



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: P. KIHARA KARIUKI (PCA), MWILU & OUKO, J.J.A.**

**CRIMINAL APPEAL NO. 98 OF 2005**

**BETWEEN**

**DAVID KURIA MWARANGU.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from a Judgment of the High Court of Kenya at Nairobi (Mr. Justice Ochieng, J**

**and Makhandia J) dated 20<sup>th</sup> July 2004**

**in**

**H.C.C.Cr. No. 607 of 2001)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

**1. DAVID KURIA MWARANGU**, hereinafter referred to as the appellant, was, on the 26<sup>th</sup> April, 2001 found guilty and convicted of the charges of robbery with violence contrary to the provisions of section 296(2) of the Penal Code and for wearing the uniform belonging to the Armed Forces not being an exempted person or without the permission of the Minister or other lawful authority contrary to the provisions of section 184(1) of the Penal Code. For the latter offence he was sentenced to serve a term of imprisonment of one year while on the former he was sentenced to suffer death as by law provided. The High Court, confirmed that position at the appellant's first appeal to that court.

The appellant had also faced the charge of rape but the two courts below neither convicted nor acquitted him of the said charge.

2. The appellant being aggrieved has preferred this second appeal and in his home-made "*Petition*" of Appeal raised some six grounds of appeal, four of which were abandoned by the appellant's advocate at the hearing hereof, leaving the two grounds set out hereunder;

***"3. That the learned judges further erred in law in relying on the allegation of rape as prove (sic) of violence inspite of their having been no prove (sic) to link me with the commission of the said crime.***

**4. THAT the learned judges erred in law in basing their findings solely on circumstantial evidence that fell far short of the standard required to sustain a conviction.”**

3. Mr. Rombo, learned counsel for the appellant submitted that the issue of the alleged rape cannot have rightly been used to convict the appellant for robbery with violence considering that the appellant was not convicted for rape. He added that the High Court found identification to be improper, circumstantial evidence was described as insufficient and the conviction unsafe.

4. That was not the view taken by Mr. Kivihya learned State Counsel, who saw the appeal as one completely devoid of merit. He submitted that circumstantial evidence is not inferior evidence; that the appellant was said by the complainant to have been wearing army uniform and it was in army uniform that he was arrested. Counsel saw the proximity of time between the time of the commission of the offence and the arrest of the appellant and his being brought to court as a relevant factor.

He agreed with the High Court that rape is the worst type of violence against a woman, saying that since sex between the appellant and the complainant had been proved, and because of the fright experienced by the complainant. When the appellant confronted her was a form of violence, and stripping the complainant naked was yet another form of violence, then the appellant’s conviction was right and this appeal should be dismissed. Mr. Kivihya concluded his submission thus, that the P3 forms in respect of the sexual assault were filled on the very date of the commission of the offence, and as the complainant proved robbery and further that the appellant was identified by his chipped tooth, then identification of the appellant was safe yet another reason why this appeal must fail.

5. This is a second appeal and as such and pursuant to the provisions of **section 361 Criminal Procedure Code (CPC)** and the authority of **NJOROGE V REPUBLIC [1982] KLR 388** this court is only concerned with points of law. In the words of the learned Judges in the above authority:-

**“On a second appeal, the court of appeal is only concerned with points of law. In such an appeal, the court is bound by the concurrent finding of facts made by the lower courts unless they were not founded on evidence.”**

This is based on the provision of section 361 Criminal Procedure Code which provides as follows:

**“361. (1) 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 a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”**

However, this court will not hesitate to interfere if and when it finds that the findings of the lower courts were arrived at due to a pervasion of the evidence or this court is satisfied that a total consideration of the evidence shows that no reasonable tribunal properly directing findings, as was stated in the authority of **ADAN MURAGURI MUNGARA V REPUBLIC – Nyeri CA Cr. Appeal no. 247/2007**.

6. What is evidently clear is that the lower courts’ handling of the rape issue was contrary to the adduced evidence and no wonder the trial court did neither convict nor sentence the appellant on the same. We consider the issue of rape because we were told that it constituted violence as envisaged by the provisions of section 296(2) of the Penal Code. Even if rape were to be considered such violence in an appropriate case, in this case the issue of rape itself, was not, in our view, proved. It was not enough that the complainant alleged to have been raped by the appellant. It was further not enough that indeed spermatozoa were found in her private parts. What would suffice is evidence connecting those spermatozoa to the appellant and no such attempt was made. So what if the appellant’s penis had some whitish discharge? There simply was no evidence, to connect what was in the appellant’s penis with what

was in the complainant's private parts. The doctor's findings fell short of connecting the appellant's penis discharge to the complainant's situation. The doctor knew or ought to have known how to ascertain whether or not the spermatozoa found on/in the complainant were infact from the body of the appellant. And the court ought to have known that the test and/or standard of proving rape was always one beyond reasonable doubt.

There was no such proof. We are therefore left with no doubt that the courts below did not properly direct their judicial minds as required and we must interfere. Rape was not proved. Any violence associated with rape becomes irrelevant in this case. It is for that reason that we uphold ground 3 of this appeal.

7. What other evidence, circumstantial or otherwise, identified the appellant as the perpetrator of the offence he was sentenced to death for? The complainant said that her locked door suddenly broke open at about 3 a.m. and she heard someone enter the bedroom. She said the attacker, whom she said was the appellant herein, was accompanied by the child of the complainant's brother. He had a torch, wore Army uniform and a cap. He asked for money and ordered complainant to go under her bed. She said that the attacker was clad in army uniform and that she had told the police as much. She identified him because he was brought to the police station while in army uniform and because he had a chipped tooth.

8. Identification is a serious issue of law which must be conclusively proved to connect an accused/appellant, as the case may be, to the commission of an offence. There was no evidence from PW3 to whom the complainant made her first report that she could identify her attacker from his chipped tooth and army clothes. No description was given of the appellant and the courts below fell into an error when they did not sufficiently analyze evidence to see that identification was not without doubt and error. The evidence of PW2 did not help things. Once he was punched by the attacker he covered his head with a blanket and merely repeated, later to the police, what he heard from the complainant. On his part he saw the appellant enter the house alone, not exactly what the complainant said about the same event.

9. It is noteworthy that the complainant never stated in evidence what she saw of the appellant or how she could see anything, during the time the two walked the three or one kilometer (depending on whose version the two courts below chose to believe) to the place where she was allegedly raped. It is admitted that the attack was at 3 a.m. It was dark except for the torch allegedly carried by the appellant. No description of the appellant, not at all his chipped tooth by which he was allegedly identified, was given to the police (PW3) at the first reporting or indeed at all. The law is that identification must be free of error for a conviction to be based on the same – consider this:-

***“Evidence of visual identification in criminal cases can bring about 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. The way to approach the evidence of visual identification was succinctly stated by Widgery C.J. in the well-known case of R –vs- TURNBULL [1976]3 ALL ER 549 at page 552 where he said:-***

***“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”,*** being the words of this court in **CLEOPHAS OTIENO WAMUNGA V REPUBLIC [1989] KLR 424.**

10. In this appeal it was a case of identification of a total stranger in circumstances which cannot be described as being conducive to positive identification of an appellant who says it was not him. The courts below did not, with respect, properly address themselves to the issue of identification. The need to

test with the greatest care the evidence on identification was that greater due to denial by the appellant that he was not the attacker and further, he being a total stranger to the complainant in an attack committed at night without sufficient light. The High Court did infact find that it was difficult to have identified the appellant in that situation.

11. The ingredients for the offence for which the appellant was convicted under section 296(2) of the Penal Code are any of these three, that he was armed with a dangerous or offensive weapon; he was accompanied with one or more other persons or that at, immediately before or after the time of the robbery, the offender wounds, beats, strikes or uses any other form of personal violence to any person. In this case, the courts below did not care to show proof of what dangerous weapon the appellant was armed with or that other attackers were in the company of the appellant. The evidence of rape was of the weakest type and we have already discounted that as a form of the violence fitting the requirements of section 296(2) of the Penal Code. Having found the appellant to have been properly convicted under section 296(2) of the Penal Code and upholding such conviction, the High Court was obliged to hold in abeyance the service of the term of imprisonment for the offence of being found in army uniform. They did not. They erred. No matter. Even if we were to find that the appellant was correctly convicted and sentenced for the offence of being found in army uniform, and we make no such finding in the prevailing circumstances, we would find that the period the appellant has spent in custody would suffice.

12. In the end, and for the reasons we have advanced above, we do not find that the conviction herein was well founded in law and as a result we allow this appeal, quash the conviction set aside the sentence of death and order that the appellant shall be set at liberty unless he be otherwise lawfully held.

It is so ordered.

**Dated and Delivered at Nairobi this 14<sup>th</sup> day of March, 2014.**

**P. KIHARA KARIUKI**

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**PRESIDENT COURT OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

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

**REGISTRAR**

