REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 136 OF 2011

KITSAO CHARO NGATI……..APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 122 of 2011 of the Chief Magistrate's Court at Malindi – D.W. Nyambu, SPM)

JUDGEMENT

1. This is a rehearing of the appeal pursuant to the order of the Supreme Court in **Republic v Karisa Chengo & 2 others [2017] eKLR**.

2. The Appellant Kitsao Charo Ngati was convicted for the offence of robbery with violence and sentenced to death. He was also convicted for the offence of rape and sentenced to 20 years imprisonment to be held in abeyance in view of the death sentence. Being aggrieved he has filed this appeal against both the conviction and sentence on fresh grounds being that the visual identification was not conclusive leading to mistaken identity hence the trial court erred in law and fact in relying on it to convict him; that the complainant never gave an indication at the scene that she could identify the assailant; that the trial court erred in law and fact by not considering the existence of the grudge between PW1 Kahindi Thoya Baya and PW2 Hari Bengo on one hand and the 1st Appellant on the other hand; and that the trial court erred in law and fact by relying on evidence not proved beyond reasonable doubt. Further, that the sentence is excessive and unconstitutional given the fact that he was a first offender, is reformed and has been in custody since the time of his arrest.

3. The appeal was disposed of by way of written submissions. The Appellant submitted that visual identification can lead to miscarriage of justice as was held in the English case of **R v Forbes (2001) 2WLR** which also held that as a result of the possibility of erroneous identification, it ought to be reflected against the description given to the police about the assailant. The Appellant urges that the first suspect, Robert Ngonyo, presented to PW1 at the hospital was identified by PW1 as the assailant. Based on this, the Appellant questions the finding of the trial court on PW1's evidence that she recognised the Appellant's voice and more so as she had also testified that the Appellant had left her house after giving him something to keep for him. The Appellant further urges that the conditions prevailing such as source of light, as it was at night, the duration taken etc were unsuitable for positive visual identification. He relied on the decisions **of Kathurima & another v Rep KLR 1980** and **Cleophas Otieno Wamunga v Rep Cr. App. No 20 of 1987**. The Appellant took issue with the explanation that PW1 was semi-conscious yet she was able to identify Robert as her assailant. The Appellant also challenged the reliance by the trial court on the bloodstained panga. He submitted that there was a probability of the panga having been brought to the house after the robbery. He submitted that the scene ought to have been dusted for finger prints. He relied on the decision of **Edward Musenga v Rep Cr. App No. 36 of 1995**.

4. The Appellant further urged that the evidence on rape required corroboration and that the trial court ought to have ordered that the Appellant be taken for forensic testing as per Section 36(1) of the Sexual Offences Act.

5. On sentencing he urges that the court considers the High Court case of **MLD HCCRA 158 of 2007 Franklin Kahindi v Rep** and the Court of Appeal decision of Mulamba Ali Mabanda v Republic, Criminal Appeal No. 12 of 2013 (Mombasa) where the death sentence was reduced and the court considered time spent in custody.

6. The Respondent on the other hand submitted on the grounds of appeal previously filed by the Appellant. On the alleged defectiveness of the charge the Respondent stated that the charges were explained to the Appellant in a language he comprehended and that he has failed to demonstrate how the charge was defective and in what manner it prejudiced him.

7. It was further submitted that Robert was identified while PW1 was in a critical condition and was semi-conscious and that the complainant was interrogated severally and she confirmed that she was not fully conscious at the time. When she came to she was able to recall the events and her assailant. Furthermore the Appellant is her grandson and she could not fail to identify him. It is the Respondent's case that the identification was free from error. Reliance was placed on the decision of **Douglas Muthanwa Ntoribi v Republic [2014] eKLR**.

8. The Respondent also submitted that no particular number of witnesses is required to prove a fact as was held in **Keter v Republic (2007) 1 EA 135**.

9. In their view, the conviction and the sentence were safe as the case was proved beyond reasonable doubt. They urged the court to uphold the conviction and sentence.

10. This being a first appeal the onus of this court is to reconsider, re-*analyse and re-evaluate the evidence which was before the trial court and reach its own conclusions - see* ***Okeno v R [1972] EA. 32*** and John Mwangi Kamau v Republic [2014] eKLR. *Further, i*t must be borne in mind that this court in its appellate jurisdiction ought not to interfere with the finding of fact by the trial court that had the advantage of observing the demeanour of the witnesses *unless the finding of fact was based on no evidence or on a misapprehension of the evidence or the trial court acted on the wrong principles* - see ***Chemagong v Republic [1984] KLR 611*** *and* ***Gunga Baya & another v Republic [2015] eKLR***.

11. The Appellant was charged with two counts. The first was the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars being that on 27th August, 2010 at (particulars withheld) Village in Tana River County within Coast Province, the Appellant while armed with an offensive weapon namely a panga robbed K.T.M. of Ksh.1,000.00 and at or immediately before or immediately after the time of such robbery wounded the said K.T.M .

12. The second count was rape contrary to Section 3(1)(a) of the Sexual Offences Act. The particulars being that during the robbery the Appellant unlawfully caused the penetration of his male genital organ into the female genital organ of K.T.M. without her consent.

13. The issues arising are whether or not the Appellant was positively identified as the perpetrator and if the conviction is affirmed, the rehearing of the sentence imposed in light of the Supreme Court decision in ***Francis Karioko Muruatetu & another v Republic [2017] eKLR***.

14. *The onus lay on the prosecution to prove its case beyond reasonable doubt. The first count was the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Section 296(2) of the Penal Code provides:*

"(2) If 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."

15. *The Court of Appeal in* ***Suleiman Kamau Nyambura v Republic [2015] eKLR*** *stated as follows:*

"The case of Johanna Ndung'u vs Republic - Criminal Appeal No. 116 of 2005, (unreported) ***sets out the ingredients of robbery with violence pursuant to*** Section 296 (2) ***of the Penal code as follows:***

a. ***If the offender is armed with any dangerous or offensive weapon or instrument, or;***

b. If he is in the company with one or more other person or persons, or;

c. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

16. *The Court also held that:*

"Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction under Section 296 (2) of the Penal Code."

17. The prosecution's case was that the Appellant who is the grandson of PW1 after exchanging greetings with PW1 gave her rat poison for safekeeping. They lived in separate houses in the same compound at the time. That same night at about midnight PW1 while asleep felt someone hold her neck. PW1 was alone in the house. She inquired as to why the Appellant wanted to kill her and he responded clearly that it was not him but the owner of the bicycle asking for money. He spoke in kiswahili **"nipe pesa, nipe"**. PW1 recognised his voice. There was a bicycle in the compound which PW1 had borrowed to ferry charcoal and the Appellant had failed to return it to its owner. He then demanded for Ksh.40,000.00 but PW1 only had Ksh.1,000.00 from the sale of charcoal which she gave him.

18. The Appellant then took a panga which was nearby pulled her to the bush, raped and sodomised her and cut her with the panga. She managed to crawl to her house but collapsed outside where upon a Good Samaritan called the police and she was taken to hospital.

19. PW2 Hari Bengo a clinical officer examined PW1. She had bloodstained clothes and had visible bleeding cuts on the neck, bleeding wound on the upper right eye, multiple bleeding bruises on thorax and abdomen area, fractured right arm which was also bleeding, small tear at cervix which was bleeding, bruises in the vaginal area and blood in urine but no spermatozoa was seen. He concluded that rape was possible. A P3 form was filled and was produced in evidence.

20. PW3 S.N., the daughter of PW1 and the mother of the Appellant testified that the day after the incident the Appellant chased her away telling her that PW1 had been killed. PW2 reported to the village elder and learnt that PW1 had been taken to hospital. She found her in a critical condition. PW1 was admitted for three months.

21. The investigating officer PW4 Police Constable Vincent Ndumba recovered a bloodstained panga from the Appellant's house. No one witnessed the incident but the medical evidence corroborated PW1's testimony that she had been cut up. PW3 found her mother with cuts in a critical condition and a bloodstained panga was recovered. The prosecution was able to prove two ingredients of robbery with violence namely the wounds of the victim and the perpetrator being armed with a crude weapon.

22. The identity of the assailant had to be proved. In ***Suleiman Kamau Nyambura*** *(supra) the court also held that:*

"In addition, and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set out ingredient of robbery with violence is the need to positively identify the assailant/s in question."

23. PW1 testified that she recognised the assailant by voice. The court has held in **Mbelle v Republic [1984] KLR 626** that the following ought to be satisfied:

a. The voice was that of the accused.

b. The witness was familiar with the voice and recognized it.

c. The conditions obtaining at the time it was made were such that there was no mistake in testifying as to that which was said and who said it.

24. This finding was adopted in the Court of Appeal decision in **Simon Kiptum arap Choge & 3 others v Republic [1985] eKLR** and in **Julius Waititu Muthuita v Republic [2006] eKLR**.

25. In **Choge** (supra) the court also held that:

"There can be no doubt that evidence of voice identification is receivable and admissible in evidence and it that can, depending on the circumstances, carry as much weight as visual identification since it would be identification by recognition rather than at first sight."

26. On recognition the Court of Appeal in **Anjononi & others v Republic, (1976-80) 1 KLR 1566, 1568** held that:

"...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

27. Yet on the strength of recognition a court must take caution as was observed in **Regina v Turnbull (1976) 3 ALL E.R. 549**, that:

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

28. The Court of Appeal in **Shadrack Mbaabu Kinyua v Republic [2013] eKLR** pointed to the need for caution to eliminate the possibility of error in voice recognition.

29. The identification was by a single witness. In **Sammy Kanyi Mwangi v Republic [2010] eKLR** the Court of Appeal highlighted the duty of the court in relying on the evidence of a single witness. It stated that:

"The law is clear that a fact may be proved by the testimony of a single witness and there is therefore no compulsion for the prosecution to summon a multiplicity of witnesses. But this Court has consistently been cautious about reliance on such evidence particularly in cases relating to identification and in Abdala bin Wendo & Another v R (1953) 20 EACA 166, it emphasized:

"…the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.""

30. The Court also cited the case of **Roria v Republic [1967) EA 583** where it was held that:

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDENER, L.C. said recently in the House of Lords in the course of a debate on s.4 of the Criminal appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

" There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten if there are many as ten – it is in a question of identity.""

31. The Court then held as follows:

"That danger is greater, and therefore the duty heavier for the court to satisfy itself that in all the circumstances it is safe to act on the identification, where the only evidence is from one witness."

32. The evidence on identification was by a single witness. Hence this court is therefore enjoined to caution itself and consider if the prevailing conditions allowed for positive voice recognition. The trial court also cautioned itself. PW1's evidence was that her grandson who shared the same compound and whom she had spoken to just before she retired to bed assailed her. He used the words **"nipe pesa, nipe".** He also told her that it was not him but the owner of the bicycle that was making the demand. PW1 knew her

grandson. I am not in doubt that she also knew his voice. The obtaining conditions eliminated the possibility of a mistake as to that which was said and who said it.

33. In his defence the Appellant testified that he learned from neighbours about the incident the following day and that PW1, his grandmother, informed them that the owner of the bicycle had committed the crime. They apprehended him and PW1 was able to identify him in hospital. He testified that his mother resented him and had coerced his grandmother to fix him with the crime. He informed the court that PW3's character was wanting and he had chased her from the home as a result of this. PW3 had testified that the Appellant hated her and had on more than one occasion including the day of the incident chased her away from the home.

34. DW2, K.C, the Appellant's wife testified that they learnt that PW1 had been injured the day after the incident.

35. PW1 explained that in her semi-conscious state while in hospital she recorded that one Robert Ngonyo was her assailant. PW4 upon further investigation found the Appellant to be the proper suspect. PW1 also testified that upon regaining full consciousness, she was able to recall the whole event and that the Appellant was the perpetrator. PW4 also told the court that he recovered a bloodstained panga from the house of the Appellant a day after the incident.

36. Neither the Appellant or DW2 testified that the Appellant, after initially interacting with PW1, remained at his home the whole night until morning when he was allegedly informed of the incident so as to give him the defence of alibi. I am of the view that the Appellant was positively identified in the circumstances.

37. Was the 2nd count proven to the required standards" Section 3 of the Sexual Offences Act defines rape as follows:

“(1) A person commits the offence termed rape if—

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

(b) the other person does not consent to the penetration; or

(c) the consent is obtained by force or by means of threats or intimidation of any kind.”

38. Medical evidence proved that there was the possibility of rape given the fact that there was a bleeding tear at the cervical, blood in the urine and bruises at the vaginal area. Hence this count was proved. I therefore find that the appeal on conviction is without merit.

39. In light of the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** this court ought to take into account the Appellant’s mitigation and impose an appropriate sentence.

40. In mitigation the Appellant had stated during trial that he was helping them (I suppose this means PW1). He has also added that he is a first offender, is reformed and has been in custody since the time of his arrest. The aggravating factors are the injuries sustained by PW1 including the rape. It is noted that the Appellant was a first offender and the sentence of death would be inappropriate in the circumstances. However, taking into account the aggravating circumstances, a long jail term is necessary in this case. The death sentence imposed on the Appellant is therefore set aside and substituted with imprisonment for thirty years with effect from the date of sentencing by the trial court.

41. Apart from the substitution of the sentence as already stated, the appeal fails and the same is dismissed.

Dated, signed and delivered at Malindi this 14th day of February, 2019.

W, KORIR,

JUDGE OF THE HIGH COURT