IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, G. B. M. KARIUKI & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO.161 OF 2014

BETWEEN

SUMAT OLE SAKAI…….....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a sentence of the High Court of Kenya at Nairobi (Ochieng & Achode, JJ.) dated 3rd June, 2013

in

H.C. CR.A No.26 of 2006)

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JUDGMENT OF THE COURT

The appellant, ***Sumat Ole Sakai,*** has placed this second appeal before us for determination, having been aggrieved by the judgment of the High Court (***Achode, Ochieng, JJ***) which was delivered on 3rd June, 2012. The appeal before the High Court, followed his conviction and sentence handed down by the Senior Resident Magistrate in the Chief Magistrates Court, Kibera.

In the lower court, the appellant was charged with two main counts and two alternative ones. It was alleged in count 1 that contrary to ***Section 296(2) of the Penal Code***, on 9th June, 2006 he jointly with others not before court while armed with offensive weapons, namely, pistols, a *panga* and *rungus* robbed ***J N M*** of one TV set (Sony), one DVD (Samsung), Meko Gas Cylinder (Total) pairs of shoes, a mobile telephone (Samsung), assorted clothes and cash all valued at Sh.61,550/=. During the incident, the robbers threatened to use personal violence on the said ***J N M***, at Lenana Village Nairobi.

In the second charge it was alleged that contrary to ***Section 3(2) of the Sexual Offences Act*** on the same day and place, the appellant had carnal knowledge of the said ***J N M*** without her consent.

The first alternative charge read that at the said place, the appellant indecently assaulted ***J N M*** contrary to ***Section 11(b) of the Sexual Offences Act*** by touching her private parts namely, the vagina.

And in the second alternative charge the appellant was said to have dishonestly handled one *lesso*,

assorted clothes, one *meko* gas cooker and shoes knowing or having reason to believe that those items were stolen or unlawfully obtained contrary to ***Section 322(2) of the Penal Code***.

After trial the learned trial magistrate found the appellant guilty of the offence of robbery with violence and attempted rape. He sentenced him to suffer death for the former charge while the sentence for the latter was suspended.

In convicting the appellant on the count of robbery with violence, the learned trial magistrate said that after appreciating the evidence tendered:

> ***"The upshot of this is that there is overwhelming evidence against the accused person. The complainant as one of the assailants identified him*** (sic)***. Secondly, he was found in possession of recently stolen goods and he did not bother to offer an explanation on how those items came to be in his possession. Thirdly, there is a report from the government analyst which links him with communion*** (sic) ***of this offence. I find this evidence watertight."***

For the charge of rape, the learned trial magistrate had heard from the victim that the appellant had not managed to penetrate her. He had 2 only ejaculated on her underpant and between her thighs. Therefore the offence proved was only one of attempted rape. The appellant appealed to the High Court.

In the High Court the appellant had presented four grounds of appeal, namely that his visual identification had not been free of error, the alleged offence having taken place under difficult circumstances (at night). He added that the evidence of identification having been given by a single identifying witness, an identification parade ought to have been conducted, which was not. The other ground was that there was no nexus between his arrest, the offence and the recovered stolen items. The appellant further contended that no proper investigations were carried out in the alleged offence and the evidence tendered was contradictory. He concluded that his defence had been rejected without reasons.

The learned Judges of the High Court began by reminding themselves of the duty falling on their shoulders as the first appellate court which is to reevaluate the evidence on record, and come to their own conclusion as stated in the case of ***Odhiambo v Republic Cr. App. No.280 of 2004***, which was reproduced. They then proceeded to appreciate the evidence as narrated by each witness. They focused on the evidence of ***J N M*** who was the single identifying witness at the scene of the crime which took place at night. They referred to the case of ***Karanja & Another vs Republic [2004] 2 KLR, 140*** to stress the need and care with which to address evidence of a single identifying witness to ensure that justice is done. While citing the case of ***Ogeto vs Republic [2004] 2 KLR***, ***14*** the learned judges, duly cautioned themselves and proceeded to find and agree

3 with the lower court that the complainant had positively identified the appellant at the scene. And lastly, the learned judges took cognizance of the conditions that must exist before convicting, relying on the doctrine of recent possession as stated in ***Arum vs Republic [2006] 1KLR, 233.*** They concluded that the appellant was found in possession of property recently stolen from ***J N M*** through robbery which she positively identified.

The High Court also addressed itself to the tests and analysis that the

Government Chemist accorded to the saliva and blood samples taken from the appellant and the semen found on the complainant's underpant, which in his opinion belonged to blood group B of the appellant. That was a relevant factor in the case that the appellant faced. As for the defence, the learned Judges found that even as the appellant had no obligation to explain himself or prove his innocence, nonetheless:

> ***"The evidence on record, however, is overwhelming and his defence, which merely stated that he was not found with anything at the time of arrest and that he was innocent did not do much to discount the prosecution evidence."***

Before us, ***Mr. Paul Mugwe Nyaga***, learned counsel for the appellant, argued the four grounds of appeal

contained in the supplementary memorandum of appeal, and incorporated one from the appellant's home-made memorandum filed in court on 15th December, 2014 on the issue of recent possession. Counsel also cited two cases in support of his client's case. The appeal was opposed by ***Mr. B. L. Kivihya,*** Assistant Director of Public Prosecutions.

4 Beginning with the ground of recent possession, ***Mr. Nyaga*** told us that the evidence of ***Jane Koki*** (PW2) was that the appellant entered the *matatu* in which she was early in the morning of 9th June, 2007, with three other people, on the way from Lenana to the City Centre. They had luggage some of which was placed in the boot while the appellant placed his manila bag luggage near her. She touched it and realized that it was a *meko* gas cooker. The appellant, clad in a Maasai *shuka* then sat behind PW2.

According to ***Mr. Nyaga*** placing that piece of luggage into the matatu did not mean that it belonged to the appellant. It could have belonged to his mates. So, that luggage, which was a *meko* gas cooker, did not belong to the appellant. His was a paper bag containing sugar and cooking oil. That there was no evidence adduced to link the appellant to the container with the *meko* gas cooker. Therefore both the trial and the High Court were in error to find or conclude that the appellant was found with the complainant's *meko*. Even the *Shuka* he was wearing had no distinctive marks by which the complainant claimed its ownership.

The next ground was identification, which counsel told us was closely interlinked with the alleged recent possession. ***Mr. Nyaga*** argued that only the complainant, PW1, testified on this, yet the incident took place at night without a reliable source of light in which the complainant would positively identify the appellant, a person she did not know before. The intensity of the torch light said to have been flashed about by the two intruders in the complainant's house was not stated and the complainant's testimony that the torchlight bounced or was reflected on her iron sheet walls – thereby enabling her to see and identify the appellant was not credible or reliable.

5 That accordingly the two courts below were wrong to find that the complainant positively identified the appellant. Further, that it was not stated for how long the complainant looked at the appellant or even how long the robbery took. In that regard, ***Mr. Nyaga*** cited the case of ***Mutonya Kariuki vs Republic Cr.A.68 of 2013*** regarding the essence of length of time to observe or see a stranger in order to be positive about his identity. For that reason, an identification parade ought to have been conducted to confirm the complainant's claim. Yet, the High Court found that such a parade was not necessary or could serve no purpose. That was an error on its part.

The learned counsel then moved to the ground that the courts below relied on ***"an inconclusive DNA evidence.***". We heard that since two people had sexually assaulted the complainant on the material night, the Government Analyst's report linking the appellant to the act was doubtful. Quite probably, the analyzed samples of the semen found on the complainant's underpant belonged to the appellant's accomplice, counsel submitted.

Lastly, ***Mr. Nyaga*** argued that some vital witnesses were not called to testify, namely, the *matatu* driver and tout. They had dropped some passengers at some other destinations before arriving at the scene where the appellant was arrested. The culprits could have alighted earlier and yet it was the appellant who was arrested. Therefore the evidence by PW2 that the appellant was the culprit was not definite, he argued.

Mr. Kivihya, opposing the appeal, told us that the robbery took place at night but early the following morning the appellant was arrested in a *matatu* with the stolen property of the complainant, which included the Maasai *Shuka* and the *meko* gas cylinder. PW2 who had seen the appellant, with others, enter the *matatu* in which she was, had seen him place the bag containing the *meko* near her. She touched it and realized that it was a *meko* gas cylinder. Since she had been informed by the complainant of the robbery at their place, PW2 called the complainant who on arrival at the point of arrest, screamed on seeing the appellant. She identified/recognized him as one of her attackers. She positively identified her stolen property including the *meko* and the *Shuka.*

Mr. Kivihya argued that the two lower courts were not wrong to accept the evidence that torchlight

reflected on the iron sheet walls of the complainant's house, enabled her to identify the appellant; the appellant had even told her that he was going to rape her; she asked him why he could do so in the presence of her 7 year old son, but nonetheless after a struggle, he lay on her trying to rape her. That was ample time and opportunity to identify the appellant, whom she recognized after his arrest later and she screamed on seeing him.

> Counsel added that it was not only on account of recent possession of the complainant's stolen property or identification that the appellant was convicted. The Government Chemist's evidence, ***Stephen Matinde*** (PW6) in his report (exh.P17) linked the appellant to the whole case. The blood and saliva samples taken from him matched the stains of spermatozoa found on the underpant of the complaint. All seen together, led to the conclusion which made conducting an identification parade unnecessary. That the prosecution chose which witnesses to call to support its case and that was all that it was required to do. The charges were proved against the appellant leading to his conviction and sentence. In determining this appeal we are cognizant of the provisions of

Section 361(1) of the Criminal Procedure Code regarding dealing with a second appeal. The substance of that provision of law has been enunciated in many decisions of this Court including ***Njoroge vs Republic [1982] KLR 388*** in that on second appeal this Court only concerns itself with points of law. It is bound by concurrent findings of fact by the two lower courts unless such findings were not supported by evidence.

The brief background of this case is that the complainant, ***J N M*** (PW1), was attacked in her house at Lenana at night. She was asleep with her son when five intruders struck. They had a torch; they got into her bedroom, demanded for money and the mobile phone. They stole goods including a *meko* gas cylinder, clothes and many other items. While three of the robbers moved to other part of the house, the appellant, a tall man, with another who was shorter, remained in the bedroom. The appellant told her that he wanted to rape her. They struggled and so he did not manage to penetrate her. He ejaculated on her underpant. The other man raped her. The complainant alerted a neighbour (***Maina***) who banged on their common wall. The intruders fled. The complainant checked and found that her property had been stolen. She called and informed neighbours. Early that morning one ***J N*** (PW2) telephoned PW1's neighbour ***E N***, to inform her that her stolen property had been recovered at the railways bus stage in the city centre. She went there and found PW2, with ***P.C. Christopher Kiptum*** (PW3) holding the appellant.

8 Early that morning as PW2, left home at *Lenana* to go to town, the appellant and 3 other people entered the *matatu* she was in. The appellant placed a bag containing what PW2 touched and realized was a *meko* gas cylinder. Having been informed of the robbery in their place, PW2 told the learned trial magistrate that she mentioned to the *matatu* driver to drive into a police station so as to report the matter. He declined but as they got to the railway station stage, PW2 raised alarm which led to drawing the attention of PW3, and the eventual arrest of the appellant. PW2 was firm that the appellant, who was wearing PW1's *Shuka* entered the matatu with the bag containing the *meko* and placed it near her. Thus on his arrest he had both these items with him.

Considering the findings by the two counts below, the record before us and the submissions by counsel, we are satisfied that the appellant was found in possession of recently stolen goods. The robbery took place at night but early in the morning, through PW2's action, the appellant was arrested by PW3 in possession of some of the goods the robbers stole from PW1's house. These included the *meko* gas cylinder, the *Maasai Shuka*, and other items the complainant positively identified when she found the appellant having been arrested by PW3. The appellant was wearing the complainant's *Shuka* which PW2 knew. She was firm in her evidence that he placed the bag containing the *meko* on the *matatu*. The complainant positively identified it as hers. Both the trial and the High Court found so and we have no reason to differ with them. Indeed, the appellant did not claim those items or explain how he came by them. We did not agree with

9 Mr. Nyaga's proposal that even as he put the bag containing the *meko* on the *matatu* near PW2, that bag belonged to one or the other three people he had boarded the *matatu* with. Therefore, this ground fails and we dismiss it.

The two courts below also found that the appellant was identified at the scene, despite the difficult circumstances, when his mate flashed about the torch whose light also bounced on the iron sheet wall. The appellant talked to the complainant about intending to rape her. He lay on her after a struggle. When she saw him under arrest, she screamed that he was the assailant who had robbed and attempted to rob her. And identification was not the only ground to convict. We have already alluded to the appellant being found in recent possession of the complainant's stolen property.

The other factor is that PW6 conducted an analysis of the saliva and blood samples taken from the appellant side by side with the semen stains on the complainant's underpant. The result and link was that they belonged to the appellant's blood group "B". It was no coincidence and there was no basis to say that probably the semen stains belonged to the appellant's mate. PW1 was categorical that the appellant, in his attempt to rape her, did not succeed to penetrate her. But he ejaculated between her thighs. The semen fell on her underpants and PW6 matched the stains with the appellant's saliva and blood samples. That test, not DNA as ***Mr. Nyaga*** made to argue, irresistibly pointed to the appellant. We conclude that the two lower courts were entitled to find that it was the appellant who attempted to rape the complainant on the night she was robbed and also raped by his mate. He was therefore among the people that raided the complainant's residence. This ground, too, fails and we dismiss it.

10 Similarly, we are not persuaded that the exclusion of what the defence called crucial witnesses, the *matatu* tout and driver, weakened the prosecution case. The prosecution called the witnesses it considered vital to prove its case. It has not been demonstrated that the exclusion of the *matatu* crew as witnesses lead to the conclusion that their evidence could or had an adverse inference on the part of the prosecution or its case.

In sum, we conclude that this appeal has no merit and we dismiss it in its entirety.

Dated and Delivered at Nairobi this 20th day of March, 2015

J. W. MWERA

JUDGE OF APPEAL

G. B. M. KARIUKI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR