



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KARANJA, OKWENGU & SICHALE, JJA]

CRIMINAL APPEAL NO. 117 OF 2018

BETWEEN

SIMON KIMITI DAVIDAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kajiado (Nyakundi, J) dated 19th April, 2017

IN

Criminal Appeal No. 15 of 2016

JUDGMENT OF THE COURT

This is an appeal against the judgment of **R. Nyakundi, J** dated 19th April, 2017.

A brief background to this appeal is that **Simon Kimiti David** (the appellant herein) was charged with two counts. In count I, he was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code, the particulars being that on the **1st day of January, 2014**

within Kajiado South District, in Kajiado County, while being armed with an offensive weapon namely a panga, robbed **JNS** of her mobile phone make Nokia C-1 and a sim card all valued at Kshs 4,000 and immediately before or immediately after the time of such robbery, threatened to use actual violence to the said **JNS**.

In count II, the appellant was charged with the offence of rape contrary to section 3(1)(a)(c) of the Sexual Offences Act No. 3 of 2006, the particulars being that on the same day (**1st January, 2014**) at the same place intentionally and unlawfully caused his penis to penetrate the vagina of **JNS**.

The appellant pleaded not guilty to the two offences. In a trial conducted by Honourable **Okuche**, the then Senior Principal Magistrate, Kajiado Law Courts, the appellant was found guilty of the offences charged and sentenced to suffer death in count I and also sentenced to ten (10) years imprisonment in count II, which sentence was put in abeyance.

Aggrieved by the trial court’s conviction and sentence, the appellant appealed to the High Court at Kajiado and in a judgment delivered on **19th April, 2017, Nyakundi, J**, dismissed the appeal in its entirety and upheld the conviction and sentence of the appellant. In his judgment, the learned judge held:

“Having considered all the relevant issues raised by the appellant, I am satisfied that the requirements of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and that of rape contrary to section 3 (1) of the Sexual Offences Act are therefore present in this case. The trial court had sufficient material to establish the case beyond reasonable doubt against the appellant.

I therefore uphold the conviction of the lower court on both counts.”

Undeterred, the appellant has appealed to this Court listing nineteen (19) grounds of appeal. In a Supplementary Memorandum of Appeal filed on **19th July, 2019**, the appellant faulted the trial judge for failing to find that his right to a fair trial were violated; for failing to consider that his conviction was based on identification which was erroneous; for failing to consider that there was no sufficient evidence to support a conviction; for failing to consider that there was no positive identification of the appellant; failing to consider that the appellant was convicted on uncorroborated and contradictory evidence; failing to consider that the sentence of the appellant was unconstitutional; failing to consider that the doctrine of recent possession was misapplied to the detriment of the appellant; failing to re-evaluate the entire prosecution evidence to the detriment of the appellant; affirming the appellant's conviction without considering the appellant's plausible defence and finally, failing to consider that the prosecution evidence was full of suspicion.

The appeal before us is a second appeal. Our position as regards a second appeal is clear. By dint of Section 361 (1) (a) of the Criminal Procedure Code we are mandated to consider only matters of law. In **Kados vs. Republic Nyeri Cr. Appeal No. 149 of 2006 (UR)** this Court delivered itself thus on this issue:

“...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ...”

In **David Njoroge Macharia vs. Republic [2011] eKLR** it was stated that under

Section 361 of the Criminal Procedure Code:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (see also Chemagong vs. Republic [1984] KLR 213).”

However, in order to determine whether the trial court and the 1st appellate court failed in the discharge of its functions, it is important to subject the entire evidence to an exhaustive review.

The evidence tendered in the trial court was that on **1st January, 2014**, at 6.30 p.m. **JNS (P.W.1)** was walking home when a man armed with a panga confronted her and inflicted bodily harm on her neck and left hand; that the man pulled her into the maize plantation, undressed her and forcibly had sexual intercourse with her; that the man then robbed P.W. 1 of her mobile phone described as Nokia C-1 and a SIM card together with a memory card. It was P.W.1's testimony that she reported the ordeal to her mother, **SS (P.W.2)**.

On learning of the incident from her daughter (P.W.1), **SS (P.W.2)** called for help from neighbours to assist in tracing the culprit and in response to P.W.2's distress call, **George Samoire (P.W.4)** rushed to the home of P.W.2. P.W.4 testified that from the description of the assailant by P.W.1, him together with P.W.2 pursued the assailant, arrested him and escorted him to Entarara Police Station. P.W.4 further stated that they recovered a phone battery and a panga from the appellant's house.

Dr. Stephen Mutiso (P.W.3), testified on behalf of **Dr. Mutunga** who filled the P.3 form in respect of P.W.1. P.W.3 observed that the medical records/notes revealed that P.W.1 sustained visible bruises on the lower part and the outer vaginal wall and that she also suffered maim to the left index finger.

On **1st November, 2014**, **APC Mutai (P.W.6)**, a police officer attached to Entarara AP post re-arrested the appellant from members of the public. He also received a phone battery and a panga that was allegedly recovered from the appellant.

In his defence, the appellant gave unsworn statement and called two (2) witnesses, **Catherine Wangare (D.W.2)** and **Susan Wambui (D.W.3)**. The two told the trial court that on the material date, they attended a funeral service of their uncle together with the appellant; that they stayed at the funeral upto 10.00 p.m. when they left together for their homes and that on their way home, they met with three people who asked the appellant (D.W.1) where he was coming from; that after D.W.1's explanation, he was asked to sit down after which he was arrested and taken to Entarara police post. They further stated that another person was also arrested the same way and both were taken to the police station; that the exhibits tendered in evidence were brought to the police post by the complainant.

The appeal came before us for plenary hearing on **12th December, 2019**. **Mr. Ondieki**, learned counsel for the appellant, in his oral submissions highlighted the appellant's written submissions filed on **22nd July, 2019**. Counsel submitted that there were material contradictions in the prosecution's evidence as P.W.1 told the trial court that the appellant was arrested from a house which was 100 metres away; that she also stated that the appellant was arrested from a maize plantation; that at one point, she said she was raped by an unknown person and contradicted this by stating that she knew her assailant; that P.W.6 confirmed that two people were arrested; that the appellant's constitutional rights were infringed as he was not supplied with witness statements; that P.W.1 described the appellant's clothes to include a **“Maasai brown yellow striped shuka”** as well as a **“maroon Maasai shuka with yellow strips”**

On identification, counsel contended that it is indeed P.W.2 who **“identified”** the appellant as she **“.... had seen such a person at the funeral. I was the one who was serving the people...”**; that P.W.1 and P.W.2 could have been honest but mistaken; that the appellant gave a plausible explanation of where he was; that he was arrested with another person as confirmed by P.W.7.

In opposing the appeal, **Ms Wang'ele**, Senior Public Prosecution Counsel (SPPC) submitted that there were concurrent findings of identification of the appellant by the two courts below; that P.W.1 gave a detailed description of the man who raped her; that the time was 6.30 p.m. hence, there was sufficient lighting; that the appellant was found in possession of a battery charger which was positively

identified by P.W.1; that the battery charger was one of the items stolen from P.W.1 at the time of the ordeal; that the alleged contradictions raised by the appellant's counsel were minor and finally, that the appellant was arrested in a house within the maize plantation. As to the defence of alibi, counsel pointed out that the rape occurred at about 6.30 p.m. and the appellant's alibi defence was between 7 – 10 p.m.

The trial court and the 1st appellate court considered the evidence and came to the conclusion and rightly so, in our view that it is the appellant who raped and robbed P.W.1. P.W.1 gave a detailed description of her attacker. She stated:

“I reached home, and informed my mother. I informed her of the attire of the person, he was putting on a black marvin, maroon Masaai shuka with yellow strips. He also did not have one tooth on the top incisors. He was also putting black fading trouser and safari boots. I had not seen the accused before this occasion. It was my first time. He was speaking Kiswahili with Tanzanian accent”.

Further, she was able to identify her battery charger. She stated:

“The accused was searched and with him was found with my phone's battery. They told me that they had not recovered the phone. I had put a mark on my battery because where we charge the batteries, they get lost so had I removed the cover. That is for purposes of identification”.

Further, P.W.1 narrated to her mother the attire of her attacker and her mother (P.W.2) remembered having seen such a person at a funeral she had attended. At the time of arrest, the appellant was still wearing the same clothes that he wore at the time of the attack.

Contrary to defence counsel's submissions, we find that there was nocontradiction in the prosecution's evidence. The appellant was arrested from a house which was inside a maize plantation. The fact that the appellant was found with a phone battery which was positively identified by P.W.1 leaves no doubt that it is indeed the appellant who robbed and raped P.W.1. We find that the appellant's conviction was well founded.

As regards sentence, the appellant was sentenced to life imprisonment for the offence of robbery with violence and sentenced to ten (10) years imprisonment for rape. The latter sentence was put in abeyance. However, in view of the Supreme Court decision in ***Francis Karioko Muruatetu & another vs. Republic [2017] eKLR*** and given the circumstances of the robbery, the fact that the appellant was a 1st offender and taking into consideration his mitigation that he was the bread winner for his young family, we reduce the sentence of life imprisonment to a term of thirty (30) years imprisonment with effect from the date of conviction (**18th September, 2015**). The sentence of 10 years shall run concurrently with the sentence of 30 years imprisonment for the offence of robbery with violence.

It is so ordered.

Dated and Delivered at Nairobi this 24th Day of April, 2020.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPTY REGISTRAR