Kaberia (Criminal Appeal 68 of 2019) [2024] KECA 1128 (KLR) (6 September 2024) (Judgment)

Neutral citation: [2024] KECA 1128 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 68 OF 2019

W KARANJA, J MOHAMMED & LK KIMARU, JJA

SEPTEMBER 6, 2024

IN THE MATTER OF

JACKSON KABERIA ..... APPELLANT

(Being an Appeal from the Judgement of the High Court of Kenya at Meru (F.M. Gikonyo, J.) dated 20th February, 2018 in HCRA No. 62 of 2017)

JUDGMENT

1. Jackson Kaberia (Jackson), (the appellant) was charged before the Tigania Principal Magistrate's Court with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. It was alleged that on the night of 3rd January 2015 in Tigania East District within Meru County, jointly with others not before court while armed with dangerous weapons namely riffles and Somali swords they robbed SKK (S) (the complainant) of one mobile phone make Nokia 1680 valued at Kshs.8,000 and Kshs.6,900 all valued at Kshs.14,900 and immediately before the time of such robbery assaulted the said SKK. He was also charged with gang rape contrary to Section 10 of the *Sexual Offences Act*.

2. The appellant pleaded not guilty to the charges and the matter proceeded for hearing with four witnesses testifying in support of the prosecution case. When placed on his defence, the appellant gave an unsworn statement and called no witnesses. The trial magistrate upon considering the evidence before the court, found the appellant guilty, convicted him, and sentenced him to death on the count of robbery with violence while on count two, he was convicted of the lesser offence of committing an indecent act with an adult and sentenced to five (5) years imprisonment with hard labour.

3. Being aggrieved, the appellant appealed to the High Court. Upon re-evaluating the evidence, the High Court (Gikonyo, J.) upheld the appellant's conviction and sentence and dismissed the appeal. However, the sentence with regard to count 2 was held in abeyance. Being further aggrieved, the appellant moved to this Court on second appeal against both conviction and sentence.

4. In his home made memorandum of appeal, the appellant faulted the learned Judge for, inter alia, failing to discharge his duty of re- considering, re-evaluating and analyzing the evidence before the trial court and come to its own conclusion; for failing to note that section 204, 296(2) is unconstitutional; for

failing to note that the circumstances were not favourable for positive identification; for failing to note that the evidence adduced by the complainant was not proved beyond reasonable doubt and that the sentence was harsh and excessive in the circumstances.

5. The appellant's counsel later filed a supplementary memorandum of appeal in which he faulted the High Court for failing to discharge its duty of re-considering, re-evaluating and analysing the evidence before the trial court; for failing to give the appellant a chance to mitigate; for failing to warn himself on the risky reliance of a visual identification of an eye witness whose evidence was contradictory and inconsistent hence raising doubt on the credibility and that the sentences were harsh and excessive in the circumstances.

6. Briefly, the prosecution case was that on the night of 3rd January 2015 at around 7:30pm, the complainant was going home from her place of work. It had rained at the time. When she got to her compound, she saw three people approach her, one armed with a rifle, one with a knife and that the third person was all covered up. She stated that two of the persons were visible as they were uncovered.

7. She testified that the intruders grabbed her and pushed her into her house where her two children aged nine and four respectively were present. She stated that the man with the rifle pushed her into the house and that the appellant stepped on her head and demanded for money. Further, that the thugs forced the children under the bed in one of the bedrooms as the thugs were harassing her in the sitting room. She stated that the assailants beat her up demanding for money. They ransacked the whole house but failed to get any money whereupon the gunman held her at gunpoint and threatened to kill her if she did not give them money.

8. She testified that at some point the assailants pushed her into the second bedroom and that the appellant removed her clothes and placed his penis in her vagina and when about to penetrate her, the assailant with the gun shoved him aside and proceeded to rape her. She stated that later they covered her face with a sack and left her naked, a state in which she was later found by her children.

9. That before that the assailants had demanded that she transfers money from her cell phone No.0720-998xxx to their cell phone No.0714-661xxx which she later learnt was registered in the name of Rosiea John. She stated that she transferred Kshs.6,900 under duress to the said number and that after the transfer the assailants took her cell phone make Nokia 1680 which had been given to her as a present by her brother Justus Mwongela.

10. She stated that finally she was found by her husband who took her to Muthara Police Station where she was issued with a P3 form which she took to Tigania Hospital where she was examined and treated. The matter was reported to the police station and investigations commenced. From the medical examination, the complainant was found to have been assaulted as a result of which she sustained injuries on her shoulder and lower back. On examination, there were no bruises and lacerations in the vagina and cervix but there was presence of seminal fluid on the outer genitals. A high vaginal swab revealed spermatozoa and epithelial cells indicating sexual intercourse. The injury was classified as harm.

11. The appellant was arrested later following a tipoff that he had been sighted selling a cell phone. He was arrested by PC Mutuku within Muthara Market. An identification parade was carried out on 28th January, 2015 at 2.30 p.m. and the appellant was positively identified as the person who had robbed and raped the complainant. He was subsequently charged with the charges earlier outlined.

12. In his defence, the appellant denied committing the offence, and explained that he did not know Sarah and had never seen her before.

13. In support of the appeal, the appellant's counsel filed submissions dated 11th December, 2023. It was submitted on the issue of whether there was positive identification of the appellant that the complainant while giving her testimony in court stated that she was able to see the faces of two of her attackers out of the three because their faces where not covered. That she was able to positively identify the appellant because there was electricity in the house where the alleged crime took place and because the whole event took about an hour during which time, she could see the appellant. It was submitted, however, that she did not state that during this time she could see the appellant clearly to be able to identify him later.

14. It was submitted that the identification parade was conducted a month later and that even before the identification parade was conducted the complainant did not give any description of the two assailants.

15. Counsel submitted that it is important to note that the complainant did not give any description of the assailants to the police when she first reported the matter. Further, it was submitted that this issue was raised by learned counsel Thibaru during the 1st appeal where she stated that the complainant did not give the description in the initial report for proper and positive identification of the appellant.

16. It was submitted that the learned Judge did not deal with the description issue which was raised by the appellant's advocate and only focused on the issue of identification of the appellant by a single witness. Counsel further submitted that an identification parade is only used to affirm the ability of the complainant to identify the assailants who she/he described to the police when the crime was reported and that in this case the complainant did not give any description of the assailant when she reported the case to the police nor before the identification parade nor did she indicate the aspect of the appellant's appearance that made her pick the appellant in this case.

17. It was submitted that without the description of the assailant it is unclear how the complainant was able to identify the appellant. Counsel thus submitted that in light of the foregoing it is clear that the learned Judge did not consider the identification evidence well because if he had done so the appellant would have been set free.

18. With regards to the failure by the appellant to mitigate before sentence it was submitted that the record shows that the appellant may not even have understood what mitigation was. It was submitted that the court did not explain to him what mitigation was and when he was called to mitigate, the appellant responded as follows:-

> " I was framed and I have nothing else to say."

It was submitted that this clearly implies that the appellant did not understand what mitigation was and the trial court did not bother to explain that to him.

19. On the defence that was raised by the appellant, it was argued that the same was never rebutted by the prosecution. We were urged to allow the appeal. Mr. Wakahu, learned counsel for the appellant, adopted these submissions and laid emphasis on the issue of identification, stressing that the issue on insufficiency of positive identification was enough to earn the appellant his freedom.

20. For the respondent, Ms. Nandwa learned prosecution counsel opposed the appeal. In submissions dated 7th December, 2023 it was submitted that the ingredients of the offence of which the appellant was charged were proved to the required standard of proof. On the issue of identification Ms. Nandwa submitted that in carrying out the identification parade, Sarah was able to identify the appellant as one of her assailants and that this evidence was never challenged during trial.

21. With regards to gang rape, Ms. Nandwa submitted that the offence was proved to the required standard of proof and that the results from the government analyst indicated that the samples were from an indeterminate origin ostensibly on account of more than a single assailant and hence that the same was enough evidence by the prosecution to prove that Sarah was raped by more than one person.

22. On sentence it was submitted that the death sentence meted by the trial court was the legal sentence and was well within the law, we were urged to dismiss the appeal on conviction and sentence.

23. This being a second appeal, the jurisdiction of this Court as specified under Section 361(1) of the Criminal Procedure Code is limited to matters of law only. As stated by this Court in Chamagong -vs- Republic (1984) KLR 611:-

> "A court on appeal will not normally interfere with a finding of fact by the trial Court whether in a Civil or Criminal case unless it is based on no evidence or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted in wrong principles in reaching the findings he did."

24. We have considered the record of appeal, the rival oral and written submissions, and the law, bearing in mind our jurisdiction as aforestated. In our view, this appeal succeeds or falls on one ground only, namely, identification. Was the identification of the appellant by Sarah sufficient to support a conviction?

25. As appreciated by the two courts below, Sarah was the only eye witness to the robbery. She testified that she identified the appellant at the scene of crime as the incident took about one hour and the room was lit by electricity making it bright enough for her to identify the appellant.

26. It is not disputed that the law requires that the evidence of a single witness be treated with the greatest circumspection before the same can be relied upon to support a conviction. See Roria -vs- Republic [1967]EA 573. The position has subsequently been reiterated in many decisions of this Court, including Cleophas Otieno Wamunga -vs- R. [1989]eKLR. See also R. -vs- Turnbull [1976] 3 ALL ER 549. In this case, the trial magistrate did indicate in his judgment that he was aware of the danger inherent in basing a conviction on the evidence of a single witness before going ahead to convict the appellant.

27. It is apposite to note that the trial court relied on the evidence on the direct identification of the appellant by the complainant and also on the identification parade which was conducted about a month later, whereby the complainant is said to have picked out the appellant. This evidence was challenged before the High Court on appeal. The learned Judge found that the incident had taken a considerable period of time and the complainant had ample time to identify the appellant. The learned Judge went on to find that the trial magistrate had cautioned himself of the danger of convicting on the basis of the evidence of a single witness.

28. Having done so, the learned Judge found that the identification of the appellant was watertight and on the basis of identification alone proceeded to uphold the conviction.

29. The issue we have to address now is whether the evidence of identification as adduced before the trial court and accepted by the High Court was sufficient to support conviction against the appellant. We note that the complainant had never seen or known the appellant before the date in question. It is possible that in the one hour taken to commit the offence, the complainant was able to see the appellant clearly. If so, she would have given a description of her assailant to the police when the report was first made, or even describe him in her statement to the police.

30. This would have been necessary to aid the police in identifying and arresting the suspect. (See Peter Mwangi Mungai -vs- Republic [2002] eKLR). In this case the circumstances under which the appellant was arrested were not clear, but what is evident is that the arrest was not as a result of his description to the police by the complainant. We also note that the identification parade was conducted almost a month after the robbery. It is possible that the complainant's memory may have faltered. These were issues that were raised by learned counsel for the appellant before the High Court but they were not considered. We find the complainant's lone evidence of identification of the appellant in the absence of any other evidence insufficient to support the conviction. The appellant should have been given the benefit of the doubt in the circumstances and acquitted.

31. Accordingly, we find this appeal has merit. We allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF SEPTEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR