



**Serem & another v Republic (Criminal Appeal 66 & 66A of 2016  
(Consolidated)) [2023] KEHC 17741 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17741 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CRIMINAL APPEAL 66 & 66A OF 2016 (CONSOLIDATED)  
F GIKONYO, J  
MAY 18, 2023  
FORMERLY NAKURU HIGH COURT CRIMINAL APPEAL  
NO. 199 OF 2013 & NAKURU HIGH COURT  
CRIMINAL APPEAL NO. 198 OF 2013**

**BETWEEN**

**DAVID KIPKORIR SEREM ..... 1<sup>ST</sup> APPELLANT**

**DISMUS KIPLANGAT KITHU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellants were charged with robbery with violence contrary to section 296(2) of the *Penal Code*. It is alleged that on the February 14, 2013 in Narok North district within Rift Valley province jointly while armed with a dangerous weapon namely a knife robbed AA cash Kshs 500/= and one mobile phone make nokia all valued at Kshs 4,000/= and immediately before and after the time of such robbery used actual violence to the said AA.
2. The appellants were further charged jointly in count II and III with the offence of gang rape
3. In count II they were charged with the offence of gang rape contrary to section 10 of the *Sexual Offences Act*. It was alleged that on February 14, 2013 in Narok North district of the Rift valley province the 1<sup>st</sup> appellant in association with the 2<sup>nd</sup> appellant intentionally and unlawfully caused his penis to penetrate the anus of AA without his consent.
4. In count III, the appellants were charged with the offence of gang rape contrary to section 10 of the *Sexual Offences Act*. it was alleged that on February 14, 2013 in Narok North district of the Rift Valley



province the 2<sup>nd</sup> appellant in association with the 1<sup>st</sup> appellant intentionally and unlawfully caused his penis to penetrate the anus of AA without his consent.

5. The prosecution called 5 witnesses while the defense gave unsworn testimonies and did not call any witnesses.
6. They were tried for the offence and convicted on the charge of robbery with violence and sentenced to death. The sentences in count II and III were held in abeyance.
7. Having been dissatisfied with the conviction and sentence they filed this appeal.
8. The appellants cited 4 grounds in their amended grounds of appeal that;
  - i. The trial court erred in fact and law in convicting the appellants by misconstruing the required standard of proof beyond reasonable doubt against the weight of evidence on record.
  - ii. The trial court erred in law and fact by convicting the appellants on the insufficient, contradictory, uncorroborated evidence of a single identifying witness to guarantee a safe conviction.
  - iii. The trial court erred in law and fact by convicting the appellant when no proper recognition of the appellants was conducted, given the difficult circumstances peculiar to this case as required under the law.
  - iv. The trial court erred in law and fact by pressing on with the trial despite the appellants needing to be supplied with the relevant documents on time hence denying them the right to a fair hearing while delivering an unsafe conviction.

#### **Directions of the cour**

9. The appellant and the respondent intimated to the court that the appeal be canvassed by way of written submissions. Directions were given to that effect.

#### **The appellants' submissions.**

10. The appellants submitted that the prosecution failed to provide evidence that the two were at the scene of crime.
11. The appellants submitted that the prosecution did not prove that they were armed with dangerous weapons.
12. The appellants submitted that the prosecution failed to call four critical witnesses to prove their case. Firstly, PW1's aunt was not called to clarify whether PW1 lodged at her place or the mother's(PW4) place. Secondly, the medical doctor who examined the 1<sup>st</sup> appellant was not called. Thirdly, the prosecution did not call the unnamed villager in the Enabelibeli center. Fourthly, the intended buyer of PW1's phone was not called to testify.
13. The appellants submitted that the prosecution failed to surrender the alleged bloodied clothes belonging to PW1 and the 1<sup>st</sup> appellant for DNA testing or any other scientific and forensic examinations that would debunk the myth about the appellants' involvement in the alleged offences.
14. The appellants submitted that the offence of gang rape was not sufficiently proved because the learned magistrate relied on insufficient evidence of PW3, a medical examination report- P3 form.
15. The appellants submitted that the entire court file and exhibits are still missing. Therefore, this court will not be able to re-evaluate the evidence as required.



16. The appellants submitted that the prosecution failed to remedy the inconsistencies and contradictions in the evidence of PW1 and PW4 as regards where the complainant lodged on February 14, 2013.
17. The appellants submitted that the prosecution should have provided evidence of ownership of the items described in the charge sheet to confirm whether they belonged to PW1 or existed.
18. The appellants submitted that the trial court never evaluated the issue of identification as required under the established legal principles. The court ought to have exercised great caution and interrogated the lighting's intensity, distance and position as alleged in PW1 testimony to attain an error free identification that would guarantee a safe conviction.
19. The appellants submitted that they were greatly prejudiced and were at a point of disadvantage when the trial proceeded without them being supplied with relevant documents. They could not foot the costs of statements since they were in remand custody. On the next court date the trial court issued an order that they read the statements in court as they await their case to be heard.
20. In the end, they urged this court to allow the appeal, quash the conviction and set aside the sentence meted out by the trial court upon the appellants.
21. The appellants relied on the following authorities;
  - i. [\*Johana Ndungu v Republic\*](#) CRA 116/1995
  - ii. [\*Suleiman Kamu Nyambuara v Republic\*](#) [2015] eKLR.
  - iii. [\*Moses Sankale Simpiri v Republic\*](#) [2020] eKLR.
  - iv. *Bukenya & others v Uganda* [1972] EA 549
  - v. [\*Berger v United States\*](#) 295 US 78,88(1935)
  - vi. *Cabrles Wanyonyi & others v Republic* Kisumu criminal appeal No 134 of 2004 as cited with approval in [\*Permula Ole Robia & 2 others v Republic\*](#) [2020] eKLR
  - vii. [\*Joseph Gicheru Mwangi v Republic\*](#) [2020] eKLR
  - viii. Section 107 (1) of the [\*Evidence Act\*](#)
  - ix. *Abdallah Bin Wendo & another v Republic* (1953) 20 EACA166 as cited with approval in [\*Samwel Omaiyo Kasimiri v Republic\*](#) [2016] eKLR.
  - x. [\*R v Turnbull & others\*](#) (1973) 3 ALL ER 549 cited with approval in [\*Elly Otieno Alose v Republic\*](#) [2019] eKLR
  - xi. [\*Samwel Kilonzo Musau v Republic\*](#) [2014] eKLR as cited in [\*Joseph Gicheru Mwangi v Republic\*](#) [2020] eKLR
  - xii. Supreme Court of India in [\*Rattiram & Ors v State of M.P T.R Insp Of Police\*](#) criminal appeal No 223 of 2008.
  - xiii. *Pett v Greyhound Racing Association* cited by the Court of Appeal in [\*Thomas Alugha Ndegwa v Republic\*](#) [2016] eKLR.

### **The respondent's submissions**

22. The prosecution submitted that three elements of robbery with violence were proved beyond reasonable doubt.



23. The prosecution submitted that the incidence took place for quite a while and the complainant was in the hands of the assailants for a reasonable amount of time making it favourable to know the 1<sup>st</sup> appellant as his assailant. The identification of the 1<sup>st</sup> appellant was on recognition and not identification. The 2<sup>nd</sup> appellant was not well known to the complainant but by virtue of being found with the phone of the complainant a day after the incident places him at the scene of crime.
24. The prosecution submitted that there was sufficient light at the scene and PW1 was able to identify the appellants.
25. The prosecution submitted that the trial magistrate took into consideration the 1<sup>st</sup> appellant's mitigating factors (The 2<sup>nd</sup> appellant had no mitigating factors), nature and circumstances of the offence prior to passing the death sentence. That the death sentence was within the law. The death sentence is lawful and not unconstitutional.
26. In the end the prosecution, urged this court to dismiss the appeal in its entirety. That the conviction and sentence be upheld as it is within the law.
27. The respondent relied on the following authorities;
  - i. Mombasa criminal appeal 13/2017 *Mohammed Ali v The Republic* [2013] eKLR.
  - ii. *Dima Denge Dima & others v Republic*, criminal appeal No 300 of 2007.
  - iii. *Peter Musau Mwanzia v Republic* [2008] eKLR.
  - iv. *R v Turnbull* [1976] 3 ALL ER 549.
  - v. *Arum v Republic*, Court of Appeal at Kisumu criminal appeal No 85 of 2005.

## **Analysis and Determination**

### **Court's Duty**

28. The duty of first appellate court is to re-evaluate the evidence presented at trial and draw own conclusions. Except, it must bear in mind that it neither saw nor heard the witnesses first hand. Thus, demeanor is best observed by the trial court (*Okeno v Republic* [1972] E.A 32).
29. I have perused the lower court record, written submissions and authorities relied upon by both parties. The broad issues arising herein are: -
  - i. Whether the prosecution proved its case beyond reasonable doubt.; and
  - ii. What sentence is appropriate to the offence in the circumstances?

### **Elements of robbery with violence**

30. According to the Court of Appeal in the case of *Oluoch v Republic* [1985] KLR: -

“Robbery with violence is committed in any of the following circumstances: a) The offender is armed with any dangerous and offensive weapon or instrument; or b) The offender is in company with one or more person or persons; or c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person .....



31. The three elements of the offence of robbery with violence under section 296(2) of the *Penal Code* are, however, to be read disjunctively and not conjunctively. Therefore, proof of one element beyond reasonable doubt founds a conviction for the offence of robbery with violence (*Dima Denge Dima & others v Republic*, criminal appeal No 300 of 2007)
32. In this case PW1 stated on February 14, 2013 at around 2000hrs, he was headed to Enabelibeli shopping Centre to collect his phone that was being charged. As he headed home he met with the 1<sup>st</sup> appellant who was known to him. The 1<sup>st</sup> appellant requested him to wait for him and his friend so that they could walk the journey back home together as they were headed in his direction. He obliged.
33. After walking for about 30 meters the 2<sup>nd</sup> appellant hit him with his fist on the head and he fell down. Immediately thereafter, they ransacked his trouser pockets and took from him Kshs 500 and a phone make Nokia. They continued to pin him down. He begged them to pity him. The 2<sup>nd</sup> appellant gave him several blows with his fist before collecting a stick which he used to inflict more injuries on him.
34. The 1<sup>st</sup> appellant ordered his accomplice to search for more cash in the complainant's pockets whom in turn ordered him to take off his shoes and trousers. The 1<sup>st</sup> appellant further ordered PW1 to bend forward on his knees. They gang raped him in turns. The 2<sup>nd</sup> appellant later removed a knife and inflicted an injury on his chest.
35. PW3, a clinical officer testified that PW1 had a swollen neck and head and bruises on his face. He also had bruises on his knees, chest, elbows, thighs and left eye. He assessed the degree of injuries as harm. As regards the sexual assault, he confirmed that PW1 had 2 wounds on his anus with painful palpation and a foul smelling discharge mixed with blood emanating from his anus. He produced a P3 form in court as P Exh. 1.
36. Nonetheless, as the incident occurred at night, care should be taken to ensure the appellants were positively identified as the perpetrators of the offence. The court in *Wamunga v Republic* (1989) KLR 424 at 426 had this to say:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”
37. I have interrogated the circumstances under which identification was done.
38. PW1 stated that he was standing a foot away from the 1<sup>st</sup> appellant when the 1<sup>st</sup> appellant called him. He knew the 1<sup>st</sup> appellant by face not by name as he used to reside near the shopping centre. The event happened outside a closed shop that had security lights. He was able to see them.
39. The appellants seem to suggest that a conviction cannot be founded on a single identifying witness. To the contrary, it is lawful to convict on the evidence of a single identifying witness except the court should examine the evidence carefully to eliminate any element or possibility of mistaken identity or delusion on the part of the witness.
40. In this case, PW1 was able to identify the appellants during the incident. It appears they took time to ransack him and assault him. There was also conversation between the trio. PW1 stated that the assailants were conversing in Kipsigis.
41. The complainant did not know the 2<sup>nd</sup> appellant well but, he was found in possession of the complainant's stolen phone a day after the incident.



42. Other than the evidence by PW1, the 2<sup>nd</sup> appellant was linked to the said robbery as the phone that was stolen from PW1 was traced to him a day after the robbery.
43. The appellants think that the trial court erred in law and fact in not diligently considering the doctrine of recent possession.
44. I have perused the record and the recording by the trial magistrate show that, the trial court was not only alive to, but understood and accordingly applied the doctrine of recent possession.
45. The evidence by PW3 also corroborated the evidence by PW1 that he was injured and raped during the incident. The findings by the doctor are consistent with the evidence by PW1 on the injuries he sustained during the robbery.
46. Accordingly, the prosecution proved beyond reasonable doubt that; (i) the offenders were armed with dangerous and offensive weapon or instrument; (ii) the offender was in company with one or more person or persons; and (iii) at or immediately before or immediately after the time of the robbery the offenders wounded, beat, struck or used other personal violence the victim

### **Of gang rape**

47. I have perused the lower court record; the evidence of PW1 on gang rape was not controverted. It was corroborated by the evidence of PW3. There was no mistaken identity that the appellants are the ones who penetrated the anus of PW1 in turns without his consent. I find that the offence of gang rape was also proved.
48. Accordingly, the appeal on conviction fails and is dismissed.

### **Sentence**

50. Death sentence is still lawful in Kenya, and may be imposed where circumstances so deserve. It has been observed that death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder (see Prof. Ngugi J in *James Kariuki Wagana v Republic* [2018] eKLR); say, where excessive or brutal force has been employed, or offence committed in most bizarre manner, or in circumstances which expose many to danger or injury or death.
51. In the case before me, all the ingredients of robbery with violence have been met. The appellants, robbed the complainant, and in the course of the robbery, used force, and also they were armed with a dangerous weapon which was used to inflict harm to the complainant, and they also gang-raped him.
52. The level of violence unleashed on the complainant is sufficiently serious to warrant death sentence or long period of imprisonment.
53. The court is aware that death sentences were commuted by the president to life imprisonment. In the circumstances of this case, life sentence is appropriate sentence. I formally set aside the death sentence and impose life sentence upon the appellants. The sentence for gang rape is not disturbed.
54. Orders accordingly.

**Dated, signed and delivered at Narok through Teams Application, this 18<sup>th</sup> day of May, 2023**

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**F. GIKONYO M.**

**JUDGE**



**In the presence of:**

1. Both appellants
2. Kubwa for appellants
3. Ms. Peninah for DPP
4. Kasaso - CA

