Omulama & another v Republic (Criminal Appeal 137 of 2015)
[2023] KECA 43 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 43 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 137 OF 2015

PO KIAGE, HA OMONDI & F TUIYOTT, JJA

FEBRUARY 3, 2023

BETWEEN

ELISHA MAIYA OMULAMA ..... 1ST APPELLANT

CHARLES ANEMA AMBOKA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kakamega (D.S. Majanja, J.) Delivered by R. Sitati, J dated 13th October, 2017 in HCCRA No. 1 of 2014)

JUDGMENT

1. It is often said that there is no such thing as a perfect crime. Some others though are so imperfect and unsophisticated! Read on.

2. J M (PW1) subscribes to Safaricom on Mobile Number 0721XXXX02 and also to its mobile money platform M-Pesa. On December 20, 2012, she held a credit of Kshs 2,550.00 on her M-Pesa. At around 3.00am as she slept in her house at [Particulars Withheld] village, Mazuu sub-location, Munguma location, she was shocked to see two people in her bedroom. They were armed with pangas and torches. On her bed was her mobile phone. One of the uninvited intruders took it and forced her to give him the personal identification number (PIN) to her M-pesa account. He then told her that he had transferred some money and left a balance of Kshs 100.00. It turned out on that night at about 3.45am, Kshs 2,400 had been transferred from the M-pesa account of PW1 to telephone Number 0701XXXX49 registered in the name of Elisha Omulama. That evidence was provided by inspector Morris Shamala (PW7) who is attached to Safaricom law enforcement liason office in Nairobi and whose duties include producing data records of Safaricom numbers and M-pesa transactions to Court, when required.

3. The name of the 1st appellant is Elisha Omulama, it was the evidence of PW1 that prior to the attack on that night the two people who robbed her were not known to her but she was able to see their

unmasked faces because of the bright light from the torches they carried and when one of them at some point switched on the bedroom lights using the bed switch.

4. Other than transferring money from her phone they forced her to surrender her handbag to them. The 1st appellant took the handbag, the 2nd appellant ransacked it, took Kshs 10,000.00 from it and threw all else down. They ransacked the bedroom as they threatened to kill her. The second and more sad part of the episode was about to begin. The 2nd appellant went into a bedroom opposite hers which belonged to her daughter D B (PW2) she heard him asking her to remove her panty but when the 1st appellant told him to wait, he (the 2nd appellant) brought her to PW1's bedroom and told her daughter to lie on her mother's bed.

5. They took a laptop from the bedroom of PW1's son and they continued to ransack the house. After taking PW2 back to her room and taking away from her a mobile phone and Kshs 20.00 she was brought back to the bedroom of her mother (PW1) and made to lie on her stomach. The 2nd appellant cut PW2's jeans shirt and panty using a *panga*, turned her to face upwards. The 1st appellant raped her first then told her to wipe herself and then the 2nd appellant raped her. All in the presence of her mother PW1.

6. Bizarre as it seems, the 1st appellant ordered them to sing for them but the two remained quiet. He pulled a blanket from PW1's bed and covered them from head to toe and the robbers shortly left the house. The two victims narrated their ordeal to PW1's mother in-law and others who were sleeping in the same house. PW1 contacted her husband who was away and who in turn asked one of his friends to check on them.

7. PW1 and PW2 reported the incident to the police at Vihiga Police Station and as directed by the police, they went to Vihiga District Hospital where PW2 was examined, tests conducted, counseled and given medication. She returned on the following day when a PW3 form was filled.

8. PW1 who had seen the assailants gave their description to the police. On June 10, 2013 two identification parades were conducted. In the first parade she was able to identify the 1st appellant. It was the testimony of PW2 that she could not forget his face and scar he had. On the second parade she picked out the 2nd Appellant whose face again she could not forget and he too had a scar but on his hand.

9. PW2 gave a similar account as her mother. Rudely woken up from her sleep at about 3.00am on December 20, 2012, a man shone a touch on her face and told her to go into her mother's bedroom where she found her with another man. She gave evidence of the demand of the PINNumber, laptop and money. At the point when she returned to her bedroom with the 2nd appellant, he ordered her to remove her clothes. When it became apparent to her that the 2nd appellant wanted to rape her, she turned him back to her mother's bedroom by telling him that he would give him more money there.

10. PW2 gave a narration of how the 1st appellant used a *panga* to cut her panty and skirt, raped her, and ejaculated in her. The 2nd appellant ordered her to wipe herself and then the he too raped her. It was her evidence that she was able to see the 2nd appellant's face with the help of a torch light and was able to identify his face, physic and also skin texture. She also says that she was able to see the 1st appellant. At a two identification parades conducted at Vihiga police station on June 10, 2013, she was able to identify the appellants. The 1st appellant was in the first parade. She saw a scar on the left side of his head that she was able to identify. She picked out the 2nd appellant in the second parade. She says that she could never forget his face and physic.

11. When PW1 visited Vihiga District Hospital, she saw Sammy Chelule (PW3) a Senior Clinical officer who examined her. She was frightened, had a painful scapular with visible bruises and reddening and was tender to touch. The lower right umber region was also painful and had visible reddening, was bruised and swollen. She returned an opinion that the injuries, which he assessed as harm, were caused by a blunt object.

12. PW3 also examined PW2. She was an 18-year-old frightened girl. She had visible bruises and reddening on the medical aspect of her crotch was tender. This injury, whose degree was assessed as harm, could probably have been caused by a blunt object, was the conclusion reached by PW3. On examination of her vagina, he found that PW1's hymen had healed but both labia were swollen. Although there were no visible lacerations or tear, the labia it had fresh inflammation and was tender to touch on the swollen side. The perineum was intact as was the cervix. A whitish vaginal discharge was noted. Routine HIV, syphilis and pregnancy tests returned negative results. Ultimately, PW3 concluded that PW2 had suffered an intentional, forceful, unconsented and unprotected vaginal penetration.

13. Sgt Bosco Kuria (PW4) arrested the 2nd appellant and 1st appellant respectively on June 3, 2013 and June 4, 2013. This was in connection with several cases of robbery with violence which had taken place over several months in Vihiga County.

14. Corporal Renlasi Meli (PW6) investigated the complaint while Chief Inspector Judith Nganga (PW5) arranged and conducted 2 identification parades in which PW1 and PW2 identified the two appellants.

15. This was the prosecution case that was put forward to support the charges of robbery with violence contrary to section 295 as read together with section 296(2) of the *Penal Code*, of gang rape contrary to section 10 of the *Sexual Offences Act* and the alternative charge of committing an indecent act with an adult contrary to section 11(4) of the *Sexual Offences Act* that the two appellants faced.

16. In an unsworn testimony, the 1st appellant denied the charges. He is a *boda boda* rider and owns a motorbike which he had hired out to another person to work with. He heard that the person had been arrested and decided to go to Vihiga police station. As he was ready to mount a motorcycle, 3 police officers confronted him and asked him whether he was Elisha Maiya Omulama. On confirming he was, he was placed in a CLD vehicle. In that vehicle was the 2nd appellant. They were taken to Vihiga Police Station. They found 3 other persons locked up in a cell who had been found in possession of stolen items including a mobile phone registered in his name. He says that he had lost his ID Card a year before the arrest. The three were released.

17. The 2nd appellant resides at Ebusiroro in Luanda and is a mason at Maseno University. On June 4, 2013, at around 3.00pm, he met a lady by the name Andisa who asked him whether he knew Elisha Maiya Omulama, to which he answered in the affirmative that he knew him to be a motorbike rider. She asked him to accompany her to Luanda Police Station, to which he obliged. At 7.00pm CID officer from Vihiga police station picked him up and took him to the police station. When he was asked to show them where the 1st appellant lived, he took them to the 1st appellant's house which is near Vihiga police station but they did not find him there. At about 2.00am the police officers escorted him to Kondele police station but they did not find the 1st appellant. He was returned to Vihiga police station where he slept. Later the 1st appellant was arrested and placed in the same vehicle in which he was.

18. After considering the evidence, the Hon V Mwangi SRM found the appellants guilty of both counts of robbery with violence and gang rape, convicted them and sentenced each of them to death and put the sentence for gang rape in abeyance although the record does not show the sentence imposed. On the first appeal, Majanja J, affirmed the conviction and sentence.

The learned Judge noted the lapse by the trial court in failing to impose a sentence for the second count and passed a sentence of 20 years' imprisonment against each appellant. These sentence were held in abeyance in view of the death sentence imposed on count 1.

19. The appellants are before us on a second appeal. Although the appellants raised five grounds of appeal, the submissions filed in support of the appeal reveal that those can be collapsed into two. That the learned Judge erred in failing:

    i. to find that the appellants had not been properly identified.

    ii. to find that the appellants were eligible to re- sentencing as the death sentence was not a mandatory punishment.

20. In the submissions, we see an attempt by the appellants' counsel to raise a further ground that the trial court failed to order for forensic and scientific tests on the appellants to ascertain the perpetrators of the gang rape. This argument was not taken up in the first appeal and cannot properly arise before us (see *Alfayo Gombe Okello v Republic* [2010] eKLR).

21. At plenary Ms Macogot, learned counsel for the appellants rehashed the written submissions dated May 16, 2022. She argued that PW1's evidence was that when the attackers entered the house, they flashed torches at themselves and switched the room light through a switch next to her bed and that she allegedly was able to see the appellants. Counsel submits that the witness admitted that she had never seen the attackers before.

22. As to the evidence of PW2, it was contended that her evidence was that she was able to see the appellants' features using torch light at the time the appellants lay on her stomach. Counsel poses the question whether it was really possible that a torch was pointed towards the robbers at this juncture. It was submitted that the assailants would have been so foolish to flash torches at themselves so as to be seen by the victims.

23. On the sentence, we are urged to find that the Supreme Court's decision in *Francis Kariokor Muruatetu & another* [2017] eKLR applies with equal force to sentences in respect to the offence of robbery with violence.

24. Miss Vitsengwa, learned prosecution counsel represented the respondent.

    Counsel submitted that both courts below considered the evidence within the guidelines for receiving and considering identification evidence as established in the decision of *Rex v Turnbull* [1976] 3 KLR 445. She argued that both complainants had ample time and opportunity to see the complainants who took around one hour to commit the offences. The assailants held a conversation with them and where in close proximity with the complainants. Apart from the light from the torches, the appellants switched on the electricity light for about 1 minute when she could clearly see their uncovered faces. Further, the two complainants gave distinct descriptions of the appellants when they reported the case to the police and the actual appearance of the two fitted that description.

25. Learned prosecution counsel contended that the *Muruatetu* case specifically dealt with the mandatory death sentence in murder cases and does not apply to all other offences for which mandatory or minimum sentences are prescribed. Reference was made to the directions in *Muruatetu II*.

26. The appellants came before us on a second appeal in which our mandate is circumscribed to by the provisions of section 361 (1)(a) of the *Criminal Procedure Code* to dealing with matters of law only (See *Karani v R* [2010] 1 KLR 73).

27. The fulcrum of the appeal is that the circumstances for identification of the appellants by the victims were difficult and there is a danger that the appellants have suffered conviction on the basis of mistaken identity. On that fateful night, two persons made sudden entry into the house of PW1. So sudden was the intrusion that PW1 woke up in her sleep to find two men in her room. The entry by one of the assailants into the bedroom and privacy of PW2 was no less unexpected. Although the appellants carried torches which were on, the suddenness of the entry and the menacing nature of the demands on the victims would have left them traumatized. This would not be ideal circumstances for victims to see and identify persons who were prior to the incident not known to them.

28. This is the type of circumstances that were contemplated by the caution advanced in the case of *Turnbull* in which the following directions were given;

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.
>
> In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way as for example by passing traffic or a press of people? Had the witness even seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police?
>
> Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

29. How do the circumstances here fare against that caution? To start with, the assailants had luxury of time. For about one hour they terrorized the victims. In the course of this period of time they had torches on and would occasionally flash them on their own faces. At one point, for about 1 minute, the bedroom lights were on. In this relatively extended period of time they were in close proximity with the complainants. All this time the assailants made demands on the complainants. The interaction though unconsented from the victims' point of view was close. The assailants, most callously, raped PW2 in the presence of her mother. The body of PW2 was in contact with that of her assailants. While the attack was sudden and distressing, the length of time of the attack, the source of lights and the proximity of the victims to the robbers made it possible for the victims to see not just the faces of the assailants but their bodies as well. They were able to pick out body marks on the bodies of the assailants. The victims described the assailants to the police and were able to easily and confidently point them out in identification parades which have not been faulted. The courts below were satisfied that appellants were positively identified and so are we. Their conviction on that alone was in our view safe and should not be disturbed.

30. As regards the 1st appellant, there was additional and stronger evidence. The appellants took away the mobile phone of PW1, forced her to disclose her Pin to them and transferred some Kshs 2,400 to an M-pesa account which turned out to be that of the 1st appellant. The time and date of transfer coincided

with the time of the robbery. The proposition by the 1st appellant that he had misplaced his ID and it must have been used to open an M-pesa account in his name is an afterthought as it was not raised in the course of investigation. This strong evidence against the 1st appellant is further assurance that the identification evidence was foolproof.

31. The appellants made a forceful entry into the home of PW1, where they found her and her daughter. They terrorized the two for 1 hour, robbed them and worse still gang raped PW2. So heartless were they that they raped the young girl in the presence and full view of her helpless mother. In the course of the robbery they assaulted the victims. The death sentence remains in our books as a possible sentence for the offence of robbery with violence. The circumstances of this case are aggravated and the death sentence does not deserve review from us.

32. We dismiss the appeal and affirm the conviction and sentences imposed.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF FEBRUARY, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR