



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 285 OF 2007

SAMMY NGAWASA LONGORI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kitale (Ochieng, J)

dated 3rd December, 2007

in

H. C. CR. A. NO. 18 of 2004)

JUDGMENT OF THE COURT

This is a second appeal, against both conviction and sentence.

The appellant, Sammy Ngawasa Longori, was charged with three counts of rape, six counts of assault causing actual bodily harm, one count of grievous harm and one count of house breaking. In a Judgment handed down on 30th December, 2003 by the Senior Principal Magistrate's court at Kitale [H. I. Ong'udi (Mrs)], he was convicted on three counts (2, 4 and 11). However, in delivering the sentences on 30th January, 2004, the learned magistrate went ahead and sentenced him on all counts (except count 1). Although nothing much turns on this error, it is unfortunate that the superior court, being the first appellate court also overlooked this error, and proceeded to endorse the sentences even on those counts for which the appellant was not found guilty. As the ultimate sentence imposed was "life sentence" in respect of count 2 (rape), the superior court went ahead and suspended the sentences on all other counts. That is why we said earlier that nothing much turns on this error.

As the appellant's appeal to the superior court was disallowed, he preferred this final appeal to this court. He was unrepresented and filed the following home-made grounds of appeal:

- 1. THAT Your lordships both the below courts erred in law and facts in holding that the identification of the appellant by the complainants was free from possibility of error.***
- 2. THAT both the below courts erred in law and facts in relying on identification parade evidence without observing that the identification parade was conducted in breach of the laid down procedure and regulations governing identification parade.***

3. ***THAT both the below courts erred in law and facts in failing to take issue with the failure by the prosecution to avail some of the mentioned witnesses to clear doubts which was fatal to the case.***
4. ***THAT the below courts erred in law and fact in declining to attach any due weight to my defence and the need to outline cogent reasons before rejecting it since the burden of proof was clearly shifted upon the appellant.***
5. ***THAT the convictions and respective sentences unleashed upon the appellant was against the weight of the evidence adduced on record.***

As we have stated, this is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law and not matters of fact.

The appellant's main ground of appeal is centred on his "identification". That, of course, is an issue of law and therefore within the jurisdiction of this court to consider. It also arose before the two courts below. They were both clearly aware that the prosecution case rested on the credibility and proper identification of the appellant. On such credibility, the best judge was the trial magistrate who had the advantage of seeing and hearing the witnesses. The learned magistrate had this to say:

"During the identification parade the witnesses PW 1, PW 2, PW 3, PW 4, PW 5, PW 7 all identified the accused and others as being the ones who caused havoc in Sighor that day. The offence took place during day time at a trading centre. The victims saw their attackers very well. Accused has denied committing the offence but he admits being on operation in that area on that day. The accused was arrested the next day after the incident and was taken to the DO's office Sighor. The victims complained the same day of their ordeal at the hands of the accused and others. After weighing all the evidence on record I am convinced beyond doubt that the accused has been properly identified."

The superior court revisited the issue of identification in reassessing the evidence on record and said as follows:

"As regards identification, as well as the manner in which the identification parades were conducted, I note that the incident occurred in broad daylight. About that fact, there is no doubt. Indeed, PW 7 testified that the officers who assaulted and raped her (and the other victims) had removed their caps. Therefore, she (PW 7) was able to see the appellant (and the others) very well."

The appellant and his co-accused were inside one room, with their victims, for a considerable length of time. During the said period, the assailants beat up their victims, using slaps, kicks and a metallic whip. That implies that the assailants and their victims were in very close proximity to one another.

In those circumstances, I find that there should have been no difficulty in the victims being able to identify the appellant."

We are of the view, based on the law, that the issue of identification was resolved by the two courts below on sound basis and we have no reason to depart from those findings. The incidents occurred in broad daylight. The appellant was identified independently by five witnesses – Veronicah Chemaywa (PW 1), Francis Belion (PW 2), Julius Achia (PW 3), Elizabeth Aregai (PW 5) and Jennipher Akai (PW 7). All these witnesses were beaten and slapped by the appellant, and the women were raped, all in close proximity to the appellant, whose face was uncovered and clearly visible.

Furthermore, there is no merit to the appellant's submission that the identification parade had been conducted irregularly. There is no such evidence on record. In fact the appellant is a former police officer, who knew the procedure in conducting parades, and he not only signed the identification forms indicating his approval of the procedure, but also at no time did he complain of the same in the trial court. Accordingly, we reject his argument regarding the impropriety or irregularity of the identification parade.

With regard to sentence, as this is a **second** appeal, consideration of severity of sentence is not within our jurisdiction, unless the sentence given was unlawful. That is not the case here. The appeal has no merit, and the same is dismissed.

Dated and delivered at Eldoret this 3rd day of July, 2009.

E. O. O’KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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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