IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 188 & 189 OF 2005

1. NELSON SIMIYU SIARA

2. ANDREW NYONGESA EKIRAPA……..……. APPELLANTS

AND

REPUBLIC ……..…….…. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kitale (Wanjiru Karanja, J) dated 5th May, 2005 in H.C. Cr. Appeal No. 188 of 2001)

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JUDGMENT OF THE COURT

This is a second and last appeal. The first appellant, Nelson Simiyu, in this appeal referred to as Nelson Simiyu Siara (first appellant) was the third accused in the Senior Principal Magistrate's Court at Kitale Criminal Case No. 3797 of 2000. The second appellant, Andrew Nyongesa Ekirapa, then referred to as Andrew Nyongesa (second appellant) was the first accused in that case. They, together with one Joseph Wasilwa (then second accused) were jointly charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of that charge were that:-

"On the 19th day of August 2000 in Trans-Nzoia District within Rift Valley Province jointly with others not before the court being armed with dangerous or offensive weapon (sic) namely pangas and knives robbed L.N.W of her bicycle, a panga, a wall clock make Ajanta, weighing scale machine, a sack of shelled maize all valued at Ksh.7,300/= and after the time of such robbery used actual violence."

The first appellant faced a second charge of rape contrary to section 140 of the Penal Code in that:

"On the 19th day of August 2000 in Trans-Nzoia District within Rift Valley Province, had carnal knowledge of M.H without her consent."

They both pleaded not guilty to the joint charge of robbery with violence contrary to section 296(2) of the Penal Code, and the first appellant also denied the second count of rape brought against him under section 140 of the Penal Code. After full hearing, the learned Senior Principal Magistrate (Mrs. Ong'udi) in her considered judgment, reduced the charge to that of simple robbery under section 296(1) of the Penal Code

and sentenced each of the two appellants together with Joseph Wasilwa to serve five (5) years imprisonment plus hard labour. The learned Magistrate also ordered that the three of them be subjected to police supervision for five years after sentence. The first appellant was also sentenced to serve ten (10) years imprisonment in respect of the second count of rape contrary to section 140 of the Penal Code. In convicting the appellants and Wasilwa under section 296(1) of the Penal Code, the learned Magistrate expressed herself thus:

"I am satisfied beyond doubt that PW 1 and PW 2 had ample time to identify their attackers. Going back to the circumstances of the robbery it has not clearly come out that the circumstances of the robbery qualify under the ingredients under section 296(2) P.C. I will therefore reduce the charge to one under section 296(1) P.C for which I convict all the accused persons. Accused 3 is also found guilty of the charge of rape and I convict him of the same."

Both appellants together with Wasilwa were not satisfied with the same conviction and sentence meted out by the learned Senior Principal Magistrate. They lodged appeals in the superior court, being Criminal Appeal Nos. 188 of 2001, 191 of 2001 and 199 of 2001. Before their appeals could be heard, the learned State Counsel indicated to the court in the presence of the appellants that the State intended to apply to have the appellants convicted under section 296(2) of the Penal Code under which they were originally charged in the subordinate court. Before that application was made, Joseph Wasilwa applied to and was allowed to withdraw his appeal. The first and second appellants before us opted to proceed with their appeal. The State formally applied for leave to file notice to have the appellants convicted under section 296(2) of the Penal Code and to have the appellants punished as provided under the provisions of that section. On 23rd February, 2005, notice for enhancement of sentence dated 22nd February 2005 was filed in court by the Principal State Counsel for the Attorney General. It reads as follows:

> **"NOTICE FOR ENHANCEMENT OF SENTENCE:**
>
> **PLEASE TAKE NOTICE that the Republic through the Attorney General will at the hearing of your appeal herein move the Hon. Court for the following orders:**
>
> **1. THAT, your appeal on conviction be dismissed.**
>
> **2. THAT, the sentence of 5 years imprisonment awarded by the subordinate court be enhanced to the sentence of DEATH on the grounds, that the said sentence was illegal."**

Each appellant was served with a copy of that notice.

After the service of the same notice upon both appellants, the record shows that on the same date 23rd February 2005, the learned Judge brought to the attention of the appellants the contents of the notice of enhancement and explained the same to the appellants. The pertinent part of the record reads as follows:

"Mr. Mutuku"

I ask for leave to file a notice of enhancement of the sentence. I have it here today (same given to the appellants). They can decide whether they wish to proceed with the appeal or not.

Wanjiru Karanja

Court

The contents and purpose of the notice of enhancement explained to the appellants in court. They are asked if they still wish to proceed with the appeal. They say they are still ready to proceed with their appeal.

Wanjiru Karanja."

The hearing of the appeals then proceeded before the superior court (Wanjiru Karanja, J) after the two remaining appeals i.e. No. 188 of 2001 and No. 191 of 2001 were consolidated. After full hearing of the appeals the learned Judge of the superior court found the appeals lacked merit and dismissed them. But the superior court went further. It also enhanced the sentences to that of death. In doing so, the learned Judge had this to say:

"The sum total of all this is that the appeal before me is devoid of merit. The same is consequently dismissed. On count 1 however, the evidence compels me to agree with the learned State counsel and find that indeed the sentence imposed by the learned trial Magistrate was illegal. I accordingly quash the conviction on the charge of robbery under section 296(1) P.C and in its place substitute a conviction for robbery under section 296(2) P.C. I also set aside the sentence of 5 years imprisonment and in its place impose the only lawful sentence for that offence, i.e. that the 2 appellants are sentenced to suffer death in a manner prescribed by law. I also dismiss the appeal on count 2 and uphold the sentence of 10 years imprisonment for 2nd appellant."

That is the decision that has prompted the appeal before us. Each appellant filed his own memorandum of appeal in person. The learned counsel for the first appellant, Mr. Kigamwa, adopted the first appellant's grounds but in his address to us, he raised two matters which were first that the trial before the superior court was a nullity as the learned Judge heard the appeal as a single Judge whereas section 359(1) of the Criminal Procedure Code states that all criminal appeals should be heard by two Judges except where the Hon. the Chief Justice has directed that the appeal be heard by a single Judge. In his argument, as there was nothing on record to show that the single Judge was permitted to hear the appeal, her doing so was without jurisdiction. The second point taken by Mr. Kigamwa was that the entire trial before the subordinate court was a nullity as the prosecution was conducted by an unqualified person. He was however, with respect, unable to point out who was the unqualified person.

For the second appellant, Mr. Chemoiyai relied on supplementary grounds of appeal filed on 12th February 2007, but he abandoned grounds 3 and 4 of the same supplementary grounds of appeal. The grounds of appeal he argued were as follows:

> **"1. The appellate Judge erred in law and in fact by convicting the 2nd appellant who was identified by a name other than his official name (sic).**
>
> **2. The appellate Judge erred in law and fact by not recognizing that the charge sheet was amended contrary to provisions of section 214 of the Criminal Procedure Code Cap 75.**
>
> **3. ……**
>
> **4. ……**
>
> **5. The appellate Judge erred in law and in fact by holding the 2nd appellant guilty of rape without any apparent cogent evidence to that effect."**

He amplified the above grounds by submitting that the appellant was identified as Opondo which is not his name although he admitted that the witnesses in so referring to him as Opondo, were physically referring to the second appellant. Further, he contended that as the charge was amended after some witnesses had given evidence under a charge sheet with a different date of the offence from the date in the amended charge sheet, the second appellant was prejudiced as he was not allowed to recall the witnesses who had given evidence prior to the amendment of the charge sheet. His last ground of appeal was that evidence on record did not support the Judge's finding that the second appellant raped M.H (PW 2).

Facts that were accepted by both the subordinate court and the superior court were briefly that on the night of 18th/19th August 2000, L N W (PW 1) (N) was asleep in her house at Kitale Ndogo Estate together with her daughter M.H

i (PW 2) (M

) aged 16. At about 1.00 a.m. she heard bangs on the door. She screamed but her attackers broke the door and four men entered the house. She was in the bedroom. There was no door to the bedroom. There was bright moon light and after the door was broken open, the moonlight pervaded the entire house. Three people remained in the sitting room while one person entered the bedroom where she was and asked her where her husband was as they needed his head. That person had a torch and flashed the torch everywhere in the room apparently searching for her husband. Seeing her husband was not in the house, he demanded money. N identified that man as Wekesa who died later in another incident before he was arrested and taken to court. Although N said she had no money, her daughter E prompted N to look for her bag and Wekesa asked for that bag. From that bag, Wekesa took Ksh.2,000/=. He then went to the sitting room and returned with Opondo who was in court identified as accused No. 1 (Andrew Nyongesa) the second appellant in this appeal and Mrefu (Joseph Wasilwa who withdrew his appeal). The second appellant and Wasilwa, by use of lights from the torches together with the first appellant went into the bedroom from where the second appellant and Wasilwa took away N's bicycle. N said the first appellant had a long sword. Wekesa had a panga, but she did not see what the second appellant and Wasilwa had. The second appellant and Wasilwa carried away one sack of maize which was in the bedroom. They all went out but Wekesa returned and demanded money. The first appellant also returned and he, together with Wekesa took N's box to the sitting room after M had opened it for them at their command. N and M were thereafter ordered to cover themselves on N's bed but later N was pulled out of the bed and her child fell down. She was also manhandled and fell down. Thereafter, Wekesa raped her and as Wekesa was doing so, the first appellant also pulled M, placed her on a chair and as she resisted rape, the first appellant beat her, and ordered her to leave the chair as the first appellant found it difficult to penetrate her while on the chair. She was ordered to lie on the floor and was raped by the first appellant while she was forcefully lying on the floor. They then removed a wall clock and a panga which were in the box. The thugs then left and Wekesa and M went to Maurice Wanyonyi (PW 4) who was a village elder. Earlier, one day before the incident, E N (PW 3) had been approached by Wekesa and was asked to join Wekesa and seven others in a job that was to be done in which her part was to go and monitor for them where N's husband and N kept their radio and inform Wekesa of the same. The names given to E by Wekesa included the names of the first appellant, the second appellant and Wasilwa who were the next day identified by N and M as the people who attacked them.

Jimmy Peter Simiyu (PW 5), a clinical officer, Kitale, examined M and confirmed that she had been raped. Pc. David Mutai (PW 6) of Kitale Police Station received a report of the incident from Maurice Wanyonyi and arrested the appellants one month later on 19.9.2000 as the appellant, though coming from the neighbourhood of the complainants' residence, disappeared after the incident. Pc. David also produced a P3 form for the victim. Peter Masake (PW 7) a Clinical Officer at the District Hospital examined the first appellant and found him suffering from Tirichomonas. He produced a report filled by him to that effect. IP Paskal Okello (PW 8) received a report from N of rape and robbery. The complainants gave him the names the attackers were known by such as Opondo, Mrefu, Wekesa and Simiyu. He issued the complainants with P3 forms. Later the thugs were arrested and were brought to the police station and he had them charged with the offences they faced in the subordinate court. M's evidence on the main supported that of her mother N.

The first appellant said in his defence that he knew nothing about the charge. He was arrested on 19th September 2000 at 8.30 a.m. by Wanyonyi to whom he took some money but refused to give him a receipt for that money and as a result of disagreement he was arrested. The second appellant denied the charge saying that he was arrested on 19th September 2000 at 11.00 a.m. while he was engaged on his other personal matters. He was arrested by five people who first demanded money Ksh.1,500/= from him. When he was enquiring why they wanted that money, a vehicle came with five policemen who took him to the police station.

The above were the brief facts that were before the subordinate court. That court properly analysed and evaluated the same facts and came to an inevitable conclusion first that robbery did take place and N was the victim; secondly that N and M were raped during the robbery ordeal; that the two appellants were properly identified as being part of the group of four people who committed the robbery and that the first

appellant also raped M. She dismissed the defence by the appellants as mere denial. She concluded her judgment by stating as we have reproduced hereinabove, that she was satisfied beyond doubt that the appellants had been properly identified. However, she, for reason that she gave without elaborating, stated that it had not clearly come out that the circumstances of the robbery proved the ingredients that did justify conviction on the first count under section 296(2). She was in doubt on that aspect. For what we will state in this judgment later, we find it difficult to understand the learned Magistrate's predicaments at that stage of the judgment. However, because she felt the circumstances of the case did not warrant conviction on first count under section 296(2) of the Penal Code, she reduced the charge to that of simple robbery under section 296(1) and awarded the sentences under that section. She also convicted the 1st appellant (Accused 3) of rape in count number 2.

The superior court likewise, analysed the facts on record and in our view, properly re-evaluated the same as is required of the first appellate court – see Okeno v. Republic (1972) EA 32. Having done so, the learned Judge of the superior court came to the conclusion that the appellants had initially been charged under the correct provision as the ingredients of section 296(2) under which they were initially charged were met and that being so, the learned Judge reinstated the charge as it was originally preferred before the subordinate court and awarded the sentence of death on that count. She had no difficulties with the learned Magistrate's finding on the charge of rape and that conviction plus the sentence thereof were confirmed.

The above were the concurrent findings on facts and this being a second appeal, we cannot interfere with the same as we are certain, in our mind, having ourselves perused the record, that the same findings are sound. Both the subordinate court and the superior court did make concurrent findings of facts and these were first that N and her daughter M were attacked at night by more than one person. Second, that the attackers had at least a long sword and a panga. N says in evidence as follows:

"They were in no hurry so I had time to see them. Accused 3 had a long sword. Wekesa had a panga. I did not see what accused 1 and accused 2 had."

Thirdly, there was evidence that Wekesa pushed N and she fell down. There was evidence that at one time the attackers pushed N and a child she was carrying fell down. The first appellant also beat M to relent to rape. These were the ingredients of the offence that was before the subordinate court and which the same court considered and felt fell short of what is required to prove robbery with violence under section 296(2). With due respect to the learned Magistrate, she was clearly wrong in her conclusion on that count. In the case of Oluoch v. Republic (1985) K.L.R 549 at page 556, this Court stated as follows:

"Under Section 296(2) of the Penal Code robbery with violence is committed in any of the following circumstances:-

> ***"1. The offender is armed with any dangerous or offensive weapon or instrument or***
>
> ***2. The offender is in company with one or more other person or persons or***
>
> ***3. At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person."***

The above will show that even if the question of being armed with weapons – dangerous or offensive – were left out of the charge, if the charge shows that the offender was in company with one or more persons or that he wounded or beat or used other personal violence to any person, and if the same ingredient, which needs only be one is proved then the conviction would stand."

In this case, there were more than one ingredient of robbery with violence under section 296(2) of the Penal Code alleged and proved. First was that the appellants were in company with others. Indeed the mere fact that three of them were proved to have been there was in itself enough to satisfy the ingredient of robbery under section 296(2) without any need for any other ingredient. The second was that they were armed with at least a sword and a panga. Who needs proof that a sword is a dangerous and/or

offensive weapon? Who can dispute that a panga is an offensive and/or dangerous weapon? The attackers of N and M had a panga and a sword. Thirdly, the victims were beaten as we have indicated above. Any one of these ingredients was enough to sustain conviction under section 296(2) which was, in our view, the correct charge going by the facts on record. The learned Judge of the superior court was of the same view as ours and she was plainly right.

Five matters were however raised and we need to address ourselves to them. These were first that the learned Judge of the superior court stated in her judgment that count 2 related to the second appellant and that she was satisfied that the second appellant raped M. She said specifically as follows:

> ***"On count 2 as relates to the 2nd Appellant, I am satisfied that he raped PW 2. She saw him clearly. PW 1 corroborated her evidence as she was also being raped in the same room just a few steps away. PW 2's P3 form corroborated her evidence. 2nd Appellant's P3 further offer corroboration to PW 2's evidence".***

We have perused the record. The charge of rape was the second count. The person charged with that offence was only one and that was Nelson Simiyu who was the third accused before the subordinate court. He was the first appellant as can be clearly seen at page 50 (in red) of the record. The evidence of N is clear. She says:

"Accused 3 had also pulled my daughter M and placed her on a chair. M cried so much. Accused 3 beat her as she resisted. He ordered her to lie down and open her legs. I was there and there. He tried to rape her on the chair but he was unable. He ordered her to lie on the floor. She did so and told her to open her legs. He then penetrated her as she cried and he shouted at her to keep quiet."

And M had this to say:

> ***"Accused 3 remained in the bedroom. He threw the child I was holding on bed. He pulled me by the hand upto the sitting room. He placed me on a sofa set and he tore my pants. He ordered me to open my legs for him. He was unable to penetrate. So he ordered me to lie down. He then raped me."***

We have gone to all this length to show that the person who was charged with rape and who was identified as having raped M (PW 2) was accused 3 before the subordinate court and that was Nelson Simiyu, the first appellant before us. Peter Masake, clinical officer, also says he examined Simiyu and not Nyongesa on allegation of rape and issued P3 for Simiyu. The learned Magistrate in her judgment said:

> ***"Accused 3 is also found guilty of the charge of rape and I convict him of the same."***

In sentencing the appellants, the learned Magistrate sentenced accused 3 to serve 10 years imprisonment for that offence of rape. It is clear to us that the reference made to the second appellant as the one who committed the rape offence by the learned Judge is an inadvertent mistake. We treat it as such and make it clear that the first appellant, Nelson Simiyu, is the person who was charged, found guilty, convicted and sentenced for the offence of rape and certainly not Andrew Nyongesa.

The next matter is the complaint that particulars of the charge was amended to read 18.8.2000 instead of 19.9.2000 and section 214 was not complied with. In our view, nothing turns on this aspect of the appeal. The particulars – mainly on date was amended in the course of the hearing and after two main witnesses – N and M - had given evidence. N in her evidence recalled the events of 18.8.2000. Mneke likewise remembered the events of 18.8.2000. That evidence was not challenged in cross-examination and in any event, N in cross-examination clearly stated that the second appellant was arrested on 19.9.2000 so that amended or not, the dates of the offence and of the arrest were not in issue in the entire case. We see no prejudice caused to the appellants nor do we see any injustice in omission to inform the appellants of their right to re-call the witnesses. In any event, the amended charges were put to the appellants and they pleaded to them.

The third matter raised was that the second appellant was not properly identified as the name that the witnesses used to identify the offender was Opondo while his name in the charge sheet was Nyongesa. Again that, in our view, is neither here nor there. The witnesses physically identified him as the person they were referring to as the person who committed the offence together with others. That he was known by another name whether nick name or alternative name does not reduce the weight of the evidence against him so long as physically he was the person to whom the witnesses referred as the offender. He was physically identified and the witnesses said they knew him locally by the name Opondo. What is in a name? A criminal with any name remains a criminal.

Mr. Kigamwa submitted that the trial was a nullity because non qualified people conducted the prosecution. He was not able to tell us who that person or those people were. The record shows that one Miyenda conducted most of the trial. Mr. Kigamwa was not aware of his rank and so could not for certain say he was not qualified to conduct the prosecution. This was clearly an attempt by Mr. Kigamwa to hoodwink the Court. We deprecate this type of practice. Our perusal of the original record revealed that Miyenda was a Chief Inspector of Police. Any legal arguments can only proceed from settled facts. It is of no use to anybody throwing one's net wide in the hope of catching fish by luck. That ground of appeal lacked merit and needs no more consideration.

Lastly, and of more concern, the learned Judge heard the appeal before her as a single Judge. The learned counsel for the first appellant raised this point but with a different approach. According to him, the learned Judge had not been authorized to hear the appeal as a single Judge as is required by the provisions of section 359 of the Criminal Procedure Code. Again, he was not able to show us the source of his information that that particular Judge of the first appellate court had no authority from the Chief Justice to hear appeals as a single Judge. That argument again had no merit.

However, on our own, we agonized as to whether the learned Judge, having known that the State counsel had applied to enhance the sentence on this matter, should have heard the appeal as a single Judge, it being that the consequence of the State counsel's application could be serious as enhancement could end in death sentence being awarded to the appellants. However, on our own perusal of the original record of the superior court, we note that on 5th June 2002, the appeal was admitted for hearing before one Judge at Kitale and there is an order to that effect by a Judge under section 352 of the Criminal Procedure Code in the file dully signed by a Judge who was formerly running the High Court at Eldoret when Kitale was a sub-registry of the High Court. That in effect means that much as it would have been prudent for the learned Judge to seek direction on the matter a second time after indication that enhancement of the sentence was sought so as to have the appeal heard by two Judges, in law, the Judge was perfectly within her jurisdiction to hear the appeal which was then an appeal against the conviction and sentence under section 296(1) of the Penal Code. Secondly, we note as we have demonstrated above that the Judge took all caution and warned the appellants of the effects of the notice of enhancement served upon them. Indeed Wasilwa was on his guard and took the advantage in time when he withdrew his appeal. The appellants proceeded with their appeal. It was their right to do so, but the law also had to take effect and they would only blame themselves. One cannot say with accuracy that their rights were not taken care of by the learned Judge. We thus see no injustice in the appeal having been heard by a single Judge, neither do we see any illegality in the same.

Before we dismiss the appeal as we must do, we note that in sentencing the appellants, the learned Judge having substituted the sentence of five years imprisonment with that of death in respect of both appellants, went on to uphold the sentence of 10 years imprisonment in respect of the second appellant. As we have stated, it was the first appellant who should have been sentenced to 10 years imprisonment. To that extent, the sentence of 10 years imprisonment on the 2nd appellant is not proper. We make it clear that the sentence of 10 years imprisonment for the offence of rape is to be served by Nelson Simiyu. However, of more importance, that sentence cannot be served immediately. The correct legal position is to have it in abeyance as the appellant is currently facing death sentence. See the case of Abdul Debamo Boye and another vs. R. – Criminal Appeal No. 19 of 2001 (unreported), Waithaka Gachuru vs. R. – Criminal Appeal No. 261 of 2003 (unreported) and Muiruri vs. R. (1980) KLR 70, and recently the case of Simon Karimbi Muriithi vs. R. – Criminal Appeal No. 311 of 2005 (unreported). The sentence of 10 years upon Nelson Simiyu will be held in abeyance pending the sentence of death.

The totality of all the above is that these appeals lack merit. They are dismissed. Judgment accordingly.

Dated and delivered at Eldoret this 23rd day of February, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR