



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 21 OF 2016

BETWEEN

JOSEPH VASI MUTUKU.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi

(Kamau & Ogola, JJ) dated 20th December, 2013

in

HC.CR. A. No. 280 of 2011)

JUDGMENT OF THE COURT

Background

1. The appeal herein arises from the judgment of the High Court, (**Kamau & Ogola, JJ**), dismissing the appellant's appeal against conviction and sentence for the offence of robbery with violence.
2. The appellant was charged before the Chief Magistrate's Court at Kibera with seven (7) counts of various offences. He was acquitted of four counts but convicted of three of the counts. These were the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** in which he was alleged to have robbed **Chemutai Maureen (Maureen)** of Kshs. 40,000/-threatening to use actual violence; the offence of rape in which he was alleged to have raped **Winnie Kathoki Tindi (Winnie)** contrary to **section 3(1)(a)** and **(b)** as read with **section 3(3)** of the **Sexual Offences Act**; and the offence of stealing from the person contrary to **section 279(a)** of the Penal Code in which he was alleged to have stolen one mobile Nokia phone and a Erotel mobile phone, one jacket and cash, Kshs. 700/- from the person of the said **Winnie**.
3. During the trial, the prosecution evidence was that **Maureen** who worked as a game ranger at Manyani Wildlife Service was on 28th July, 2006 at about 8.00pm walking towards Machakos Bus Stage when she met the appellant who introduced himself to her as Langat. The appellant enquired in Kiswahili where **Maureen** was going and she replied that she was travelling to Mt. Elgon whereupon the appellant offered to direct her to another bus stop for vehicles going to Mt. Elgon. **Maureen** agreed and they walked until they reached a bush where she refused to go any further. At this stage, the appellant produced a knife and demanded that **Maureen** hand over to him everything that she had. As **Maureen** hesitated, he threatened her with a knife. He then took **Maureen's** bag, ransacked through it and took Kshs. 40,000/-after which he kicked her and told her to go.
4. Maureen ran towards the road where she found police officers manning a road block about 300 meters away from where the robbery had taken place. **Maureen** reported the robbery incident to the police officers and informed them that the robber had identified himself as Langat. The police officers informed **Maureen** that they were looking for the appellant as they had received a similar complaint from another victim. **Maureen** accompanied the police officers in their vehicle and she directed them to the place where she had left the appellant. On their way, Maureen saw the appellant crossing the road near a Petrol Station and she pointed him out to the police officers. She was able to identify the appellant positively as he was dressed in the same clothes as he had worn when he robbed her. She had walked with the appellant for about 30 minutes and there was sufficient light to enable her to recognize him. The police officers arrested the appellant and took him to Parklands

Police Station between 9.00pm and 10.00pm.

5. At the police station, they found **Winnie** who reported that she had been sexually assaulted at City Park Forest. **Winnie** who was the complainant in counts 2 and 3 was a resident of Machakos. She had come to Nairobi to repair her “*simu ya jamii*”

phone. After the phone was repaired she headed to the bus stop to board a vehicle to her home in Machakos. On her way there she met the appellant who was smiling and stretching out his hand in greeting as if he knew her. The appellant asked her if she remembered him to which she responded that she did not.

6. The appellant informed her that he comes from her home area and that he was a police officer and lived with a colleague from their home area. He convinced **Winnie** that she should get to know where he lived in Parklands so that she could have a place to stay whenever she was held up in Nairobi. He assured her that she could travel home with an Akamba Bus that left Nairobi for Machakos at 8.00 p.m. On their way to Parklands, the appellant showed **Winnie** long queues of commuters travelling to Parklands and convinced her that it was better and faster for them to walk to Parklands. They therefore walked towards Globe Cinema round about.

7. **Winnie** started getting nervous when they got into a forest, but the appellant assured her that as a police officer who was armed, they were safe as he was permitted to access all places. Once they were in the forest and after crossing a bridge, the appellant put the bag that he was carrying on the ground and informed **Winnie** that he was a thief and that she should co-operate or he would call other thieves in the forest to come and kill her. The appellant took **Winnie's** phone from her pocket, the ‘*simu ya jamii*’ phone and Kshs 700/= in cash, and placed them in the bag that he had been carrying.

8. The appellant then started touching her breasts and unbuttoned his trouser. She pleaded with him not to rape her informing him that she was married, born again and that she was having her monthly periods. Despite her pleas, the appellant proceeded to rape her after reminding her that he was armed and could shoot her. Upon accomplishing his mission, the appellant gave her Kshs 10/= as bus fare and ordered her to leave without looking back. He directed her towards the direction where there were lights from on-coming vehicles.

9. **Winnie** ran towards the lights and on the road she met police officers manning a road block and explained to them that she had been raped and robbed. The police officers escorted **Winnie** to Parklands Police Station where she recorded her statement. On their way to Nairobi Women’s Hospital, **Winnie** identified the appellant, who had been arrested in connection with the complaint by **Maureen**, as the person who had raped and robbed her. **Winnie** testified that she was able to identify the appellant as he was still wearing the same clothes he had worn when he assaulted and robbed her. Upon being searched, the appellant was found in possession of **Winnie's** mobile phone, ‘*simu ya jamii*’ phone and a jacket. **Winnie** was later examined and treated at Nairobi Women’s Hospital. A report prepared by **Dr. Muhombe** of Nairobi Women’s hospital, who has since died, was produced by **Dr. David Thuo**. According to the report, a high vagina swab taken from **Winnie** revealed the presence of spermatozoa.

10. **Sergeant Peter Ogaro (Sergeant Ogaro)** was the officer who was in charge of the roadblock on Limuru Road on 28th July, 2006 when at about 7.30 p.m. **Winnie** emerged from City Park Forest and reported having been raped and robbed of a ‘*simu ya jamii*’ phone, cash, a Nokia phone and a bag of clothes. The officers took **Winnie** to Parklands Police Station. At about 9.40pm **Maureen** emerged from City Park Forest and also reported having been robbed. **Maureen** informed the officers that she could identify her assailant if she saw him. **Sergeant Ogaro** then mobilized two fellow officers at the roadblock and embarked on a search, driving slowly through the possible routes that the robber may have taken. Somewhere along Forest Road, **Maureen** identified the appellant who was walking, as the person who had robbed her. The police officers stopped the vehicle and arrested the appellant and thereafter took him back to the road block where they searched him and recovered Kshs. 27,350/- and a bag containing a “*simu ya jamii*” phone, Nokia 8210 and assorted clothes. During the course of his arrest, the appellant tried to escape and was shot. **Cpl. Jennifer Sirwa**, an officer attached to Parklands police station who investigated the case, recorded statements and collected all the exhibits, which she later produced in evidence in court.

11. During the trial, the appellant made a sworn statement in his defence. He denied all the charges levelled against him and stated that he was employed by Kenya Railways as a casual at Railway Training School, and was also an athlete for the company, a businessman and a photographer. He explained that on 28th July, 2006, he was going for training when he was ordered by the police to stop but he refused and was later arrested at the bus stop; that the police took him to a road block where he was confronted regarding his refusal to obey the police order to stop; that the police officer who he later learnt was the OCS shot him and ordered that the appellant be taken to Parklands Police Station where he was further interrogated. Upon disclosing where he lived, the OCS ordered police officers to accompany the appellant to his house; that the police took Kshs 27,000/= from the appellant’s house and Kshs 350/= which was in the appellant’s pocket; that the police officers threatened the appellant’s wife and advised her to leave the appellant’s home and go elsewhere; and that he was only identified in the parade as he had been shot and his clothes were bloody. As already stated, upon considering the evidence, the trial court acquitted the appellant of counts 4, 5, 6 and 7 but convicted him of counts 1, 2 and 3.

12. Aggrieved by the decision of the trial court, the appellant appealed to the High Court but his appeal was dismissed, the High Court holding that the prosecution witnesses had given cogent and consistent evidence, and that the trial court rightfully rejected the appellant’s defence. Undeterred, the appellant filed this second appeal on the grounds that the first appellate court failed to properly evaluate the entire evidence; that identification of the appellant was not proved; that the prosecution shifted the burden of proof to the appellant in relation to counts 1, 2 and 3, and that the appellant’s defence was disregarded.

Submissions

13. When the appeal came up for hearing **Mr. Muthaura** and **Mr. Marube** appeared for the appellant, while **Ms. Murungi** a Senior Assistant Director of Public Prosecution (SADPP) appeared for the State.

14. In support of the appeal, **Mr. Muthaura** identified the issues raised in the grounds of appeal as identification, burden of proof, the High Court having failed to re-evaluate the evidence of the trial court, and having shifted the burden of proof onto the appellant by faulting him for not calling his brother as a witness.

Mr. Muthaura submitted that there was no reason for **Maureen** to have mistaken a Kamba for a Kalenjin and that the only possible explanation is that the person who robbed her was not the appellant. In addition, that the description given by prosecution witnesses of the appellant's clothes differed; that the Occurrence Book (OB) did not indicate that any of the stolen items were recovered; that although the appellant was alleged to have stolen Kshs. 40,000/- he was only found with Kshs. 27,350/- and no explanation was given regarding where the rest of the money disappeared to within the short period of time; and that the appellant's defence which was consistent was not properly considered.

15. **Mr. Marube**, learned counsel for the appellant submitted that the appellant was shot merely because he defied the order of the police to stop; that **Maureen** did not witness the shooting despite being present at the scene; that the evidence of **Corporal Sirwa** confirmed that the appellant had been framed; that it was an error for the court to have found the defence unreasonable; that an opinion had been formed that the appellant was a serial rapist; that there was a miscarriage of justice as the appellant's defence was not considered; that the identification by **Winnie** was not free from error as the appellant had already been arrested by the time she identified him. Counsel urged the Court to allow the appeal.

16. **Ms. Murungi** opposed the appeal submitting that there was overwhelming evidence against the appellant; that he was positively identified as the perpetrator of the offences and the burden of proof had been discharged by the prosecution; that both **Maureen** and **Winnie** were able to identify the appellant as they had spent time with him having walked and had conversations with him; that the appellant was arrested 15 minutes after attacking **Maureen**; that **Winnie** identified the appellant who still had her bag and although she did not describe the bag, she was able to identify the items inside the bag; that the appellant presented himself to **Winnie** and **Maureen** as an athlete and showed them a photograph of himself wearing a track suit as produced in court; that at the time of arrest, the appellant was wearing a different outfit; that the items in the bag were positively identified as items belonging to **Winnie** and **Maureen** of which they had been robbed and this is when the burden of proof shifted to the appellant but he failed to explain how he came into possession of the bag and items; and that the doctrine of recent possession was applicable. Counsel urged the Court to uphold the conviction.

17. In reply, counsel for the appellant submitted that the main issue was identification and that there was no record of the items collected from the appellant at the scene and from his house.

Determination

18. We have carefully considered the record of appeal, the submissions by counsel, the authorities cited and the law.

Section 361(1) of the **Criminal Procedure Code** provides that:-

“A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.” (emphasis supplied)

19. In **M'Riungu v. Republic (1983) KLR 455** this Court stated;

“Where the right of appeal is confined to the question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the 1st appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law.”

20. There was clear evidence that the appellant was arrested a few minutes after the robbery committed against **Maureen**. The police officers found no need to conduct an identification parade for **Maureen** and **Winnie** since **Maureen** was actually the one who pointed out the appellant to the police at the time of his arrest, while **Winnie** also identified the appellant after his arrest and identified some items that were recovered from the appellant as items that had been stolen from her by the person who raped and stole from her. Both **Maureen** and **Winnie** were therefore each able to positively identify the appellant as their assailant.

21. In **Johana Ndungu vs Republic [1996] eKLR**, this Court had this to say in regard to the ingredients of the offence of robbery with violence contrary to section 296(2) of the Penal Code;

“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. 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 before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

- 1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
- 2. If he is in company with one or more other person or persons, or**

3. *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.*

Analyzing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in S.295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.”

22. In the instant appeal, the appellant was in possession of a knife and also threatened to shoot **Maureen** with a gun at the time he robbed her. **Maureen** identified the appellant as her assailant and Kshs 27,350/= was recovered from the appellant at the time of his arrest. This was consistent with **Maureen’s** evidence that she had been robbed of Kshs 40,000/=. Some time had elapsed between the time **Maureen** was robbed, and the time the appellant was arrested and therefore the difference between the amounts was inconsequential as the appellant had time to use the money. The crucial ingredients of the offence of robbery with violence were therefore established.

23. As regards the offence of rape and theft from the person, the appellant was identified by **Winnie** as the person who raped her and stole from her. In addition, the appellant was found in possession of a nokia mobile phone and a “*simu ya jamii*” phone, both of which were identified by **Winnie** as her phones that were stolen from her by the rapist. It is notable that the appellant did not deny being found with the bag that contained the stolen items nor did he provide any reasonable explanation how the items came to be in his possession.

24. Under the doctrine of recent possession, where an accused person is found in possession of recently stolen property and is unable to provide a reasonable explanation for his possession, a presumption arises that he is either the thief or the receiver. **See Hassan vs Republic [2005] 2 KLR 151.**

25. In **Isaac Ng’ang’a alias Peter Ng’ang’a Kahiga v Republic Cr App. No. 272 of 2005 (UR)** this Court held as follows:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof;

- i. that the property was found with the suspect;**
- ii. that the property is positively the property of the complainant;**
- iii. that the property was stolen from the complainant;**
- iv. that the property was recently stolen from the complainant.**

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”

26. All the above elements were satisfied in the present case. The stolen items were recovered immediately after the theft on the appellant’s person. The appellant failed to put forward a satisfactory explanation of how he came to be in possession of the stolen items and in his defence he did not deny being in possession of the stolen items. The offence of theft from the person was therefore proved. As regards the offence of rape, the learned judges of the High Court did not address this offence and therefore, in this regard, failed in their duty to re-evaluate the evidence. This notwithstanding, we have examined the evidence that was before the trial court in order to determine whether the ingredients of the charge of rape were established.

27. **Winnie** testified that the appellant forcefully had sexual intercourse with her threatening her with a knife. Her evidence that she had been raped was consistent with the vaginal swab taken at the Nairobi Women’s Hospital, which revealed the presence of spermatozoa. The examination was done on the very day when **Winnie** was raped. We have noted the evidence of **Nelly Maureen Papa**, an analyst attached to the Government Chemist who stated that she examined a high vaginal swab submitted to her in regard to **Winnie**, but found no evidence of semen or spermatozoa. We reject this evidence as inconsistent with the evidence from Nairobi Women’s Hospital. The doctors noted that **Winnie** was apparently in distress at the time she went to the hospital, and this was just a few hours after her ordeal. The report from the Nairobi Women’s Hospital was therefore more reliable. The two lower courts believed **Winnie’s** evidence that the appellant stole from her. We have no reason to doubt her evidence that the appellant also raped her. Indeed, the truthfulness of her evidence that the appellant raped her and stole from her, is supported by the recovery of the stolen items from the appellant. We therefore find that there was sufficient evidence to sustain the offence of rape against the appellant.

28. From the foregoing, we are satisfied that notwithstanding the failure by the High Court to consider the evidence in regard to the charge of rape, the evidence against the appellant was overwhelming, not only in regard to the offence of rape, but also in regard to the offence of robbery with violence and theft from the person. In the premises, the appeal against conviction has no merit.

29. In regard to sentence, we note that the appellant made a mitigation statement beseeching the court for leniency. The trial magistrate noted the mitigating factors but found herself bound by the sentence provided under **section 296(2) of the Penal Code**, which in her view was a mandatory death sentence. She therefore sentenced the appellant to death on the robbery with violence count but did not pass any sentence on count 2 and 3. The learned judges of the High Court dismissed the appeal against sentence and said nothing about this omission. In our view, the trial magistrate ought to have imposed a sentence on count 2 and 3, but order the sentences be held in abeyance because of the death sentence that was imposed on count 1. This ought to have been addressed by the High Court.

30. Be that as it may, the trial magistrate failed to exercise her discretion in sentencing in regard to the charge of robbery with violence holding that the sentence of death imposed under section 296(2) was mandatory. The Supreme Court in **Francis Karioko Muruatetu & another V. Republic, Petition No. 15 of 2015**, held the mandatory death sentence provided under section 204 of the Penal Code as unlawful as the section only provides a discretionary maximum penalty of death. This means that the trial court has the discretion to impose the maximum penalty or any other sentence that may in the circumstances of the case, be appropriate.

31. In **William Okungu Kittiny Vs. Republic Criminal Appeal No. 56 of 2013**, this Court recently applied the Muruatetu decision to section 296(2) of the Penal Code stating:

“...we hold that the findings and holding of the Supreme Court, particularly in para. 69, applies Mutatis Mutandis to section 296 (2) and 297 (2) of the penal code. Thus, the sentence of death under section 296 (2) and 297(2) of the penal code is a discretionary maximum punishment.”

32. Applying the Muruatetu decision, we are of the view that in the circumstances of this case, the death sentence was not warranted as no violence was actually used on **Maureen**. In addition, the trial magistrate did not take into account the mitigation given by the appellant as she felt she had no discretion. We have considered whether given the flaws in sentencing, we should remit this matter to the lower court for re-sentencing. However, given the fact that the appellant has been in custody for about 13 years, we believe it would be fair and just for this Court to finalize this matter by imposing the sentence. Taking into account that the appellant was armed with a knife and threatened to harm **Maureen**, and that he raped **Winnie** and stole from her, similarly threatening her with a knife, a sentence of a term of imprisonment in regard to all the three counts would serve the ends of justice.

33. For the foregoing reasons, we dismiss the appeal against conviction but allow the appeal against sentence to the extent of setting aside the sentence of death imposed on the appellant, and substituting thereto a sentence of 25 years imprisonment on the charge of robbery with violence contrary to section 296(2) of the Penal Code; we also impose a sentence of 15 years imprisonment on the appellant in regard to the charge of rape contrary to section 3(1)(a) and (b) of the Sexual Offences Act; and 5 years imprisonment in regard to the offence of stealing from the person contrary to section 279(a) of the Penal Code. The sentences shall run concurrently and take effect from 27th October, 2011 when the appellant was sentenced by the trial court.

34. This judgment has been delivered in accordance with Rule 32(2) of the Court of Appeal Rules, Githinji JA having ceased to hold office by virtue of retirement.

Dated and delivered at NAIROBI this 24th day of January, 2020.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

Copy of the original

DEPUTY REGISTRAR