REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO 11 OF 2017

PETER MWAURA WAWERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 248 of 2015 in the Chief Magistrate's Court at Thika by Hon A. Lorot H.R (SPM) on 14th July 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Peter Mwaura Waweru, was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on the 21st day of December 2014 at [particulars withheld] in Thika Township within Kiambu County jointly with others not before court, he robbed N W M (hereinafter referred to as "PW 2"), one mobile phone and cash Kshs 3,000/= and immediately before such robbery threatened to use actual violence on her.

2. The Accused person was also charged on Count II with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No 3 of 2006. The particulars of this charge were that on the aforesaid date, time and place, in association of others not before court, he intentionally and unlawfully caused his penis to penetrate PW 2's vagina without her consent.

3. He had also been charged with the alternative charge of committing an indecent act with an adult contrary to Section 11A of the Sexual Offences Act. The particulars of this charge were that on the aforesaid date, time and place, he intentionally touched PW 2's vagina with his penis against her will.

4. The Learned Trial Magistrate, Hon A. Lorot H.R, Senior Principal Magistrate, convicted him of the offence of robbery with violence and imposed on him the death sentence as was prescribed under the law. He also convicted and sentenced him to serve life imprisonment for Count II. However, he directed that the sentence of life imprisonment would remain in abeyance pending the execution of the death sentence.

5. Being dissatisfied with the said judgment, on 14th October 2016, the Appellant filed a Chamber Summons seeking leave to file his Appeal out of time, which application was allowed and the Petition deemed to have been duly filed. He relied on five (5) Amended Grounds of Appeal. On 19th March 2018, he filed Amended Grounds of Appeal and Written Submissions. This time he relied on ten (10) Amended Grounds of Appeal.

6. When the matter came up for hearing on 20th March 2018, the State submitted orally in court.

LEGAL ANALYSIS

7. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor".**

8. Having considered the Appellant's and State's Written Submissions, this court found the following issues to have been placed before it for determination:-

1. **Whether or not the charge sheet was defective;**

2. **Whether or not the Prosecution proved its case beyond reasonable doubt;**

3. **Whether or not the Learned Trial Magistrate complied with the provisions of the law when he wrote his decision.**

9. The court therefore dealt with the said issues under the distinct and separate heads shown herein below.

I. CHARGE SHEET

10. Amended Ground of Appeal No (a) and (b) were dealt with under this head because they were related.

11. The Appellant submitted that the Charge sheet was defective because the same did not indicate that they were armed at the material time. In this regard, he relied on the case of **Erick Macharia Mugo & Another vs Republic Criminal Appeal No 32 of 2014 Nyeri** where the court therein found the charge sheet to have been fatally defective as it did not disclose the type of weapon that had been used therein.

12. He also relied on the case of **George Omondi & Another vs Republic Criminal Appeal No 5 of 2005** where the Court of Appeal cited the case of **Juma vs Republic (2003) 2 EA** and several other cases where the description of the weapon was found to have been key in a charge sheet.

13. He also submitted that the alternative charge was defective because there was no such provision of the law such as Section 11A of Sexual Offences Act.

14. Whilst the court noted that the State did not respond to the Appellant's two (2) issues under this head, this court found and held that a charge sheet does not become defective merely because the evidence that has been adduced during trial does not prove the facts in such a charge sheet. If the evidence that is presented in court does not prove any offence, the trial court is obligated to acquit an accused person as envisaged in Section 210 and Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya) as the prosecution will either have failed to demonstrate that a *prima facie* has been established or to prove its case beyond reasonable doubt.

15. A perusal of the charge sheet showed that the Appellant and his accomplices robbed PW 1 and immediately before the robbery threatened to use actual violence on her.

16. Under Section 296 (2) of the Penal Code, the ingredients of the offence of robbery with violence are as follows:-

a. **the offender must be armed with any dangerous or offensive weapon or instrument; or**

b. **the offender must be in the company of one or more other person or persons or;**

c. **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.**

17. Indeed, the charge for robbery with violence can be sustained if any one of the aforesaid ingredient was present at the time of the commission of the offence. This is connoted by the use of the disjunctive word "or" and not the conjunctive word "and". It is therefore not necessary that the exact weapon must be described because violence can be through beating, striking or using any other personal violence to any person.

18. Going further, this court found the Appellant's submissions that the alternative charge was defective because there was no provision of the law such as Section 11A of the Sexual Offences Act was immaterial in the circumstances of this Appeal because the Learned Trial Magistrate did not convict him of that offence.

19. However, for the completeness of record, this court found that the Appellant had misrepresented the correct position of the law. Indeed, Section 11A of the Sexual Offences Act provides as follows:-

"Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings as to both".

20. Further, Section 382 of the Criminal Procedure Code provides as follows:-

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

21. In the absence of any demonstration by the Appellant of what prejudice he suffered, this court was not persuaded to find that the Charge

Sheet as drafted was defective.

22. In the circumstances foregoing, this court did not find merit in the Amended Grounds of Appeal Nos (a) and (b) and the same are hereby dismissed.

II. PROOF OF THE PROSECUTION'S CASE

A. IDENTIFICATION

23. Amended Grounds of Appeal Nos (c), (d), (e), (f), (g), (h) and (i) were dealt with under the following head as they were all related.

24. The Appellant argued that when relying on identification of an accused person, the evidence must be water tight. He relied on several cases including **Republic vs Turnbull [1976] 3 ALL ER 551** to buttress his argument in this regard.

25. On its part, the State was emphatic that the Appellant was positively identified and he was actually in communication with PW 2 as was demonstrated by the Forensic Report. It pointed out that the Appellant was identified at the scene and at the time of his arrest.

26. According to PW 2, she was being escorted by her friend called F to board a Boda Boda when they were attacked by four (4) men. Her friend ran away after being hit on the head. Three (3) of her attackers then ran after her friend and she was left with a young man who was about sixteen (16) to seventeen (17) years of age. The three (3) attackers came back after they were unable to get her friend and they then loaded her on a Boda Boda and took her towards [particulars withheld] area.

27. One of them was armed with a panga. The Boda Boda rider knew exactly where they were going because when he asked where they were going and he was told that they were going to their base, he drove straight to a cleared bush. They demanded that her friend send them money by Mpesa which he did. They then each raped her after which they went to withdraw money from her phone. She was able to see the faces of two (2) of her attackers who had been left guarding her. They took her phone and sim card and then gave her Kshs 50/= for her to take a Boda Boda. Her Mpesa balance had earlier been Kshs 299/=.

28. She went next to Tuskys and found security guards to whom she explained her ordeal. They gave her a phone through which she called one M and J to come for her. They came and took her to hospital. After which she went home and showered. She also went to her parents home in [particulars withheld] and explained to them her ordeal. She, however, did not say exactly when she went to her parents home.

29. While she was at her parents' home, her roommate, D, called her and informed her that there was a "guy" who called her to tell her that he had her (PW 2's) phone. D gave her the "guys" number and they started communicating with the "guy" who was called Peter.

30. When the said Peter trusted her and she convinced him that she had forgiven him, he agreed to meet her at the [particulars withheld] (**sic**) Hotel. A police officer who had been asked to investigate the case followed them from behind, incognito. They reached the Hotel. However, before they could order for food, the police officer came and greeted the Appellant and led him to the police station.

31. He realised that he had been arrested when she came to the police station and identified him. The Appellant called her to the police station. The phone that was stolen on the material night was not recovered but the phone with the messages between her and the Appellant was tendered in evidence during trial.

32. She said that she identified the Appellant as one of the persons who was guarding her on the material night because he was the Boda Boda rider, he had no cap on, he was the tallest of her four (4) attackers, he was the one who escorted her to board a Boda Boda and gave her Kshs 50/= to go home. She was emphatic that she was able to see him because there was sufficient light from street lights where they stood while waiting for his accomplices to withdraw money from her phone. She also added that she identified the sixteen (16) – seventeen (17) year old boy.

33. No 79373 Corporal Nancy Rotich (hereinafter referred to as "PW 3") was the investigating Officer. She rehashed PW 2's evidence. The M-pesa statements and Print outs of the sms's PW 2 exchanged with the Appellant were marked for identification.

34. Dr Hermis Gichane (hereinafter referred to as "PW 1") was a medical officer at Thika Level 5 Hospital. He tendered in evidence the P3 Form that had been filled by his colleague Dr Murugi on 23rd December 2014. He said that PW 2 went to hospital on 23rd October 2014 (**sic**) and the incident was alleged to have occurred on 21st December 2014 at 2.00 am. He also testified that PW 2 was seen in hospital on the same day of the attack at 8.26 am when the Post-Care Report was filled. The approximate age of the injuries was given as two (2) days old.

35. He further told the Trial Court that the state of PW 2's at the time of her medical examination was not captured. She had soft tissue injuries to the occipital region of the head, lacerations to the right elbow posterior and healing abrasions on the right anterior knee and on the left medial malleolus. She had no injuries on the thorax, abdomen and genitalia. Although her hymen was missing, no blood or discharge was noted. However, a high vaginal swab showed an infection called bacterial vaginosis.

36. The injuries, which PW 1 said had been occasioned by students, were classified as "harm". He pointed out that the last consensual sexual intercourse PW 2 had was on 20th December 2014 and that at the time of the examination, there was no evidence of forceful penetration. He said that the penetration from gang rape would have resulted in tear and laceration of the vagina but that was not to say that there had been no rape.

37. In his unsworn evidence, the Appellant stated that on 21st January 2015, he received a call from PW 2 and they agreed to meet at White

Line (**sic**) Hotel. He was to return her phone which he had picked **(sic)**. They met and ordered for tea. Before he could finish his tea, someone tapped him on his shoulder and called him by name. He was then taken to the police station where PW 2 came and said that she knew him.

38. The Learned Trial Magistrate was satisfied that the Prosecution proved its case beyond reasonable doubt as PW 2's trickery led to the Appellant's arrest at [particulars withheld] Restaurant.

39. This court carefully analysed the evidence that was adduced by the Prosecution witnesses and noted that the same had several gaps that would have been filled by calling of crucial witnesses. Although under Section 143 of the Evidence Act Cap 80 (Laws of Kenya) the Prosecution has the discretion to decide the number of witnesses it will call to prove a particular fact, it is trite law that failure to call crucial witnesses will deal a fatal blow to its case.

40. It was the considered view of this court that the said F, M, J, D, PW 2's parents and the police officer who arrested the Appellant from White Line **(sic)** Hotel were crucial witnesses who would have corroborated PW 2's evidence on what really transpired on the material date.

41. F would have confirmed that indeed he was escorting PW 2 to get a Boda Boda when he was hit by the four (4) attackers who accosted him and PW 2 and that he fled, leaving her to the mercy of the attackers. Further, he would have corroborated her evidence that he sent her Kshs 3,000/= on her phone by Mpesa which the Appellant and his alleged accomplices withdrew after raping her.

42. This corroboration was of paramount importance because although the Mpesa statement showed that a sum of Kshs 3,000/= was deposited in PW 2's phone at 02.16.44 hours, the said amount, was withdrawn on 25th December 2014 at 17:55:56 hours and not on the material night as she had testified.

43. It also appeared that the Prosecution failed to show the nexus between account number 714647265 that was shown on the Mpesa statement and No 0701474302 that PW 2 was allegedly communicating with the Appellant herein. Indeed, this piece of evidence was critical to the Prosecution's case because the Forensics Report dated 10th November 2015 limited itself to mobile number 0701-474302.

44. It would have been important for the Prosecution to have demonstrated that both account No xxxxxx and xxxxxx belonged to PW 2. Tendering in evidence a Report showing that Nokia, IMEI No [particulars withheld] paired with a Safaricom Sim Card ICCID: [particulars withheld] from which text messages were extracted added no value to the Prosecution's case because it did not prove that the phone belonged to PW 2. The Prosecution ought to have gone a step further to provide documentary evidence to show that the number xxxxxxx was PW 2's registered line and that xxxxxx was the Appellant's registered mobile number.

45. M and J would have corroborated PW 2's evidence that they collected her from Tuskys and took her to hospital. This is because PW 2 did not tender in evidence hospital attendance notes for the material night. D would have clarified how the Appellant, who was a total stranger to PW 2, knew that she was PW 2's roommate and how he came to know her telephone number so that he could call her (D) to tell her that he had her (PW 2's) phone. This piece of evidence was critical because PW 2's evidence was that she did not know the identity of her attackers on the material night. PW 2's parents should also have been called as witnesses as PW 2 testified that she travelled to [particulars withheld] and informed them of her ordeal. They could have corroborated her evidence of the events of the said material night.

46. There appeared to have been some relationship between PW 2, Peter and others. In his text of 22nd December 2014, at 10:54:56 am, the said Peter thanked PW 2 for having forgiven him for what he did to her because it was a mistake and he did not know how he did it. In text messages exchanged between them on 25th December 2014 from 6.08.10 pm – 6.24.08 pm, PW 2 sought to enquire if there was anyone among them who was sick to which Peter replied that he did not know about the rest but that on his part, he was not unwell. On her enquiry who had the phone, Peter said that it went with the person who had a panga and he thought he had sold it.

47. Some sexual contact between PW 2, Peter and others could be inferred. What could not be discerned by this court was whether or not the same was consensual. The inclusion of there having been a panga seemed to suggest that the phone may have been taken from PW 2 against her will.

48. Although the Learned Trial Magistrate was satisfied that PW 2 tricked the Appellant to meet him so that he could return her phone, the messages that were exchanged between xxxxxx and xxxxx caused this court great discomfort. Despite, the incident having occurred on 21st December 2014, PW 2 and Peter the person she was communicating with had been in communication day before the incident. Having said so, this entire conservation completely threw the court off guard because it was not clear what really transpired.

49. In PW 2's text to that person on 21st December 2014 at 9.18 pm it read as follows:-

> **"Nitakugonga Peter… will talk n thanx sana for everything… kama venye nilikuambia jana usiniogope"**, the loose English translation being:-
>
> **"I'll hit you Peter… will talk and thanks a lot for everything…like I told you yesterday, don't fear me."**

50. If the robbery and rape occurred on 21st December 2014 at 2.00 am as PW 2 testified, it was not practicable that she would have been communicating with Peter on 21st December 2014 at 9.18.29 pm regarding a conversation they had the previous day on 20th December 2014.

51. Further, if D called PW 2 when she was already at her parents' house at [particulars withheld] to tell her about the person who called to give her phone, as she had testified, then it was difficult to understand how she was already communicating with Peter on the same day of her attack and much earlier than the attack took place. Something was just not adding up.

52. This court was also puzzled as PW 1 stated that no injuries on PW 2's genitalia were observed when she was examined. Although he stated that the fact that there was no evidence of forceful penetration which would have resulted to lacerations and tears did not mean that there was no rape, this court found it strange that the rough manner in which PW 2 was raped would not have demonstrated forceful entry when she was in fact taken to hospital by M and J on the same night, shortly after she was raped.

53. Indeed, the Post Care Report dated 21st December 2014 which was of the same date the alleged incident occurred, clearly stated that there was "**No evidence of sexual penetration seen.**" This was absolutely comfounding. Notably, PW 1 also testified that PW 2's last consensual sexual intercourse was on 20th December 2014.

54. This piece of evidence led this court to question whether it was this encounter that had brought PW 2 and Peter together on 20th December 2014 as per her aforesaid text message of the said date of 20th December 2014. The question that arose in this court's mind was why a rapist would have wanted his victims' picture as shown in the text message of 25th December 2014 at 6.06.35 pm.

55. However, as there are certain actions that may not appear rational, PW 2 may well have been sexually assaulted as she had contended and that she had maintained a friendly rapport with her attackers with a view to having them arrested. However, this court also had to bear in mind that it is the duty of the Prosecution to present a water-tight case to avoid any gaps especially where medical evidence does not corroborate assertions of a victim.

56. Accordingly, having considered the evidence that was adduced by the Prosecution witnesses and the oral and written submissions by the parties, this court come to the firm conclusion that the Prosecution's case had gaps that failed to clearly demonstrate the circumstances of the case herein. This was not a case where this court could rely on the provision of Section 124 of the Evidence Act to find that PW 2's was sufficient to persuade this court to find the Appellant herein to have been liable for the offence of robbery with violence and gang rape. Indeed, there was no evidence of the sum of Kshs 3,000/= having been withdrawn from PW 2's phone on the material night and there was no evidence of sexual penetration at all.

57. It will be a sad day if the Appellant herein will go away scot free because the Prosecution presented a weak case. However, this court is fully aware that it is not the responsibility of an accused person to prove his innocence unless the burden of proof has shifted to him in line with Section 110 of the Evidence Act. At all given times, the burden of proof lies with the Prosecution to prove its assertions.

58. Although the Appellant did not disclose where he picked PW 2's phone and/or explain how they started communicating so that he could meet her at White Line **(sic)** Hotel so that he could give her her phone and/or elucidate the circumstances under which the person with a panga took the phone, the hazy circumstances of this case and the mention of students having been the perpetrators of PW 2's attack, who PW 1 referred to but whom PW 2 failed to mention in her evidence, led this court to find and hold that the Prosecution did not prove its case beyond an iota of doubt as the Learned Trial Magistrate had found.

59. In the circumstances foregoing, Amended Grounds of Appeal Nos (c), (d), (e), (f), (g), (h) and (i) were merited and the same are hereby allowed. As all the other grounds were successful, this court did not find any value in analysing Amended Ground of Appeal No (j) which related to the issue as to whether or not the Learned Trial Magistrate erred in not explaining why he rejected the Appellant defence and thus contravened the provisions of Section 169 of the Criminal Procedure Code Cap 75 (Laws of Kenya).

DISPOSITION

60. For the foregoing reasons, the Appellant's Petition of Appeal that was lodged on 14th October 2016 was merited and the same is hereby allowed.

61. In view of the doubts that were created in the mind of this court by the unexplained gaps and ambiguities in the Prosecution's case, this court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant as it was clearly unsafe to confirm the same. It is hereby directed that the Appellant be hereby released forthwith unless there be any cause or reason that he be lawful held.

62. It is so ordered.

DATED and **DELIVERED** at **KIAMBU** this **27th** day of **June** 2018

J. KAMAU

JUDGE