IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, KIAGE, & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 311 OF 2009

FREDRICK AMBANI NAITIRI ………...…......….APPELLANT

VERSUS

REPUBLIC…………………….……………..RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisumu

(Mwera J. & Warsame J.) dated 21st September 2006

in

(KISUMU HCRA 428 0F 2003)

****

BETWEEN

JUDGMENT OF THE COURT

The appellant **FREDRICK AMBANI NAITIRI** was on 10th June 2003 arraigned before the Principal Magistrate at Kisumu on a single charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and of rape contrary to **Section 140** of the Penal Code both alleged to have been committed on 14th May 2003 in Kisumu District. He was alleged to have robbed and raped one **E A A** (PW1). He was in the company of one other person and armed with pangas and rungus. They used actual violence on PWl in the cause of stealing her mobile phone, personal documents, watch, brown shoes and handbag.

After the case was tried, the appellant was found guilty of the offence charged, and convicted. On the robbery with violence charge he was sentenced to suffer death as by law provided while for the rape charge he was to serve five years imprisonment with hard labour.

Aggrieved, the appellant filed an appeal in the High Court at Kisumu against both conviction and sentence. That appeal was heard by Mwera and Warsame JJ, (as they then were) who, by a judgment dated and delivered on 21st September 2006, dismissed it. They however held the sentence for rape in abeyance. That dismissal provoked the current appeal.

The appellant's point of grievance are captured in a five ground Memorandum of appeal filed on

19th November 2012 by the firm of Bruce Odeny & Company Advocates and a supplementary memorandum of appeal of equal length filed by the same advocates for the respondent on 18th January 2014. When the appeal came up for argument before us, however, Mr. Odeny, the appellant's learned counsel abandoned all but the last of the grounds on the memorandum of appeal together with three of those in the supplementary memorandum of appeal. That left the following as the appellant's points on which the learned Judges are alleged to have erred;

1. Upholding the death sentence yet other options were available.

2. Violence was not sufficiently proved for "lack of collaboration (sic!) and lack of evidence on alleged weapons".

3. Identification.

4. Lack of corroboration of the complainant's evidence on rape.

Starting with identification, Mr. Odeny submitted that as PW1 was undeniably traumatized by the ordeal, a fact confirmed by **JAMES TOLO** (PW8) the clinical officer who examined her, she could not have been in a position to positively identify her attackers. He also criticized the High Court for accepting her evidence yet she did not tell the police exactly how many people attacked her. He faulted the evidence of the identification parade at which the appellant was picked on the ground that the identification witnesses already knew the appellant.

This ground was opposed by the respondent through Mr. Abele the learned Assistant Director of Public Prosecutions who invited us to consider the concurrent findings by the courts' below that the incident, though occurring at night being early evening, was such that it afforded the witness ample opportunity to identify and recognize the appellant.

PWl, a teacher at [particular withheld] Primary School was on her way home after seeing a friend at Kiboswa when she alighted by a Kiosk near her home. As she approached a home nearby, she was confronted by two panga-wielding men. They demanded money from her before pushing her to a bush and relieving her of the items listed in the charge sheet. They pushed her deeper into the bush where one of them raped her. It is the same one who had taken her hand bag. She saw the man clearly by the headlights of a vehicle that passed by. As the robber duo attempted to drag her to yet another spot, she heard voices and managed to prise herself free of the robbers' grip and ran towards the voices of a man and a woman. The man was **NAFTALI OCHIENG (PW2)** and as PW1 was running towards him crying for help, he switched on his spotlight and could see clearly two men chasing after the screaming PW1 who had taught him in primary school. He recognized one of the men as a former neighbour commonly known as Ayub. This Ayub is the same man who had raped PW1 and he was positively identified and recognized as the appellant.

This is a second appeal and we are by statute enjoined to address matters of law only and will not interfere with concurrent findings of fact unless based on no evidence (See **Section 361** of the **Criminal Procedure Code; <u>GACHURU - VS- REPUBLIC</u> [2005] 1 KLR 688 and <u>NJOROGE - VS- REPUBLIC</u> [1982] KLR 388)**. We note from the record that the evidence of identification and recognition as presented by PW1 and PW2 was not at all challenged by the appellant. In cross examination of PW1 all the appellant elicited was the statement that she did not know him prior to the incident suggestive of his having asked .her a single question. He elected not to cross-examine the second appellant whose evidence, being of recognition, is stronger than that of the identification of a stranger and remains therefore uncontroverted.

The identification evidence was corroborated in material repects by the evidence of the appellant's recent possession of PWl's phone. The learned Judges dealt with this aspect of the case as follows:-

"And even with all the above, still the appellant remained to be convicted under Section 296 (2) Penal Code on evidence flowing from L (PW3), V A (PW4), M O (PW5) and P.C Kiberenge (PW7).

When A was sent by his mother M to sell this cell phone with a rare name TRIUMPH, the prospective buyer was L, PW1's cousin. She knew that it had been stolen some 10 days earlier. She had used it before and she knew it well. She got P.C Kiberenge to arrest PW4 with it. He in turn led them to his mother (PW5) who revealed that she snatched it from the appellant in order for him to pay her debt. Then she led the police to arrest the appellant and he was charged. We saw this as a dramatic but connected chain of events a few days following the robbery. We do not think that it was in error to arraign the appellant with robbing E of this gadget and other things. It was also positively identified. The appellant could not escape charge, trial conviction and sentence. The appeal on the count 1 robbery with violence contrary to Section 296 (2) Penal Code was proved. The appellant with his mate were armed on the day of the robbery."

We are of the respectful view that the learned Judges were entirely correct in their evaluation and appraisal of the evidence in this respect and the conclusion that the appellant was one of the robbers cannot be faulted.

Turning to the appellant's complaint that the rape charge was based on uncorroborated evidence, it was Mr. Odeny's submission that the spermatozoa found in PW1 was not proven to have emanated from the appellant and that in any event there was no eye-witness to the rape. With respect to counsel, very rarely does the act of rape occur in the presence of by standers who can be called as independent eye-witnesses. In most cases the only person who can testify to the violation is the victim and her evidence does not, by dint of **Section 124** of the Evidence Act, require to be corroborated. In the present case, however, it was actually corroborated by the presence of spermatozoa given the unchallenged evidence of PW1 that the appellant it is that raped her. Further corroboration had been provided, though none was required, by the long catalogue of injuries sustained by PW1 in the traumatic incident including tenderness on both arms, bruises and wounds as well as the presence of thorns in both her legs consistent with her evidence that the robber- rapists had removed her shoes and then dragged her into a thorny bush where the appellant raped her. The two courts below were right to find the offence of rape as well as that of robbery with violence to have been proved beyond reasonable doubt.

From what we have already set out herein, and in particular the fact of the appellant having been in the company of another and actual violence including the rape itself having been used against PW1 contemporaneous with the robbery, the ingredients of a robbery with violence charge under **Section 296(2)** of the **Penal Code** are satisfied. The argument that there was no evidence of the alleged weapons therefore does not avail the appellant much.

Turning finally to the question whether the courts below should have considered any other sentence other than the death sentence for the robbery with violence charge, we agree with Mr. Abele that in so far as the sentence of death is a lawful one, the appellant's complaint seems to be one of severity of sentence, which, by express provision of section 361(2) of the **Criminal Procedure Code**, is a matter of fact over which we have no jurisdiction. The appeal on that ground therefore fails.

The upshot of our consideration of this appeal is that it is devoid of any merit. We accordingly dismiss it in its entirety.

Dated and delivered at Kisumu this 11th day of July 2014

J.W ONYANGO

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR