



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CRIMINAL APPEAL NO 132 OF 2017**

**JAMES MWANGI NJOGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 3794 of 2012 in the Chief Magistrate's Court at Thika delivered by Hon C.A. Otieno- Omondi (PM) on 4<sup>th</sup> May 2017)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, James Mwangi Njogu was jointly charged with Simon Nganga Njoroge (hereinafter referred to as "his Co-Accused person") on five (5) Counts of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya).
2. The particulars of Count 1 were that on the 31<sup>st</sup> day of July 2012 in Muranga county jointly with others not before court while armed with dangerous weapons namely rungas and pangas, they robbed M N K (hereinafter referred to as "PW 1"), of one Kodak camera, two mobile phones, two radio amplifiers, two pangas, four hens, one investor travelling bag and cash Kshs 16,000/= all valued at Kshs 50,000/= and immediately after such robbery used actual violence to the said PW 1.
3. The particulars of Count II were that on the aforesaid date and place jointly with others not before court while armed with dangerous weapons namely rungas and pangas, they robbed P W K (hereinafter referred to as "PW 3"), of mobile phone make Motorola C 125 valued at Kshs 2,000/= and immediately before such robbery used actual violence to the said PW 3.
4. The particulars of Count III were that on the aforesaid date and place jointly with others not before court while armed with dangerous weapons namely rungas and pangas, they robbed Charles Nyoike Waweru (hereinafter referred to as "PW 2"), of one mobile phone, torch, assorted clothes and cash Kshs 500/= all valued at Kshs 5,000/= and immediately before such robbery used actual violence to the said PW 2.
5. The particulars of Count IV were that on the aforesaid date and place jointly with others not before court while armed with dangerous weapons namely rungas and pangas, they robbed Peninah Wanjiru Nyoike (hereinafter referred to as "PW 4"), of one mobile phone nokia 1616, 4 blouses, 3 petticoats, one TV (akra) foodstuffs and cash Kshs 22,000/= all valued at Kshs 45,000/= and immediately before such robbery used actual violence to the said PW 4.
6. The particulars of Count V were that on the aforesaid date and place jointly with others not before court while armed with dangerous weapons namely rungas and pangas, they robbed Benard Isaiah Ondule of his mobile phone Nokia 1200 and cash Kshs 250/= all valued at Kshs 3,250/= and immediately before such robbery used actual violence to the said Benard Isaiah Ondule.
7. In Count VI, the Appellant was also charged with the offence of rape contrary to Section 3(1) (a) (b) (3) of the Sexual Offences Act No 3 of 2006. The particulars of this charge were that aforesaid date and place, he intentionally and unlawfully caused his penis to penetrate the vagina of PW 1.
8. The alternative charge was for indecent act with an adult contrary to Section 11 (6) of the Sexual Offences Act. The particulars of this charge were that on the aforesaid date and place, he intentionally and unlawfully committed an act to PW 1 by touching her genital organ namely vagina with his genital organ namely penis.
9. The Learned Trial Magistrate, Hon C.A. Otieno-Omondi, Principal Magistrate convicted the Appellant on Counts I, II, III, IV and V and sentenced him to death as prescribed by law. On Count VI, he sentenced him to ten (10) years imprisonment. The sentences in Count II, III, IV and V were held in abeyance. Charges against his Co-Accused were withdrawn under Section 87 (a) of the Criminal Procedure Code after he jumped bail.

10. Being dissatisfied with the said judgment, on 30<sup>th</sup> June 2017, 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) Grounds of Appeal. On 21<sup>st</sup> March 2018, he filed Amended Grounds of Appeal and Written Submissions. This time he also relied on five (5) Amended Grounds of Appeal.

11. When the matter came up for hearing on the said 21<sup>st</sup> March 2018, the State orally submitted in court whereupon this court reserved its judgment.

### **LEGAL ANALYSIS**

12. 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”.**

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

**1. Whether or not the Appellant’s right to a fair trial were infringed upon;**

**2. Whether the Prosecution proved its case beyond reasonable doubt.**

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

### **I RIGHT TO A FAIR AND IMPARTIAL TRIAL**

15. Amended Ground of Appeal No (1) was dealt with under this head.

16. The Appellant submitted that his right to fair trial was infringed as he was not supplied with Witness Statements despite the Trial Court having directed that he be issued with the same. He added that he did not also know what charges he pleaded to and that the failure to furnish him with the said Witness Statements did not give him sufficient time to prepare his defence.

17. He referred this court to the case of **Simon Githaka Malombe vs Republic [2015] eKLR** where the Court of Appeal held as follows:

**“... It is the Prosecution that assembles and retains custody of the accused person. The duty of disclosure lies with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a responsibility that the office of the Director of Public Prosecutions can shirk. Whenever an accused person indicates inability to make copies, the duty must lie with the state, which the prosecutor represents, to avail the copies at state expense. It is for the office to make proper budgetary allocation for that item. Then only can the constitutional guarantee in Article 50 (2) (c) and (j) be real...”**

18. On its part, the State submitted that the order that the Appellant be issued with Witness Statements was made on 13<sup>th</sup> November 2013 after he had requested for the same and that he never raised the issue again until 24<sup>th</sup> March 2015 when he asked to be supplied with additional statements. It was its submission that the issue had been raised in the appellate stage, albeit late.

19. The request for Witness Submissions and the orders given by the Trial Court were, as was explained by the State. On 11<sup>th</sup> September 2013 the Appellant indicated that he had not been furnished with Witness Statements. The Trial Court remarked that whenever the Appellant and his Co-Accused saw the witnesses, they were always afraid to proceed with the hearing. Nonetheless, the Trial Court directed that the Appellant and his Co-Accused be supplied with Witness Statements and granted the last adjournment to them. The Trial Court also directed that they be supplied with Witness Statements on 13<sup>th</sup> November 2013 when they informed it that they should be issued with Witness Statements.

20. When the matter came up for hearing on 16<sup>th</sup> December 2013, the matter proceeded for hearing. The Appellant did not indicate that he had not been furnished with Witness Statements. The evidence of PW 1 was taken and he Cross-examined her. The hearing proceeded on subsequent days and he Cross-examined PW 2, PW 3, PW 4 and PW 6. He never mentioned anything about the Witness Statements. On 24<sup>th</sup> March 2015, the Trial Court directed that he be supplied with the Witness Statements of the Investigating Officer and a copy of the P3 Form.

21. As the matter proceeded on 8<sup>th</sup> October 2015 and subsequent dates and he did not complain of not having been given Witness Statements, the only inference that this could draw was that he obtained the Witness Statement and if he did not obtain the same, he was nonetheless availed the opportunity to obtain the same and thus had sufficient time to prepare his defence.

22. He did not inform the Trial Court that he was unable to obtain the Witness Statements due to lack of finances and hence the case of **Simon Githaka Malombe vs Republic** (Supra) that he had relied upon was distinguishable from the facts of his case.

23. It was therefore the considered view of this court that the Appellant’s right to fair trial, in particular his right to be informed in advance

the evidence the Prosecution intended to rely upon and to have adequate time and facilities to prepare his defence as provided in Article 50 (2) (c) and (j) of the Constitution of Kenya, was not infringed upon.

24. In the premises foregoing, this court found the Appellant's Amended Ground of Appeal No (1) not to have been merited and the same is hereby dismissed.

## **II PROOF OF THE PROSECUTION'S CASE**

25. Amended Ground of Appeal Nos (2), (3), (4) and (5) were dealt with under this head because they were related.

26. The Appellant submitted that the Prosecution witnesses did not give the description of their attacker to the police when the First Report was recorded. He added that his identification was not free from error as the incident was said to have occurred at night and that it could not be safely found that he was conclusively identified at the scene of the crime.

27. He relied on the cases of **Mohamed Bin Allui vs Republic [1942]** (sic), **Victor Mwendwa Mulinge vs Republic [2014] eKLR**, **Maitanyi vs Republic [1986] KLR**, **James Tinoga Omwenga vs Republic [2014] eKLR** amongst several other cases where the common thread was that trial court must be satisfied that the circumstances of identification were free from error.

28. He also argued that the Prosecution witnesses ought to have adduced in evidence a receipt to confirm ownership so that he could be linked to the mobile phones. He averred that because he was not identified, the doctrine of recent possession was not applicable in the circumstances of the case herein. He placed reliance on the cases of **Daniel Muthomi M'arimi vs Republic [2013] eKLR**, and **Malingi vs Republic [1989] KLR 225** and others in this regard.

29. His further argument was that there was no evidence that was adduced to show the criteria used in tracking the mobile phone which he said was contrary to Section 65 (8) (a) of the Evidence Act Cap 80 (Laws of Kenya). He was emphatic that the evidence ought to have been adduced as he was not found in actual possession of the phone. He referred this court to the case of **Charles Matu Mburu vs Republic [2014] eKLR** where the Court of Appeal analysed Section 65(8) of the Evidence Act which requires that the Prosecution provide certification and tender evidence to show how the print outs were generated. He therefore urged this court to find the evidence of how the phone was tracked inadmissible.

30. It was also his submission that the medical report was admitted in contravention to Section 50 and Section 72 of the Evidence Act. He was categorical that the Trial Magistrate ought to have satisfied itself that Dr Musono Gachau (hereinafter referred to as "PW 9") was acquainted with the handwriting of the doctor who had completed the P3 Forms. He argued that because the said doctor was not called to testify, there was suspicion that PW 9 and the police doctored the P3 Form. He also stated that suspicion was heightened because the P3 Form was filed a month after the examination.

31. On its part, the State contended that all the ingredients of robbery were established by PW 1, PW 2, PW 3, PW 4 and PW 5. It said that the items that were stolen were enumerated in the Charge sheets. It added that the Prosecution had established that the Appellant was in the company of two (2) other attackers and that PW 1 and PW 3 identified him as one of the attackers and that PW 1 and PW 3 were raped as was shown by the P3 Form.

32. It was its submission that there was sufficient lighting at the time of the attack and that identification of the Appellant was by recognition in an Identification Parade by PW 1. It therefore urged this court to dismiss the Appellant's Appeal.

33. A perusal of the proceedings shows that on the material date and time, PW 1, PW 2, PW 3, PW 4 and PW 5 were sleeping when the three (3) men banged PW 5's door with a stone. The door broke. PW 5 woke up and his hands were tied at the back. The attackers took him to the farm hand's house. The farm hand's name was Bernard Isaiah. When the farmhand opened his door, the attackers also tied his hands at the back.

34. The attackers led PW 5 and the farmhand to PW 1's house and after she was threatened, she opened the door. They demanded a sum of Kshs 100,000/= but she told them that she did not have that kind of money. She gave them Kshs 1,500/=. They also took a sum of Kshs 100/= they found in her dress pocket and her mobile phone.

35. One of the attackers pulled out PW 3 and put her outside the house. After ransacking the house, they led PW 1 and PW 3 away and raped them. They then led PW 1 to PW 2's house where she tricked PW 4 into opening their house. PW 2 and PW 4 were PW 1's elderly father and mother-in-law.

36. They ransacked PW 2's house and took away his mobile, torch, a sum of Kshs 500/=: a TV and other assorted goods. PW 4 opened a drawer and gave them Kshs 16,000/=. They stole her phone, clothes and other assorted goods. Her phone was recovered and was tendered in evidence.

37. Flying Squad Makuyu were alerted to track the phone. They tracked the phone make Nokia which led to the arrest of the Appellant herein. The phone was initially tracked to Ruth Kwamboka who informed the police that she was sold the phone by the Appellant herein.

38. PW 1 and PW 3 were treated at St Mulumba Hospital on 31<sup>st</sup> July 2012 and the P3 Form was filled at Thika Level 5 Hospital on 31<sup>st</sup> August 2012. Examination of PW 1 showed that there were lacerations on her labia majora and labia minora while an examination of PW 2 revealed lacerations and dried blood on her labia majora and labia minora. PW 9 concluded that both PW 1 and PW 3 had been raped and adduced in evidence P3 Forms evidencing the injuries.

39. According to PW 1, there was moonlight on the material night. She said that she was able to identify the Appellant herein from the light of the torches her attackers were using. She identified the Appellant in an Identification Parade by touching him on the shoulder. PW 2 was not able to identify the Appellant at the scene. He, however, identified the Appellant's in the Identification Parade by touching him.

40. According to PW 3, the lights were on when they were ransacking their house. She could not recall seeing the Appellant herein and she did not participate in the identification parade. She was emphatic that it was the Appellant's Co-Accused who raped her. She could not recall having seen the Appellant herein.

41. PW 4 said she was able to see her attackers as lights were on. She did not participate in the Identification Parade. She was emphatic that she saw the Appellant's Co-Accused but was silent on the Appellant herein.

42. PW 5 also attended the Identification Parade and identified the Appellant herein by touching him. However, from the evidence of No 233385 CIP Judith Oyiera, PW 5 was not able to identify the Appellant's Co-Accused. The farm hand was the one who identified the Appellant's Co-Accused during the Identification Parade.

43. Notably the print outs of how the phone was tracked were tendered immaterial when the Appellant was positively identified by PW 1 and PW 5. Calling Ruth Kwamboka to corroborate PW 7's evidence that it was the Appellant who sold her the phone would have been good but again, the identification of the Appellant herein made her evidence superfluous. Failure to adduce a receipt to prove ownership of the phone was also immaterial on account of the said identification.

44. It was evident from the evidence of PW 6 that the Appellant herein was identified by PW 1 and PW 5. From the proceedings, it appeared as though he was the 1<sup>st</sup> Accused. The proceedings show him as the 2<sup>nd</sup> Accused in the lower court. However, the Identification Parade form referred to him by name, James Mwangi Njogu. His identification by the two (2) witnesses satisfied this court that there was no mistake in his identification. Infact the mix up of the reference to the Appellant herein intermittently as the 1<sup>st</sup> or 2<sup>nd</sup> Accused person was well explained in the judgment of the Learned Trial Magistrate.

45. In her judgment, the Learned Trial Magistrate had the following to say regarding the reference of the Appellant herein as the 2<sup>nd</sup> Accused person:-

**“I have considered that the initial consolidated charge sheet indicated the accused person now before court as the 1<sup>st</sup> accused person in the particulars to the 1<sup>st</sup> Count which involved the robbery of PW 1's items while the other 5 Counts of robbery with violence identify the present accused person as the 2<sup>nd</sup> accused person. I have considered whether the mix up in the consolidated charge sheet under which PW 1 testified could have led to her identifying the wrong accused person but note that despite the mix up, the court record seems to suggest that the present accused person James Njogu was the one identified as the 1<sup>st</sup> accused person as the case against the 2<sup>nd</sup> accused person was withdrawn under Section 87 (a) Criminal Procedure Code and that against the accused person proceeded. As it is the accused person who is currently before court, it therefore follows that he is the one referred to as the 1<sup>st</sup> accused person. Honourable Mutuku before whom PW 1 to PW 5 testified in her proceedings of 25<sup>th</sup> February, 2015 identified the accused person herein as the 1<sup>st</sup> accused person. Further I note that the accused person faces the charge of raping PW 1 in which charge he was not charged with his Co-Accused and given the evidence by PW 2 that the person who raped her was part of those who robbed her, I am satisfied that the accused person was properly identified. The proceedings of 8<sup>th</sup> October, 2015 before Honourable Lorot also clearly show that, James Mwangi Njogu, the accused person presently facing charges was indicated as the 1<sup>st</sup> accused person while Simon was identified as the 2<sup>nd</sup> accused person. This was the same position when Honourable Lorot took over the matter on 1<sup>st</sup> July, 2015 when he identified James Mwangi Njogu as the 1<sup>st</sup> accused person and Simon Nganga Njoroge as the 2<sup>nd</sup> accused person”.**

46. Section 296 (2) of the Penal Code provides 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, he shall be sentenced to death.**

47. The Charge against the Appellant could be sustained if one any of the aforesaid ingredients were present. However, in this instant case, all the ingredients constituting the offence of robbery with violence were present showing the aggravated circumstances that obtained herein.

48. The Appellant robbed PW 1, PW 2, PW 3, PW 4 and PW 5 of their property. He was in the company of others and they were armed with rungas and pangas. PW 1 was also raped as was confirmed by PW 9.

49. Accordingly, having considered the evidence that was adduced in the Trial Court and that of the Appellant, despite the Appellant not having been found in actual possession of the subject, this court was satisfied that the Prosecution proved its case against him, beyond reasonable doubt. The Learned Trial Magistrate therefore arrived at a correct conclusion when he convicted him of the offence and sentenced him to death as prescribed by law.

## **DISPOSITION**

50. For the foregoing reasons, the upshot of this court decision was that the Appellants Appeal that was lodged on 30<sup>th</sup> June 2017 was not merited and the same is hereby dismissed. Instead, this court hereby affirms the conviction and the sentence that was meted upon the Appellant herein as they were both lawful and fitting.

51. However, in view of the holding in the recent case of **Francis Muruatetu & Another vs Republic** where the Supreme Court found that the mandatory death sentence was unconstitutional, this court hereby directs that this matter be referred back to the Chief Magistrate's Court at Thika Law Courts for re-sentencing, if need be. This matter shall be placed before the Chief Magistrate of Thika Law Courts on 20<sup>th</sup> August for his or her further orders and/or directions.

52. It is so ordered.

**DATED and DELIVERED at KIAMBU this 14<sup>th</sup> day of August 2018**

**J. KAMAU**

**JUDGE**