>st</sup> appellant, the complainant identified him as one of her assailants. She said there was electric light from the gate of the institute and *Poa Place*. The 1<sup>st</sup> appellant was wearing a black jacket. She identified him from his physical features, voice and the jacket. She said the 1<sup>st</sup> appellant was the first to rape her.

11. That narrative was confirmed in all material respects by PW2. PW2 was the male colleague accompanying the complainant when they were accosted by the thugs. The thugs ordered them to sit down, ransacked his pockets and stole his phone, cash of Kshs 135, sports shoes and socks. The 1<sup>st</sup> appellant had pointed a dagger at his ribs. They then separated him from PW1 and took PW1 into a different direction. The police officers (PW3 and PW4) confirmed the incident and in particular, that they gave chase to the 1<sup>st</sup> appellant and arrested him hiding in a thicket. He was wearing a black leather jacket (exhibit 8). When they returned to the scene with the suspect he was identified by PW1 as her attacker and the one who raped her first. The next day, the 1<sup>st</sup> appellant took PW8, the investigating officer to the thicket where they recovered the dagger. On the same day, the 1<sup>st</sup> appellant led the police officer (PW8) to the house of the 2<sup>nd</sup> appellant. The police recovered a bloodstained jacket and red shorts or underpants.

12. The pink underpants of the complainant on the one hand, and the jackets and red shorts worn by the appellants on the other hand were analyzed by PW6, the Government Analyst. He confirmed that the blood samples on the complainant's bikers or underpants (who was menstruating) and on the dark brown jacket and shorts of the appellant matched. The complainant's blood group was type A and was found on her bikers and the 1<sup>st</sup> appellant's jacket and 2<sup>nd</sup> appellant's jacket and red shorts. The analyst formed the opinion that the blood stains on the complainant's bikers and appellants' clothing *originated* from the complainant. The P3 form, exhibit 7 produced by PW7 confirmed the complainant's genitalia had lacerations; her hymen was torn and tender. Her urinalysis revealed red blood cells. PW7 confirmed that the complainant was on her menstrual cycle.

13. Evidence of recognition is generally more reliable than identification of a stranger, but mistakes may sometimes be made by witnesses. In Wamunga v Republic [1989] KLR 424, the Court of Appeal held as follows-

*“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”*

14. In Republic v Turnbull & others [1976] 3 All ER 549, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. In Kiarie v Republic [1984] KLR 739, the Court of Appeal had this to say-

*“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.”*

15. See also Joseph Ngumbao Nzaro v. Republic [1991] 2 KAR 212, Richard Gathecha Kinyuru & another v Republic Nairobi High Court Criminal Appeal 290 of 2009 [2012] eKLR. Obwana & Others v Uganda [2009] 2 EA 333.

16. From that evidence, we find that the appellants were positively identified. For starters, they had spent nearly *three* hours with the first complainant. They had robbed her, raped her in turns and were in the process of taking her to an unknown place when the police officers surfaced. There was adequate electric lighting from the gates of the [*Particulars withheld*] Institute, *Poa Place* (where a public function was ongoing) and another business described as *KCC*. The 1<sup>st</sup> appellant in particular was arrested *immediately* after the incident and *identified* by PW1 from his physical features and the jacket he was wearing. He was

also identified *positively* by PW2 as one of the three attackers. The 1<sup>st</sup> appellant then led the police to the 2<sup>nd</sup> appellant's house where the incriminating bloodstained jacket and shorts were found. It is also instructive that upon his examination, and as detailed in his P3 form, numerous pus cells were detected.

17. In addition, there was an identification parade conducted by police Inspector Henry Njeru (PW5). The parade was done on 5<sup>th</sup> March 2010. It had nine members. The complainant was alone in an office, curtains drawn and door shut. She did not come into contact with the suspect before the parade. The suspect initially stood at position number 4. The complainant identified the 2<sup>nd</sup> appellant by touching him. The 2<sup>nd</sup> appellant then changed clothes and took a new position 8. The complainant still picked him out. The 2<sup>nd</sup> appellant elected not to have a friend or solicitor at the parade. He consented to the parade and signed the parade form (exhibit 10). We are unable to impeach the parade as urged by the 2<sup>nd</sup> appellant. We find instead that the parade was conducted in a fair manner and according to the Judges' Rules. See Joseph Mukoya v Republic Eldoret High Court Criminal appeals 6 & 9 of 2010 [2014] eKLR. The identification of the 2<sup>nd</sup> appellant was thus *not* worthless dock identification as urged in this appeal.

18. There were minor discrepancies between the evidence of PW1, PW2, PW3 and PW8 on the sequence of events or colours of the jackets and undergarments. But the witnesses were all *consistent* on the identification of the appellants, recovery of the weapon and the circumstances under which the 2<sup>nd</sup> appellant was arrested. PW1 was a steadfast witness even under cross-examination. We are unable to say she was coached in her evidence. In Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993, the Court of Appeal held:-

*“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”*

19. We have also reached the conclusion that the appellants committed the offence of robbery with violence. The key ingredients for a robbery with violence are detailed in section 296(2) of the Penal Code. It provides as follows-

*“if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”.*

20. In this case the complainants were attacked by the two appellants who were in the company of a third person. They threatened to kill the complainants (PW1 and PW2). They had an offensive weapon, namely a dagger. The dagger was recovered from the thicket the 1<sup>st</sup> appellant led the police to. The appellants robbed the two complainants of money and mobile phones particularized in the charge sheet. They raped PW1 in turns. We thus find that at, during or immediately after the robbery, the appellants and their accomplices threatened to use violence or used violence against the complainants.

21. We have then considered the defence in the trial court. The 1<sup>st</sup> appellant was positively identified and arrested near the *locus in quo*. He led the police to his accomplice, the 2<sup>nd</sup> appellant. As we have stated, all the ingredients of robbery with violence were present. When juxtaposed against the clear evidence of the prosecution, the defence of the 1<sup>st</sup> appellant was feeble and unbelievable. The 1<sup>st</sup> appellant had claimed that he was standing outside *Poa Place* waiting for his *matatu* conductor when police arrived on a motor bike and arrested him.

22. The 2<sup>nd</sup> appellant did not tender any defence. We have examined page 64 of the record. The learned trial Magistrate explained to the appellants the procedure under section 211 of the Criminal Procedure Code. The 1<sup>st</sup> appellant elected to give unsworn testimony. The 2<sup>nd</sup> appellant said as follows- *“I don't want to say anything.”* The first appellant then tendered his unsworn testimony. The court again enquired

of the 2<sup>nd</sup> appellant whether he was ready. He answered-“*I am not ready to defend myself.*” The court then recorded as follows-

“*Accused persons have had from 7/10/2011 to prepare defence and refusal by accused to defend self can only be construed to mean he has no defence to offer*”

23. We agree with the trial court. On 7<sup>th</sup> October 2011, the trial court found that both appellants had a case to answer. On 24<sup>th</sup> November 2011 when the appellants were being asked to present their defence, a period of more than *one month* had passed. The 2<sup>nd</sup> appellant was not seeking an adjournment or explaining to the court why he was not ready. On the date of the ruling under section 210 of the Code, the 2<sup>nd</sup> appellant said he had authored a letter to the Chief Magistrate asking that the case be transferred to another court. The letter was neither *addressed* to the trial court nor was it an application to the trial Magistrate to *recuse*. Fundamentally, on the date of their defence, there was no indication that the Chief Magistrate had acted on the 2<sup>nd</sup> appellant’s letter.

24. The 2<sup>nd</sup> appellant had earlier, on 22<sup>nd</sup> July 2011, applied to recall PW1, PW2 and PW3. The trial court considered the matter and found that the 2<sup>nd</sup> appellant had cross-examined those witnesses “extensively” and that witnesses could not keep on being examined until the appellant was completely “satisfied”. The application was declined. It is thus not true as urged in this appeal that the court did *not* consider the application for recall. But the dismissal of that application was not a ground to refuse to tender a defence. The truth of the matter is that the 2<sup>nd</sup> appellant was offered a full opportunity to defend himself; he elected not to do so. We are unable to pin any blame on the trial court. The 2<sup>nd</sup> appellant was the author of his own misfortune. Granted those circumstances, we are unable to say there was *non-compliance* with section 211 of the Criminal procedure Code; or, that the fundamental rights of the 2<sup>nd</sup> appellant were *breached*.

25. From the evidence we set out earlier at length, the 1<sup>st</sup> appellant was the first to rape the complainant. From the report of the Government Analyst, the biker or underpants worn by complainant had seminal stains of blood groups A and O secretors and a few degenerated spermatozoa. A jacket (exhibit 1) and red shorts or pants worn by the 2<sup>nd</sup> appellant, Yusuf Kibor, and the jacket worn by the 1<sup>st</sup> appellant, Mohamed Salim, had human bloodstains of group A. The complainant’s blood group was A. She was on her menstrual cycle. The conclusion of the Government Analyst (PW6) was that “*the complainant had taken part in sexual activity with groups A and O secretors. The bloodstains on the short, biker and jacket could have originated from the complainant.*”

26. When we add that to the evidence of PW7, the clinical officer, we are left in no doubt that the appellants had sexual activity with the complainant. The sexual activity was *not* consensual. The P3 form, exhibit 7, produced by PW7 confirmed the complainant’s genitalia had lacerations; her hymen was torn and tender. Her urinalysis revealed red blood cells. The offence of gang rape as defined in section 10 of the Sexual Offences Act was thus well established. The sentences of fifteen years handed down were the *minimum* sentences.

27. We have also reached the conclusion that all the ingredients of the offence of robbery with violence were *proved* beyond reasonable doubt. The *mandatory* sentence is death. There is no discretion. See Joseph Njuguna Mwaura and others v Republic Nairobi, Court of Appeal, Criminal Appeal 5 of 2008 [2013] eKLR. The learned trial Magistrate was thus correct in holding the fifteen years’ imprisonment terms for the other offences in *abeyance*.

28. The upshot is that the consolidated appeals lack merit. They are hereby dismissed.

It is so ordered.

**DATED and SIGNED at ELDORET** this 4<sup>th</sup> day of December 2014

**GEORGE KANYI KIMONDO**

**C.W. GITHUA**

**JUDGE**

**JUDGE**

**Judgment read in open court in the presence of-**

Both appellants (in person).

Ms. Karanja for the State.

Mr. P. Ekitela Court clerk.