



IN THE COURT OF APPEAL
AT NAKURU
(CORAM: BOSIRE, ONYANGO OTIENO & VISRAM JJA)
CRIMINAL APPEAL NO 30 OF 2008

BETWEEN

STANLEY NGUGI KIMEMIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and judgment of the High Court of Kenya at Nakuru (Musinga & Kimaru JJ) dated 27th February, 2008

in

HCCRA NO 166 of 2005

JUDGMENT OF THE COURT

Following his conviction jointly with others whose appeals and sentences are not before us for the offences of robbery with violence contrary to **section 296(2)** and rape contrary to **section 140** of the Penal Code respectively, and the subsequent dismissal of his first appeal to the superior Court, the appellant, Stanley Njuguna Kimemia, has come to this Court on second appeal. He has raised two main grounds, namely:-

- (1) His identification was not beyond reasonable doubt.
- (2) The superior court did not fully and properly re-evaluate the evidence as was expected of it as a first appellate court.

The facts of this case reveal how a human being can and does at times behave towards his fellow human being in a brutal and inhuman way. James Gachane Gathima, (deceased), was on 16th March 2005 asleep with his wife in his own house at Gatimu area in Nyandarua District of Central Province, when at about 2 a.m. robbers forcibly gained entry. To do so they broke the main door, and another door leading to his bedroom. The robbers had torches with bright lights. However, inside the house there were no lights

on. Both the deceased and his wife, N.N.G (PW1) were naked. The robbers beat them up as they demanded money. The robbers were many, because those who entered the house were at least two, while others were on the roof removing a solar panel which the deceased and his family were using for lighting purposes. At some point in time PW1 slipped and hid under their bed. The robbers later moved the bed and saw her and her husband on their knees in a bent position. One of the men forcibly had sexual intercourse with her in that bent position while her husband watched. Thereafter one of the robbers asked the deceased to explain how his motor vehicle which was outside was being started. Although the deceased explained as requested the robbers were unable to start it, and demanded that the deceased go to start it for them which he did. Earlier the deceased and PW1 had their hands tied together and also their respective legs together. The robbers freed the deceased with a view to him accompanying them outside. It was then that he went and started the vehicle for them. They demanded that he drives them to their intended destination, but as he tried to drive the vehicle through his gate it hit against the gate and stalled. The robbers were angry with him and decided to cut him severally on the head.

The deceased and PW1 were not the only people in that house. Their daughter and house maid, one Sarah Wairimu (PW3) were also there but in a separate room. They too were shackled and PW1 is the one who later freed them. It was not until dawn that PW1 and her daughter discovered that the deceased was at the gate dead. It is also at that time that PW1 realized that a number of items had been stolen, among them two blankets, a kid's jacket, a solar battery, a solar panel, dresses, a sweater, dry maize and beans, table-cloths and other assorted items of clothing. The deceased had been blind folded before he was shot dead.

Police were contacted. They came to the scene and removed the deceased's body to the mortuary. Doctor John Weru (PW2) performed a post mortem of the body. He noted that the deceased had deep cut wounds on the scalp and face, fractured skull bones and bleeding over the brain. He was of the opinion that the cause of death was the severe injuries he sustained on the head.

PW1 did not identify any of their attackers. S.W, however testified that she did. She witnessed the beating of the deceased and PW1 by the robbers. She testified that at some point one of the robbers placed his bright torch on the window sill. Using the light from that torch she observed their attackers and managed to identify the appellant and another person whose appeal is not before us. She was able to see that his left ear lobe was folded. She was able to pick him at an identification parade on 22nd April, 2005, about six days after the robbery.

The appellant was arrested from a house in Githima area. The gate to the house was locked and so was the house. The house was locked from outside to create the impression that there was no person inside. However, when the police forced the padlock open and entered the house they found one John Ndungu Wainaina, hiding inside the ceiling. The solar panel and battery stolen from PW1's house was recovered from that house. John Ndungu Wainaina, was the appellant's co-accused, and he was the first accused. The first accused led the police to a house at Ngomongo. Two blankets and a kid's jacket were recovered from therein. PW1 and PW3 identified them as some of the items which were stolen in the course of the robbery at their house. The appellant was arrested from that house. He was there with one Charity Wairimu. Two other people were arrested later and the four were jointly charged with two counts, the first of robbery with violence contrary to **section 296(2)** of the Penal Code and the second of rape contrary to **section 140** of the Penal Code, with an alternative count of indecent assault on a female contrary to **section 144** of the Penal Code.

In his defence the appellant gave a sworn statement denying, firstly that he participated in the robbery, and secondly, that anything relevant to this matter was recovered from the house from where he was arrested with Charity Wairimu, who was the 4th accused at the trial.

In his judgment the trial magistrate found as fact that the appellant was properly identified by PW3, and therefore found him guilty of both the robbery with violence charge and also the rape charge. He sentenced him to death on the robbery count and one year imprisonment on the rape charge. This Court has said time and again, that when a person faces more than one charge, one of which carries a death penalty and he is convicted of that offence, it is undesirable and improper to impose an imprisonment

term for the remaining count or counts unless that sentence is ordered to remain in abeyance. In the circumstances of this case the imprisonment for the rape charge should have been ordered to be in abeyance. The superior court judges did not notice that anomaly, and it is our view that they erred.

The superior court on first appeal, considered the evidence of particularly, PW3 who said, that she identified the appellant, considered the evidence of the police that they recovered two blankets and kid's jacket in the house from where they arrested the appellant and Charity Wairimu which items were positively identified by both PW1 and PW3 as among the items stolen from their house, about a month earlier. The Court then concluded, that the appellant having failed to account for his possession of those items an inference could be drawn that he was the thief thereof. That court considered the time of recovery of those items as recent enough for it to invoke the doctrine of recent possession. The Court did not however say anything about the rape charge. It was incumbent upon that court to correct that error, and that it did not do so, it clearly erred.

In his submissions before us Mr. Bichanga for the appellant challenged the finding of the superior court on the identification of the appellant. It was his view that the identification was at night time by one witness, the circumstances favouring a correct identification were difficult as the light relied upon for the identification was only torch light. He was also of the view that the items allegedly recovered from the appellant were not positively identified by PW1 and PW3 and also because the appellant's co-accused, one Charity Wairimu admitted the house from where those items were recovered was hers. For that reason, he stated, the evidence of recovery could not properly corroborate the evidence of identification by PW3.

Regarding the rape charge, Mr. Bichanga expressed the view that as PW1 did not identify the person who raped her, the appellant could not properly be held to have raped her, more so because only one person committed the act according to PW1.

Mr Omutelema, Senior Principal State Counsel, opposed the appeal and submitted that the evidence on identification was clear. It shows that the torch the robbers had, emitted bright light and was close to the appellant. PW3 was observing the appellant as he approached her intending to rape her. She later identified him in an identification parade. Besides, he said the appellant had the keys to the house from where a recovery of stolen items from PW1's house was made. He could not, properly disclaim ownership of the house. Finally, regarding the rape charge, learned counsel submitted, the appellant was present when the act was committed and by his presence and acquiescence he facilitated it. He also manifested his approval by himself wanting to rape PW3.

We have considered this matter. The main issue is identification. The offence was committed at night time when normally conditions favouring a correct identification are difficult. In that regard the evidence of PW3 is crucial. She was forcibly led into PW1's bedroom. She saw the deceased and PW1 being beaten while naked. She was herself tied and forced to lie down. She saw one of the robbers place a torch on a window sill. The torch was on. The light from it lit the face of the appellant and another person. It was her evidence that the appellant wanted to rape her but changed his mind and instead pushed his hand into her vagina. She observed that he was clean shaven on his head and had a cut mark on his forehead. Her evidence was graphic and it is understandable because the robbers stayed in the house for long. The trial and first appellate courts believed her and acted on her evidence. The superior court before accepting and acting on her evidence cautioned itself on the dangers inherent in acting on the testimony of a single identification witness at night time, and in doing so that court relied on the case of **Roria v Republic [1967] EA 583**. There is a plethora of authorities on that aspect and we need not cite them as the principles involved are clear. A court must satisfy itself that in all the circumstances it is safe to act on such identification without more.

In our case it was not only the evidence of identification that the two courts below relied upon. There was also the evidence of recovery of some items which had been stolen from PW1's house during the robbery there. Mr Bichanga for the appellant challenged that evidence on two fronts. First, the house from which the recovery was made did not belong to the appellant. Secondly, that the items were not positively identified as belonging to the deceased.

On the first issue P.C. Paul Thairu (PW4) was one of the officers who arrested the appellant along with Charity Wairimu Kabage. The appellant described themselves as husband and wife, and that he found them sleeping together. The appellant supplied the key which was used to open the house from where recoveries were made. The witness, as material, testified thus:-

“ You never told me you were a visitor in the house. You said both houses were yours and you were staying with your wife fourth accused. The house is a rental house. We went to Wiyumiririe to make more recoveries. I found you sleeping with fourth accused. You gave us a key we opened and recovered other items whose case is in court 1(one). The key is not an exhibit.”

Both courts below made a concurrent finding of fact as to the ownership of the house although not explicitly. We have no basis for holding otherwise.

On the second issue both PW1 and PW3 testified that two blankets and a jacket which were recovered belonged to them. PW3 testified that she was the one using the two blankets and therefore knew them well. She was not challenged on that and it cannot be said at this late stage, that her identification of the blankets was not positive. PW1 was more categorical. She pointed out bindings on the blankets as identification marks. As for the child’s jacket she pointed out a hole in it from which she was able to tell that it belonged to her child. The jacket had also a defective zip. None of the four accused persons challenged her on her identification of those items. Clearly the testimony on this aspect was believable and was properly acted upon.

From the foregoing evidence we have no basis for interfering with the appellant’s conviction on the robbery with violence charge.

As regard the charge of rape, no direct evidence was adduced to identify the specific robber who raped PW1. PW3 identified the appellant as the person who wanted to rape her but instead pushed his hand into her vagina causing her pain. The appellant clearly manifested his intention of raping. He had come to that house intending to rob and possibly rape. One person with him raped PW1. The appellant apparently approved it and he himself could have done it and in actual fact penetrated PW3 but with his hand. It was an act of indecent assault. There was common intention which was manifested from his conduct. Consequently under **section 21** of the Penal Code, the appellant with the actual rapist were joint offenders as envisaged under **section 21** of the Penal Code.

In the circumstances, the appellant’s conviction on the rape charge was proper and we have no basis for interfering with it.

In the result we dismiss the appellant’s appeal on conviction in its entirety. As regards sentence we stated earlier that the sentence of one year imprisonment should have been ordered to be in abeyance. It was not so ordered and we hold that the two courts below erred in that regard. In the result we order that that sentence be held in abeyance as it defeats logic to hold that a person facing a death penalty should also serve an imprisonment term.

Dated and delivered at Nakuru this 10th day of June, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR