Case Number:	Criminal Appeal 57 of 2018
Date Delivered:	03 Dec 2020
Case Class:	Criminal
Court:	High Court at Murang'a
Case Action:	Judgment
Judge:	Grace Wangui Ngenye Macharia
Citation:	Lawrence Ngeki Muiruri v Republic [2020] eKLR
Advocates:	Mr. Waweru for the Respondent.
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon. A. Mwangi - SRM
County:	-
Docket Number:	-
History Docket Number:	Cr. Case No. 1270 of 2017
Case Outcome:	Appeal dismissed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NUMBER 57 OF 2018

BETWEEN

LAWRENCE NGEKI MUIRURI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court

at Kigumo Cr. Case No. 1270 of 2017 delivered by Hon. A. Mwangi (SRM)

on 26th September, 2018).

JUDGMENT

Background

1. The Appellant, **Lawrence Ngeki Muiruri** was charged with the following offences:

a. In count 1, he faced a charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars were that on the 9th day of September, 2017 at around 2.30 am in Murang'a South within Murang'a County, while armed with a panga, robbed **ENN** of cash Kshs. 3,800/=, one mobile phone make Tecno W4, six packets of maize flour, 2kg rice and 2kg sugar all valued at Kshs. 10,210/= and at the time of the said robbery threatened to use actual violence to the said **ENN.**

b. In the alternative, he was charged with handling stolen goods contrary to **Section 322(1)** of the **Penal Code**. The particulars were that on the 9th day of September, 2017 at around 2.30 am in Murang'a South within Murang'a County, otherwise than in the course of stealing, dishonestly received or retained one mobile phone make Tecno IMEI No. 357274070695325 and No. 35727047047069533, three packets of maize flour valued at Kshs. 5,270/= knowing or having reason to believe them to be stolen or unlawfully obtained goods.

c. In count 2, he was charged with rape contrary **to Section 3(1)** of the **Sexual Offences Act No. 3 of 2006.** The particulars were that on the 9th day of September, 2017 at Kenol Kimorori area in Murang'a South within Murang'a County, intentionally and unlawfully caused his penis to penetrate the vagina of **ENN** without her consent.

d. In the alternative, he was charged with committing an indecent act with an adult contrary to **Section 11(A)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the 9th day of September, 2017 at Kenol Kimorori area in Murang'a South within Murang'a County, intentionally touched the vagina of **ENN** with his penis against her will.

2. He pleaded not guilty to the offences. After a full trial, he was found guilty of robbery with violence and rape and convicted accordingly. Consequently, he was sentenced to serve life imprisonment in respect of count 1 and twenty (20) years imprisonment in respect of count 2. Being aggrieved by his conviction and sentence, the Appellant filed the instant appeal.

Grounds of Appeal

3. The Appellants raised four (4) grounds of appeal in his Amended Petition of Appeal filed alongside his written submissions on 1st September, 2020. These were as follows:

i. THAT the learned trial magistrate erred in both law and fact in relying on a single identifying witness whose evidence lacked material corroboration and under difficult conditions of shock and fear hence occasioning a prejudice.

ii. THAT the learned trial magistrate erred in both law and fact in relying on unproved evidence on alleged doctrine of recent possession and illegally produced evidence.

iii. THAT the learned trial magistrate erred in both law and fact in failing to appreciate that vital critical witnesses were not availed contrary to Section 150 of the Criminal Procedure Code and Section 146 of the Evidence Act.

iv. THAT the instant matter was full of material contradictions and proof was not tendered to the required standards in law.

Summary of Evidence

4. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. The court must however have regard to the fact that it neither saw nor heard the witnesses and give due allowance for that. (See **Okeno v Republic (1972) EA 32).**

5. The Prosecution's case can be summarized as follows: On 9th September, 2017 at around 2.30 am, the complainant, **PW1, ENN** was sleeping with her children and her sister in law **PW2, SWW** in her house when she heard a knock on her bedroom door. She thought it was one of her children since they were sleeping in a separate bedroom. She went to open the door and met a man holding a torch and a panga. The man shone the torch at her and the wall reflected the light on his face which was not covered thus enabling her to see his face. PW1 screamed and her son Victor went and hugged her. The man told her to keep quiet or he would cut them with the panga. He ordered them to go back to bed. PW1 and her son went to the bed and covered themselves. The man ransacked PW1's bedroom then ordered her son to go back to his room. After that, the man demanded for her phone which she gave him. He gave it back to her and asked to input her M-Pesa PIN number then transferred Kshs. 1,800/= from PW1's M-Pesa account to a telephone number registered in the names of Mary Kariuki.

6. Thereafter, he ordered her to seat on the bed and blindfolded her with a leso then ordered her to stand up and undress. PW1 pleaded with him but he started hitting her with a panga on her thighs and threatened to insert the panga in her vagina if she did not do as ordered. As such, PW1 removed her clothes then the man put her on the bed and raped her without a condom while threatening her that he would call others who were outside if she screamed. After finishing, he covered her then took six packets of maize flour which were in PW1's bedroom before proceeding to ransack the cupboard in the sitting room where he also took Kshs. 2,000/=. When the man left, PW1 dressed up and went to the sitting room. She closed the door which had been left wide open and screamed for help.

7. PW3, Senior Sergeant James Kariuki formerly of Kenol DC Office Administration Police heard the screams. Together with his colleagues Corporal Kiarie and another, they proceeded to PW1's house which was about 300 metres from the camp. PW1 narrated to them what had happened then they took her to Maragua District Hospital. They did not find doctors there and as such they took her to Kenol Hospital where she was examined and treated. Thereafter, PW1 went and reported the incident at Makuyu police station at about 7.00 am. From there, PW1 went and obtained her M-pesa account mini statement which showed that the suspect had sent Kshs. 1,800/= to one Mary Kariuki.

8. PW3 and his colleagues used the telephone number to which the money had been sent to trace the house of the said Mary Kariuki. They found her in the house of the Appellant washing clothes. She was his wife. They retrieved three packets of maize flour that had been stolen from PW1 in the said house under a bed. They also got a knife and panga as well as a wire that had been used to open PW1's door. Thereafter, the Appellant led them to a house which was still under construction where he retrieved PW1's phone from where he had hidden it. PW3 and his colleagues arrested him and his wife, as well as one Samuel Muya and took them to the Administration Police camp.

9. Later on at about 2.00 pm, they escorted the three suspects together with the recovered exhibits to Makuyu police station and handed them over to the investigating officer, **PW5, Corporal James Gitau**. PW5 went to PW1's house with the wire and established that it could actually open her door. On interrogation, he also established that Mary Wanjiku Kariuki was the Appellant's wife while Samuel was an old friend of the Appellant.

10. PW1 was called to Makuyu Police Station where she found her phone and three packets of maize flour which had been stolen from her house. She was able to prove that it was her phone since the M-pesa transaction message was still on the phone. She also identified the Appellant as the man who had robbed and raped her in her house. She recalled having seen the Appellant twice earlier that week building a stall in their plot. The Appellant had also been hired by PW1's husband a while before the incident to do some job in their home.

11. PW4, Charles Kamau Kamotho, a Clinical Officer from Murang'a County Hospital filled PW1's P3 form on 10th September, 2017. He noted that PW1 had earlier been treated at Kenol Hospital. No injuries were noted on PW1 on both physical and genital examination. A high vaginal swab revealed the presence of sperms. Her urine was normal. Pregnancy and HIV tests were negative but she was given preventive medicine. PW4 concluded that the male sperms confirmed that PW1 had been raped. He produced PW1's P3 Form and treatment card in evidence.

12. All the other exhibits recovered from the Appellant as well as the statement obtained from Safaricom showing that Kshs. 1,800/= was transferred from PW1's line to 0720484282 registered in the name of Mary Kariuki on the day and time of the incident were produced in evidence by PW5.

13. Upon being placed on his defence, the Appellant elected to give an unsworn statement. He stated that on 9th September, 2017, he was arrested while at work and escorted to the police station. He was later taken to court and was shocked to hear the offences he had been charged with.

Analysis and determination

14. The Appeal was canvassed by both oral and written submissions. The Appellant filed his written submissions on 1st September, 2020 and appeared in person during the oral hearing of the case. The Respondent on the other hand was represented by learned State Counsel, Ms. Gacheru who only presented oral submissions. Upon carefully re-evaluating the evidence on record and considering the parties' respective submissions, I find that the following are the issues for determination: whether the prosecution proved both the offence of robbery with violence and rape against the Appellant to the required standard and whether the sentences were proper.

Whether the offence of robbery with violence was proved beyond a reasonable doubt

15. In determining this issue, it is incumbent upon the court to first consider whether the evidence on record established the offence of robbery with violence. The offence is established where the prosecution proves that either of the circumstances prescribed under **Section 296(2)** of the **Penal Code** obtained during the robbery incident. These are that:

a) The offender is armed with a dangerous or offensive weapon or instrument; or

b) The offender is in the company of one or more person or persons; or

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

16. PW1 testified that upon opening her bedroom door, she was confronted by a man holding a panga which is no doubt a dangerous and offensive weapon. It was also her testimony that her assailant used personal violence on her by hitting her with the panga on her thighs. The man robbed her of her mobile phone, Kshs. 1,800/= from her M-pesa account, six packets of maize flour and Kshs. 2,000/= from the cupboard. PW5 confirmed that the said incident was reported at Makuyu Police Station on 9th September, 2017. In the premises, I find that two of the elements, either of which is sufficient to prove that the offence of robbery with violence, were established.

17. The next issue question that the court has to answer is whether the Appellant was positively identified as the robber. The

Appellant submitted that he was convicted on the basis of suspicion which cannot provide a basis for conferring guilt however strong as was held in the cases of **Sawe v Republic [2003] eKLR** and **Mary Wanjiku Gichira v Republic, Cr Appeal No. 1 of 1998**. He was aggrieved that the trial court convicted him on the sole evidence of a single identifying witness who was mistaken**.** He argued that PW1 could not have seen him with the light that allegedly reflected on his face as she must have been blinded by the torch light shone on her and was also in shock.

18. The Appellant also faulted the trial court for failing to critically assess the time spent with the robber, the intensity of the torch light, the duration under observation, the state of the alleged reflecting walls, the distance between PW1 and the robber and more importantly the aspect of shock. He relied on the case of **Kura Charo Ndombo v Republic (2003)e KLR (Criminal Appeal No. 63 of 2002)** where the Court of Appeal rejected the identification evidence since the intensity of the moonlight and duration of observation was not given. He also placed reliance on the case of **Maitanyi v Repulic [1986] eKLR** and **Mwaura v Republic [1987] eKLR.** In his view therefore, the identification evidence lacked material corroboration.

19. On her part, learned State Counsel Ms. Gichuru held the view that the prosecution proved the offence against the Appellant beyond any reasonable doubt.

20. According to the evidence on record, the incident is alleged to have occurred at night at around 2.00 am when it was obviously dark. PW1 testified that she was able to see the Appellant with the help of the torch light that hit the wall and reflected on his face which was not covered. However, I note that the trial court failed to interrogate the size and intensity of the torch light alluded to. The trial court also failed to interrogate the nature of the wall in issue so as to determine whether it was capable of reflecting light. Further, I have also taken cognizance of the fact that the robber was armed with a dangerous weapon which must have instilled fear and panic on PW1. In the premises, I find that the evidence of visual identification cannot be held to be free from error.

21. Be that as it may however, the indisputable evidence on record is that the Appellant was arrested later that morning with the help of a mobile phone number to which he transferred money from PW1's M-Pesa account during the robbery. The mobile phone number was registered in the name of Mary Wanjiku Kariuki whom he was found with in his house and who turned out to be his wife. In his submissions, the Appellant faulted PW5 for producing a mini-statement of PW1's Mpesa account obtained from Safaricom, contrary to the provisions of **Section 106** of the **Evidence Act.** He relied on the case of **Republic v Julius Karisa Charo[2005] eKLR** where it was stated that that expert evidence should be tendered by persons qualified in the field and not police officers

22. I have perused the M-Pesa statement which clearly indicates that PW1's phone number sent Kshs. 1,800/= to Mary Wanjiku at about the same time when PW1 alleges that the Appellant attacked her. However, it is important to note that an M-pesa transaction is electronic evidence which can only be admissible if accompanied by a certificate prepared under **Section 106B (4)** of the **Evidence Act** by a person who is competent in the management of the electronic devise, outlining the manner in which the information was extracted. The said Section provides as follows in this regard:

"In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following--

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it."

23. In the absence of such a certificate therefore, I agree with the Appellant that the M-pesa statement printout was inadmissible and unreliable as its authenticity could not be vouched for.

24. Further, the Appellant faulted the trial court for wrongly invoking the doctrine of recent possession in convicting him. He submitted that the prosecution did not provide any proof in the form of photographs or an inventory signed by him or his alleged wife to prove that the items stated by PW3 were actually recovered in his possession. It was also his contention that there was no proof that the alleged mobile phone, simcard and flour belonged to PW1 or that the same were capable of being stolen. He argued that without cogent proof then the evidence can only be treated as hearsay and suspicion.

25. The applicability of the doctrine of recent possession was set out by the Court of Appeal in the case of ***Isaac Nganga Kahinga alias Peter Nganga Kahinga v Republic [2006] eKLR*** as follows:-

"It is trite that before a court of Law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant. Thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

26. In **Malingi v Republic [1989] KLR 225** Bosire J (as he then was) at Page 227 held thus:

"***By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."***

27. In the instant case, PW3's uncontroverted evidence was that upon tracing the Appellant the morning after the robbery, they recovered a number of things, *inter alia*, three packets of maize flour under his bed, a wire and PW1's mobile phone which the Appellant personally led them to where he had hidden. PW5's evidence was that upon receiving the items from PW3, he went back to PW1's house and confirmed that the wire could actually open her door. Further, when PW1 was called to Makuyu Police Station to identify the items, she found that the said mobile phone still had the text message showing the M-pesa transaction from her phone number to the Appellant's wife, Mary Wanjiku. This enabled her to prove that the mobile phone was actually the one stolen from her earlier that day.

28. It is well settled that *the doctrine of recent possession being a presumption of fact is a rebuttable presumption. This means that if a person is found in possession of a stolen goods, he or she will be required to tender an explanation in rebuttal, failure to which, an inference is drawn that he either stole the goods or was a guilty receiver. (*See ***Maingi v R [1989] KLR 221****).*

29. When placed in his defence, the Appellant did not tender any explanation as to how he came to be in possession of a mobile phone that was recently stolen from PW1. He also did not deny that the M-Pesa transaction message was still in the said phone when it was recovered meaning therefore, that PW1's evidence in that respect was uncontroverted. In the premises, it is my considered view that the recovered mobile phone and particularly the M-Pesa text message established an undeniable nexus between the Appellant and this offence. I am therefore satisfied that the Appellant was positively identified as the robber.

30. Further, the Appellant faulted PW1 for failing to give the name or description of the alleged robber to anyone to enable a later identification. Whereas it is ideal for a witness to give a description of an assailant in their first report, I find that the evidence tendered by the prosecution witnesses was watertight and directly pointed to the Appellant as the robber, more so on the application of the doctrine of recent possession. The omission therefore has no effect on the evidence tendered.

31. The Appellant was also aggrieved by the prosecution's failure to call the following witnesses to testify: all the arresting officers, the owner of the house where the flour was recovered, the owner of the construction site where the phone was recovered and his alleged wife Mary Wanjiku who was the owner of the phone to which the money was transferred. In his view, these were crucial witnesses and the only presumption that can be drawn is that their non-availability was due to the adverse evidence they would have tendered. He relied on the case of **Bukenya v Uganda (1972) EA, 549** in support of that contention. I have perused the evidence on record and am unable to see the benefit that the evidence of the aforesaid witnesses would have added, if any. I say so having in mind that the prosecution reserves the right to call the witnesses it deems fit to prove a fact. The witnesses called sufficiently

established the case for the prosecution.

32. Additionally, the Appellant contended that the prosecution's case was full of contradictions and discrepancies. He pointed out that PW2 contradicted PW1 materially on the alleged identity of the attacker and whether PW1 opened the door for the attacker. He stated that PW1 contradicted the other witnesses on the mode of arrest of the Appellant. He stated that there was a discrepancy on the amount of money transferred that is whether it was Kshs. 1,700/= or Kshs. 1,800/=. He argued that the discrepancies were substantially material and goes to the root of the case at hand. In this regard, he relied on the case of **John Mutua Musyoki v Republic [2017] eKLR.** Yet again, my perusal of the evidence on record reveals that this ground also lacks merit and is dismissed accordingly.

33. In totality therefore, I find that the prosecution proved beyond any reasonable doubt that the Appellant was guilty of robbery with violence. His conviction for this offence was therefore safe and is accordingly upheld.

Whether the offence of rape was proved beyond a reasonable doubt

34. Having settled the issue of the identification of the Appellant hereinabove, this court will not belabour the point but only determine if he also raped PW1.

35. The offence of rape is provided for under **Section 3** of the **Sexual Offences Act** 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.

36. In **Republic v Francis Otieno Oyier [1985] eKLR** the Court of Appeal held as follows:-

1. "The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.

3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."

37. As to whether there was an unlawful penetration of PW1's vagina, I note that PW1 gave clear and uncontroverted testimony on how the Appellant forcefully had sexual intercourse with her on the material night. Her testimony was corroborated by the medical evidence produced by PW4 which showed that a high vaginal swab revealed the presence of sperms. PW4 concluded that the same confirmed that there was a recent sexual activity. It is therefore clear that there was sufficient evidence of penetration.

38. The Appellant submitted that the mere presence of sperms, without any abrasion or laceration in PW1's vagina, was not proof of penetration. He argued that that in any event, the sperms were not analysed through a DNA test to ascertain that they belonged to him. It is trite that DNA testing is not necessary to prove a fact of rape or defilement as the same can be proved by the oral evidence of the victim or circumstantial evidence (See **Kassim Ali v Republic [2005] eKLR**.

39. The second issue for determination is whether PW1 consented to the act of penetration. Under **Section 42** of the **Sexual Offences Act**, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. PW1 narrated how the Appellant hit her with a panga on the thighs when she tried to plead with him upon ordering her to undress. The Appellant also threatened to insert the panga in her vagina if she did not do as ordered. Clearly, the Appellant's said actions did not give PW1

room for the freedom to consent to sexual intercourse with the Appellant.

40. In the circumstances, I find that the offence of rape was proved to the required standard. The Appellant's conviction for the same was therefore safe.

Whether the sentences were proper

41. On the offence of robbery with violence, the punishment prescribed by **Section 296(2)** of the **Criminal Procedure Code** is a death penalty. The trial court noted that it had taken took into account the Supreme Court decision of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** which declared the mandatory nature of the said death penalty unconstitutional before sentencing the Appellant to serve life imprisonment for this offence. Whereas I appreciate that sentencing is a matter of the trial court's discretion, I am aware that the same can be interfered with in limited circumstances. In the case of **Bernard Kimani Gacheru v Republic [2002] eKLR** the Court of Appeal posited that:

"On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle."

42. Taking into consideration the circumstances of the robbery, the fact that the Appellant did not seriously injure anyone and the fact that some of the stolen goods were recovered, this court is of the view that the custodial sentence of life imprisonment was harsh and manifestly excessive. However, I take note that the offence was aggravated by the rape. In the circumstances, I am of the view that a sentence of twelve (12) years imprisonment will serve as sufficient punishment and deterrence.

43. As for rape, the minimum sentence prescribed for the offence under **Section 3(3)** of the **Sexual Offences Act** is a term of not less than ten years but which may be enhanced to life imprisonment. Whereas there is no doubt that the offence was serious, it is my respectful view that there were no aggravating factors to warrant the enhancement of the minimum prescribed sentence to twenty (20) years imprisonment. Similarly, I hold the view that ten (10) years imprisonment will serve as sufficient punishment and deterrence for this offence.

Conclusion

44. The upshot is that the appeal against conviction lacks merit and is accordingly dismissed. However, the appeal against sentence partially succeeds. The life imprisonment imposed for the offence of robbery with violence is set aside and substituted with twelve (12) years imprisonment. The twenty (20) years imprisonment imposed for the offence of rape is set aside and substituted with ten (10) years imprisonment. The sentences shall run concurrently from the date of arrest which is 9th September, 2017. The days that the Appellant spent in remand custody of one year and 15 days shall be considered to constitute part of the sentence. It is so ordered.

DATED AT MURANG'A THIS 3RD DAY OF DECEMBER 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*

2. *Mr. Waweru for the Respondent.*