REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 28 & 29 OF 2011

BETWEEN

CYRUS WANGUKU KAGO …..…….…….. 1ST APPELLANT

PATRICK MAINA WAHOME ……..……...…….. 2ND APPELLANT

AND

REPUBLIC …….…….. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Wendoh & Emukule, JJ.) dated 25th February, 2011

in

H. C. CR. A No. 342 of 2009)

****

JUDGMENT OF THE COURT

1. The appellants herein were jointly charged with six counts of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code*** while the 2nd appellant was charged with the offence of rape contrary to ***Section 3(1)*** of the ***Sexual Offences Act*** in the Principal Magistrate's Court at Nyahururu.
2. The particulars of the first count of robbery with violence were that on 15th February, 2008 in Nyandarua District within the then Central province, the appellants jointly robbed MNN of cash Kshs. 4,850/= and a mobile phone make Sagem valued at Kshs. 4,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said MNN. On the second count, the particulars were that on 22nd February, 2008 at the aforementioned place, the appellants jointly robbed Hillary Mwangi Waithangi of Kshs. 1,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Hillary Mwangi Waithangi.

3. On the third count, the particulars were that on 20th February, 2008 at the aforementioned place, the appellants jointly robbed Joseph Kanyi Ndungu of cash Kshs. 3,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Joseph Kanyi Ndungu. The particulars of the fourth count were that on 23rd February, 2008 at the aforementioned place, the appellants jointly robbed Peter Kariuki Ngatia of a mobile phone make Motorola and a wrist watch make Seiko valued at Kshs. 6,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Peter Kariuki Ngatia.
4. On the fifth count, the particulars were that on 23rd February, 2008 at the aforementioned place, the appellants jointly robbed Sarah Mumbi Njoroge of a mobile phone make Motorola T. 190 and cash Kshs. 4,500/= all valued at Kshs. 4,800/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Sarah Mumbi Njoroge. On the sixth count, the particulars were that on 23rd February, 2008 at the aforementioned place, the appellants jointly robbed Mary Wangechi Njoroge of a mobile phone make Nokia 2300 valued at Kshs. 6,000/= and cash Kshs. 3,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Mary Wangechi Njoroge.
5. On the count of rape, the particulars were that on 15th February, 2008 at the aforementioned place, the 2nd appellant unlawfully and intentionally committed an act which caused penetration with his genital organs to the genital organ of MNN without her consent. The appellants pleaded not guilty to all charges.
6. The prosecution called a total of nine witnesses in support of its case. It was the prosecution's case that on 15th February, 2008 PW4, PNN (N), went to Kanyagia to buy potatoes. On his way back home, N called his wife, PW2, MNN (M), and asked her to meet him at the Murichu stage. M arrived at Murichu stage at around 1:00 p.m.; she called her husband and inquired where he was. N informed her that his bicycle had broken down and directed her to walk towards the direction he was coming from so that they could meet on the way. After walking for about a Kilometer, M noticed two men seated along the road. As she was about to pass the said men, one stood in front of her while the other stood behind her. It was her testimony that one of the men who she identified as the 2nd appellant was armed with a panga while the other who she identified as the 1st appellant was armed with a sword.
7. The robbers demand money from her and she gave them Kshs. 50/=. They continued demanding for more money and M tried to plead for her life. The robbers dragged M into Ndaragwa forest which was close by and ordered her to sit down. Fearing for her life, M gave the robbers Kshs. 4,800/= which she had kept in her mobile phone cover. The robbers also took her mobile phone make Sagem. It was M's evidence that the 2nd appellant took the food which she had carried for husband and started eating while the 1st appellant raped her. After the 1st appellant was done, the appellants ran away. M woke up and started heading in the direction that her husband was coming from. N met M and she narrated the ordeal to him; M reported the incident to the police and sought medical attention. On the same day two men went to PW 5's, James Njuguna Mbugua (James), shop and gave him a mobile phone to charge. James noticed that the phone resembled N's phone and he asked the two men whether it was N who had sent them. The two men told him that it was N who has sent them; that either they or N would pick up the phone. Thereafter, James informed N that two men had brought his mobile phone to his shop. N went to the shop and established that the said mobile phone was the one which had been stolen from M. James identified the two men as the appellants herein.
8. On 22nd February, 2008 at around 7:00 a.m. PW3, Hillary Mwangi Waithangi (Hillary), passed through Ndaragwa forest as he was heading to Nyahururu. He saw two men sitting down; one of the men who he identified as the 1st appellant was armed with a rungu while the other who he identified as the 2nd appellant was armed with a sword. The appellants started chasing him and the 1st appellant hit him on the head with the said rungu causing him to fall down. The robbers then took Hillary's wallet which had Kshs. 1,000/= and ran away. Hillary reported the incident to the police.
9. On 23rd February, 2008 at around 10:30 a.m. PW1, Peter Kariithi Ngatia (Peter), was walking on a foot path which passed through Ndaragwa forest. On his way he met two men standing on both

sides of the road. One of them who he later identified as the 1st appellant blocked him using his hands while the other who he identified as the 2nd appellant threatened him to sit down using a stick he was carrying. The robbers demanded money from Peter but he did not have any money. They took his mobile phone and wrist watch make Seiko. Thereafter, the robbers ordered Peter to leave and not to tell anyone about the incident. After he reported the incident to the police he was informed that M who was known to him had also been robbed in the same area. Peter went to M's home and informed her that he had also been robbed; M informed him that she could identify the robbers if she saw them.

10. PW6, Mary Wangechi Njoroge (Mary), testified that on 23rd February, 2008 at around midday she was in the company of her sister, Sarah Muriuki. On their way home they met two men near Ndaragwa forest; the said men ordered them to stop. She noticed that one of them who she later identified as the 1st appellant was armed with a knife. The robbers took her mobile phone make Nokia 2300 and Kshs. 3,000/=. They robbed her sister of her mobile phone make Motorola T. 190 and Kshs. 300/=. Thereafter, they disappeared into the forest. It was her evidence that she was only able to identify the 1st appellant.
11. From the evidence hereinabove it emerged that the robberies were committed on diverse dates by the same people and at the same place. On 28th February, 2008 while M was at the market she saw the 2nd appellant and identified him as one of the robbers who had attacked her. She followed the 2nd appellant and saw him enter into a bar. While M was outside the bar she called her husband, N and PW1 (Peter) and informed them she had spotted one of the robbers. N and Peter went to the said bar and arrested the 2nd appellant who Peter identified as one of the robbers who had attacked him. It was the prosecution's case that the 2nd appellant led the police to the whereabouts of the 1st appellant who was identified as the other assailant by both M and Peter.
12. PW8, PC Shadrack Mumo Musyimi (PC Shadrack) testified that identification parades involving both appellants were conducted; PW6 (Mary) identified the 1st appellant as one of the robbers who had attacked her and her sister. PW3 (Hillary) also identified both appellants as the robbers who had attacked him from the said identification parade. However, in his evidence Hillary stated that he did not take part in any identification parade. It was PC Shadrack's evidence that on 29th February, 2008 the appellants led him to where they had hidden the panga in Ndaragwa forest. PW8, Dr. Charles Nganga Mulisyo (Dr. Charles), testified that the examination conducted on M revealed the presence of spermatozoa in her vagina and urine. The results were an indication that M had been raped.
13. In his defence, the 1st appellant denied committing the offences he was charged with. He testified that when he was arrested he had gone to Gwa Kungu to collect timber on behalf of his employer. A certain woman asked him if he knew the 2nd appellant who had been arrested. The 1st appellant maintained that he did not know the 1st appellant. He testified that while he was in custody he was beaten and forced to confess to the aforementioned charges.
14. The 2nd appellant maintained that he was framed and denied committing the offences he was charged with. He stated that police officers asked him to pay them Kshs. 100,000/= to secure his release and when he failed to do so he was charged with the aforementioned offences.
15. After considering the merits of the case, the trial court convicted the appellants on two counts of robbery with violence against M and Peter and sentenced them to death. The trial court also convicted the 2nd appellant on the count of rape and sentenced him to twenty years imprisonment. The appellants were acquitted of the other counts of robbery with violence. Aggrieved with the said decision, the appellants filed an appeal in the High Court which was dismissed vide a judgment dated 25th February, 2011. It is that decision that is the basis of this second appeal based on the following grounds:-

- ***The learned Judges erred in law in entertaining a conviction of the lower court which relied on a defective charge sheet that was marred by irregularities, but was also overburdened by several counts yet the appellants had been charged with robbery with violence, a capital offence as the first count. Sic***

- ***The learned Judges erred in law in simply echoing what the trial magistrate had stated in his judgment without reviewing the evidence afresh with anxious care and anxiety as was its duty. Sic***

16. M/s Karimi, learned counsel for the appellants, submitted that the charge sheet was defective because the weapon allegedly used during the robbery was not mentioned therein. ***Section 296(2)*** of the ***Penal Code*** requires that the word offensive or dangerous to be stated in the charge sheet. She argued that the prosecution did not establish that the spermatozoa found on the complainant, M, belonged to the 2nd appellant. According to her, the complainant was a married woman and there was a possibility that the spermatozoa was from her husband. M/s Karimi further submitted that there was no corroboration of recent possession of the mobile phone by the appellants'. The investigating officer clearly stated that none of the stolen items were recovered on the appellants. She urged us to allow the appeal.
17. Mr. Omutelema, Senior Assistant Director of Public Prosecution, in opposing the appeal, submitted that the charge was not defective. This is because one of the ingredients of robbery with violence is that a robber be accompanied by one or more persons. According to him, the High Court reviewed the evidence tendered at the trial court. He submitted that the two lower courts made concurrent findings that rape had been proved. Mr. Omutelema argued that the evidence tendered by PW5 (James) on how the appellants took to him M's phone was uncontroverted.
18. We have anxiously considered the record, the grounds appeal, submissions by counsel and the law. This being a 2nd appeal and by dint of ***Section 361*** of the ***Criminal Procedure Code***, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See ***Mwita –vs- R (2004) 2 KLR 60***. In ***Kaingo -vs- R (1982) KLR 213*** at p. 219 this Court said:-

"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)"

19. From the record, it is clear that the two lower courts made concurrent findings that the appellants were positively identified as the robbers by both M and Peter. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In ***Kariuki Njiru & 7 others –vs- R- Criminal Appeal No. 6 of 2001***, this Court stated:-

"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error."

See also ***Wamunga -vs- R (1989) KLR 424***.

20. In this case, M testified that the incident occurred at 1:00 p.m. during daylight and it took 20 minutes. She was able to see the assailants' faces clearly because they had no disguise. Peter also gave uncontroverted evidence that he was robbed at 10:30 a.m. and he also saw his attackers. We note that it was M who spotted the 2nd appellant in the market on 28th February, 2008 and led to his arrest. We further note that at the time the 2nd appellant was arrested, Peter was present and he also identified him as one of the robbers who had attacked him. It was the prosecution's uncontroverted evidence that the 2nd appellant led the police to the whereabouts of the 1st appellant; during his arrest, M and Peter also identified the 1st appellant as one of the robbers. We are of the view that since the robberies on M and Peter took place during daylight there was no possibility of a mistaken identity. Further, the fact that the appellants were arrested a few days

after the robberies lends credence to the identification evidence since the impression of the physical attributes of the assailants were still fresh in M's and P's minds. We therefore, concur with the two lower courts that the identification evidence was free from error.

21. The lower courts also found that the appellants were found in recent possession of M's mobile phone; the same corroborated the identification evidence. James testified that on the material day, two men took a mobile phone to his shop to be charged; he recognized the mobile phone as N's; the two men informed him that they had been sent by N; N identified the said phone as the one stolen from M. James gave evidence that he identified the said men as the appellants. In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- R -Criminal Appeal No. 272 of 2005***, this Court held,

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

We are of the considered view that prosecution did not prove that the appellants were in possession, constructive or otherwise of M's mobile phone. Why do we say so? James testified that he did not know the two men who brought the said phone prior to the material day; he later identified the said men as the appellants. There is no evidence as to the circumstances of the identification of the appellants by James. Did James pick out the appellants in an identification parade or did he identify them during the trial? In ***James Tinega Omwenga –vs- R- Criminal Appeal No. 143 of 2011***, this Court expressed itself as follows:-

"The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless."

22. M/s Karimi, learned counsel argued that the charge as drawn was defective because it neither indicated the weapon(s) used nor described any weapon(s) used as dangerous. In ***George Omondi – vs- R- Criminal Appeal No. 5 of 2005***, this Court sitting in Mombasa and citing the case of ***Juma –vs– R, (2003) 2EA 471*** stated as follows:

"Where the prosecution is relying on the element or ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the appellant was armed was a dangerous or offensive one. The reason for this is that a knife, for example, is not an inherently dangerous or offensive item. A knife can and is often used under very many circumstances entirely for peaceful purposes. So that if it is being alleged that the knife was being used for dangerous or offensive purpose, it must be so stated in the particulars of the charge under Section 296 (2) to distinguish such a charge from one under Section 295 punishable by Section 296. It is the use to which the weapon or instrument is put that makes it dangerous or offensive. .... The charge of robbery brought against the appellants was, with respect, defective as it failed to allege a vital ingredient thereof namely that the knife was a dangerous or offensive weapon. The conviction recorded against each of the appellants must, accordingly be quashed. We do so and set aside the sentence of death imposed thereon as respects each appellant".

23. We perused the charge sheet and have noted that the same did not disclose that the appellants were armed with offensive weapons. Therefore, what is the consequence of the said omission? ***Section 296(2)*** of the ***Penal Code*** provides as follows:-

" 296(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

24. From the foregoing, it is clear that if the prosecution in proving the offence of robbery with violence relies on the element or ingredient of being armed the charge sheet ought to indicate the weapon and described it as being offensive or dangerous. Failure of which renders the charge defective and the accused can only be convicted on a lesser charge of simple robbery under ***Section 295*** of the ***Penal Code***. However, in this case, we agree with the submissions of Mr. Omutelema that the charge of robbery with violence was not defective. This is because as rightly pointed out by the state one of the ingredients of the offence of robbery with violence that is, that an accused was accompanied by one or more persons was proved in this case. It was proved that during the commission of the offence the appellants were together. In ***Juma –vs- R (supra),*** this Court held,

"Under Section 296(2) of the Penal Code the charge must state that the accused was armed with a dangerous or offensive weapon or instrument, or was in the company of one or more other person or persons or at or immediately before or immediately after the time of the robbery the accused wounds, beats or strikes or uses any other personal violence to any person."

25. On the issue of rape, this Court in ***Francis Mugendi –vs- R- Criminal Appeal No. 345 of 2008*** stated:-

"The provisal to Section 124 of the Evidence Act states that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

M gave evidence that it was the 2nd appellant that raped her during the incident; it was in broad daylight and she saw him clearly. Medical evidence corroborated the fact that M was raped. We see no reason to interfere with the concurrent findings of the lower courts that it was the 2nd appellant who had raped M.

26. The upshot of the foregoing is that we find the appeal has no merit and is hereby dismissed. Lastly, we would like to point out that once an accused person is convicted of a capital offence and is sentenced to death, sentences in respect of other charges ought to be held in abeyance. Hence in this case we direct that the sentence against the 2nd appellant in respect of the offence of rape be held in abeyance.

Dated and delivered at Nakuru this 27th day of November, 2014.

ALNASHIR VISRAM

……

JUDGE OF APPEAL

MARTHA KOOME

……

JUDGE OF APPEAL

J. OTIENO- ODEK

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR