REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 269 of 2008

SALIM HAMISI MWAHADI .....……..... APPELLANT

AND

REPUBLIC ……...…… RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Mombasa (Sergon & Azangalala, JJ) dated 28th October, 2008

in

H. C. CR. A. NO. 227 OF 2005)
****

JUDGMENT OF THE COURT

In the trial court the appellant, ***Salim Hamisi Mwahadi*** together with two others namely ***Rashid Wagonga Mwagonga*** and ***Athumani Abdalla Shughuli*** were charged on the first count with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code (Cap 63 of Laws of Kenya). In the second count the appellant was charged with the offence of rape contrary to ***section 140*** (now repealed) of the Penal Code. On the third count the trio were charged with the offence of burglary contrary to ***section 279 (b)*** of the Penal Code. In the fourth count the trio were charged with the offence of stealing two pillows and other items from the dwelling house of one ZMC and with an alternative charge of handling stolen goods contrary to ***section 322 (2)*** of the Penal Code.

After a full hearing the trial court found the appellant guilty of the offence of robbery with violence on count one but acquitted his two co-accused of that count and further found the appellant guilty of the second count of rape but acquitted the other two accused. In addition , the court acquitted the appellant's two co-accused of the third count and the first limb of the fourth count. However as regards the alternative charge of handling stolen goods the court found the two guilty.

On count one, the appellant was convicted and sentenced to death and on the second count and the second limb of the fourth count the appellant was sentenced to ten and two years imprisonment respectively and the prison sentences were ordered to run concurrently. It is therefore clear from the foregoing that this appeal has only been brought by the appellant as against his conviction and sentence in respect of the charges in which he was convicted as outlined above.

The appellant's first appeal to the superior court was dismissed hence this second and final appeal to this Court.

The particulars of the first count as per the record were that the appellant jointly with the other two and others not before the court on 25th day of October, 2003 at about 2.30 am, at K Mombasa while armed with dangerous weapons namely pangas, rungus and iron bars robbed T. K. M of cash in the sum of Kshs.145/= and at or immediately before or immediately after the time of such robbery used actual violence to the said T.K.M.

The particulars of the second count were that on the same day at about 2.30 a.m at K in Mombasa District within Coast Province the appellant had carnal knowledge of F.K without her consent.

Concerning the alternative charge the particulars were that the trio, on the same day at about 5.00 am at K Mombasa District within Coast Province, dishonestly received and retained one mattress knowing or having reason to believe it to have been stolen.

During the hearing of the appeal before us on 19th January, 2010, the learned counsel Mr. Nyabena represented the appellant and the learned Senior State Counsel, Mr. Monda represented the State.

For the purpose of this appeal, Mr. Nyabena relied on the memorandum of appeal filed by the appellant on 13th November, 2005 and also a supplementary memorandum of appeal filed on 12th January, 2010. We do not consider it useful to set out in extenso the grounds as appearing in the two memoranda because the learned counsel Mr. Nyabena in his submission deliberately chose to highlight only certain grounds namely alleged error of identification; lack of corroboration in the identification; inadequate medical report in support of the charge of rape; discrepancies and inconsistencies of the evidence including failure to ascertain the ownership of the incriminating mattress; failure

by the court to finalize hearing of the evidence of PW 5 and to recall him for cross-examination and failure to take into account the appellant's defence.

Taking the above grounds seriatim. Mr. Nyabena submitted that the appellant was identified by the complainant at the police station. For this reason, Mr Nyabena said that an identification parade was necessary, and none was held. In addition PW 5, Mrs. F.K was not able to identify the appellant the first time but was only able to identify him when he allegedly came back to the house for the second time and she was able to identify him because he flashed a torch on her husband and the fact that there was moonlight. He added that the police should have been the first to identify the person they had arrested and an identification parade held. The learned counsel contended the conditions described as above by the witness were not conducive to proper identification and it would therefore be unsafe to uphold the conviction.

As regards his contention on corroboration Mr. Nyabena clarified that he meant that the evidence on identification should have been sufficiently strong especially in a situation where F PW 5A had initially said that she had not identified the appellant yet her husband Mr. T. K PW1 had identified the appellant by the name of "**Salim**". For this reason the contradiction between the two close witnesses should have considerably reduced the weight of the evidence on identification. Moreover the ownership of the incriminating mattress was never ascertained or proved.

Mr. Nyabena's challenge concerning rape was based on the fact that although the alleged rape took place on 25th October, 2003 the examination of the complainant took place on 30th April, 2004 nearly six months after the event and the findings in the P3 form were that the PW 5A was pregnant and her vagina had her hymen torn and it also had ragged edges. On this finding he submitted that there could not be proof of rape nearly six months after the event for a married woman! Counsel also submitted that the naming of the appellant by PW 1 "**Salim**" for the first time was evidence based on an afterthought or a frame up taking into account that PW 1 the husband had talked of one or two persons as the perpetrators of the crime while PW 5 A the wife, had only seen one person.

On the omission by the court to have Mr. ONR PW 5 recalled after he had been prematurely stood down and not recalled and failure to have him cross-examined, on behalf of the appellant Mr. Nyabena contended that that was grossly prejudicial to the appellant and a violation of the due process.

Mr. Nyabena finally contended that the two courts had failed to take into account the appellant's defence.

Mr. Monda in his submissions in support of conviction stated that the evidence of identification by PW 1 was by recognition because without any prompting he gave the appellant's name as "**Salim**" the man who raped his wife. In addition the witness said that there was moonlight which enabled him to recognize him. The appellant, he said, was also clearly identified by PW 5A, F who endured a nearly two hour rape ordeal. In addition Mr. Monda submitted that the appellant was a resident of the house where the incriminating mattress was found. He submitted that the identification of the appellant by recognition including possession of the mattress clearly placed the appellant at the scene of crime and that the evidence was overwhelming and could not result in mistaken identity. Mr. Monda contended that the alleged discrepancies or inconsistencies between the evidence of PW 1 and PW 5A were not material as held by the two lower courts.

Mr. Monda further stated that in the circumstances corroboration was not required as a matter of law nor was an identification parade necessary. As regards the evidence of the recovery of the mattress, Mr. Monda submitted that the appellant and his two co-accused (who were acquitted for other reasons by the trial court) were found in one house and the ownership of the mattress was established by ZM PW 2 whose house had also been broken into on the same night. Furthermore upon being given an opportunity to cross-examine the owner of the mattress the appellant failed to do so.

On the issue of the failure to complete the evidence of PW 5 and to recall and also accord an opportunity to cross-examine him, Mr. Monda submitted PW 5's evidence was never relied upon either by the trial court or the superior court and therefore nothing turned on the said lapse or omission on the part of the court.

Again concerning the alleged inadequacy of the medical report to support rape, Mr. Monda submitted that there was adequate independent evidence of the victim of rape namely PW 5 A which was capable of sustaining the charge.

Finally, Mr. Monda submitted that the two courts had, as is clear from the record, evaluated the defence of the appellant which they concurrently found not to have dented the totality of the evidence adduced by the prosecution.

We have carefully considered the rival arguments as set out above and the law. On the first ground of identification we agree with Mr. Monda that the identification was by recognition by PW 1 and this was substantially supported by the evidence of PW 5 A. In addition, the appellant was placed at the scene of the crime by the mattress which was used in assisting to perpetrate the offence of rape and which mattress was positively identified by PW 2, the owner of the mattress. In the circumstances, contrary to Mr. Nyabena's submissions there was no need for corroborative evidence in law. There is ample evidence that the appellant was identified by PW 5 A through the moonlight and while in the act which took two hours and was also indentified in the house by PW 1.

Similarly, concerning the six months gap between the date when the victim of rape namely PW 5 was examined and date when the offence was committed, we are of the view that nothing turns on this because the two lower courts did believe the evidence of PW 5 A that she did recognize the appellant and that it is the appellant who raped her. The suggestion that there cannot be evidence of rape against a married woman because a medical report was obtained six months after the event is ridiculous because the offence of rape is basically having carnal knowledge with a woman without her consent. Oral evidence by PW 5 A that she was raped supported by the fact that evidence was led to the effect that at the same time her husband was hit with a panga as his wife PW 5A was being taken away taking together with a mattress which according to her was used in facilitating the rape and finally that the sufficient evidence was given connecting the appellant to the mattress.

On the alleged contradiction or inconsistencies relating to the number of robbers seen by PW 1 and PW 5 A we find that inconsequential in that the appellant was clearly identified by both witnesses and other persons acquitted by the trial court for other reasons including lack of proper identification.

Concerning the challenge that PW 5's evidence was incomplete and that he was neither recalled nor an opportunity accorded to the appellant to cross-examine him, the record reflects that the two courts did not rely on the evidence of Mr. N, PW 5 at all. This ground must therefore fail.

Touching on the alleged failure by the two courts to consider the appellant's defence, the record reflects that both courts gave due consideration to the appellant defence and the appellant, inter alia, failed to explain his whereabouts when the offence took place or reveal the identity of his tenant. The defence according to the two courts constituted an afterthought and in our view the defence evidence could not supplant the prosecution case and the challenge was therefore properly rejected.

Finally on the issue of the mattress, the record shows that it was recovered from a house where all the three accused persons including the appellant had locked themselves up and upon recovery of the mattress it was clearly identified by PW 5 the owner.

In conclusion save for the issue of identification and the effect of failure to recall the witness and to allow cross-examination, all the

other points are matters of fact in which both courts have made concurrent findings and for this reason they do not constitute the province of this Court as the second and final Court of Appeal. In the case of ***Njoroge vs Republic*** ***[1982] KLR 388*** this Court held:-

"On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal the Court is bound by concurrent findings of fact made by the lower courts unless those findings were not based on evidence."

All in all, we find no merit in this appeal and the same is dismissed.

Dated and delivered at Mombasa this 12th day of March, 2010.

S. E. O. BOSIRE

……
JUDGE OF APPEAL

E. M. GITHINJI

……
JUDGE OF APPEAL

J. G. NYAMU

…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR