



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Criminal Appeal 26 of 2008

SUMAT OLE SAKAIAPPELLANT
VERSUS
REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 3797 of 2007 in the Chief Magistrate's Court at Kibera – Mr. Maundu (SRM) on 25/1/2008)

JUDGMENT

1. Sumat Ole Sakai, the appellant herein was tried and convicted for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in count I, and for the offence of rape contrary to **Section 11(6)** of the **Sexual Offences Act No. 3 of 2006** in count II, by the learned Senior Resident Magistrate at Kibera law courts.

2. The chief facts were that on the 9th day of June 2007, at Lenana Village in Karen within Nairobi Province, jointly with others not before court, while armed with offensive weapons namely, Pistol, Panga and rungu robbed J.N.M. of one television set make Sony one DVD make Sumsung, Total Meko gas cylinder, 3 pairs of shoes, 2 single shoes, one mobile phone make Samsung, cash kshs.15,750/= and assorted clothes all valued at Kshs.61,550/= and at or immediately before or immediately after the time of such robbery – threatened to use personal violence to the said J.N.M.

3. Upon conviction he was sentenced to suffer death in count I, while in count II the sentence was suspended. Being aggrieved by the conviction and sentence, the appellant filed an appeal whose grounds we have compressed as follows:

(i) The visual identification was not free from error and mistake as it was made under difficult circumstances, was not tested by a properly conducted identification parade and came from a single identifying witness.

(ii) There was no nexus between his arrest and the offence or the recovered stolen items.

(iii) Proper investigations were not carried out and the evidence was contradictory.

(iv) The defence was rejected for reasons far from the truth.

4. Learned state counsel Miss Maina, opposing the appeal on behalf of the state, submitted that there was sufficient evidence to support both conviction and sentence.

5. We have analysed and re-evaluated the evidence on record afresh bearing in mind the decision in **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR**. In the said case the court of Appeal held that:

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

6. On identification, the complainant testified that on 9th June 2007 at about 2 a.m. she woke up suddenly from sleep to find torch light shining in her bedroom. Five intruders had gained entry into her house. Three of the intruders began to carry house hold goods out of her two roomed house, while two others raped her in turns. The intruders left after Mr. Maina, the next door neighbour banged on the wall and ordered them to leave. They left with all the complainants’ property listed in the charge sheet. She informed her neighbours in the plot of the robbery.

7. At about 5.30 a.m. one neighbour named Esther Ngima, informed her to go to Railways bus stage where another of her neighbours, Jane Koki, had recovered some of her stolen property. She went to Railways bus stage and found the neighbour Jane Koki and some of her property. She also found a man in the custody of a plain clothes Police officer and identified him immediately as one of the robbers and specifically, one of those who raped her.

8. The appellant was convicted on the evidence of a single identifying witness. The Court of Appeal in **Karanja & Another vs. Republic [2004] 2 KLR pg 140**, held *inter alia* that:

“1. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.

2. Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification”.

We therefore bear in mind the said warning, when re-evaluating the evidence on record.

9. According to the complainant, the intruders switched on the light in the living room but used a big torch in the bedroom where she was. The light of the torch held by one of the intruders as the appellant raped her, helped her to see and identify the appellant. It was her testimony that her house was made of iron sheet walls and that the other intruder shone the torch around the room and the light reflected off the walls enabling her to identify the appellant. He would also direct the torch light at the complainant and appellant at times. It was her testimony that the appellant brought his face very close to her to tell her quietly, that he was going to rape her. He did not want the other intruders to hear him. She testified that his face was also close when he lay on her and ejaculated on her thighs.

10. The appellant was arrested with the help of **PW2**, Jane Koki who told the court that she and the complainant resided in the same plot, and that the complainant informed her and other neighbours of her ordeal at the hands of robbers on the night of 9/6/2007. About 2 hours later at 4.45 a.m. she boarded a

matatu to go to town to ply her wares at the market. A few minutes later the matatu stopped at the next bus stage and picked up four passengers. She knew one of those passengers as a bus driver. Of the other three, one was covered in a “maasai shuka” that looked like one she usually saw in the complainant’s house. The complainant had informed them that among the stolen items was her maasai shuka.

11. The man who was covered in the maasai shuka was the appellant herein. According to her testimony the appellant also had some luggage in a manila bag and he put it down next to her and sat down behind her. One man also carried a T.V. wrapped in a white bed sheet. **PW2** touched the luggage next to her and found that it was a meko gas cooker.

12. She also remembered that the complainant had told them that the intruders spoke with a maasai accent, and observing this appellant she saw that his ears were pierced in the maasai style. She suspected that he was a maasai. She asked the matatu driver to drive into the police station but he refused. When they got to Haile Sellasie Avenue she began to shout to attract attention. The driver stopped at Railway station bus stage and she immediately ran for help, to a plain clothes police officer identified to her by the driver.

13. The Police Officer helped her to arrest the appellant as the other two passengers escaped. **PW2** had also seen in the custody of one of the other two men, a mobile phone that she identified as belonging to the complainant because of the picture of two birds carried on the screen.

14. She called neighbours to inform the complainant to go to Railway bus stage, the complainant did arrive in a short while and she identified both the recovered goods, and the appellant, who was in the custody of the plain clothes police officer.

15. The evidence of **PW2** as to the manner of arrest of the appellant was lent support by that of **PW3** the arresting officer. Concerning the complainant, **PW3** had this to state:

“When she saw the accused she identified him at once. She started screaming saying that the accused person raped her”.

In this case we find that the complainant was certain as to her assailant and the part he had played in the robbery. It is not the police who arrested the appellant and took him to where the complainant was. The complainant screamed spontaneously upon seeing the appellant, saying that he had raped her. An identification parade would therefore have served no purpose.

16. We cautioned ourselves in line with **Ogeto v Republic [2004] 2KLR** in which the Court of Appeal held *inter alia* that:

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken”.

As the learned state counsel Miss Maina submitted, it was the evidence of **PW1** that she identified the appellant by his physical appearance and that he had not covered his face during the robbery.

17. On the ground that there was no nexus between the appellant and the recovered goods, we noted that **PW2** who saw the appellant clad in the complainant’s maasai shuka, did not lose sight of him when he alighted from the matatu at Railway bus stage and discarded the maasai shuka as he attempted to walk away. She testified that there were just a few passengers in the matatu and she therefore had ample opportunity to see and identify these appellant.

18. **PW2** did no attempt to make the case stronger by insisting that the appellant was in possession of all the goods when he and others boarded the matatu. She did testify that his companions had goods which were put in the boot of the matatu. The complainant later identified these items as her property.

19. We therefore find that the evidence on record has proved beyond reasonable doubt, that the appellant was among the persons that robbed the complainant of her household goods using violence on 9th June 2007 at 2.00 a.m, and that some of the stolen property was recovered in the appellant's possession three hours later.

20. The prosecution evidence in this case provided all the ingredients that need to be present for a court to invoke the doctrine of recent possession. In Arum v Rep [2006] 1KLR pg.233, the Court of Appeal set out conditions that must exist before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case. These include proof, that the property in question was found with the suspect, the property was positively identified by the complainant, that it was stolen from the complainant and that it was stole recently.

21. On the question as to whether or not the prosecution's case had been proved against the appellant to the required standard. The ingredients of **Section 296(2)** of the **Penal Code** under which the Appellant was charged are set out 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 ...”

In this case there were five assailants, and they were armed with a pistol, a panga and a rungu. They used the pistol to threaten the complainant, and “other personal violence” used against the complainant included rape. The complainant's testimony that she was raped during the robbery was corroborated by **PW4**, Dr. Ketra Muhombe.

22. **PW6**, the Government Chemist testified that the semen stain found on the complainant's under pants submitted for analysis came from a blood group B secreta. The analysis of blood and saliva from the appellant confirmed that he belonged to blood group B secreta. In the opinion of the Government chemist the appellant could have been the person the complainant had a sexual encounter with, whose semen was found on her under garments. The court did not find him guilty of rape because there was no penetration. He however attempted to rape her and it is not clear whether the ejaculation on her thighs was due to premature ejaculation or was his preferred mode of pleasure.

23. This being a criminal case the burden of proving the appellant's guilt rested at all times with the prosecution. The appellant was under no obligation to explain himself or to prove his innocence. The evidence on record however is overwhelming and his defence, which merely stated that he was not found with anything at the time of arrest, and that he was innocent did not do much to discount the prosecution evidence.

24. After careful re-evaluation of the evidence on record, we find that the prosecution proved its case against the appellant beyond reasonable doubt, on both counts. For the foregoing reasons we find that this appeal is unmeritorious. We dismiss it and confirm both conviction and sentence.

SIGNED DATED and **DELIVERED** in open court this 3rd day of **July**. 2012.

F. A. OCHIENG
JUDGE

L. A. ACHODE
JUDGE