IN THE COURT OF APPEAL
AT KISUMU

(CORAM: O'KUBASU, WAKI & ONYANGO OTIENO, JJ.A.)

CRIMINAL APPEAL NO. 353 OF 2009

BETWEEN

PETER OYUGI MOKAYA ……..…….1ST APPELLANT
ERICK ONDIEK ANDREA ……..……...2ND APPELLANT
RODGERS ONDIEKI NYAKUNDI ……....……3RD APPELLANT

AND

REPUBLIC ……..……...RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kisii (Musinga and Karanja, JJ) dated 30th October, 2008

in

H.C.CR.A. NOS. 135, 136 & 137 OF 2006)
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JUDGMENT OF THE COURT

This is the second and last appeal. The three appellants ***Peter Oyugi Mokaya, Rodgers Ondieki Nyakundi*** and ***Erick Ondiek Andrea,*** were all charged before Chief Magistrate's Court at Kisii with three offences namely robbery with violence contrary to ***section 296 (2),*** rape contrary to ***section 140*** and indecent assault contrary to ***section 144 (1)*** all of the Penal Code. They each denied the charges but after full hearing, the learned Senior Resident Magistrate (A. A. Ingutya) found each guilty of the first count of robbery with violence, convicted them of the same and sentenced each of them to death. They were found not guilty of the offences of rape and indecent assault and were acquitted and released in respect of those two counts. The particulars of the offence of robbery with violence in respect of which they were convicted read as follows:-

"On 26th day of December 2004 at Machabi area Riana location in Kisii District within Nyanza Province jointly robbed J.O.A of Kshs. 3000/- and his National Identity Card S/N 586122 and at/immediately before or immediately after the time of such robbery wounded the said J.O.A."

In convicting the three, the Senior Resident Magistrate stated in his judgment, *inter alia*, as follows:-

"I have carefully considered the evidence on record. I find that the three accused were positively identified by the complainants herein who knew them as their neighbours. They were not only identified by appearance but also by voices during the conversations preceding the offences.

There cannot be a mistake on identity. The testimony of PW3, is on all forms (sic) with that of PW1, her husband. She saw her husband being raped (sic) and assaulted by the accused.

I am not in doubt that the prosecution proved its case on the first count and I convict all the accused under section 296 (2) of the Criminal Procedure Code (sic)."

The appellants were not satisfied with the conviction and sentence. They appealed to the superior court which also dismissed their appeal and confirmed conviction and sentence; hence this appeal based on six (6) main grounds of appeal filed on 18th June 2011, in a supplementary memorandum of appeal which was adopted by Mr. Menezes, the learned counsel for the appellants as he abandoned the three original grounds each filed by the appellants separately. A summary of these grounds is that the first appellate court failed to revisit the evidence that was adduced at the trial afresh, analyse it, and deal with it as is required by law; that the first appellate court failed to consider whether the numerous adjournments at the trial infringed appellants constitutional rights; that it was not ascertained whether the appellants understood

the languages used at their trial; that it did not consider whether the light available at the time the offence was allegedly committed was enough for proper identification of the appellants; that the grounds of appeal were not considered by the first appellate court; that defences of the appellants such as that of grudge between Peter Oyugi Mokaya and the complainant, and those of alibi by Erick Ondiek Andrea and Rodgers Ondieki were not considered; and that first appellate court erred in considering the appellants' defences jointly rather than considering each defence on its own.

Mr. Menezes addressed us on those grounds at length, submitting that the appellants' defences, though summarized in the judgment of the superior court, were not considered by that court as should have been done, that court being a first appellate court. He submitted further that it would appear the offence never took place and evidence was fabricated. A good example of such fabrication was that the complainant said he was whipped twenty times, but he never went for any treatment and never secured a P3 to prove the allegation and likewise his wife P.O said she was raped and a foreign body inserted into her private parts yet medical examination on her did not reveal any such injuries. He contended that the conduct of the complainant soon after his wife was allegedly taken away in failing to search for her and to make immediate reports to the authorities indicated that nothing of the alleged incidence took place and lastly he submitted that there was a possibility of the allegations arising from elements of *"love gone sour"*. He urged us to find that the offence was not committed, allow the appeal and set free the appellants.

Mr. Gumo, the learned Assistant Director of Public Prosecutions, on the other hand supported the conviction and sentence, maintaining that the matters urged by the appellants were matters of fact and as the trial court and the first appellate court had made concurrent findings on the same, this Court had no jurisdiction to entertain them. He urged us to dismiss the appeal.

We will consider all the above, the judgment and the law but first, the facts as are in the record before us.

J.O.A (PW1) and his wife P. O (PW3) said and it was not refuted, that they lived in the same area as the appellants. On 26th December 2004 at about 7.00 p.m. they were going home from the shops at Nyamira when they met three young men whom they knew and later identified as the appellants. He greeted the first appellant. In response the first appellant (Peter) asked him where he was going and J replied that he was going to his home. Peter then asked him why he was walking with his wife at night. J replied that they were from the shops. The first appellant then told J to stop for a while. At that juncture the second and third appellants also greeted him and asked him *"unatoka wapi saa hizi"*. On the complainant's further reply that he was from the shops and was going home, they asked why he was with his wife at night. They further told him they would take away his wife and whatever he had. The second appellant then searched his pockets and took away his identity card and Kshs.3,000/- wrapped in a paper. They then told him they had decided to rape his wife and the first appellant who had a whip whipped him. He whipped him twenty (20) times all over his body. He screamed attracting the wives of the second and third appellants to the scene but those were chased away by the appellants. The third appellant threatened to kill him with a masai sword. He ran away to a home nearby but on explaining to the owner of that home, a Mr. Charles Marogi what had happened to them, he was told to go to Assistant Chief. When he went to Assistant Chief he was told to report the next morning. In the meantime his wife P.O was held by the second appellant who pulled her to a maize plantation and having whipped her, asked her to follow him as the first and third appellants were still with her husband. The two followed the second appellant and P. They told her to remove her clothes and lie down. She tried to resist but the third appellant hit her with a sword. They then raped her in turns and thereafter the second and third appellants left her with the first appellant who continued raping and beating her from time to time and at one time inserted a stick into her private parts. After all that she was released early morning of the next day but after tearing her skirt and other wearing apparel. She remained with a biker and pant only. She tried to go home but was so exhausted that she fell down and slept near home. That was at 4.00 a.m. Later she woke up and called J and when J responded, she asked him to take some clothes to her. J did so. At 6.00 a.m. J went to the Assistant Chief who gave him a letter to take to the village elder with instructions to arrest the appellants. The appellants were arrested by the Chief's youth wingers, through the instructions of Chief Z.D.N (PW5), and taken to Police Post on 28th December 2004 where, PC F.S (PW4) re-arrested them. P was examined by J.M (PW2) who diagnosed her with a swollen and reddish eye. She also had a tender chest but Jackson did not see anything significant on the offence of rape. The degree of injury was assessed as harm. The appellants were charged as stated above. In their defence, the first appellant in a sworn statement denied the charge maintaining that on 28th December 2004, he had been digging his farm leased to him by the complainant when the complainant chased him away from the farm. When he went to report the incident to the Chief, he found the Chief was not there. Later the village elder went to him and told him he was needed by the Chief. He accompanied the village elder to the Chief's office where he found the complainant. He had complained about his land which he said the appellant was digging. No agreement was reached on that issue and he knew the complainant who was his neighbour. However as to P, the first appellant said he saw her for the first time on 28th December. He said there was agreement for the lease of the complainant's land to him but he did not have the agreement and he never reported the land dispute to the village elder or the Chief, neither did he report his being chased away from the land to the police. The second appellant gave unsworn statement that on 28th December 2001, he was at home when the village elder approached him and told him the Chief wanted to see him. He went to the Chief's office, found the complainant and his wife P. He was put into the cells and was thereafter taken to Suneka Police station and later to Court and charged with this offence. The third appellant's defence was also unsworn. He was instructed on 27th December 2001 to repair a motor vehicle puncture as he was a matatu conductor. As he was doing so, the complainant ***approached with*** *"abiko"* ***and "scrufinad" the motor vehicle***. Later a village elder went to his home and told him the Chief wanted to see him. He went to the Chief's office where he found the complainant. He was arrested and taken to Suneka and then to Kisii Police Station. He was then charged with the offence.

The above were the facts that the trial court considered and which led it to find the appellants guilty. The first appellate court also considered the same facts afresh and in our view analysed, and evaluated them. After doing so the learned Judges (Musinga and Karanja, JJ.) confirmed the conviction stating:-

"Despite their denial, the complainant's evidence coupled with that of his wife showed that the appellants were seen and recognized at the scene. There was enough light and adequate opportunity for them to be recognized. They also did engage in conversation with the complainant prior to committing the unlawful act of robbery. Their respective defences were in the circumstances unsustainable. Their identification by the complainant and his wife was by recognition which is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other (see Anjononi & others vs. Republic [1980] KLR 59."

We have considered the record, the judgment, the submissions by Mr. Menezes, and Mr. Gumo and the law. This is a second appeal. Under the provisions of ***section 361*** of the Criminal Procedure Code, we are confined to consider only matters of law unless it is demonstrated to us that the two courts below failed to consider matters that should have been considered or considered matters that should not have been considered or that looking at the entire decision as a whole, the decision was plainly wrong in which case the entire issue becomes a matter of law. In the case of ***M'Iriungu vs. R. (1983) KLR 455 at page 466,*** this Court stated:-

"In conclusion we would agree with the views expressed in English case of Martin vs. Glyneed Distributors Ltd (t/a MBS Fastening). The times of March 30, 1983 – that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, appellate court, unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law. We, here, have resisted the temptation."

In this case, the main issues raised by Mr. Menezes are that identification could not have been proper as there was not enough light at the scene; that the evidence by the complainant is not born out by his conduct and likewise that of his wife does not meet the findings of medical examination and thus the two witnesses relied upon by the trial court and the first appellate court were not credible; that the first appellate court did not revisit the evidence, analyse it, evaluate it and reach its own independent conclusion as was required of it.

The offence, took place at 7.00 p.m. Clearly that was time between day time and night time. It was not dark as yet, and certainly for neighbours, as first the appellant confessed the complainant was his neighbour, it could not be difficult to recognize each other at that time. Indeed there was evidence that wives of the appellants came out in response to the screams of the complainant, but they were also chased away. Further, and as the trial court and superior court found, the appellants engaged the complainant and his wife in a question and answer session which must have enhanced the complainant's assurance as to who were talking to him. That goes for his wife as well. In the case of ***Anjononi & others vs. R. (1980) KLR 59*** which was referred to by the superior court, this Court stated at page 60 as follows:-

"Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We draw attention to the distinction between recognition and identification in Soire ole Guteya vs. Republic (unreported)."

We do agree that as is stated in the case of ***R vs. Turnbull & others (1976) 3ALLR 549*** mistakes can be made even in cases of recognition as an honest witness may nonetheless be mistaken even in case of recognition, but in the case where the appellants were not only neighbours of the complainant, but also engaged in conversation with the complainant and his wife, and where there was still some light as the offence took place at 7.00 p.m., we see no possibilities of such a mistake. In our view, on the matter of law raised i.e. identification, we find that the appellants were properly identified by recognition as the complainant's assailants. The acceptance of that fact as was accepted by the trial court and first appellate court ousts the alibi defences by all appellants. It is correct as Mr. Menezes says that the complainant, though he complained that he was whipped by the assailants more than twenty (20) times, yet he did not go for treatment and there was no medical evidence to prove the same. It is also true that his wife complained of gang rape and further rape by the first appellant several times, yet medical evidence showed that there was nothing to establish allegations of sexual harassment. Further it is true the complainant appears not to have bothered to follow his wife who was being taken away by the thugs. The suggestion is that the evidence was exaggerated or fabricated. However, even if those aspects were ignored, there is still the evidence that the three were at the scene of the crime and that they stole Kshs.3,000/- from the complainant and his identity card. Meting out personal violence upon a victim is only one ingredient of robbery with violence under ***section 296(2)***of the Penal Code. Thus even if personal violence upon complainant was not proved, the other ingredient of being more than one person still caught up with them as they also stole his money and his identity card. As we have stated, the issue of their credibility was before the trial court which saw their demeanour and heard them and the first appellate court which had the duty to revisit the evidence afresh, analyse it and evaluate it. We have reproduced part of the appellate court's judgment where in our view, that court did evaluate the evidence afresh. We do not, with respect, agree with Mr. Menezes that that was not done. There is no set pattern for revisiting, the evidence by the first appellate court, neither is there need for a lengthy approach to the issue. What is important is that it be demonstrated that the first appellate court independently applied its mind to the need to reconsider the evidence afresh. This was done in this case and as we have stated, we have reproduced the part of the judgment to show that the first appellate court acquitted itself of the duty that the law imposed on them as a first appellate court.

It is clear from the above that this appeal cannot stand. Mr. Menezes did not argue the grounds raised on the language used and that raised on violation of appellants' rights through adjournments. We have on our own perused the record and we note that on the date the plea was taken language was indicated as English/Kisii. The complainant gave evidence in Kiswahili and was duly cross-examined properly by all appellants. P gave evidence in Ekigusii and was also properly cross-examined. Every adjournment that was granted was duly applied for and as the charges were serious, we see no reason to intervene in the learned Magistrate's discretionary jurisdiction on that aspect.

The appeal has no merit. It is dismissed.

Dated and delivered at Kisumu this 28th day of July, 2011.

E. O. O'KUBASU

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JUDGE OF APPEAL

P. N. WAKI

…….
JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR