REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 36 OF 2015

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 967 of 2014 of the Chief Magistrate's Court at Naivasha – E. Kimilu, Ag. PM)

JOSEPH EKIRU KANARI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was charged in the first count with the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code. In that on the 16th day of May, 2014 at Karagita in Naivasha Sub-County within Nakuru County, he robbed **A.K.N** of Kshs 700/= and at the time of such robbery used actual violence to the **said A.K.N**.

2. The second charge was Rape contrary to Section 3 (1) as read with Section 3 (3) of the Sexual Offences Act. The particulars state that on the 16th day of May, 2014 at Karagita in Naivasha Municipality within Nakuru County, he intentionally and unlawfully cause his penis to penetrate the vagina of **A.K. N.** without her consent.

3. Following a full trial, the Appellant was found guilty, convicted and sentenced on both counts although the second sentence was ordered held in abeyance.

4. Aggrieved with this outcome, he has lodged an appeal to this court, citing five grounds as follows:-

"1. THAT, the trial magistrate erred in facts and law when she convicted the Appellant failing to realize that the charge sheet was defective.

2. THAT, the trial magistrate erred in facts and law failing to realize that the identification was not properly done.

3. THAT, the trial magistrate erred in facts and law when she convicted the Appellant on charge of rape failing to note that there was medical evidence that supported the charge.

4. THAT, the trial learned magistrate erred in facts and law by failing to realize that my arrest was not connected to the offence in question.

5. THAT, the trial learned magistrate erred in both law and facts by dismissing my plausible defence without giving points to determination contrary to Section 169 (1) of the CPC."(sic)

5. In written submissions supporting the grounds of appeal, the Appellant contested the validity of the charge sheet which he claims

was defective for want of details. He relied on the case of **Jonathan Ndung'u –Vs- Republic [1995] KLR 387** as to the ingredients of the offence of robbery. Asserting that the offence occurred at night, the Appellant pokes holes in the identification evidence of the complainant in light of the stated circumstances of the offence and points to the failure by the police to conduct an identification parade.

6. He further questions the medical evidence tendered at the trial asserting it did not connect him with the offence because no sample of spermatozoa found on the complainant's genitalia and underwear was subjected to forensic examination. Thus, in his view there was no evidence connecting him to the offence and his arrest was unjustified. Further, he gave an alibi defence at the trial which he complains was not accorded adequate attention by the trial court. He emphasized grounds 4 and 5 and faulted his conviction as baseless.

7. The DPP supported the conviction and reiterated the prosecution evidence , highlighting in particular , the evidence of identification of the Appellant at the scene of the offence by the complainant and other witnesses. He dismissed as unfounded the appellant's submission that the charge sheet was defective.

8. I have considered the legal technicalities raised on this appeal. With regard to the issue of the charge sheet, the particulars of the first count stated *inter alia* that the Appellant robbed **A.K.N.** of cash Shs 700/= and at the time of such robbery used actual violence to the said **A.K.N.**

9. The element of the use of actual violence on the complainant in the charge particulars brings the charge within the definition of Robbery contrary to Section 296 (2) of the Penal Code. As the Appellant has correctly submitted in **Jonathan Ndung'u –Vs- Republic [1995] KLR 387** the court set out the circumstances in which a charge of robbery could attach, namely, *"where the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."* The statement of offence and particulars contain elements of the offence of robbery with violence. The complaint that the charge sheet herein is defective cannot stand in the circumstances.

10. The rest of the grounds argued on this appeal relate to the adequacy of the evidence upon which the conviction was based. As stated in **Pandya -Vs- Republic [1957] EA 336** this court as a first appellate court is obligated to review the trial evidence and to draw its own conclusions:-

"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

11. The prosecution case was a follows. **A.K.N.** (**PW1**) was an employee of [particulars withheld] and stationed at Hell's Gate National Park. In the material period, she resided at Karagita. On the evening of 16th May, 2014 she went to shop after work and thereafter travelled to Karagita. She alighted, presumably from a matatu at Karagita stage about 8.00pm and commenced her walk to [particulars withheld]. A man apparently followed her and sprung upon her suddenly, and while strangling her dragged **PW1** through thickets of cactus. PW1 sustained multiple thorn pricks on her body in the process. The man eventually overpowered **PW1** and she lost consciousness. He raped her for several hours and took her phone and money.

12. **Evans Wamboga** (**PW2**) an employee of a hotel at Karagita was heading home at 11.00pm. He was attracted by the flash of what appeared to be light emanating mobile phone in the field belonging to his employer. He decided to investigate. Drawing close , he found the complainant who was unable to speak, and the assailant at the scene. He tried to inquire and demanded they accompany him to the police station. At that moment, the man ran away, leaving his vest and T-shirt in **PW2's** grip. **PW2** tried to chase the man in vain.

13. **PW1** was escorted to the Karagita Police Station by **L E** (**PW4**) a colleague at [particulars withheld] whom **PW1** called, and

other Officers. **PW1** described her assailant to the witnesses and police. She was treated at Naivasha District Hospital and thorns stuck in her flesh removed.

14. On the next day, a local chief **Aliyo Mohamed Mohamud** (**PW3**) who had learned of the incident was notified of someone spotted hovering at the scene of the robbery, apparently searching for something. Having confirmed the report, he rushed to Karagita Police patrol base and reported to **PC Kiptanui** (**PW5**). **PW5** went directly to the scene and arrested the Appellant. The investigating officer **PC Patrick Ndambuki (PW7)** after visiting **PW1** in hospital was escorted by **PW2** to the scene where **PW2** had found the Appellant and complainant on the previous night. He was able to recover the T-Shirt and vest left behind by the fleeing suspect. The mother of the Appellant later visited the patrol base. **PW7** said that on arrest, the Appellant had thorns on his body. **PW1** and **PW2** identified the Appellant.

15. The Appellant stated in an unsworn defence statement that he resides at Karagita and traded at Oserian. That on the material night he went home to find that his house had be burgled and several items stolen. Therefore he spent the night at his mother's house. Before he went to report to police on the next day, he decided to pass by a football pitch close to the patrol base. When he eventually went to Karagita Police Patrol base, police were reluctant to attend to his complaint. He noted a group of people at the football pitch. Before long, the group approached the base and confronted him, took him to Kenya Wildlife Service offices where an officer questioned him. He claims to have been assaulted. Police escorted him for treatment. Blood samples were taken from before his remand at the Naivasha Police Station. He pleaded innocence, saying he was 18 years old but had previously been committed to a Borstal institution.

16. There is no dispute that the complainant was stalked by a lone attacker early on the night of 16th May, 2014 as she walked to [particulars withheld] at Karagita, where she resided. The stalker attacked her, strangled her and dragged her into a bush, in the process scattering her belongings. That the attacker raped her over several hours and at the same time took her phone and demanded money, taking Shs 700/= from her handbag. The complainant sustained injury from thorns and the attempted strangulation. The injuries are well documented in the P3 from and PRC Forms produced at the trial.

17. The key question to which the Appellant severally adverted during the trial is the identity of the assailant. **PW1** and **PW2** gave lucid accounts of the transaction that occurred in the open field where **PW1** was accosted and assaulted. **PW1** said there was moonlight at the scene and that there was light emanating from her phone which shone on the face of the Appellant as he handled it; that she was with him for four hours; that she conversed with him as she pleaded for her life; that she noted the gap in his teeth and on the next morning recognized him from the group of three men brought by police to her hospital bed.

18. In cross-examination she remained firm. Her evidence is supported by that of **PW**2, who equally unfortunately saw the Appellant on the next morning when he went to Karagita Police Patrol base to report the matter having visited **PW1** at hospital. Police would not have known he was a witness in the matter, and it seems from the Appellants' account that PW2 may have been one of the people who came to the base after he was arrested. **PW2** also described in detail his involvement with the Appellant on the material night as he inquired about his and **PW1's** presence within the premises owned by the hotel where he worked. He said he used light from his Samsung phone and noted his feature including the gap in his teeth as he interviewed him. The trial magistrate was alive to the need to examine with care the evidence of identification in difficult circumstances, seeking guidance from the case of **Wamunga -Vs- Republic (1989) KLR 424.**

19. In **Joseph Muchangi Nyaga & Another -Vs- Republic [2013] eKLR** the Court of Appeal reviewed several decisions on the question stating *inter alia* that:-

"Evidence of visual identification should always be approached with great care and caution (See Waithaka Chege versus Republic (1979) (KLR 217). Greater care should be exercised where the conditions for favourable identification are poor. (Gikonyo Karume and Another Versus Republic (1980) KLR 23) ……before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of and the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him……"

20. It is true as the Appellant has stated that identification parade ought to have been held in respect of the witnesses **PW1** and **PW2** to rule out the possibility of error. This court has grappled with this question. In light of the evidence by **PW1** and **PW2**, the ideal situation required that an identification parade be held. But in this case, does the failure to conduct an identification parade nullify what appears to be otherwise strong and credible identification evidence" The trial magistrate who heard the witnesses and had the opportunity to see them testify accepted **PW1** and **PW2** as witnesses of truth, giving her reasons.

21. In my considered view, the evidence by **PW1** and **PW2** does not neatly fall into the category of dock identification as stated in **Ajode Versus Republic (""/)**. Because, while the conditions in which **PW1** identified the Appellant on 17th May, 2014 were far from ideal, she spent a considerable amount of time with the appellant after regaining consciousness to beg him to spare her life and discuss his demand for money as he fiddled with her phone which beamed light in the face of her assailant who lay on top of her. She was admitted in hospital not even having recorded statement when on the next day, the Appellant and two other men were presented to her by police. She picked out the Appellant noting his gap in the teeth, a fact confirmed by the trial court. Equally, **PW2** ran into the Appellant at the patrol base when he went there to make a report on what he had witnessed the previous night.

22. In the circumstances of this case, I think the court ought to have considered other circumstantial evidence that seemed to point a finger at the Appellant as the culprit. This is the evidence by the chief, **PW3** that he spotted the Appellant evidently searching for something at the scene of the attack on the very next morning. **PW3** notified police at the base and **PW5** immediately went to the field and arrested the Appellant. The Appellant admits having been in the field adjacent to the police base, moments before his arrest.

23. The evidence by **PW3** and **PW5** concerning the circumstances of the arrest was consistent, **PW5** denying that the Appellant was arrested while at the base report office. This evidence regarding the scene of the offence is consistent with the narration of the rape and robbery transaction by **PW1** and **PW2**. Because of the intervention by **PW2**, the Appellant had fled the scene abandoning not only the loot taken from the complainant which included money and a phone, but also his own vest and T-shirt while he wrested himself from PW2's grip. The clothes were later recovered by **PW7**.

24. In addition, there was evidence by **PW3**, the colleague to **PW1** who escorted **PW1** to hospital that when she saw the Appellant at the patrol base **"he had thorns on his front part below waist and even his legs and hands."** This witness reiterated the description of the Appellant given her by **PW1** on the previous night moments after her ordeal , in particular the gap in his teeth . The complainant according to the clinical officer **Jane Wangui Njoroge** (**PW6**) had **"been pricked with thorns on her right hand, she had thorns……..which were removed."** This , confirming the complainant's evidence that the assault occurred in a scene growing cactus plants whose thorns pricked her. **PW7** also testified that the Appellant had thorns in his flesh and was escorted to hospital.

25. The Appellant's defence was that he was at his mother's house on the material night. His account and his mother's **(DW2)** as to the alleged burglary at his place sounds contrived and left open the question why he would abandon his house because a bicycle (according to his mother) had been stolen, and not report to police on the same night or first thing on the next day. In his defence statement, the appellant said he first played football at the pitch on the next day before going to report the alleged burglary. And that, by apparent coincidence while he was at the report office, intending to make a report, a group of people who seemingly were strangers to him turned up and made accusations against him.

26. I think that this stretched explanation of his presence at the field that was the scene of the offence and subsequently at the report office was designed to dislodge evidence by PW3 and PW5 that the appellant was found hovering at the offence scene engaged in an apparent search. Unfortunately, the explanation has a ring of concoction and is dislodged completely by the prosecution evidence considered as a whole.

27. The evidence by **PW1** and **PW2** taken together with the unchallenged evidence of the presence of thorns on the Appellant, his hovering at the scene in a search on the next day strongly indicates that he and nobody else is the person who assaulted the complainant and robbed her. It would be confounding that a man randomly arrested by people who did not know him while he was at a crime scene a day after the offence, turns out to have thorns on his body, a distinctive gap in the teeth described by PW1 is really an innocent man, whose house had been burgled the previous night, and who decided to play football early in the morning, close to the crime scene before reporting the burglary.

28. The trial court believed and accepted the testimony **PW1**. It is reasonable, given the proven circumstances of the case, to conclude that, that the Appellant returned to the scene on the next day to look for the shirt and vest that he left in **PW2**'s hands there while fleeing, and the loot he was forced to abandon due to **PW2's** intervention.

29. Section 124 of the Evidence Act allows a court to record a conviction against a sexual offender even where the sole witness is the victim, if the court believes the victim. The caveat is that the court must give its reasons. It is not mandatory to tender that DNA evidence in order to prove a sexual offence as the Appellant appears to suggest. In this case the court believed the evidence that the Appellant raped **PW1** and gave sound reasons. The same person who raped **PW1** also robbed her as he was acting alone. That is

the only reason for the presence of thorns on both the PW1 and the Appellant on the following day.

30. Reviewing the evidence tendered by the prosecution, I am satisfied that the Appellant was properly convicted on the weight of evidence that displaced his defence. The trial court properly dismissed the appellant's defence and based the conviction on sound evidence. This appeal has no merit and is accordingly dismissed.

Dated and signed at Kiambu, this **26th** day of **June**, **2018.**

C. MEOLI

JUDGE

Delivered and signed at Naivasha, this **13th** day of **July, 2018.**

JUDGE

In the presence of:-

For the DPP : Mr. Koima

Appellant : Joseph Ekiru Kanari

C/C – : Quinter Ogutu