REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

Criminal Appeal 237 of 2009

BETWEEN

STEVE BIKO ODIRA ……..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Kisii (Musinga & Karanja, JJ.) dated 28th April, 2009

in

H. C. Cr. A. No. 178 of 2005)

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JUDGMENT OF THE COURT

In the trial court of the Senior Resident Magistrates Court at Oyugis, the appellant and two others were charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars of the offence, as per the charge sheet, were that on 22nd May, 2004 at ***[particulars withheld]*** Rachuonyo District in Nyanza Province, while armed with pangas, metal bars and a pistol, they robbed B.A.O of a suit case containing assorted clothes valued at Kshs.105,000/= and at or immediately after the time of such robbery used actual violence to the said B. A. O.

The second charge which was against the appellant only as the second accused, states that on the same day and at the same place he had canal knowledge of B.A.O. The trial court found the appellant guilty of the first and second counts and proceeded to convict him on the first and second counts but only sentenced him to death on the first count but omitted to pass a sentence on the second count. The two co-accused of the appellant were acquitted.

Aggrieved by the trial court's verdict the appellant filed a petition of appeal in the High Court. The High Court upheld the conviction and sentence on count one and corrected the error as regards the second count by sentencing the appellant to ten years imprisonment with hard labour but, quite rightly, in our view ordered that sentence on the second count be held in abeyance. Dissatisfied with the outcome, the appellant filed a second appeal to this Court vide a home-made memorandum of appeal dated 14th July, 2009 and a supplementary memorandum of appeal filed on 13th September, 2011 by Messrs Amondi & Company Advocates on his behalf.

At the hearing Mr. Amondi learned counsel represented the appellant and the State was represented by Mr. Kiprop, learned State Counsel. In his submissions Mr. Amondi relied on all the eight grounds in the memorandum of appeal filed on 13th September, 2011 and in addition relied on one of the grounds set out in the home-made memorandum of appeal which ground related to the appellant's alleged five month's confinement in remand before being taken to court contrary to ***section 77 (2) (b)*** of the repealed Constitution. The grounds relied on were:

"1. The learned Honourable Judges of the Superior Court erred in law by giving credence to this *(sic)* ***evidence of identification by a single witness without warning themselves of the possibility of error.***

2. The learned Judges of the Superior Court erred in law by finding that the Appellant was properly identified when the description of the accused was not given.

3. The learned Judges of the Superior Court erred in law when they failed to interrogate the source of the light and the intensity or nature of the light allegedly used to identify the Appellant.

4. The learned Judges of the Superior Court erred in law when they failed to properly warn themselves of the damages *(sic)* ***and reliance on the evidence of a single witness overlooking the possibility of an error.***

5. The Superior Court erred in law by failing to find that the ingredient of rape was not proved against the Appellant or that such an offence actually occurred.

6. The Superior Court erred in law by failing to consider the alibi of the Appellant.

7. The Superior Court erred in law when they failed to interrogate the absence of the investigating officer as a prosecution witness to establish whether or not an offence actually occurred."

8. The Superior Court erred when it failed to note and appreciate the gaps and inconsistencies in the prosecution case."

In elaborating the above grounds the learned counsel for the appellant centred his submissions on what he called inadequate identification on the grounds that the prosecution had failed to state the time the alleged rape took place; failure to define the intensity of light allegedly used to identify the appellant; failure to give a description of the appellant in advance of the identification parade; that the pant of B.A.O was not one of the items described in the medical report; blood allegedly found on some of the items was never analyzed; that there was no penetration; that the two courts below failed to evaluate the evidence adduced by the prosecution and finally that the appellant's defence was not taken into account although it was capable of displacing the prosecution case and casting a reasonable doubt to the prosecution case.

In opposing the appeal Mr. Kiprop submitted that the appellant was properly identified in that the complainant (PW1) used two lamps which provided the source of light for the purposes of identification and in addition the act of rape took a considerable time and this gave PW 1 sufficient time to identify the appellant since the lights were on.

Concerning the defence, Mr. Kiprop submitted that the record shows that the High Court did consider the defence but found that the evidence on identification did place the appellant at the scene of crime and therefore his defence could only have been an afterthought.

On the issue of the alleged lack of evaluation of the evidence by the first appellant court, learned counsel submitted that again the record did reflect a detailed evaluation of the evidence by the High Court. He concluded his submissions on this point, by stating that under ***section 123*** of the Evidence Act, PW 1's evidence on identification did not require corroboration and the two courts below were perfectly entitled to rely on the evidence of one witness. As regards the alleged violation of ***section 77*** of the repealed

Constitution, counsel submitted that the appellant's remedy if any, was set out in ***section 77 (6)*** of the Constitution since the alleged violation had no direct link or any link at all with the offence.

Starting with the issue of identification, with respect, to the appellant's counsel, it is quite evident from the record that the testimony of PW 1 which was believed by the two courts indicated that the rape by the appellant did take a considerable period and with the available light from the two lamps PW 1 was able to identify the appellant. In addition PW 1 was thereafter able to identify the appellant in a properly conducted identification parade. We therefore think that the identification was safe in the circumstances. Similarly, we think that the issue of intensity of light was perfectly answered because of the time expended in perpetrating rape. The blood stains challenge has no basis in our view, because no evidence on it was relied on by the two courts below.

As regards the submission of lack of evaluation, we think that the first appellate court did carry out an independent evaluation. It is apparent from the judgment that although it is lacking in the actual reproduction of specific portions of the evidence adduced, and, although it is in the form of a narrative, nonetheless it does in our view all the same contain an adequate analysis of the evidence adduced. Perhaps we should observe that evaluation is a matter of style and not an art provided the court focuses on critical evidence upon which the case turns.

Finally on the alleged failure by the two courts below to take into account the appellant's defence, the first appellate court addressed the point thus:

"With the existence of favourable conditions and adequate opportunity for identification of the appellant as having been one of those who robbed the complainant and being the only one who raped her we would say that his defence was effectively discredited and rendered valueless"

In addition the defence of *alibi* which was raised was also considered and the same was discredited by positive identification which clearly linked the appellant to the commission of the crime. It is therefore quite clear to us that the defence was duly considered.

Finally as regards the alleged violation of ***section 77*** of the repealed Constitution, in answer to this Court's query on what link if any the alleged violation of the Constitution had to the offence charged, learned counsel for the appellant conceded that the two had no linkage at all. In view of the frequency at which this ground is being urged by appellants in this Court, we wish to reiterate in full the holdings of this Court in the case of ***Julius Kamau Mbugua vs Republic - Criminal Appeal Nai 50 of 2008***. It follows therefore nothing turns on this ground at all.

The upshot is that all the grounds raised by the appellant have not been sustained and what commends itself to us is to dismiss the appeal and it is accordingly dismissed.

Dated and delivered at Kisumu this 22nd day of March, 2012.

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR