



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 12 OF 2013

BETWEEN

KENNEDY OCHIENG ODIRA Alias OGIDO.....1ST APPELLANT

BENARD OWUOR OPIYO Alias PUKO.....2ND APPELLANT

PETER OTIENO OYARE.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisii (R. N. Sitati, J.) dated 21st day of May, 2012

in

H.C.C.R.A. NOS. 106, 110 & 279 OF 2010)

JUDGMENT OF THE COURT

1. The appellants, Kennedy Ochieng' Odira, Bernard Owour Opiyo and Peter Otieno Oyare, were charged and tried for the offence of gang rape contrary to section 10 of the Sexual Offences Act. The particulars of the offence were that on 20th May, 2007, in the then Homa Bay District of the then Nyanza Province, the appellants intentionally and unlawfully gang raped AAO, a schoolgirl at [Particulars Withheld] Girls' Secondary School. They were convicted and each sentenced to serve life imprisonment. Their appeals to the High Court were dismissed on 21st May, 2012 as "*totally lacking in merit.*" This is a second appeal.

Background

2. The facts as established by the two lower courts are that the complainant, AAO, who was PW1, a seventeen-year-old student at [Particulars Withheld] Girls' Secondary School at the time, was walking to school on Sunday 20th May 2007 at about 4.30 pm. She was wearing her school uniform and was carrying a bag. On reaching a place called [particulars Withheld], she found a boy standing by the road who

enquired from her why she “*was not greeting people.*” Before she could reply, the boy, who she identified as the second appellant and whom she knew by the name Apuke, got hold of her by the neck, strangled her and dragged her towards a maize plantation that was about 15-20 meters from the road. On reaching the plantation, she found two other boys, who she identified as the first and third appellants. She used to see them grazing cattle together. The first appellant enquired from the second appellant “*whether he had brought the lady*” to which the second appellant responded in the affirmative. In a conversation that ensued between the appellants, one of them then enquired what time it was, the other one responded that it was 4.58 pm, where upon they all said that “*by 5.00pm they would have finished their mission.*”

3. The second appellant continued holding AAO’s neck; they laid her on the ground; the first and third appellants held her legs and separated them; they tore her underpants and biker into pieces; pinned her down and raped her. The first appellant was the first one to rape her. She experienced a lot of pain, bled and in the process lost consciousness. In her words “*when accused 1 was having sex with me, accused 2 was holding my neck firmly and accused 3 was struggling with my legs keeping them apart.*”

4. When she regained consciousness three days later, she was at Homa Bay District Hospital where she remained recuperating for the next three months until her discharge in July 2007.

5. On Sunday, 20th May, 2007 at about 6.00 pm Michael Opunda (PW3) and Sarah Atieno Ombeta (PW4) were walking along a path in [Particulars Withheld] on their way home after visiting their friend when they heard a small voice from a maize plantation. On checking they found a girl who was totally naked lying on the ground. Her clothes were scattered on the ground. Her school bag was near her head. She was sleeping on her school uniform. Her clothes were covered with mud and blood. PW 3 administered first aid and when they enquired from her what had happened, she showed them “*by sign that 3 people raped her.*” PW 3 and PW 4 then called for assistance; took her to Ratanga Shopping Centre where her relatives identified her and took her to hospital.

6. On receiving information on 20th May 2007 that one of her students had been raped, Doreen Oraku (PW7), the Principal of [Particulars Withheld] Girls Secondary School arranged for the complainant to be transported from Ratanga Centre to a clinic at Ndhiwa Center and subsequently to Homa Bay District Hospital where she was hospitalized.

7. On 21st May 2007 at about 9.00 am, John Opundo, (PW5, a farmer and clan elder at [Particulars Withheld]) received information that a girl had been defiled near his farm and that the first appellant was among those who had done so. Accompanied by other elders, they went to the home of the first appellant and escorted him to Ombama Police Post. There, they found AP Sargent Michael Dido (PW2) who re-arrested the first appellant, and on interrogating him about the incident, the first appellant led him to the second and third appellants who were subsequently arrested.

8. Suter Joel, (PW6), a clinical officer attached to Homa Bay District Hospital, produced a P3 Form that was prepared by Dr. Ganda who examined the complainant upon presenting with a history of having been physically and sexually assaulted by persons known to her. The examination revealed that the complainant sustained soft tissue injuries to her neck and legs; her lower limbs had injuries on the thigh up to the knee level; she walked with difficulty; there was laceration on the floor of her vagina and labia majora and minora; a vaginal swab showed non-moral dead sperms; she had whitish discharge from the vagina which was a sign of infection.

9. Sargent Peter Ramog, (PW8), was attached to the Criminal Investigations Department, Homa Bay Branch, and was tasked with investigating the matter. On interviewing the complainant in June 2007, she narrated to him how she was attacked and raped on 20th May 2007 and that she had no difficulty in identifying the appellants whom she knew and recognized, as her attackers. After his investigations he concluded that the appellants had gang raped the complainant and charged them accordingly.

10. In his defence, the first appellant stated that on the day the alleged offence was committed he was at his home and nowhere near [Particulars Withheld] where the offence was committed. The second

appellant also denied any involvement in the crime, saying that on 20th May 2007 he was at his home in [Particulars Withheld] . The third appellant in his defence expressed shock for having been arrested and charged in connection with an offence he knew nothing about.

11. The trial court concluded that there was overwhelming evidence that the appellants gang raped the complainant until she lost consciousness and convicted them.

12. After reviewing and analyzing the evidence including the alibi defences put forth by the appellants, the High Court concluded that the prosecution evidence presented by the prosecution “*remained unshaken all through the trial*”; that “*the attack took place in broad daylight*” and “*the issue of mistaken identity does not arise*” and that the conviction was safe. The learned judge was also not satisfied that circumstances existed for interfering with the sentence meted out to the appellants and dismissed their appeals.

Submissions

13. Against that background, the first appellant, Kennedy Ochieng’ Odira, complains in this appeal that the magistrate who conducted the trial did not have jurisdiction to do so; the judgment of the trial court is irregular because the magistrate who sentenced him did not inform him of his rights to have witnesses recalled under section 200(3) of the Criminal Procedure Code; he was convicted on the basis of uncorroborated evidence of a single identifying witness; further investigations, in the nature of DNA tests, were required and the failure to do so was contrary to section 36(1) of the Sexual Offences Act; the trial court shifted the burden of proof from the prosecution and his alibi defence was not accorded due consideration. The first appellant went on to say that he was arrested on 22nd May, 2007, two days after the offence was committed, was incarcerated for one month before being taken to court; there is nothing to show that he raped the victim and no evidence was tendered on the victim’s age.

14. Bernard Owour Opiyo, the second appellant, argues that absent a DNA test, the prosecution case was not proved to the required standard of proof; the conviction was wrongly based on the evidence of a single identifying witness; there was conflicting evidence on the age of the victim; the trial court shifted the burden of proof from the prosecution; there was no direct evidence against him and the trial court wrongly based his conviction on circumstantial evidence. The second appellant went on to say that he was arrested on 22nd May 2007 and tortured in several police stations before finally being arraigned in court; and that he was mistaken for a person known as Mzee.

15. The third appellant, Peter Otieno Oyare, contended that the conviction and sentence should be quashed on account of his constitutional rights under section 72(3)(b) of the Constitution having been violated; that the evidence of the single identifying witness relied upon was unreliable as the witness did not, in her first report, give a description of him; the evidence presented by the prosecution was fraught with contradictions and inconsistencies; his sperms were not tested to establish whether they matched the spermatozoa found in the victim; there was no medical evidence establishing that the complainant was raped by more than one person; his alibi defence was overlooked.

16. Opposing the appeal, Mr. D. N. Ogoti, Senior Assistant Deputy Public Prosecutor, submitted that the prosecution proved its case against all the appellants; the incident occurred in broad day light at about 4.30 pm; it was well planned and executed; the second appellant accosted the complainant along the road and dragged her into a maize plantation where the first and third appellants were found waiting; the first appellant enquired from the second appellant whether he had brought the lady; a conversation took place between the appellants with one of the appellants enquiring what time it was and on being informed that it was 4.58 pm they all said they would have finished their mission by 5 pm.

17. Counsel went on to say that the question of mistaken identity did not arise; the victim knew all the appellants and she recognized them; the trial magistrate found the victim to be a credible witness; the circumstances were conducive for positive identification as it was during day time; that the victim talked to PW3 and 4 upon being rescued and was able to communicate with them before being taken to hospital where she stayed for three months recovering from the ordeal. Counsel maintained that the prosecution

proved its case, there was medical evidence in the form of exhibit 6; there were no contradictions in the prosecution evidence as alleged; the alibi defence put forth by the appellants was displaced; the burden of proof was not shifted to the appellants; the guilt of the appellants was established by direct, as opposed to circumstantial evidence as claimed by the appellants; the case was proved to the required standard beyond any reasonable doubt; that under Section 20 and 21 of Penal Code the appellants were either principal offenders or abetted in the commission of the offence.

18. Regarding jurisdiction of the magistrate, counsel submitted that the file was passed on to a competent magistrate to pass sentence and no prejudice was occasioned to the appellants thereby.

19. Regarding the sentence, counsel submitted that the offence committed is heinous; the appellants do not deserve any mercy and the life sentence is deserved. With that counsel urged us to dismiss the appeal.

Determination

20. We have considered the appeal and submissions by the appellants themselves and by learned counsel for the respondent. Under section 361(1) of Criminal Procedure Code, second appeals to this Court are restricted to matters of law. [See **M'Riungu v R [1983] KLR 455**]

21. Furthermore, we cannot, on a second appeal, interfere with findings of fact by the trial court unless such findings are not based on evidence, or are based on a misapprehension of the evidence, or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings it did. [See **Chemagong vs. Republic [1984] KLR 611**]. In **Karingo vs. Republic [1982] KLR 213**] the Court stated:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja vs. R (1956) 17 EACA 146)”

22. The issues that require our consideration in these appeals are, firstly, whether the lower courts erred in basing the convictions on the evidence of a single identifying witness; secondly, whether the prosecution established its case to the required standard and whether the appellants' alibi defence was considered; thirdly, whether the appellants' constitutional rights under section 72(3)(b) of the repealed Constitution were violated and if so the effect; and fourthly, whether the appellants' rights under section 200(3) of the Criminal Procedure Code were breached.

23. On the question whether the lower courts erred in basing the convictions on the evidence of a single identifying witness, it is often said that the evidence of a single identifying witness is fraught with danger. In **Cleophas Otieno Wamunga v R Criminal Appeal No. 20 of 1989** 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 alleged 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.”

24. Accordingly, before convicting an accused person in reliance of the correctness of identification, the court should be cautious and satisfy itself that conditions were favourable for correct identification. [See also **Charles O Maitanyi v Republic (1986) KLR 198**]. Indeed, where the circumstances surrounding the identification are difficult, the courts can only rely on such evidence after testing it with the greatest care. [See: **Abdallah Bin Wendoh and another v R (1953) 20 EACA page 166**].

25. We are satisfied that both lower courts proceeded on the correct legal basis and that the evidence of identification of the appellants was watertight. The circumstances in this case were not at all difficult. The

incident occurred in broad daylight at about 4.30 p.m. in the afternoon. The appellants are persons who are known to the complainant. There is no merit in the complaint by the appellants that the lower courts erred in relying on the evidence of a single identifying witness.

26. On the question whether the prosecution established its case to the required standard and whether the appellants' alibi defence was considered, we agree with the proposition advanced by the appellants that it was the duty of the prosecution to prove their guilt and that if at the end of the whole case there was reasonable doubt created by the evidence given by either the prosecution or the defence as to their guilt then they would be entitled to an acquittal. [See **Woolmington v DPP [1935] All E R 1** to which the appellants referred]. The lower courts were therefore under a duty, which in our view they discharged, to consider the evidence tendered by the prosecution and by the appellants in their defence as a whole and to determine whether at the end, any reasonable doubt was raised as to the guilt of the appellants.

27. The trial court analyzed the evidence before concluding that "*the prosecution has proved beyond reasonable doubt the charges against the accused persons*" and before disregarding the appellants' defences as "*mere denial*". After analyzing the evidence, the trial court in its judgment stated:

"In my assessment of PW1, she impressed me as an honest and truthful lady. Her accounts of how Accused 2 approached her and what transpired thereafter leaves me in no doubt that the three accused persons all participated in removing the cloths (sic) of PW1 and pinning her down inside the maize plantation.

She was well known to Accused 1 and accused 2 by names. She also said that she had met accused 1 and accused 2 grazing animals on the nearby fields as she walked to school with Accused 3 in their company. She even said Accused 1, Accused 2 and Accused 3 had a particular joint they sat and smoked something like bhang on many occasions as she walked to school. This leaves no doubt in my mind that the accused were well known to her. Finally, the description she gave led to the arrest of accused 1 and accused 2 and when she recovered, no contradiction occurred.

Her description of her assailants and how they acted on her shows consistency and is believable. It was not possible for the accused harassment during cross-examination to shake the PW1 who cried due to long questions and enjoyment by the accused especially accused 1 and accused 2 on whether she enjoyed their sex!!!"

28. After noting that PW 1 directly implicated the first appellant, the learned trial magistrate then stated, in relation to the second and third appellants, that:

"The PW1's evidence alone shows that the only thing she remembered and saw before she lost consciousness was Accused 1 having sex with her. The question that the court has to answer is whether the Accused 2 and Accused 3 also had sex with PW1.

There is no direct evidence showing accused 2 and accused 3 had sex with PW1. However, it is my finding that both were accomplices to the offence. The accused 2 is the one who grabbed (sic) PW1 from the path and dragged her to the maize plantation.

Accused 3 was holding PW1 (sic) legs as accused 1 started the sex escapades. This clearly shows that Accused 1, accused 2 and accused 3 had a common-purpose, to have sex with the PW1. From the evidence on record, I find that accused 2 and accused 3 did not abandon that common purpose or intention to have sex with PW1."

29. The High Court on its part after reviewing and re-evaluating the evidence concluded that the prosecution had discharged its burden and proved its case against the appellants to the required standard and that the convictions by the trial court are safe.

30. We have no doubts in our minds that the appellants, in association with each other and with a

common intention, raped the complainant. We are satisfied that the prosecution evidence was watertight and met the required threshold. The evidence tendered by the prosecution witnesses and the medical evidence produced established that the appellants committed the offence. No further evidence, whether by way of DNA as suggested by the appellants, or otherwise was necessary. There is no merit in this ground and it fails.

31. The next complaint is that the appellants' constitutional rights under section 72(3)(b) of the retired Constitution were violated because they were detained longer than required before being arraigned in court. This complaint was taken up for the first time on appeal to the High Court.

32. The charge sheet shows that the appellants were arrested on 23rd May 2007. They were taken to court on 15th June 2007. They were therefore in police custody for about 24 days before they were presented to court. Section 72 of the retired Constitution required that a person arrested upon reasonable suspicion of having committed or about to commit an offence to be brought before the court as soon as is reasonably practicable. Where such a person is not taken to court within either twenty four hours for non capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the Prosecution.

33. In **Dominic Mutie Mwalimu vs. Republic Cr. Appeal No. 217 of 2005** this Court held that on a reading of section 84(1) of the Constitution, there has to be an allegation of breach before the court can be called upon to make a determination of the issue and the issue has to be raised at the earliest opportunity. The appellants should have taken up the matter of their detention in excess of the period permitted by the Constitution earlier in order to give the prosecution an opportunity to explain why they were not presented to court earlier.

34. We do not know what explanation the prosecution would have offered in this case but it is not lost to us that based on the record, the complainant was hospitalized immediately after the incident and remained in hospital until July, 2007. It was not until mid June, 2007 whilst she was still in hospital that the investigating officer managed to record a statement from her. In **Basilio Mwaniki Ileri vs. Republic Criminal Appeal No. 87 of 2013 [2015] eKLR** this Court stated that:

“Moreover the appellant never raised this issue in either of the two courts below; this matter was only raised for the first time before this Court; thus the prosecution did not have an opportunity to offer an explanation for the said delay which would have enabled the two courts below determine whether the delay of 1 day was reasonable.”

35. Other decisions of this Court to the same effect include **James Kabwaro Nyasani vs. Republic Criminal Appeal No. 54 of 2011** and more recently **Musembi Kuli vs. Republic [2013] eKLR** where the Court categorically stated that an accused has a duty to complain about “*extra-judicial detention*” or “*prolonged detention or delay*” at the earliest opportunity.

36. In any event, the trial does not become a nullity on account of violation of the right to be brought to court within the constitutional time limits. Without condoning detention of suspects in contravention, such violation can only be a basis for founding a claim for damages. [See **Julius Kamau Mbugua v Republic [2010] eKLR** and **Fappyton Mutuku Ngui [2014] eKLR.**]

37. The last issue is whether the appellants' rights under section 200(3) of the Criminal Procedure Code were breached. The trial, commencing with taking of prosecution evidence on 20th June 2007, the defence case up to delivery of judgment on 21st September 2007 was conducted before S. M. Mwendwa, Resident Magistrate, who convicted the appellants. After mitigation by the appellants the trial magistrate stated that:

“The act by the accused person to the complainant was beastly and inhuman. They almost killed the complainant on guise of having (sic) sex with her. The minimum sentence provided under section 10 of the sexual offences Act is 15 years imprisonment which I have no jurisdiction to impose. I order the matter to be placed before Court 1 on 25/9/2007 for the accused to be sentenced to serve life Imprisonment. The accused 2 and accused 3 to be taken for age assessment and their report produced in court on that day. Mention on 25/9/2007, Court 1.”

38. Having regard to Section 7 (1)(b) of the Criminal Procedure Code which provides that:

“7.(1) A subordinate court of the first class held by;-

a.

b. ***A resident magistrate may pass any sentence authorized by law for an offence under section 278, 308 (1) or 322 of the Penal Code or under the Sexual Offences Act, 2006.”***

The trial magistrate S. M. Mwendwa, Resident Magistrate was mistaken that he did not have jurisdiction to pass sentence. Indeed he had.

39. However, on 25th September, 2007 the matter was placed before E. K. Mwaita, Ag. SRM, who recorded; ***“I invoke the provisions of section 200(3) of the CC (sic) and proceed to sentence the accused as the Hon. R.M has no jurisdiction on the sentence herein.”*** The Acting Senior Resident Magistrate then sentenced each of the appellants to serve life imprisonment.

40. Section 200(3) does not in our view apply to the circumstances of this case. It provides that:

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

41. In this case S. M. Mwendwa, Resident Magistrate, who also delivered judgment convicting the appellants, recorded the entire evidence. The applicable provision in this case, in our view, is section 200(2) which provides:

“Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.”

42. There is therefore no merit in the complaint that section 200(3) of the Criminal Procedure Code was breached.

43. For the foregoing reasons, the appeals have no merits. They are accordingly dismissed.

Dated at Kisumu this 9th day of October, 2015.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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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