



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR,JJ.A)

CRIMINAL APPEAL NO. 57 OF 2014

BETWEEN

JULIUS MOI 1ST APPELLANT

PATRICK NDUNDE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kakamega, (Chitembwe & Thurania, JJ.)
dated 28th June, 2012

in

HCCR. C. NO. 134 & 135 OF 2010

JUDGMENT OF THE COURT

1. The appellants, Julius Moi and Patrick Ndunde, were the second and first accused persons respectively before the trial court where they were charged, alongside Aggrey Majani, who was the third accused, with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the night of 19th/20th November 2007 at [Particulars withheld] village, [Particulars withheld] Sub location in Kakamega District of the then Western Province, jointly with others, while armed with dangerous weapons robbed Hagai Ligami of household items enumerated in the charge sheet, all valued at Kshs. 250,000.00 and at or immediately after the time of such robbery they used actual violence on J H.

2. Under count II, they were charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act. The particulars were that on 20th November 2007 at [Particulars withheld] village, [Particulars withheld] Sub location in Kakamega District of the then Western Province, jointly with others raped J L in turns.

3. They also faced an alternative charge of indecent act with an adult contrary to section 11 of the Sexual Offences Act.

4. The trial was conducted before the Magistrate's Court at Kakamega. In a judgment delivered on 18th June 2010, the trial court convicted the appellants for the offence of robbery with violence and for the offence of gang rape. The third accused, Aggrey Majani, was acquitted. The trial magistrate made no findings on the alternative count.

5. The appellants were each sentenced to death for the offence of robbery with violence and to a custodial sentence of 15 years each for the offence of gang rape. The custodial sentence was however suspended.

6. The appellants' subsequent appeal to the High Court was dismissed in a judgment delivered on 28th June 2012 after which the appellants instituted the present appeal.

Background

7. F H R (F), PW3, a teacher at a girls' secondary school in Kakamega, is the husband to J S L (J), PW1, also a teacher at a primary school in Kakamega. They resided in Kakamega. During the night of 19th / 20th November 2007, F, J and their children, including C A (C), PW2, were at their home sleeping when burglars broke into their home. The burglars were armed with pangas, rungas and knives. J put the number of the burglars at 15. F said the burglars were "more than 18 or thereabouts". C, who was in standard 5 when she testified in November 2008 said "there were over 15 men". C said she was able to count the burglars "from torches light."

8. The burglars dragged F out of bed. Claiming that they had information from a neighbour, one Antony, that J had been to the bank earlier in the day, the burglars demanded Kshs. 100,000.00 from her. She pleaded with them. One of the burglars summoned C into her parent's bedroom to show them where money was kept. The burglars laid F on the ground, covered him with a blanket and stepped on him. They beat up J. They hit her on the head and breast. According to J, Patrick Ndunde, the 2nd appellant, tried to stop the other burglars from beating her. He told them "wachenii." 5 of the burglars raped her in turns. One sodomized her.

9. According to J, the appellants were undoubtedly part of the gang of burglars. She said the 1st appellant, Julius Moi, was wearing a blue T-shirt. She said she identified the 2nd appellant from his voice and physical appearance; that the 2nd appellant, was wearing a paper mask; "the paper mask was white" and "it was covering a very small part of his face." She said he was wearing "a creamish shirt." She gave the name of the mother of the 2nd appellant as Rose.

10. J went on to say that the burglars had torches and the room was bright. She described the torches as "powerful." In her words, "torches were moving all over and the house was bright." She stated that, "I confirmed that I saw and identified the 1st and 2nd accused in the act. They are my neighbours." She said that while she did not identify those who took the things, she saw those who raped her.

11. Before they left the house, the burglars warned those in the house to keep quiet. The burglars left sometime between 2.00 am to 3.00 am and took away testimonials, clothes, utensils, a mountain bike, among other things.

12. After the burglars left, F reported the incident to a village elder, Antony Nyangu, who testified as PW4. He took F and J to the police station. At the police station, J gave the names of the appellants as having been part of the burglars who broke into their home and raped her. The police subsequently asked PW4 to point out the appellants to them. PW4 led police constable Malu, (PW 5) of the CID office in Kakamega to the home of the 2nd appellant where he was arrested. PW4 also accompanied PC Malu to the 1st appellant's place of work, at the jaggery, where he was arrested. According to PC Malu, the 1st appellant's boss said that the 1st appellant was at work on the day the robbery took place.

13. Benter Otieno, (PW6), a clinical officer at the Provincial General Hospital, examined J on 21st November 2007. Based on that examination, PW6 completed a P3 form. She formed the opinion that J

had been raped.

14. In his defence, Julius Moi, the 1st appellant, stated that he is employed as a clerk/supervisor at Lubao jaggery from where he was arrested; that on the day he is alleged to have committed the offence, he reported to work for the night shift at 6.00 p.m. on 19th November 2007 and left work at 6.00 a.m. on 20th November 2007; that his boss confirmed to the police in the presence of F that he was indeed at work during the night in question; that after his initial arrest he was detained for two days and then released before being re-arrested a week later. He asserted that he was put on trial for an offence he knew nothing about. He went on to say that he was employed once to plough the complainant's shamba and that J, who is a neighbour, has a grudge against him. He stated further that the attendance book that would have verified that he was at work on the material day got burnt when his place of work burnt down during campaigns.

15. The 2nd appellant, Patrick Ndunde, in his defence stated that on 21st November 2007 at about 9.00 p.m., police officers and the complainant went to his place and entered his house intending to conduct a search. He said that his relationship with F was strained; that F purchased land from his father in 1999 and subsequently a boundary dispute arose; that F had warned him against interfering when he suggested they involve elders in the dispute; and that F was also not happy about a domestic worker who left to stay with the 2nd appellant. He went on to say that J, who is his neighbour, also knew him and that she was lying when she implicated him.

16. After considering the evidence, the trial court was satisfied that the prosecution had proved its case against the appellants to the required standard and proceeded, as already indicated, to convict them on the two counts. The High Court was also satisfied that the convictions were well founded. The appellants then lodged the present appeal.

The appeal and submissions by counsel

17. During the hearing of the appeal, learned counsel for the appellants, Mr. Rayola Olel, referred us to the grounds of appeal in the appellants' memorandum of appeal. He submitted that it was not safe to convict the appellants on the strength of the evidence of J who was the sole identifying witness. He drew our attention to pronouncements by the Court of Appeal for Eastern Africa, the predecessor to this Court, in the case of **Abdallah Bin Wendo & Sheh Bin Mwambere v R [1953] EACA 166**; the decision of this Court in **Maitanyi v R [1986] KLR 198**; and the decision of the Court in **Roria v R [1967] E.A 583**.

18. In counsel's view, the two courts below failed to heed the legal principles enunciated in those authorities requiring the exercise of the greatest care when basing a conviction on the evidence of a single identifying witness. He urged that the appellants were convicted on the basis of the unreliable, shaky, inconsistent and contradictory testimony of J. According to counsel, the lower courts did not subject the testimony to serious scrutiny; they did not interrogate the light conditions and generally the circumstances under which the offence was committed.

19. In relation to identification by voice, Mr. Olel submitted that the lower courts did not exercise care to ensure that J did in fact identify the voice of the 2nd appellant as she claimed; that it was not demonstrated that she was familiar with his voice and that the conditions obtaining were favourable. Counsel cited the case of **Mbelle v R [1984] KLR626** in support.

20. Basing his argument on this Court's decision in **Kiarie v R [1984] KLR 739**, counsel went on to say that the defence of alibi raised by the 1st appellant was not seriously considered by the lower courts; and that the investigating officer whom the appellant said had confirmed that the appellant was indeed at work when the alleged incident occurred should have been called as a witness.

21. Regarding the conviction for the offence of gang rape, counsel submitted that the offence was not proved to the required standard; that the medical evidence did not support the charge; that if indeed gang

rape had occurred, one would have expected J to have sustained more serious injuries.

22. It was counsel's further submission that the lower courts failed to consider and appreciate that the evidence was at variance with the charge sheet in relation to the name of the complainant. He referred us to **Yongo v R [1983] KLR** and urged us to hold that the charge sheet was incurably defective.

23. Counsel concluded by submitting that there were serious gaps in the prosecution case rendering the convictions unsafe. With that he urged us to allow the appeal.

24. Opposing the appeal, learned Prosecution Counsel Mr. Evans Ketoo, began his brief reply, by submitting that the charge sheet was not defective; and that the mix up in J's name must be a typographical error which is curable under Section 382 of the Criminal Procedure Code.

25. Regarding identification, Mr. Ketoo submitted that whereas the trial magistrate should have warned herself of the danger of relying on the evidence of a single identifying witness before analyzing the evidence, the approach taken by the trial court did not however prejudice the appellants.

26. According to Mr. Ketoo, this was a case of recognition; the appellants were well known to J and they lived near each other; that she was clear that the appellants were involved in the commission of both offences; that when she made a report to the police she mentioned the appellants' names and it was on that basis that the police arrested them.

27. According to counsel, all the ingredients of the offences were proved and no adverse inference should be drawn on account of the investigating officer not having been called to testify as it is possible that the investigating officer may have been transferred and was not readily available during the trial. With that Mr. Ketoo urged us to dismiss the appeal.

Analysis

28. We have considered the appeal and the submissions by counsel. This is an appeal against the decision of the High Court exercising its appellate jurisdiction. Under Section 361(1) of the Criminal Procedure Code such an appeal is confined to matters of law. [See **M'Riungu vs. R [1983] KLR455**].

29. The six grounds of appeal contained in the appellants' memorandum of appeal coalesce into the principal question whether the lower courts failed to undertake a careful and thorough review of the evidence, particularly on the question of identification, and whether the conviction is supported by evidence, considering the same is based on the evidence of a single identifying witness. Related to that is the question whether the defence of alibi put forth by the 1st appellant was considered or properly considered. The second issue that arises is whether the charge sheet was defective as contended by the appellants.

30. We begin with the question of identification. There is no doubt that the appellants' conviction for both offences was based on the evidence of a single identifying witness, namely J. A court should satisfy itself that evidence of identification is watertight and that possibilities of mistaken identity are eliminated before convicting an accused person based on evidence of visual identification. In **Wamunga v R Criminal [1989] KLR 424** this Court stated that:

“Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.”

31. That pronouncement was inspired by the decision of the Court of Appeal for Eastern Africa, the predecessor to this Court, in the case of **Abdallah Bin Wendo & Sheh Bin Mwambere v R** (supra)

which stressed the need to test, with the greatest care, the evidence of a single witness on identification. In **Maitanyi v R (supra)** this Court stated that a court relying on the evidence of a single identifying witness should warn itself of the danger of doing so. In **Roria v R** (supra) the Court also sounded the warning that a conviction resting entirely on identity invariably causes uneasiness considering that a witness, though honest, may be mistaken.

32. In the present case, the trial magistrate was no doubt aware that identification of the accused persons was a critical issue. The court said that, “the most important issue to determine herein is whether the accused persons have been positively identified by the witnesses.” The trial court was alive to the need for caution in dealing with that issue. The trial court observed at the outset that “the offence complained about occurred at night and the only witness who claims to have seen any of the robbers is PW1.” Of PW1’s evidence, the court said:

“In her evidence she said there was light in the house from the torches the attackers had. In particulars (sic) she claimed to have positively identified the voice of the 1st accused including his appearance. I can believe her version when she said they were being flashed with the powerful torches they had all over the house. Despite 1st accused wearing a face mask she was able to identify him. The 1st and 2nd accused she claims are the people who raped her. I have no doubt in my mind that being a neighbour to her she could clearly identify his voice when he said 'wachen'i'. For instance considering the length of time spent in the house in my view the same was sufficient for PW1 to identify the 1st and 2nd accused. In cases of incidences that occur at night voice identification is even more reliable. This is because the accused persons are not only the complainant's neighbour but the paper mask on his (1st accused) face did not cover much of his face hence her ability to see the 1st accused especially very well. Whereas I am satisfied that the circumstances prevailing at the time were sufficient to keep (sic) PW1 identify accused 1 and 2, none of the witnesses was able to identify the 3rd accused.”

33. The High Court on its part reviewed the evidence and framed the main issue, “whether the appellants were positively identified as having participated in the robbery on the material night” and “whether the conditions were conducive for positive identification.” The court then took into account that “the robbers took some time to conduct the robbery” and that “the robbers had torches that had powerful light” before concluding that;

“The appellants were positively identified by PW1 who had ample time to identify them. It is PW1 and PW2's evidence that the appellants are their neighbours. PW1 knew them and saw them at the night of the robbery. She went ahead and gave their names to the police officers. Although the investigation officer did not testify, we do find that it is the information given by PW1 to the police officers at the Kakamega Police station where PW5 was based that time that led to the arrest of the appellants. PW3 was with the police officers during the arrest. There is no sufficient evidence to establish that PW1 mentioned the appellants' names out of malice. The prosecution evidence does establish that indeed there was a robbery at the home of PW 1 on the night of 19th and 20th November 2007. PW1 was raped in the process and she identified the appellants as the robbers as well as her rapists.”

34. There are therefore concurrent findings by the two courts that the appellants were positively identified. We can, however, interfere with those findings if we are satisfied that the same are not supported by evidence or if the findings are based on a perversion of the evidence. As stated in **Adan Muraguri Mungara vs. R [2010] eKLR**, this Court must:

2007 where they committed heinous acts of robbery and rape. The question, as correctly identified by the lower courts, is whether the appellants were part of the gang of burglars. F and his child, C, were clear that they did not identify any of the burglars. They all however confirmed that the ordeal took a long time. J said that the robbers attacked “at around 12.30 am” and left “about 2.00 - 2.30 am.” C said the robbers left “at 3.00 am - 4.00 am”. F said the “thieves stayed upto 3.00 am.”

36. As regards lighting, J said that the robbers “had torches and the room was bright”; that “the torches were moving all over and the house was bright;” that the robbers had “powerful torches”. C stated that the robbers “had powerful torches” and that she was able to count the number of robbers, which she put at “over 15 men”, “from torches’ light”. Based on that testimony, and the length of time the ordeal took, we are ourselves satisfied that the lighting conditions were such as would have enabled J identify the assailants.

37. J testified that she “identified 2 of the men among them 1st and 2nd accused”; and that “they are my neighbours”. In relation to the 2nd appellant, she stated that she identified him from his voice and physical appearance; that he was wearing a white paper mask that covered a very small part of his face; and that he was the one who tried to stop the other assailants from beating her and told them to stop and that she heard him utter the word, “wacheni”. She described the shirt worn by the 1st accused as “creamish”. She said the 1st appellant was wearing a blue T-shirt and that “it is the 2nd accused who raped me 1st”.

38. On reporting the incident at the police station, she gave the names of both appellants to the police. It was on the basis of that report, that the police arrested the appellants with the assistance of PW4, the village elder who pointed out the appellants to the police.

39. Based on foregoing, we are satisfied that the findings by the lower courts placing the appellants at the scene of crime were based on evidence.

40. There is, however, the matter of the alibi defence put forth by the 1st appellant. As already mentioned, the 1st appellant testified that he was on night duty at ‘Lubao jaggery’ when the incident took place. He said the attendance register that would have verified that he was indeed at work had been burnt alongside the jaggery during campaigns. He further stated that the police had indeed confirmed with the attendance book maintained by the security personnel at the gate at his place of work, that he was at work during the night of 19th/20th November 2007.

41. When addressing the 1st appellant’s defence in his judgment, the trial magistrate observed that the 1st appellant denied committing any of the offences and that the 1st appellant “could not offer any evidence of records since the jaggery was burnt down during the 2002 (sic) campaigns.” The learned trial magistrate dismissed the defence on the basis that the records from the jaggery were not produced and further that he did not consider the 1st appellant to be a credible witness. This is how the court dealt with the matter:

“Although the 2nd accused claimed he was at work on the date of the offence, the accused attributed the loss of the Jaggery records to the 2007 election campaign. He did not strike me as an honest witness when he claimed he did not know 2nd accused yet in cross-examination the, 2nd accused elaborately explains the setup of the complainant home and neighbours too. Which by extension apply to him too.”

42. As is discernible from that passage, the trial court appears to have been influenced by the 1st appellant’s inability to produce evidence to corroborate his testimony that he was at work during the material night. Earlier in the judgment, the trial court had remarked of the 1st appellant:

“He denied committing any of the offences he is charged with. He could not offer any evidence of records since the jaggery was burnt down during the 2007 campaigns.”

43. In our view, the court misdirected itself regarding the duty of the 1st appellant. As the Court held in **Kiarie V R [1984] eKLR**:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”
(Emphasis added).

44. The High Court on its part, whilst alluding to the defence of alibi put forth by the 1st appellant did not interrogate it.

45. It is noteworthy that the 1st appellant was arrested at his place of work, where he said he had been when the offence was committed. He said that the police confirmed with the attendance book maintained at the gate of his place of work by the security personnel that on the night in question he had reported to work at 6.00 pm the previous evening and left at 6.00 am the following morning. He said it was on the basis of that information that the police released him after his initial arrest before being re-arrested a week later in what he referred to in his evidence as “a cat and mouse game” by the police.

46. It is not clear why the prosecution did not call the investigating officer who would have shed light on these matters. Police constable Malu, PW5, stated in his evidence that the 1st appellant’s boss said that the 1st appellant was indeed at work on the day the robbery took place. In our view therefore, the alibi defence raised by the 1st appellant was not properly considered, resulting in a misdirection on the part of the Court. Whereas we are not pronouncing the innocence of the 1st appellant, but his conviction is vitiated on account of that misdirection.

47. Regarding the contention that the charge sheet was defective, we are not persuaded that the charge sheet was defective on account of the different names used by J. She was referred by different names in the course of the trial. In the charge sheet she was referred to as J H and as J L. On occasions she was referred to as J S L or as J N. H and R are her husband’s names. R and L might sound the same. She referred to herself in cross examination as J S L. We entertain no doubt that all those names referred to the same person.

48. The result of the foregoing is that the appeal in relation to the 1st appellant succeeds. We allow the 1st appellant’s appeal, set aside his conviction and the sentence. The 1st appellant shall be set at liberty forthwith unless otherwise lawfully held. We uphold the conviction and sentence as against the 2nd appellant. The appeal by the 2nd appellant is hereby dismissed.

Orders accordingly.

Dated and delivered at Kisumu this 23rd day of September, 2016

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU,

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR