



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 321 of 2008

DANIEL KIPKOECH KIGEN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No.204 of 2006 of the Chief Magistrate's Court at Nakuru – G. MUTEMBEI, CM)

JUDGMENT

Daniel Kipkoech Kigen was charged with the following offences:-

1. **Robbery with violence contrary to Section 296(2) of the Penal Code;**
2. **Rape contrary to Section 140 of the Penal Code;**
3. **Failing to register contrary to Section 14(1) (a) of the Registration of Persons Act Cap 107 Laws of Kenya;**
4. **Being in possession of an imitation of a firearm contrary to Section 21(1)(2) of the Firearms Act Cap 114 Laws of Kenya.**

The appellant was convicted on counts 1, 2 and 4 but acquitted on count 3. He was sentenced to death on count 1 and the sentences on other two counts were left in abeyance. The appellant being aggrieved by the conviction and sentence, filed this appeal based on the following summarized grounds:-

- (1) **That there was not sufficient evidence upon which to base a conviction;**
- (2) **That the appellant's right to a fair trial was violated;**
- (3) **That the trial magistrate failed to comply with Section 169(1) of the Criminal Procedure Code;**
- (4) **That the magistrate erred by failing to pronounce the sentence in open court.**

The appellant's prayer is that the conviction be quashed and sentence be set aside. The appellant also filed submissions.

Briefly, the facts of this case are that on 14/1/2006, about 11.00 p.m., PW1, MGW was in his house at Kiamunyi with his wife, CW (PW2). They were watching television. PW1 dozed off. PW2 heard a knock at the door, the person knocking claimed to be Gitau. Upon opening, PW2 found that it was not Gitau but a person who was armed with a pistol. The person threatened her with death if she screamed. The intruder hit the lamp, pushed PW2 into the house and made her lie down. He started assaulting her with a panga. He also assaulted PW1, tied him up and beat him as he demanded money and mobile phones. PW2 gave him Kshs.200/-. He placed a table on PW1. Both PW1 and PW2 identified the robber as Daniel Koech who was a neighbour. The robber covered PW2's face, took her outside to a banana plantation where he raped her. Meanwhile, PW1 was helped to free himself by his son who cut the ropes and on going out, the person ran away. The complainants alerted their neighbours, reported to PW3, Cpl Lawrence Njue, who was manning a road block at Kiamunyi on the same night. PW1 and PW2 led the police to a house where they found the appellant with two boys he claimed to be his brothers. In the house, they found two toy pistols and a panga which both PW1 and PW2 identified as the panga that the appellant used to assault them and the pistol he threatened them with. He was arrested. On the next day, the appellant took PW3 back to his house where PW3 recovered the complainant's phone (PEX.3). The complainants were treated and issued with P3 forms which were produced by Dr. Daniel Wainaina of Nakuru Provincial General Hospital.

After the prosecution closed its case, the appellant was called upon to enter his defence. After several mentions, the appellant offered to give sworn evidence and call one witness. Later, he asked for a retrial of the case and asked to cross examine witnesses but the court refused to grant his request and concluded that the appellant did not want to give his defence and the court went ahead to write the judgment.

Mr. Omari, learned State Counsel, opposed the appeal for reasons that PW1 and PW2 identified the appellant who was well known to them as a neighbour; they led to his arrest the same night; that in the appellant's house were recovered toy pistols, a panga and the complainant's mobile phone; that the appellant led to the recovery of the complainant's mobile phone; he urged the court to invoke **Section 382** of the **Criminal Procedure Code** to rectify the omission by the trial court.

We have considered the evidence on record, the grounds of appeal and submissions. As respects the question of whether the court conducted the proceedings in a language that the accused understood, we have seen the record. When the plea was taken on 23/11/06, the charge was read to the appellant in English and Kiswahili. On 26/3/07, before the substituted charge was read to the appellant, he informed the court that he understood Kiswahili. On 15/1/08, when PW1 and PW2 testified, he spoke in Kiswahili and we do note that they were cross-examined substantively. In fact after PW2 testified, the appellant recalled PW1 for further cross examination. The record shows that PW2 and PW4 testified in English. If the appellant did not understand the language of the court, he could not have been able to cross-examine the witnesses. We find that the appellant understood Kiswahili, the language of the court and the challenge to the language of the court is an afterthought.

After the appellant was placed on his defence, the matter was adjourned severally before the appellant said that he wanted a retrial and to recall the witnesses. He had already recalled PW1 for further cross-examination. The appellant did not give the court the reason why he wanted a re-trial or a recalling of the witnesses. We find that the appellant's right to fair trial was not violated because of the refusal by the court to re-open the case. The appellant had been given a chance to cross examine and recall PW1. He also cross examined the other witnesses. The manner in which the appellant conducted himself by having the matter adjourned for different reasons was evident that he did not want the matter to proceed and be concluded speedily. The court observed that the appellant did not wish to enter his defence. The appellant did not indicate why he wanted the witnesses recalled. The court had even given the appellant a chance to enter his defence and a production order was also issued for his witness whom he said was in remand but instead, he changed his mind and wanted the case re-opened. It seems that Mr. Mutembei was no longer working at the station and had to go back to complete his cases. It seems the appellant was using delaying tactics to avoid the matter being heard to its conclusion.

Dr. Kamau examined both PW1 and PW2 and found both of them to have been injured during the robbery. PW1 sustained a loose lower incisor tooth, bruised eyelid, lower lip and chest, while PW2 was

sexually assaulted. The evidence of PW4 who produced the P3 forms goes to corroborate PW1 and PW2's evidence that violence was visited on PW1 and PW2. Both PW1 and PW2 told the court that the robber was armed with a pistol and panga. We are satisfied that an offence of robbery with violence was committed against PW1 and PW2.

Although the incident occurred at night, both PW1 and PW2 identified the appellant as the person who robbed them. PW2 opened the door for the appellant. The television was on and both PW1 and PW2 told the court they were able to identify the appellant as a neighbour from the light from the television. On the same night, soon after the robbery, PW1 and PW2 led the police to the appellant's house in the neighbourhood where two toy pistols and a panga were recovered and later a mobile which PW1 identified as his was recovered from the same house. Both PW1 and PW2 had seen the intruder with a pistol and panga. Both PW1 and PW2 were in close proximity with the appellant, who was not covered or disguised in any way and he is a person they knew as living in the neighbourhood. The trial magistrate was satisfied that the appellant was properly identified and we too come to the same conclusion.

Further to the above, the recovery of two toy pistols, panga and the complainant's mobile in the appellant's house does corroborate PW1 and PW2's evidence that it is the appellant who had just robbed them before his arrest. Nobody else was found in the house where the appellant was arrested save for his younger siblings. The appellant made desperate attempts to exonerate himself by alleging that he was framed. First, he alleged that he worked with PW1 and that he owed him money and that PW1 had threatened him. If that was so, then it means that PW1 knew him very well. The appellant forgetting the earlier allegation went on to allege that he had been mistaken for his identical twin brother. He did not name the said brother. PW1 and PW2 were not aware of any twin brother. We, like the trial court, believe PW1 and PW2 and we had no reason to arrive at a different finding that the time appellant was found in possession of 2 toy pistols, panga and PW1's mobile phone soon after the robbery.

According to PW1 and PW2, they were attacked by one person, the appellant. He is the same person who took PW2 out of the house and raped her after he had tied up PW1 at gun point. PW3 who visited the scene recovered PW1's headscarf, table cloth which had covered PW2's face and the complainant's torn under pants. We are satisfied that the appellant being the only intruder in PW1 and PW2's house that night, is the same person who raped PW2.

Did the trial court comply with **Section 169** of the **Criminal Procedure Code**? In our view, the trial magistrate complied with the said section, when he set out the points for determination, the reasons for the decision and the decision. He also signed and dated the judgment. The appellant did not specify what the trial court failed to do.

The applicant took issue with the fact that another magistrate other than Mr. Mutembei who heard the case and wrote the judgment pronounced the sentence. The said judgment was read by J. Onyiego (PM). He also sentenced the accused pursuant to **Section 169** of the **Criminal Procedure Code**. The judgment can be written by the presiding magistrate under his direction. The judgment had already been written and signed by Mr. Mutembei. Mr. Onyiego only read it. There is nothing irregular about Mr. Onyiego reading the judgment written and signed by Mr. Mutembei.

As the first appellate court, we are required to evaluate and analyse the evidence afresh which we have done. We come to the conclusion as did the trial court, that the appellant was properly identified and is the one who robbed PW1 and PW2. We find no good ground to warrant us to interfere with the conviction, and we hereby dismiss the appeal on conviction.

The only question outstanding in our minds is the death sentence imposed upon the appellant. As no executions have been carried out in Kenya for some years, we doubt that any will take place and we set aside the death sentence and substitute it with life imprisonment.

DATED and DELIVERED this 6th day of November, 2012.

R.P.V. WENDOH

JUDGE

ANYARA EMUKULE

JUDGE

PRESENT:

The appellant in person
Mr. Marete for the State
Kennedy – Court Clerk