



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 292 OF 2007

DICKSON LUMBASIO..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. 5153'B' of 2005 of the Chief Magistrate's Court at Kibera by Ms Mwangi – Senior Principal Magistrate)

J U D G M E N T

The appellant, **DICKSON LUMBASIO NDOMBA**, was convicted on one count of robbery with violence **contrary to section 296(2) of the Penal Code**; and one count of Rape **contrary to section 140 of the Penal Code**.

For the offence of robbery with violence, he was sentenced to death; whilst for the offence of rape he was sentenced to 15 years imprisonment.

In his appeal, the appellant has raised six issues, which can be summarized as follows;

- (i) *There was no positive identification.***
- (ii) *The court records do not show the language in which the witnesses testified.***
- (iii) *The appellant was first brought to court more than 14 days after his arrest.***
- (iv) *The defence was rejected for no good reason.***
- (v) *The charge sheet was incurably defective.***
- (vi) *Essential witnesses did not testify***

It was the appellant's contention that the complainant failed to give to the police, the description of the persons who robbed him. He pointed out that the robbery lasted for less than 5 minutes.

Therefore, that would imply that the robbery could even have lasted a few seconds.

Secondly, the robbers attacked the complainant with a stone or stones, causing him to suffer facial injuries. As the complainant became unconscious, the appellant submitted that he could not have positively identified his assailants.

If anything, the appellant believes that he was only arrested because his name is DICKSON, whilst the complainant had heard one of the assailants being called by the name DICK.

As regards the offence of rape, the appellant submitted that the complainant confused herself about the identities of her assailant. She appeared to suggest that the appellant was one of the persons who got to the scene of robbery first, but she later said that the appellant was one of the 2 people who joined the first group of 3 people.

As regards the language used in court, the appellant submitted that the record of the proceedings does not reveal the language which he allegedly told the trial court, that he understood.

Meanwhile, the defect in the charge sheet is the fact that the appellant was charged

“Jointly with others not before the court.”

It was the submission of the appellant that the victim of rape cannot be raped jointly by two or more persons, at the same time.

The appellant also submitted that the complainant's friend, who allegedly led **PW 3** to the person named DICKSON, should have testified. He would then have explained how he identified the said Dickson as the person who had raped the complainant.

In answer to the appeal, Ms Maina, Learned state counsel, submitted that the evidence tendered by the prosecution was sufficient to sustain the conviction and sentence.

The respondent submitted that the security lights together with the lights from the vehicle which **PW 1** had just parked, were sufficient to enable the complainant identify his assailants positively.

The fact of positive identification was said to have been fortified by the ability of **PW 1** and **PW 2** to pick out the appellant from the Identification Parades.

As regards the friend of **PW 3**, the respondent pointed out that he did not lead to the arrest of another person; but that the said friend was the appellant himself. He simply gave himself away by going to offer sympathy to **PW 3**, about an incident which **PW 3** had not told anybody else about, by that time.

When the friend was arrested by the police, he was unable to explain how he got to know about the incident that he had gone to offer sympathy for.

The defence was described by the respondent as an after-thought because the appellant had not raised it during the cross-examination of the prosecution witnesses. Therefore, the respondent believes that the trial court was right to have rejected the said defence.

Finally, the respondent submitted that the failure by the trial court to indicate, on the record, the language in which each witness testified did not prejudice the appellant. This court was told that the appellant must have understood the language used at his trial, because he did extensively cross-examine all the witnesses who testified for the prosecution.

As far as the respondent was concerned, if the appellant had not understood the language, he would have complained to the trial court. Having re-evaluated the evidence on record, we note that **PW 1** was robbed of a mobile phone and at least KShs.20,000/-.

The robbery took place just after **PW 1** had driven through the gate, and onto his compound. The time was about 11.15p.m. However, **PW 1** testified that there was sufficient lighting from the car's headlights, as well as from the security lighting.

The 4 men, who robbed him, also beat him up until **PW 1** was unconscious. As a consequence of the beatings, **PW 1** was admitted in hospital for about one week.

Thereafter, **PW 1** reported the incident at the police station.

About a week after **PW 1** reported the incident to the police, he picked out the appellant from the Identification parade.

During cross-examination, **PW 1** explained that he had seen the appellant clearly before the robbers beat him up to unconsciousness. He also said that even though the robbery lasted less than 5 minutes, the appellant looked a bit different. Therefore, **PW 1** identified the appellant by his physical and facial appearance.

PW 1 saw the appellant when the appellant hit the windscreen with a stone, which then hit **PW 1**. In other words, **PW 1** described the role which the appellant played at the outset of the robbery.

PW 2, J.A.B., was the complainant on the offence of rape. She is the wife to **PW 3, B.A.B.**

The couple testified that they were ambushed by 3 men when they had stepped out from their house at about 12.00 midnight. Their reason for getting out of their house at that hour was to collect water from the tap beside the house.

PW 2 and **PW 3** were ordered to lie down. Thereafter, the robbers went away with **PW 2**.

When they reached the forest, they raped her near a tree which they called "Kituo". Loosely translated, "Kituo" means "Operational base".

After the 3 men raped **PW 2**, they were joined by 2 other men. One of the 2 men also raped **PW 2**.

At some point, the men argued over the money which they had robbed from a person who had a car. During the arguments, the robbers

used the names “Dick”, “Karis” and “Njiru”

They were arguing because one of them said that they had only got KShs.6,000/- from their victim; but the others said that the money was KShs.30,000/-.

When **PW 2** reported to the police, she told them that she could identify her assailants. She described their physique and their dressing.

She had been with them between 1.00a.m. and 2.00a.m; and there was light from a full moon.

Later, **PW 2** picked out the appellant at an Identification Parade. She said that he was in the group of 2 men, who joined the original group of 3 men. She said that the appellant tried to force her to have oral sex when **PW 2** refused; the appellant raped her from the back.

During cross-examination, **PW 2** said that although there are many people called by the name Dickson, she did not choose the appellant from the parade because of his name. **PW 2** identified the appellant because she had seen him and because of what he had done to her. Therefore, **PW 2** testified that she would never forget what the appellant did to her.

Meanwhile, on the day after the robbery, a friend of **PW 3** went to empathize with him. That was on the evening of 15th June 2005.

As **PW 3** had not yet informed anybody else about the rape incident, save for the police and the Nairobi Women’s Hospital, he was surprised that his friend, D, knew about the incident.

PW 3 threatened to have the friend reported to the police if that friend did not show him the person called Dickson, who had told the friend about the rape incident. Thereafter, **PW 3’s** friend provided information which enabled **PW 3** to trace the appellant. The appellant was then arrested.

PW 4 conducted Identification Parades at which **PW 1** and **PW 2** picked out the appellant.

PW 5 was the arresting officer. He testified that **PW 3** informed him that he (**PW 3**) had found the person who had raped his wife (**PW 2**). **PW 5** proceeded to the CUC Club, where **PW 3** said the suspect would be found, and arrested the appellant.

PW 6 examined **PW 1** and **PW 2**. He found that **PW 2** did not have any injuries and that her private parts were normal. She had a normal discharge.

PW 6 testified that **PW 1** had 3 healed marks on the left fore-head and bruises under both eyes. **PW 1** was examined by the doctor (**PW 6**) some 24 days after being robbed.

On her part **PW 2** was examined more than one month after she had been raped.

PW 6 also examined the appellant and found that his private parts were normal.

Having re-evaluated the evidence on record, we note that the appellant was arrested on 22nd June 2005. His arrest was prompted by **PW 3**, who had got information from his close friend.

Although **PW 3** did not name the close friend, **PW 5** appeared to suggest that the said friend of **PW 3** was D.

In effect, the appellant was not arrested because **PW 2** had told the police that she could identify him. He was arrested because **PW 3** led the police to the club where the appellant was.

At no time did **PW 3** say that he had identified the appellant during the incident. The only reason why **PW 3** led the police to arrest the appellant was that **PW 3** believed his close friend, who had been allegedly told by the appellant regarding the rape of **PW 2**.

Had that been the only evidence regarding the manner in which the appellant was identified, we would have said that the same was unsafe. However, after the appellant was arrested, **PW 4** mounted an Identification Parade.

PW4 testified that the appellant helped him in choosing the members of the Identification Parade. Thereafter, both **PW 1** and **PW 2** picked out the appellant from the parades.

As neither of the 2 identifying witnesses were present at the time the appellant was arrested, and because there was no complaint about the manner in which the parades were mounted, we find that the appellant was positively identified by **PW 1** and **PW 2**.

But how is it possible that the appellant was identified by the complainants, when he denied being involved in the offences? Was this not a question of mistaken identity?

Was not the appellant simply framed by his former workmate, D, who had vowed to get him sacked?

Having given due consideration to the evidence tendered, we find that the appellant offered absolutely no explanation or excuse as to why **PW 1** had identified him as one of the persons who robbed him.

By introducing the name of D in his defence, the appellant was explaining why **PW 3** led to his arrest. To our minds, the appellant was intimating that **PW 3's** close friend was named D, and that the said D used to work with the appellant until D was sacked.

There is nothing to suggest the reasons why D had vowed to do everything to get the appellant sacked.

In the circumstances, the appellant's defence did not cast any doubts on the evidence put forward by the prosecution.

In relation to the offence of rape, the charge sheet states that the appellant;

DICKSON LUMBASIO NDUMBA: On the 15th day of June 2005 off Ngina Road in Riruta within the Nairobi Area Province, jointly with others not before court unlawfully, had carnal knowledge of J.A.B.

At no time was **PW 2** raped by more than one person at the same time. To that extent, the evidence did not support the charge.

In **Murunga Vs Republic [2008] KLR 333 at page 335**, the Court of Appeal held as follows;

“The particulars of that charge were that on 2nd day of March, 2000, the appellant and one John Ndegwa Waswa who was the second accused before the magistrate ‘jointly with another not before the Court had carnal knowledge of FGW without her consent’.

This court has repeatedly said that two or three men or whatever may be their number cannot jointly at the same time rape one woman. Each of the men commits the act of rape individually and is followed by the next man. We are unable to appreciate how two or three men can at the same time ‘jointly’ enter or try to enter her genital organ. The act is committed by each of them alone and if there be two, three or four of them, each must be charged on a separate count of rape. We accordingly allow the appeal as regards the charge of rape, quash the conviction recorded thereon and set aside the sentence...”

On the strength of that authority, we too, do hereby quash the conviction on the offence of rape, and set aside the sentence of 15 years imprisonment.

In any event, even if we had upheld that conviction, we would have ordered that the sentence be held in abeyance. A person convicted for a capital offence and another lesser offence, should only be sentenced to suffer death as by law prescribed.

The Court of Appeal has reminded us all that a person can only be executed once; thereafter, he can neither be imprisoned nor be executed again.

In effect, the trial court erred by sentencing the appellant to 15 years imprisonment after he had been sentenced to death.

Meanwhile, because the appellant was arrested on 22nd of June 2005, he ought to have been taken to court by the 6th of July 2005.

However, he was not taken to court until 12th July 2005. In effect, he was taken to court 5 days late.

The prosecution failed to explain the reasons for the delay in taking the appellant to court.

Notwithstanding that delay, the trial and conviction of the appellant were not vitiated simply because he was taken to court late.

In **JULIUS KAMAU MBUGUA V REPUBLIC, CRIMINAL APPEAL NO. 50 of 2008**, the Court of Appeal made it crystal clear that a pre-charge violation of a person's liberty is not ordinarily linked to the trial process itself. The court went on to say;

“The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to civil remedy-money compensation as stipulated in Section 72(b). That is the appropriate remedy which the appellant should have sought in a different forum.”

Accordingly, the delay in taking the appellant to court is not a basis for quashing his conviction for the offence of capital robbery or for any other conviction.

On the issue of the language used before the trial court, there is no indication whatsoever regarding the language in which the prosecution witnesses testified. There is also no record about the language in which the appellant testified.

In the circumstances, although the appellant appears to have cross-examined the prosecution witnesses, this court cannot be sure as to whether or not the trial was conducted in the language which the appellant understood well.

It is important for the trial courts to indicate the language in which the plea is taken, and also the language in which each witness testified. By so doing, it will be possible for any appellate court or anybody else to ascertain if the witnesses either testified in the language understood by the accused, or if the evidence was translated into the language understood by the accused.

In this case, the appellant did not assert that the proceedings were conducted in a language which he did not understand. We cannot therefore presume that the appellant did not understand the proceedings before the trial court. If anything, the depth to which he went during his process of cross-examining the prosecution witnesses, leads us to believe that the proceedings were conducted in a language understood by the appellant.

In conclusion, we find that the conviction for the offence of robbery with violence (on Count 1) was well-founded. It is therefore upheld. We also uphold the sentence in respect of that conviction.

Dated, Signed and Delivered at Nairobi, this 1st day of March, 2012

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FRED A. OCHIENG
JUDGE

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L.A. ACHODE
JUDGE