



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
(CORAM: BOSIRE, WAKI & NYAMU, J.J.A.)

CRIMINAL APPEAL NO. 503 OF 2007

BETWEEN

PETER KIMANI KARIMA 1ST APPELLANT
STEPHEN MUHORO WAWERU 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Apondi & Kimaru, JJ.) dated 9th March, 2006

in

H.C.C.R.A. NO. 497 OF 2001)

JUDGMENT OF THE COURT

Following their conviction and sentence for the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code by the Principal Magistrate's Court at Naivasha, **Peter Kimani Karima** (1st appellant) and **Stephen Muhoro Waweru** (2nd appellant) appealed to the High Court against both conviction and sentence. Their first appeals were dismissed by that court and hence these second and possibly last appeals.

The appellants' respective convictions were based on evidence of recognition at night time by two witnesses, **R.W.M** (PW1) and her sister **M.W.G** (PW2). The two witnesses lived at Mai Mahiu and shared a house. They testified that on the night of 8th and 9th June, 2001 at 2 am, robbers attacked them in their said house, forced the main door open, gained access into the house and confronted them while armed with a knife. They demanded money from PW2. Initially, there were no lights on but PW1 on hearing commotion put on the lights. PW2 testified that before the robbers gained entry into their house, she was able to peep through the window and saw and recognised the 2nd appellant. She also saw and recognized the 1st appellant as soon as he entered the house. Both PW2 and PW1 testified that they knew both appellants before because the two had worked for them earlier. PW2 was categorical that she was able to recognize both appellants with the help of moonlight and the lights in the house. PW1, too testified that as soon as she put on the lights she saw the 1st appellant and although she did not know his name, she had been seeing him as he used to do some casual jobs for them. She did not recollect seeing the 2nd appellant.

The robbers demanded money from PW2 and when they were not given any, they ransacked the house and took away household goods, a wall clock, wrist watch, some shoes, jackets among other items. They ordered both women to strip naked, after which both appellants allegedly led PW1 into PW2's bedroom and raped her in turns, before they left. The police at Longonot Police Station were later informed of the robbery and rape. The name of Muhoro was mentioned as one of the people who committed the offences. The police searched for and found him in a neighbour's house. He was arrested on 9th June, 2001. The 1st appellant was arrested on the same day from his house. They were jointly charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and a second count of rape contrary to **section 140** of the Penal Code.

An issue was raised as to the manner in which the charges were drawn. Mr. Ngetich for both appellants submitted before us that the charges as drawn do not disclose offences known in law. In his view because Section 296(2) of the Penal Code provides different ways in which an offence under that Section may be committed, it was incumbent upon the prosecution to particularize the manner the robbery herein was committed, which they failed to do, and thus, rendered that particular charge defective. He did not comment much on the second count. However, the particulars of the rape charge suggest that the appellants raped PW1 together. The particulars as material read thus:-

“Peter Kimani Karima/Stephen Muhoro Waweru on the 9th day of June, 2001, at M[...].in Nakuru District of the Rift Valley Province jointly with others not before court had carnal knowledge of R.W.M, without her consent.”

It is not humanly practicable for more than one man to have sexual intercourse with one woman at the same time. To the extent that the particulars above, so suggest, the charge is for that reason fatally defective. Besides, those particulars are at variance with the evidence. PW1 testified that each of the two appellants had sexual intercourse with her in turns. Consequently, it would have been more prudent for each appellant to be charged with separate counts of rape. The foregoing notwithstanding, both the trial and first appellate Courts did not make a finding on the charge and the arguments relating to the propriety or otherwise of the 2nd count are therefore merely academic. Regarding the robbery with violence charge, we have looked at the particulars thereof and we find nothing particularly offensive in the manner they have been worded. We agree that section 296(2) of the Penal Code has more than two elements which if taken independently would be sufficient to meet the essentials of an offence under that section.

In some instances, however, a robbery may be committed which discloses all or some of the elements of violence under the above section. Where that is so, it will not necessarily mean, that several acts of robbery would have been committed. It would still be one transaction of robbery but aggravated by the presence of a combination of the elements stipulated under the section. The charge does not by such combination of factors as herein become duplex. In the circumstances nothing turns on the submission relating to the manner the robbery with violence charge has been framed.

Several authorities were cited to us on the issue of identification or recognition. In both R. v. Turnbull and Others [1976] ALL ER 549, it was held that recognition is more reliable than identification but that mistakes do occur in recognition even where close relatives and friends are involved.

In RORIA v. R. [1967] EA 583 and NJIHIA V. REPUBLIC [1986] KLR 422 it was held that where identification is under difficult circumstances, the Court must warn itself of the risk of mistaken identification, and therefore exercise caution before acting on the evidence of a single witness.

In MWAURA V. REPUBLIC (1987) KLR 645 it was held that to satisfy itself as to the correctness of an identification of an accused by one or more witnesses, the Court is obliged to consider, among other things the length the witnesses had the accused under observation and what the accused or each of them where they are more than one, was doing at the time of the commission of the offence charged; the disposition of the witness in relation to the accused and the quality of light. R. V. TURNBULL (supra) makes a detailed statement of the various factors to take into account where the issue of identification of an accused falls for consideration.

We earlier set out, in resume form only, the circumstances which were relied upon to charge the appellants. Mr. Ngetich, for both appellants, in his address to us did not think that the circumstances were such as would support a correct identification of both appellants. In his view the offence having been committed at night time, and in view of what he said was the variance regarding the identification of the appellants, there was a doubt as to the accuracy of the identification. His reasoning was that if indeed both PW1 and PW2 were together there would be nothing to stop PW1 identifying the 2nd appellant, more so because she said she knew him before. He also suggested that the trial Court and the first appellate Court acted on the assumption that there was bright moonlight when no evidence in that regard was given.

Learned Senior State Counsel, Mr. Nyakundi in opposing the appeal submitted that the circumstances obtaining at the house of PW1 and PW2 were conducive to a correct identification of both appellants, more so because they were previously known by the identification witnesses.

As stated earlier in this judgment, the appellants' respective convictions were based wholly on evidence of identification. The appellants were not strangers to both PW1 and PW2. They are people the witnesses used to engage before in casual jobs. We appreciate that the offences in question were committed at night time when ordinarily conditions favouring a correct identification are difficult. However it is in evidence that at the time both appellants allegedly entered the house of PW1 and PW2, lights were on. PW1 testified she put the lights on when she heard commotion in the house. She was able to see the people inside. They were close to them and had ample opportunity of observing their faces, which faces were not masked. The intruders remained in the house long enough and faced the witnesses. They demanded that the two women strip naked, and they forced PW1 to have sex with each of them in turns. Although the appellants allegedly threatened the women with injury they did not assault them. PW1 was categorical that the 1st appellant is the person who led her to the room of PW2. PW1's evidence, as material on the issue of identification was as follows:-

“The thugs smashed open the door and entered. I saw two of them. I had put on the lights and saw the 1st clearly. I used to see him before. He used to work for us. The accused produced a knife and threatened us. They told us to undress. The 1st accused took me to another room leaving my sister in the other room. The accused locked the door. The accused raped me..... After the 1st accused finished with me, the other man came and raped me.”

The witness clearly described the events in their house and who did what and in what sequence. PW2 too graphically described what took place on the material night. This is what she said:-

“I checked through the window and saw Muhoro (the 2nd accused). He told the others to hit the door. I screamed. My sister heard the screams. She asked me what it was. The 1st accused came and asked me for money. I told him that I had no money. He told me to leave my room and go to that of my sister. He asked for my husband's radio. They told us to put on the lights. My sister put on the lights. She was told to go back to my room.... They ordered us to undress. Peter told my sister to leave. The 1st accused and one, Mwaura took her to the other room and raped her. Later, they told us to sleep.”

PW2's account like that of PW1 was detailed. She gave names of their attackers. It is clear that apart from the two appellants there was a third person by the name Mwaura. She gave the names to her husband who allegedly caused their arrest.

It is noteworthy that the police acted on the information given to them by both women to arrest the appellants. The two witnesses did not

spare any time. They gave the names of the appellants at the earliest opportunity.

An issue was raised by Mr. Ngetich, concerning an identification parade the police held with the 1st appellant as the suspect and PW2 as the identifying witness. Learned Counsel submitted that if indeed PW2 and her sister knew both appellants before, there would be no need for such a parade. We agree that if indeed PW2 knew the 1st appellant there would be no need of the identification parade. However, what is clear is that PW2 did not know the 1st appellant's name and if she did, she had forgotten it. We say so advisedly. In her evidence, she gave names of the people she knew by name. For instance, she mentioned the 2nd appellant and the Mwaura by name, but not the 1st appellant. PW1, likewise did not give the name of the 1st appellant. That fact might have informed the police of the need for an identification parade although in reality it served no useful purpose since the witnesses testified that they knew the 1st appellant before.

We have said enough to show that this appeal is for dismissal. Accordingly, we order that the appeal be and is hereby dismissed.

Dated and delivered at Nakuru this 23rd day of February, 2012.

S.E.O BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR