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

CRIMINAL APPEAL 67 OF 2007

1. ERICK RATEMO MWEBI
2. EVANS OBUYA .....……APPELLANTS
AND
REPUBLIC ……..RESPONDENTS

(Appeal from the judgment of the High Court of Kenya at Kisumu (Bauni & Warsame, JJ.) dated 11th December, 2006

in
H.C.Cr.A. No. 339 of 2003)
****
JUDGMENT OF THE COURT

Erick Ratemo Mwebi and ***Evans Obuya***, the appellants herein were the 6th and 5th accused respectively at the trial court. They were charged in the Principal Magistrate's Court at Nyamira with four others who were acquitted under ***Section 210*** of the Criminal Procedure Code, with two charges of robbery with violence contrary to ***section 296(2)*** of the Penal Code, one alternative charge of handling stolen property contrary to ***section 322(2)*** of the Penal Code, two charges of rape contrary to ***section 140*** of the Penal Code and two alternative charges of indecent assault contrary to ***section 144(1)*** of the same Code. The facts were that on the night of 23rd September, 2003 ***H. N.B*** (PW1), his wife ***R. M. B*** (PW2),one ***A. M*** (PW4) and his wife ***F. N. M*** (PW5) were asleep in their respective houses at N. Secondary School teachers quarters when a group of people attacked and robbed them of money, clothes and other household goods. They stole Kshs.5,360/=, a radio, two spotlights, four long trousers, one sweater, one child jacket and other children's clothes from PW1 and PW2. And from PW4 and PW5's house they stole Kshs.3,500/=, a camera, a mobile phone, a Sanyo video deck, three shirts, seven pairs of trousers, two jackets and a mobile charger. In the course of the attack, it was the prosecution case that PW2 and PW6 were respectively raped and indecently assaulted. PW6 is the cousin of PW4 and was staying with him and PW5 at the school quarters. Thereafter all the victims were taken to ***Tom Sabore Onjoro*** (PW10) a Clinical Officer at Nyamira District Hospital for treatment and assessment of the injuries sustained in the course of the alleged robbery and rape incidents. Injuries sustained by PW1 and PW4 were classified as harm. PW10 was of the view that PW2 and PW6 had been raped. He produced his medical report in evidence.

Pc. David Osiemo (PW11), a traffic police officer, arrested a suspect from a bus at the Konate junction on the morning of 24th September, 2003 on suspicion that he had committed some criminal offence. He took him to Nyamira Police Station where he found PW4 making a report of a robbery. PW4 identified a jacket and the boots the suspect was wearing as his and formed part of the items stolen from him during a robbery on the night of 23rd September, 2003. The suspect was the 1st appellant. The witness later received another suspect who had been arrested after a chase and beaten thoroughly by members of the public. He was allegedly arrested with a camera and knife suspected to have been stolen during the attack on PW1, PW2, PW4, PW5 and PW6 on 23rd September, 2003. PW11 telephoned Criminal Investigations Department Officers at Nyamira Police Station who came and collected the suspect. He was the 2nd appellant. ***Pc. Elijah Mogire*** (PW12) testified that he was at Tinga AP's Post on 24th September, 2003 at 2.00 a.m. when PW4 went there to report a robbery committed at his house that night. According to the witness when PW4 made this report he mentioned the names of both appellants as having been part of the gang that robbed him. They are people he knew before. PW4, PW11 and PW12 were then directed the same night to the appellants' homes by a watchman at N. Secondary School who was the father of the 2nd appellant but they were not found at their homes. But early morning on 24th September, 2003 the appellants were seen at N. bus stage by an informer but when they saw PW4, PW11 and PW12 they ran away abandoning the luggage they had in two bags. In one of the bags, black in colour, PW11 and PW12 found a radio cassette, video player, seven pairs of long trousers, two jackets, four radio cassettes, three shirts and three Eveready spotlights, some of which were identified by PW4 as his property. These items were all taken to Nyamira Police Station. PW12 testified that he saw both appellants at a bus stage at N with the aforesaid luggage which they abandoned and escaped.

APc. Kennedy Arula (PW14) supported the evidence of PW11 and PW12 about a report made at Tinga AP's Camp where he was attached, about a robbery which had been committed against PW1, PW2, PW4 and PW5 on the night of 23rd September, 2003 and that the appellants' names were mentioned as amongst the suspect robbers. He accompanied PW11 and PW12 to the appellants' homes to look for them after the report was made but they were not found and when members of the public reported that the appellants had been seen at N. bus stage this witness also accompanied PW11 and PW12 there and confirmed the evidence of the former about the suspect robbers dropping the luggage they had at the stage and running away.

Nicholas Biashara Barake (PW15) confirmed the arrest of the 2nd appellant at Konate junction in possession of a saw like knife and Kshs.3,000/=. According to his evidence there was another suspect who was arrested on the spot. PW15 could not remember that suspect because he was involved in the chase of the 2nd appellant. ***C.I. Ludechi Majani*** (PW16) – identified the appellants as the suspects who had been arrested by T. Camp Administration Police Officers and whom he took to Nyamira Police Station where they were charged as aforesaid.

The 1st appellant's defence was an alibi. He stated that PW4 had a grudge with him because they had quarreled at a football match where PW4 was a referee. He also testified that PW2 likewise had a grudge with him because she had refused to pay him for some work he had done for her. The 2nd appellant, in an unsworn statement denied he committed the offence with which he was charged.

In his judgment delivered on 25th November, 2003, the learned Principal Magistrate *(K.W. Kiarie)* reviewed the evidence adduced by the prosecution witnesses and the defence and rendered himself thus:-

> ***"From the evidence on record, I find that the prosecution has proved its case beyond any reasonable doubt against the 5th and 6th accused persons in respect of the offence they are charged with in count 1, count 2, count 3, count 4 and count 5. I therefore find each one of them guilty and accordingly convict him*** *(sic)* ***of the offences thereof. I make no findings on the alternative charges thereof."***

Upon their conviction, the appellants were sentenced to suffer death in counts 1 and 2, 20 years imprisonment each in counts 3 and 4 and 24 months imprisonment each on count 5 and that the terms of imprisonment would be served concurrently. Their appeals to the superior court were dismissed in respect to conviction and sentence in counts 1, 2, 3 and 4 while the appeals in regard to conviction and sentence in respect to count 5 were allowed.

The appellants were still dissatisfied with the decision of the superior court and have come to this Court on second appeal. At first they each filed a home-made memorandum of appeal which listed five grounds of appeal. These were abandoned by their counsel, *Messrs. Wasuna & Company Advocates* who filed two supplementary memoranda of appeal. The first, lodged in Court on 28th May, 2010, had ten grounds of appeal while the second, lodged in Court on 9th June, 2010, had three grounds of appeal. The 10 grounds of appeal in the first supplementary memorandum of appeal were as follows:-

> ***"1. the learned Honourable Judge of the High Court of Kenya at Kisii erred in law by failing to take note of the breach of the appellant's constitutional rights as guaranteed under section 72 of the constitution of the Republic of Kenya and/or failing to seek an explanation from the State Counsel for the delay in arraigning the appellants in court. The appellants were arrested on 24th day of September 2003 and arraigned in court on 17th October 2003***
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> ***2. The learned Hourable*** *(sic)* ***Judge erred in law by failing to find that the Principal Magistrate erred in law by failing to take the appellant's plea with regard to all the courts*** *(sic)* ***making the proceedings irregular and incurably defective.***
>
> ***3. The learned Honourable Judge erred in law and fact by failing to take note that the conviction of the appellants on the charge of rape was against the weight of medical evidence adduced and that the spermatozoa found in the rape victims vagina was not matched with the appellant's to confirm affinity.***
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> ***4. The learned Honourable Judge erred in law and in fact in upholding the conviction of the appellants by the Principal Magistrate which was the basis of an identification parade which was irregular and un-procedural as witness who participated had prior acquaintance of the appellants.***
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> ***5. The learned Honourable Judge erred in law by upholding the decision in the trial Magistrate's court which conviction was without basis as there was no sufficient***

evidence of recognition of by** (sic) **identification of the appellants as the actual perpetrators.

6. ***The first superior court erred in law by failing to appreciate error of the trial Magistrate of making a finding without considering the defence used by the appellant and not tendering any reasons why the defence evidence was not considered.***

7. ***The superior court erred in law in failing to note the omission of the trial Magistrate to explain to the appellants the substance of the charge on closure of the prosecution case as required by section 211 of the Criminal Procedure Code.***

8. ***The superior court erred in law in failing to note the inconsistency and flaws in the testimony of the prosecution witnesses, the numerous contradictions therein and convicting the appellants on insufficient circumstantial evidence.***

9. ***The superior court erred in law by failing to appreciate that the trial Magistrate erred in law and fact in misdirecting himself on the age of the 2nd appellant.***

10. ***The superior court erred in law in failing to give due regard to the first report made in respect to this charge and the failure by the prosecution to charge the appellants since the appellants were allegedly known to the complainants."***

The three grounds of appeal listed in the further supplementary memorandum of appeal were that:-

"1. The learned Honourable Judges misdirected themselves when they convicted the appellants on defective charges and failed to find that the prosecution and the trial Magistrate did not ensure the compliance of the necessary requirements as to the particulars of a charge and/or elements of the charge.

2. The superior court erred in law by failing to submit the whole evidence to a fresh and exhaustive examination and give its own decision on the evidence and draw its own conclusion.

3. The superior court erred in law by failing to inform the accused of his right to demand that witnesses be re-summoned and reheard in the event that a succeeding Judge had taken over from his predecessor who has recorded part of the evidence.

When the appeal was heard before us on 15th June, 2010, ***Mr. Omondi K .D.,*** learned counsel for the appellants abandoned the home-made memoranda of appeal filed by the appellants and grounds 1, 2 and 10 of the first supplementary memorandum of appeal. In his submissions, ***Mr. Omondi*** stated that the robbery charges were defective for failure to disclose therein the weapons used at the time of the incident. Similarly the rape charges were defective as it was uncommon to jointly rape a woman and for failure to include the words *"unlawfully"* in the alternative charge to that of rape. Counsel submitted further that the superior court did not re-evaluate the evidence recorded by the trial court, and did not determine whether it was the appellants' spermatozoa which was found in the complainants in the rape charges.

Miss. Oundo, learned Principal State Counsel opposed the appeal and submitted that the appellants were recognized by the complainants and also that they were found with some of the stolen property. According to her submissions although the word *"unlawfully"*, was omitted in the respective rape charges, there is no lawful rape. And that although in robbery charges words *"dangerous or offensive weapons"* were missing the particulars thereof included

the number of the robbers and the use of violence. She also submitted that the superior court re-evaluated the evidence recorded by the trial court and that this court should not interfere with concurrent findings of fact by the two courts' below.

This is a second and final appeal and by dint of ***section 361(1)(a)*** of the Criminal Procedure Code only issues of law fall for our consideration. The main issue in the case before the trial court was that of identification. The victims of the robbery and rape charges, PW1, PW2, PW4, PW5, all identified both appellants as their assailants and named them to the police when they reported the matter to PW11 and PW12 at T. AP. Post on the night of 24th September, 2003.

This is a case of recognition and not mere identification. This Court has repeatedly stated that recognition is better than identification. The trial Magistrate appreciated this when he stated in his judgment that:

> ***"From the evidence on record the incidents in the houses of HNB (PW1) and that of A M (PW4) took a lot of time which gave the victims, ample time to overcome the initial shock to be able to recognize the perpetrators of both robberies and the rapes … I find that the prosecution has proved beyond any reasonable doubts that the recognition was flawless***."

The superior court on first appeal affirmed that finding and rendered itself as follows:

> ***"PW2 said she even recognized his (2nd appellant's) voice. They took their sweet time in each house robbing them, raping their victims after which they sat down in each house and ate ugali and milk. The witnesses had the time and the opportunity to see and identify them. When the witnesses reported to police the same night they gave the names of the two appellants as was confirmed by PW12 and PW14."***

The robbers had torches. They flashed the torches inside the two houses as they searched for money and other valuables. It is that light which aided the witnesses to recognize the appellants. Clearly the circumstances at the scene were such that the witnesses were able to clearly see and recognize both appellants. On the robbery counts we have no basis for interfering with the appellants' conviction.

On the rape counts the particulars respectively allege that both appellants *"jointly unlawfully and indecently assaulted"* R.M.N and E.K. The evidence by both complainants is to the contrary. Each complainant testified that the appellants raped them in turns not jointly. It is not practicable for two or more people to jointly rape the same woman. It may be done in turns but not jointly. There is therefore variance between the charge and the evidence. The evidence does however support the lesser charge of indecent assault contrary to ***section 144*** of the Penal Code which has since been repealed. However, the section was in force on the date of conviction namely 1st December, 2003. The offence of indecent assault may be jointly committed and pursuant to the provisions of ***section 179*** of the Criminal Procedure Code, it being a less and cognate offence to the offence of rape, we quash the appellants' respective convictions for the offence of rape in the two counts and substitute therefore a conviction for the offence of indecent assault on a female contrary to ***section 144*** of the Penal Code. As the appellants are facing a sentence of death for the two robbery counts we do not find it necessary to pass any sentence on the two counts of indecent assault.

In the result the appellants' respective appeals fail and we accordingly order that they be and are hereby

dismissed.

Dated and delivered at Kisumu this 23rd day of September, 2010.

S. E. O. BOSIRE
……..…
JUDGE OF APPEAL

P. N. WAKI
……
JUDGE OF APPEAL

D. K. S. AGANYANYA
……
JUDGE OF APPEAL

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