COURT OF APPEAL AT MOMBASA

Criminal Appeal 351 of 2006

DAVID JEFWA KALU ……..…….APPELLANT

AND

REPUBLIC …….RESPONDENT

(An appeal from the judgment of the High Court of

Kenya at Malindi (Ouko, J.) dated 4th November, 2004

in

H.C.CR.A. NO. 113 OF 2003)

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JUDGMENT OF THE COURT

David Jefwa Kalu, the appellant herein, was one of the three people who were tried on one count of robbery contrary to ***section 296(1)*** of the Penal Code and two other counts of rape contrary to ***section 140*** of the Penal Code. With regard to the first count of robbery under section 296(1) of the Penal Code, it was alleged against the appellant and his two confederates who are not before us that on 14th January, 1999 at Tezo Location in Kilifi District of the Coast Province, the three of them jointly robbed ***Jumwa Kenga*** of one bag, "five clothes", one packet of flour, two hens and cash Kshs. 650 all valued at Shs.1,700/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said Jumwa Kenga. On the second and third charge of rape, it was alleged that on the same day of the robbery and at the same time and place, the appellant and his colleagues "jointly" had unlawful carnal knowledge of ***Kalaso Kenga*** (count 2) and ***Bandena Kakandi*** (count 3) without their consent. We were not addressed on the issue of how three men can "jointly" commit a rape on one woman at the same time when it is known that in rape the issue of the man's male organ penetrating the female's vagina is an element of the charge which has to be proved. In view of the evidence before us what the prosecution meant was that each person raped each of the two complainants in turns; it was not possible for all the three of them to penetrate one woman's vagina at the same time. That is why in a charge of rape even if two, three or four men or whatever number sleep with one woman, they do it in turns and each one of them is charged on a separate count of rape. That is the normal and usual practice. But as we have said neither Mr. Mkutu Omido for the appellant, nor Mr. Monda for the Republic addressed us on the matter and we shall strictly in the circumstances of the case, treat the joint charges as curable irregularities and we would apply the provisions of ***section 382*** of the Criminal Procedure Code. We repeat that that holding is restricted to the circumstances of this appeal and the principle is not to be taken as being of universal application, particularly after we have pointed it out to the prosecution in this

judgment. We expect prosecuting authorities and trial magistrates to take note of these remarks in future cases.

Be that as it may the appellant and his colleagues were acquitted on the third count, but were convicted on counts one and two. In convicting the appellant on count one of robbery under section 296 (1) of the Penal Code the trial magistrate remarked as follows: -

"**Before I come to the verdict in the matter, let me say that the evidence adduced before the court discloses an offence under section 296(2) of the Penal Code. Having said that, since the accused have been charged with Robbery under Section 296(1) Penal Code, I will convict each one of them in (sic) count I for Robbery contrary to section 296(1) of the Penal Code. Further I am satisfied the offence or rape is proved for each of the 3 accused 1, accused 2, and accused 3 in count II. I accordingly convict them."**

The magistrate then proceeded to sentence the appellant and his two colleagues to six years imprisonment on count one and to seven years imprisonment on count two, the two sentences being ordered to run consecutively. On count one the magistrate further ordered that the appellant would be under police supervision for five years upon release from prison. That was obviously in compliance with the then provisions of ***section 344A*** of Criminal Procedure Code. The magistrate, however, failed to impose corporal punishment which was mandatory at the time the appellant was convicted (i.e by 6th October, 1999). Corporal punishment for the offence of rape was, however, optional at the discretion of the trial court.

The appellant then appealed to the High Court against his conviction and sentence and by his judgment dated and delivered on 4th November, 2004, Ouko J having enumerated the requirements or elements for an offence under section 296(2) of the Penal Code, continued as follows: -

"**Any of the above three findings was sufficient to convict the appellant under section 296(2) of the Penal Code. It was, therefore, not enough for the trial magistrate to simply lament as if his hands were tied. If proved facts show that robbery under section 296(2) of the Penal Code has been committed the trial magistrate is bound to convict under this provision and impose the only sentence provided - death.**

For these reasons and in exercise of this court's discretion under section 354 of the Criminal Procedure Code, the appellant's conviction under section 296(1) of the Penal Code is hereby quashed and substituted with a conviction under section 296(2). The sentence of six years imposed on the appellant is similarly set aside and in its place is substituted that (sic) of death. The appellant shall suffer death in accordance with the law. ……."

With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading: -

"**CONVICTIONS FOR OFFENCES OTHER THAN THOSE CHARGED"**

and beginning with ***section 179*** up to ***section 190*** deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under ***section 296(2)*** of the Penal Code for the offence of simple robbery contrary to section ***296(1)*** of the Code. It is also permissible to convict a person charged with murder under ***section 203*** of the Penal Code with manslaughter under ***section 202*** as read with ***section 205*** of the Penal Code. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be outrageous for a trial court to convert that charge into murder simply because the evidence on record proves murder. The trial Judge probably had in mind the cases in which trial courts have refused to convict under ***section 296(2***) of the Penal Code and instead chosen to reduce the charge to one under ***section 296(1)*** of the Penal Code. But in such cases, the

charge under ***section 296(2)*** was there in the first place, was proved and yet the trial court, for some reason(s), refuses to convict on it. That is a totally different situation from what the learned Judge purported to do here. We agree with both Mr. Omido and Mr. Monda that the learned Judge grossly erred in the stand he took on the matter.

In the event, we allow the appellant's appeal, set aside the conviction for robbery under ***section 296(2)*** of the Penal Code and also set aside the sentence of death imposed by the learned Judge. In place of the Judge's orders, we restore the convictions entered by the trial Magistrate and the sentence of six years imprisonment imposed thereon. We further order that on count one the appellant shall receive two strokes of the cane as that was a mandatory requirement of the law at the time the appellant was convicted and sentenced by the Magistrate. But the offences on count one and count two were committed in one transaction and there was no legal basis for ordering that the sentences ought to run consecutively. We set aside the order that the sentences are to run consecutively and instead order that the two sentences shall run concurrently. Of course the sentences are to run from the 6th October, 1999 when the appellant was sentenced by the Magistrate. To the extent indicated herein, the appellant's appeal succeeds.

Dated and delivered at Mombasa this 20th day of July, 2007.

R.S.C OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

W.S. DEVERELL

…….

JUDGE OF APPEAL

I certify that this isa true copy of the original.

DEPUTY REGISTRAR