



REPUBLIC OF KENYA



KENYA LAW
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**Juma alias Elijah v Republic (Criminal Appeal 178 of 2019)
[2024] KECA 1695 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1695 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 178 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
NOVEMBER 22, 2024**

BETWEEN

WILSON JUMA ALIAS ELIJAH APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the judgment of the High Court of Kenya at Kakamega
(D.S. Majanja, J.) dated on 16th April, 2018 in HCCRA No. 55 of 2016)*

JUDGMENT

1. Wilson Juma alias Elijah, the appellant, was charged with two counts, the first was the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence were that on 10th May, 2014 at Idohi village, Kogoye Sub location in Vihiga County jointly with others not before the court while armed with offensive weapons namely pangas and rungus, they robbed NAK cash Kshs. 500/=, one radio make Sonitec, one speaker, four packets of 2kgs of wheat flour, 10 litres of cooking fat, two mobile phones make Samsung and Motorola, one handbag and a pair of shoes all valued at Kshs.14,120/= and the time of robbery used actual violence on the said NAK.
2. The second count was the offence of gang rape contrary to Section 10 of the *Sexual Offences Act*, the particulars being that on the same date and place, in association with others not before the court, he intentionally and unlawfully caused his penis to penetrate the vagina of NAK¹, a woman aged 32 years without her consent.
3. The appellant pleaded not guilty to the charges and the case proceeded to trial where the prosecution called 4 witnesses. The appellant gave a sworn testimony and called no witnesses. After the trial, the appellant was found guilty as charged, was convicted and sentenced to death for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*, and 3 years suspended sentence for the offence of gang rape contrary to Section 10 of the *Sexual Offences Act*.



4. The appellant, who was aggrieved by the decision of the trial court, appealed to the High Court. Upon considering the appeal, the High Court upheld the appellants' conviction, set aside the death sentence, substituting it with 35 years' imprisonment for the offence of robbery with violence and the sentence on the 2nd count was enhanced to 15 years' imprisonment with the learned judge pointing out that the appellant was not remorseful, and his actions of robbing an individual, then proceeding to sexually violate her, clearly showed that the appellant was a threat to the safety of NAK, and to society generally. The sentences were to run concurrently.
5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal faulting the learned judge for failing to note that the identification was not proper, failing to evaluate the evidence, that the offence was not proved, and disregarding the appellant's defence.
6. Briefly, the facts of the prosecution case were that on 10th May 2015 at about 1.00 am, while at her business of making and selling potato chips, the complainant NAK (PW1), was awakened by a loud bang on the door which was hit by a stone and fell inside. Suddenly two people appeared in her bedroom; and she was able to identify the appellant, whom she had known for some time as he was a boda boda rider in the village; and he used to carry for her potatoes and cooking fat from Mbale town. She only recognized the other assailant by his facial features. The two assailants started ransacking the house, the appellant took her two phones a Motorola and a Samsung, and demanded money. She gave him Kshs.500/- cash.
7. After they had ransacked the house, she tried to escape into the house belonging to PW3, Fredrick Muchanga, her landlord, but the assailants pushed her back into the house, whereupon she noticed that there were actually six (6) other assailants. One of them tore her shorts, removed her panty, and forced her to lie down. Each of the 6 (six) assailants, including the appellant, forcefully had sexual intercourse with her and after the ordeal, the assailants left. At about 6.00 am, she went to a neighbor's home and called the Assistant Chief who advised her to report the matter to the police station. She also went to Mbale District Hospital where she was treated by Loy Agwoma, PW2, a Clinical Officer who noted bruises on the labia minora, no hymen was noted, there was white discharge on her vagina, and bodily harm on the left lower thigh. He concluded that she sustained bodily harm and was also gang raped.
8. Placed on his defence, the appellant denied that he was one of the assailants who robbed and sexually assaulted the complainant; and denied knowing her, though he used to see her at her place of business. He attributed the complainant's allegations to the grudge the complainant had against him after she demanded to be carried by him on his motorcycle, but he refused as she would not pay.
9. In support of the appeal, the appellant submits that the evidence of identification rested on the testimony of a single identifying witness. That the incident took place at night, however, both the trial and 1st appellate court failed to inquire about the strength of the light and its position relative to the appellant and whether the torches were being flashed directly to the appellant. In support of this argument the appellant refers to the case of *Michael Nyongesa & Another v Republic* [2015] eKLR and in *Wanjiku v Republic* [1990] eKLR.
10. As to whether the prosecution proved the case beyond reasonable doubt, the appellant submits that the evidence tendered did not meet the threshold required as the prosecution failed to place him at the scene of crime; and solely relied on the evidence of a single witness which could not sustain a conviction.
11. Reiterating that in his defence, he had denied committing the offence and that nothing was recovered from him upon being arrested, the appellant draws from the decision in *Paul Mwangi Kariuki v Republic* [2013] eKLR, to contend that the defence ought to have been considered in his favour.



12. In opposing the appeal, the respondent maintains that all three ingredients of the offence were met, pointing out that the complainant was able to identify the appellant whom she had known for some time as he was a boda boda rider who would ferry her potatoes and cooking oil from Mbale town to Idoshi vilage. The appellant took her two phones, ransacked her house, and demanded money which he was given and when she tried to escape, she was slapped, before being subjected to gang rape.
13. On identification, the respondent contends that although the incident took place at night, the complainant was able to identify the appellant as he was known to her. Further, the assailants had torches that they were shining all over the place and at each other and given the length of the ordeal that took place, the conditions were favorable for positive recognition.
14. This being a second appeal, the Court's mandate is confined to a consideration of issues of law. As was succinctly enunciated in the case of *Karani v R* [2010] 1 KLR 73 that:

“This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters, they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

15. Having considered the record of appeal in light of the rival submissions set out above, the principles of law relied upon by the respective parties and the Court's mandate, the main issues of law that fall for this Court's determination is whether the High Court as a first appellate court, properly discharged its duty of considering and re-evaluating the evidence that was adduced before the trial court before coming to its own conclusion;
whether the learned Judge properly addressed the evidence of identification and came to the correct conclusion in finding that the appellant's identification was free from error and whether the appellants defence was considered.
16. Turning on the first issue, an examination of the judgment of the High Court reveals that the learned Judge, reconsidered and re- evaluated the evidence. Contrary to the appellant's contention that the High Court did not reconsider and re-evaluate the evidence, the High Court did so as reflected in the judgment, where the learned Judge analysed the evidence of identification and examined the applicable legal principles; and which for the benefit and purposes of fairness and clarity, we reproduce verbatim thus:

“The key issue before the trial court and in this appeal is whether the appellant was one of the assailants. The prosecution case was grounded on direct evidence of identification by the witnesses in difficult circumstances...

Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him.

It is also accepted in law that the evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger.



The case against the appellant was not one of identification but recognition by a person well known to PW1. PW1 testified that she knew him as she was a boda boda rider and he used to assist her ferry her goods. PW2 who was PW1's landlord, also stated that he knew the PW1 as a child in the village and had seen him buying chips at PW1's house from time to time. Although the appellant denied that he did not know PW1, he admitted that he used to see her at her place of business and in cross examination, he stated that he interacted with her. On the basis of this evidence, I find and hold that the appellant was not a stranger.

I now turn to the conditions of lighting in the house where PW1 was attacked. PW1 told the court that the assailants had torches which they were shining all over the house and at each other. Although the appellant did not give evidence of the intensity of the light, it is clear the incident took place in a small confined space of her room where there were two assailants at first and the six assailants then proceeded to rape her in PW3's house. Given the length of time the ordeal took place, I am satisfied that the conditions were favorable for positive recognition."

17. The learned Judge addressed and analysed the issue of identification at length as he recognized that it was the critical issue in the appellant's conviction. The evidence on record shows that both PW1 and PW3 were able to see the appellant and his colleagues, with the aid of the light from the torches the assailants were shining all over the house and at each other. Further, the incident took almost two and a half hours and, therefore, the two witnesses had sufficient time to observe the robbers. The appellant was a familiar face to PW1 whom she identified as Elijah to the police upon arrest.

18. On the issue as to whether the trial court disregarded the appellant's defence, nothing turns thereon as it was submitted that the appellant denied knowing the occurrences of that day, denied committing the offence and that nothing was recovered from him when he was arrested. Be that as it may, his defence on record was a mere denial which was easily displaced by the cogent testimonies by PW1 and PW3.

19. With respect to whether the ingredients of the offence of robbery with violence were established, section 296(2) of the *Penal Code* provides that:

If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company of 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 its decision in *Johana Ndungu v Republic* [1996] eKLR the court considered the ingredients of the offence of robbery with violence and observed as follows:

"In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of the *penal code* one must consider the subsection in conjunction with Section 295 of the *PC*. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the subsection:

- i. If the offender is armed with any dangerous or offensive weapon or instrument;
or
- ii. If he is in company with one or more other person or persons; or



- iii. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”

21. Similarly, in *Dima Denge Dima & Others v Republic*, [2013] eKLR it was held that:

“...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.”

22. It is trite that proof of any one of the ingredients of the offence of robbery with violence would warrant a conviction. In the instant case, PW1 stated that when the assailants got in her house, she saw them armed with pangas and rungs. They demanded for money which she gave them though they said it was not enough. The appellant ordered her to give him her Motorola phone, and she complied; when she tried to escape through PW3’s house, the assailants followed her and even raped her in turns and in the presence of her neighbour PW3. After the ordeal, thinking that they had left, PW1 tried to raise an alarm, only to be slapped with a panga on her left leg. Upon examination, PW2 a clinical officer at Vihiga District Hospital in his report indicated that he sustained injuries which were assessed as ‘harm’. From the evidence on record, it is evident that PW1 was violently robbed on the night in question.
23. As to whether the appellant was among the people who violently robbed PW1, counsel for the appellant contends that the prosecution’s evidence on identification of the appellant rested on the testimony of a single identifying witness. Further, that the incident happened at night when the conditions were not favorable for identification; and that the intensity of the light from the torches was not given, hence creating doubts on the identification.
24. From the perusal of the record, the High Court properly re- evaluated the evidence and did not err in its affirmation of the trial court’s finding that the identification was safe. The description by PW1 of how she knew the appellant, was proof that PW1 positively identified him. The ample time taken in raping PW1 in turns during the robbery, and coupled by the lighting that was available, was adequate for positive and error- free identification. Additionally, PW1 knew the appellant by name. PW1 and PW3 both knew him as a boda boda rider, which was corroborated by the appellant himself in his defence testimony that indeed he was a boda boda rider. Thus, the identification was by recognition which is more reliable as it is based on the witnesses’ personal knowledge of an accused. (See *Hashon Bundi Gitonga v Republic* [2016] eKLR).
25. It is our finding that the ingredients of the offence of robbery with violence were established against the appellant. He was also properly identified-indeed, the evidence before the court was one of recognition, not identification, given the time he had spent in the company of the complainant. The first appellate court properly came to the conclusion that the conviction of the appellant was merited and did not interfere with it. The appellant’s appeal to this Court in relation to his conviction has no merit.
26. As regards sentence, although the Penal Code prescribes the death penalty for the offence of robbery with violence, at the time the matter was heard on first appeal, there was a growing albeit misapprehended jurisprudence within the legal fraternity following the Supreme Court decision in *Francis Karioko Muruatetu and Anor v Republic* [2017] eKLR, that all minimum mandatory sentences undermined a court’s discretion to mete out appropriate penalties, and what followed was a flurry of decisions setting aside mandatory minimum sentences, and substituting with other perceived appropriate ones. That tide has since been stemmed as a result of the sequel *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae)* (2021) eKLR, that the decision only applied to murder cases; and not any other case. However, the respondent did not cross-appeal



on this aspect of the case; and neither did we warn the appellant of the adverse consequences of the sentence reverting to the initial death sentence, in the event that the appeal fails. Consequently, we shall not interfere with the sentence, which remains as meted out by the High Court.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF NOVEMBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

Initials used to protect her identity

