



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 338 of 2008

MBUI JOHN MWAVITA.....APPELLANT
AND
REPUBLIC.....RESPONDENT

*(Appeal from a judgment of the High Court of Kenya at Malindi (Ouko, J)
dated 30th November, 2005*

in

H.C.C.R.A. NO. 97 OF 2004)

JUDGMENT OF THE COURT

On 1st July, 2003 the appellant was charged before the Resident Magistrate Kilifi with four counts namely, grievous harm contrary to **Section 234** of the Penal Code (Count I); malicious damage to property contrary to **Section 339(1)** of the Penal Code (Count II); Assault causing actual bodily harm contrary to **Section 251** of the Penal Code (Count III); Rape contrary to **Section 140** of the Penal Code (Count IV) and an alternative count of indecent assault contrary to **Section 144(1)** of the Penal Code. The record of the trial magistrate shows that the charges in counts I, II, III and the alternative charge to count IV were read to the appellant to which he pleaded not guilty. However the record does not show that plea was taken in respect of count IV - that is rape charge. The trial magistrate after the trial convicted the appellant of three counts - namely count I, II, and IV. The appellant was however acquitted of the alleged offence of malicious damage to property in count II.

On appeal to the superior court the appeal against conviction and sentence in counts I and III was dismissed but the appeal against conviction on count IV was quashed solely on the ground that the trial magistrate had omitted both to read the charge of rape to the appellant and to take plea on that charge.

The complainant in counts I and II was **F.N.M (PW1) (F)** while the complainant in counts III and IV was **S. K (PW2) (S)**. Their evidence at the trial was brief and straight forward.

On 20th April, 2003 at 430 a.m. the two complainants and E, the 1st complainant's wife were coming from a funeral when they were attacked by five people who were armed with clubs on their way home. E managed to escape. The attackers broke F's hand and damaged his wrist watch while the three of the attackers including the appellant led S into the bush and raped her in turns. F testified at the trial that he identified the appellant whom he used to see before with the help of moonlight and that as the attackers were leaving one of them shouted, "*Mbui wachana naye*" and that the appellant is the only "*Mbui*" in the area whom he knew.. S testified at the trial that two people attacked F while three people raped her; that the appellant was the last person to rape her; that in the morning she and the appellant walked to the road before they went separate ways and that she had not met *Mbui* before.

The incident was reported at Kilifi Police Station on 20th April, 2003 and on 29th June, 2003, **PC Odha (PW4)** went to the house of the appellant but after failing to find him he left a message that the appellant should go to the police station which he (the appellant) did and was arrested and charged.

The appellant gave sworn testimony at the trial stating inter alia that he was aged 21 years and a student in secondary school; that he was a day scholar but was staying in rented premises near the school; that on 19th April, 2003 he attended a gathering (funeral) at a neighbour's home. That he returned at 11.00 p.m. and slept; that at 4.00 a.m, he

was awakened by his mother who told him that people were saying that he had beaten them; that the complainants were familiar; that he used to see them but did not know their names and that he was stunned by the allegation of assault and rape.

The prosecution case was solely dependent on the identification of the appellant by F and S. It is trite law that where the evidence relied on to implicate an accused person is entirely of identification, the evidence must be water tight to justify a conviction. (**KIARIA V. REPUBLIC** - 1984 KLR 739). It is also trite law that the evidence of a single witness respecting identification especially where the conditions for identification are not favourable should be tested with the greatest care (**MAITANYI V. REPUBLIC [1986] KLR 198**).

It was submitted at the trial by Mr. Kithi who was representing the appellant that the identification of the appellant was not proper and that it could not be said that the appellant was known if it took two months to arrest him. On the aspect of the identification the trial magistrate said:

“The two complainants say they know the accused even up to his home. They even led police there, which confirmed by the accused that he went to the station in response to the summons left at his home. This confirms that the complainants knew the accused’s home”.

The trial magistrate added:-

“Since the complainants and accused are known to each other and they knew the accused’s home, I am satisfied that the complainants did recognize the accused as one of the attackers and was.....”

It was submitted in the superior court by Mr. Okuto, counsel appearing for the appellant among other things that the identification of the appellant was flawed; that the evidence of identification was that a single witness as S did not know the appellant that the fact that it took two months to arrest the appellant leads to the conclusion that F did not know the appellant and that an identification parade should have been held.

The superior court considered the evidence and came to the conclusion that:-

“The complainants had sufficient opportunity and the conditions could be favourable for them to recognize the appellant. In the circumstances an identification parade was not necessary.”

The main grounds of appeal relate to identification and failure by the superior court to evaluate the evidence (ground 2 and 3). The appellant conducted the appeal in person and relied on his written submissions.

The superior court was required to reconsider the evidence, evaluate it itself and drawn its own conclusions. It was not sufficient to merely scrutinize the evidence to see if there was evidence of the findings to support and conclusions of the trial court (see **NGUI V. REPUBLIC [1984] KLR 729**).

The submission by the appellant that the superior court failed to evaluate the evidence leading to the circumstances under which the appellant was identified is with respect valid.

Firstly, F testified that there was moonlight. However, S did not say that there was moonlight nor did she describe the circumstances under which she identified the appellant. Further F did not describe the intensity of the moonlight or say on how many occasions he had seen the appellant before F testified that he did not see the other attackers as he concentrated on the appellant who was hitting him. It is implicit from the evidence of F that it is only the appellant who was assaulting him. However S’s version of the evidence is that two people attacked F while three raped her and that the appellant at first beat F then left F and beat S and also raped her.

According to the evidence of S she did not know the appellant before. So in the final analysis, the prosecution case depended on the recognition of the appellant by F and on the evidence of identification by S. Yet S did not describe the circumstances under which she identified the appellant.

Secondly it is apparent from the evidence of F that he did not know the name of the appellant before and that it is one of the attackers who called out the name “Mbuyi”. F claimed to have given the name to police but PC Odha testified that F did not mention the name of appellant in his statement. On her part S admitted that she did not mention the name Mbuyi to the police.

Thirdly the superior court did not consider the evidence relating to when and how the appellant was arrested.

According to the evidence of PC Odha, it is on 29th June, 2003 when complainants told him where the appellant was PC Odha further testified that on the same day he went to the appellant’s school and left a message that the appellant should report to the police station and that he arrested the appellant when he (appellant) reported at the police station. Whereas F testified he took police to the appellant’s home on the following day but appellant would not be found PC Odha testified that the suspect was known later. In particular PC Odha said in part:-

“I was not given a description of the suspects. The incident was in the dark. There was no identification parade. The suspect was known later.”

The evidence that the suspect was known later was supported by the evidence of F that:-

“After the attack I had been seeing the accused around Tezo”

It is thus clear from the evidence that although F claimed to have recognized the appellant, he did not mention him in his statement to the police nor was the appellant whom F used to see after the incident arrested until over two

months later when PC Odha summoned him to the police station. Even when the appellant was informed that he was required to report to the police he did not go into hiding. He instead presented himself to the police and was arrested. Furthermore the appellant denied on oath that he committed the offence and claims that his evidence was not discredited.

All these circumstances raise reasonable doubt as to whether F recognized the appellant and also as to whether S identified him. In the circumstances of this case an identification parade should have been held particularly to test the correctness of the identification of the appellant by S who did not know him before.

Lastly the two courts below misdirected themselves in material respect by finding that the two complainants recognized the appellant. On the contrary the evidence shows that S had not seen the appellant.

In our view the superior court failed to perform its duty and merely scrutinized the evidence. Had the superior court re-evaluated the evidence as shown above it would have come to the conclusion that the evidence of recognition and identification was not entirely reliable and would have given the appellant the benefit of doubt.

In the result we allow the appeal, quash the respective convictions in the two counts and set aside the respective sentences. The appellant shall be set at liberty unless otherwise lawfully held.

DATED and DELIVERED at MOMBASA this 23rd day of JULY, 2010.

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR