**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL APPEAL NO. 2 OF 2014**

**JOSEPHAT MULI MUSYIMI …..…… APPELLANT**

**VERSUS**

**REPUBLIC**

**[*Appeal from original conviction made on the 4th October 2013 and sentence passed on 9th October 2013 in Criminal Case No. 156 of 2012 Mavoko Principal Magistrate's Court (Hon. T. A. Odera, PM)*]**

**JUDGMENT**

## INTRODUCTION

1. This is an appeal from the original conviction made on 4th October 2013 and sentence of imprisonment for life subsequently passed on the appellant on the 9th October 2013 for the offence of robbery with violence contrary to section 296 (2) of the Penal Code by the Principal Magistrate's Court at Mavoko (Hon. T. A. Odera) in Criminal Case No. 156 of 2012.

2. The appellant was charged with one count of robbery with violence contrary to section 296 (2) of the Penal Code and one count of rape contrary to section 3 (1) (a) (b) (c) [and] (3) of the Sexual Offences Act, with an alternative charge of indecent act with an adult contrary to section 11A of the Sexual Offence Act.

3. The particulars of the charges were given on the charge sheet respectively as follows:

> Particulars of Offence on Count I are that the appellant –
>
> *"On 9th day of March 2012 at Mlolongo township within Athi-River District within Machakos County, jointly with others not before the court, while armed with a dangerous weapon namely kitchen knife, robbed E K N Ksh.127,121/=, Safaricom Scratchcards worth Ksh.5,600/=all totaling to Ksh.132,721/= and immediately after the time of such robbery injured the said E K N."*
>
> Particulars of Offence on Count II are that the appellant –

> *"On the 9th day of March 2012 at Mlolongo township within Athi-River district within Machakos County, intentionally and unlawfully inserted your male genital organ namely penis into the female genital organ namely vagina of E K N without her consent."*
>
> Particulars of Offence on the Alternative Count are that the appellant –
>
> *"On the 9th day of March at Mlolongo township within Athhi-River district within Machakos County, intentionally and unlawfully committed an indecent t act by making your male genital organ namely penis to into contact with the female genital organ namely vagina of E K N."*

4. The appellant denied the charges and the case went to full trial wherein the prosecution called 4 witnesses – the complainant, the complainant's employer, the Investigating Officer and the Police surgeon who examined the complainant and completed the Police form P3 on the complainant's injuries - to prove the charges and the appellant, when placed on his defence, gave an unsworn statement and called no witness.

5. Briefly, the prosecution's case was that the complainant PW1 a female employee at an MPESA mobile money transfer agency shop at Mlolongo had on the 9th March 2012, while going home from work at about 7.30pm been abducted by three attackers in a Nissan vehicle, and robbed of her handbag which contained money from the MPESA Agency and the business' Nokia mobile phone and her own Techno mobile phone. In the course of the robbery, the attackers had stabbed the complainant twice on her left arm and left thigh, and subsequently one of them had raped her while another held her down by the shoulders. During the robbery, the attackers had forced complainant to transfer the money float in the MPESA business mobile phone to an MPESA account under a mobile phone number which was upon investigations revealed to be registered in the name of the appellant and his national Identity Card. The appellant was consequently arrested and charged with the offences of robbery with violence and rape.

6. The Appellant's case in defence, as set out in his unsworn statement, was that he was a stranger to the charges for which he was arrested on the 9th June 2012 arrested by 4 policemen accompanied by his neighbor Julius Kiilu Mwangangi who asked him for his identity card - which he told them he had lost - and who accused him of stealing and rape in Mlolongo area:-

> *"I am a stranger to the charges herein and I pleaded not guilty and I maintain the same. 0708204136 was used in the theft with my identity card. I could [not] have committed the offence with my identity card. I lost my identity card but my mistake was not to get a police abstract. I do not know the person who used my identity card in the offence herein."*

7. After considering the evidence before it the trial court found that the charge of robbery with violence had been proved and a nexus between the appellant and the offence established and sentenced the appellant to serve imprisonment for life, the court taking the view that "*the law is now settled in Kenya that death sentence is no longer mandatory"* no doubt relying on the Court of Appeal decision in ***Godfrey Ngotho Mutiso v. R*** *[2010] eKLR.*

**THE APPEAL**

8. The appellant filed grounds of appeal challenging the judgment of the trial court as follows:

1. *That the learned trial magistrate made an error in both law and fact and misdirected himself by holding that I the appellant did not give a reasonable explanation as to how my identity card was used in the robbery whereas I had stated that the same got lost though no official report was made to police.*
2. *That the entire case for the prosecution was ot proved beyond reasonable doubt as required in law.*
3. *That my defence statement was not properly considered and the magistrate did not adhere to the*

*provisions of section 169 (1) of the Criminal Procedure Code.*

9. The appellant filed written submissions in support of his grounds of appeal while the Counsel for the Director of Public Prosecutions, Mr. Shijenje, made oral argument in support of the judgment of the trial court urging that the prosecution had proved the offence of robbery with violence and the appellant's involvement in it by the fact of deposit on monies into his MPESA mobile money account shortly before and during the robbery, and that the appellant's merely stating when put on his defence that his Identity Card had got lost without any particulars as to when he reported the loss or obtained any police abstract on the loss confirmed that he was a participant in the robbery. Counsel submitted that the judgment of the trial court had complied with section 169 of the Criminal Procedure Code as it had set out what the prosecution and defence said.

10. The appellant then responded, claiming that he had been framed by PW2 and objected that there were two Police Occurrence Book (OB) records relating to same case, namely OB 58/9/3/12 appearing on the charge sheet and OB 22/9/6/12 under which he was booked in upon arrest and that the arresting officer was not called to testify. Judgment was reserved.

**ISSUES FOR DETERMINATION.**

11. From the charges, the evidence adduced and submissions thereon by the parties, the issues for determination by the court are whether the offences charged of robbery with violence contrary to section 296(2) of the Penal Code, rape contrary to section 3 (1) (a) (b) (c) and (3) of the sexual Offence Act or the alternative charge of indecent act contrary to section 11A of the sexual offences act were proved and whether the appellant was one of the perpetrators.

**DETERMINATION**

12. At the outset, this court notes that the trial court, in setting out the points for determination, the determination and the reasons therefor, did comply with the requirements of the first part of section 169 of the Criminal Procedure Code on the contents of a judgment, which provides as follows:

> *"**169.** (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and **shall contain the point or points for determination, the decision thereon and the reasons for the decision,** and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.*
>
> *(2) In the case of **a conviction**, the judgment shall specify **the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.***
>
> *(3) In the case of **an acquittal**, the judgment shall state **the offence of which the accused person is acquitted**, and shall direct that he be set at liberty."*

13. In convicting the appellant under Count I and acquitting him under Count II, the trial court did not state the respective offences and sections of law under which he had convicted the appellant. It was clear from the recital at the beginning of the judgment that the said counts were robbery with violence contrary to section 296(2) of the Penal Code and rape contrary to section 3 of the Sexual Offences Act.

14. The appellant did not, however, suffer any prejudice by the omission by the trial court to specifically state the offences and section of law. Accordingly, the default is cured by section 382 of the Criminal Procedure Code, which provides as follows:

> *"**382.** 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."*

15. There is also no merit in the objection as to double Occurrence Book records, the previous one indicating when the matter was reported to the police and the subsequent one being a record of the arrest of the appellant, both records relating to the same matter. Furthermore, there is no requirement that the arresting officer be called as a witness, if the prosecution's case may be proved be testimony of other witnesses.

***Analysis of evidence***

16. As the first appellate court, it is the duty of this court, in accordance with the well-known case-law authority of ***Okeno v. Republic*** (1972) E.A. 32, to review the evidence and make its own conclusion in determining whether the conclusion of the trial court may be upheld regard being had of the fact that this court, unlike the trial court, did not see or hear the witnesses adduce their evidence.

17. The four prosecution witnesses testified in court as follows:

**PW1**

E S N, an employee at [Particulars Withheld] Ltd, an MPESA shop at Mlolongo owned by Julius Mwangangi Kiilu (PW2) testified that she was on the 9/3/12 at about 7.30pm walking home from work along Mgwata road. She carried monies from the business in the sum of Ksh.119,880/-, ksh.3,200 for card replacement and Safaricom scratch cards worth 5,600/- and ksh.4041 church funds together with the business Mobile phone Nokia 1100 with a float of Ksh.5000/-, which she carried in her handbag and her own mobile phone a Techno which she was holding in her hands. Near Bidii Stores she abducted by two men who came from a white Nissan vehicle which came up and braked behind her. Her abductors put her in the vehicle, whose registration number she did not note, and told her to sit between them with her head between her legs. She was familiar with the area and could tell where the vehicle was heading. The vehicle was driven by a third person towards Kitengela, taking the Bamburi Diversion rather than the main road to Kitengela.

The attackers took her Techno mobile phone and handbag which had the money and on reaching a bus [stop] next to Mlolongo primary School they raised her head and demanded that she transferred the money in the business Nokia phone to a Mobile Phone MPESA account number. When she resisted, one of her attackers stabbed her with a knife on her upper left arm. When satisfied that she had no more money, the attackers turned toward Mlolongo stopping opposite the township and pulled her out of the vehicle and pushed her to a trench and ordered to remove her clothes.

When she refused to comply with the attackers' order to remove her clothes, one of them kicked her and in the ensuing struggle she bit him on the chest whereupon he pushed her hard and she fell with her skirt raised and the attacker cut her on her left leg with a sharp object and then cut her bikers and panty, and then raped her while she was held down by the other attacker by the shoulders. The attacker who was holding her shoulders then received a call and said they had to go, and they then took the vehicle and the driver of the vehicle, who had

remained in the vehicle, drove away.

She was assisted by good Samaritans to get to Airport clinic at Mlolongo where she got first aid dressing of her wounds and referred to Nairobi Women's Hospital where he wounds were stitched and she was put on treatment. Later she had a police medical examination form P3 filled by police surgeon.

She was subsequently informed that a suspect Josphat Musyimi had been arrested because investigations showed him to be the registered owner of a mobile phone MPESA money transfer account no. 0708204136 to which a deposit of Ksh.100/- was made at 6.02pm on the material date using the appellant's national identity card no. 26283220 and to which mobile money account the attackers had later in the evening at 7.46pm during the robbery forced the complainant PW1 to transfer the Ksh.5100 held in the MPESA agency's phone account.

On cross-examination, PW1 confirmed that she could not identify her attackers, that she had not marked the registration number of the attackers' vehicle and that she had not identified the appellant in any identification parade.

**PW2**

Julius Mwangangi Kiilu, a pastor and businessman at Mlolongo in transport and MPESA business by name Saico Express Takaba testified that on 9/3/2012 at about 8.30pm he received a call from a good Samaritan who informed him that he had picked E who was his employee at the MPESA shop who they were taking to Airport Clinic. He reported the incident to the Mlolongo Police Station and then went to the Airport Clinic and found E in bandages on the leg and hand. He said that PW1 was later taken to Nairobi Women's Hospital for treatment. He helped the police with investigations by obtaining a Safaricom printout of transactions at the MPESA agency. The Safaricom printout, PW2 said

> *"shows that on 9.3.12 JOSEPHAT MUSYIMI deposited Ksh.100/- at 6/02pm and later at 7.46pm PW1 transferred Ksh.5,100/= to the same number upon abduction….The transaction book (PMF 13) shows that Josephat was account no. 58 on 9.3.12 and he deposited Ksh.100/- only. The identity card no. of Musyimi is 26283220. Police looked for Musyimi by going to the registration bureau and got the print out of his Identity Card. I was called and I saw the print out dated 28.3.12 (PMF19). The same shows the owner is JOSEPH MULI MUSYIMI, his home details, ID No. 26283220 details of his parents. On seeing PMF19 I realized that the man was from my village and the father was my farm help. In the eighties, the father was my classmate. I told the officers I knew the same."*

PW2 later led the police to arrest the appellant in the village with the assistance of the area chief and the appellant's father pointing out his house. PW2 testified that he had lost money in cash, scratch cards and card replacement and the business mobile phone with its line and MPESA float.

**PW3**

Police Corporal Allan Adolo, the investigation Officer testified that he investigated the case

and his investigations with the help of witness statements and MPESA statement and MPESA record book for the PW2's Saico Express MPESA had revealed that-

> *"The said number [0708204136] was for JOSEPHAT MUSYIMI which was used to deposit Ksh.100/- on the same day at 6.02pm. As per PMF13 and PMF14. I sought know the said Josephat and I proceeded to National Registration Bureau to get the print out of the said identity card number. I found that vide PMF11 that JOSEPHAT MULI MUSYIMI [was] from Makueni district, Tuliaminni Division, Mbooni Constituency, Nyandua sublocation and Mbooni village. Tribe Kamba, Mkanga Clan, Family Muli. David Muli is the father and Mary Mula Musyimi is the mother. The print out of the report was done on 28.3.1. I called Julius upon PW2 upon getting the printout and asked him if he knew the village. He told me he knew the village and the family of Josephat. I did a letter to the area chief and gave kit to Julius to deliver it to the chief."*

PW3 said that upon interrogation, the appellant had said he lost his Identity Card in April 2012 while the robbery incident happened on 9th March 2012.

**PW4**

Dr. Zephania Kamau, police surgeon testified that he had on 4/4/12 examined the complainant PW1 on a complaint of rape and confirmed that she had a stitched scar wound on the outer part of her left hand and the outer part of the left thigh which were about 26 days after infliction of the injuries and that she had been treated at Airport Medical Clinic and Nairobi Women's Hospital. No injuries were noted to the external genitalia and vulva, and the witness had gathered that the complainant had given birth once.

18. When put on his defence the appellant confirmed his arrest on 9/6/12 by four police officers in the company of JULIUS KIILU MWANGANGI (PW2) "who is my neighbour" but denied the charges and in an unsworn statement, the primary content of which is set out above, said that he had lost his Identity Card suggesting that somebody else must have used his Identity Card to register and operate an MPESA money transfer mobile phone account to which the some of the proceeds of the robbery were transferred.

19. The prosecution has through its witnesses PW1, PW2, PW3 and PW4 proved that the complainant PW1, as special owner thereof, was robbed of money, Safaricom scratch cards, business mobile phone and MPESA monies therein held together with her own mobile phone, by at least two people who accosted her while on her way home on the evening of 9th March 2012 and abducted her and in the course of the robbery stabbed her twice with a knife and one of them raped her with the assistance of another. The ingredients of the offence of robbery with violence under section 296 (2) of the Penal Code - with regard to theft, the number of attackers, dangerous weapon used and the wounding of a person in the course of the robbery - were therefore , in all respects, proved. The court could not help being impressed by the coherence of the details with which she related her ordeal with the attackers, and in terms of section 124 of the Evidence Act felt no doubt that she was telling the truth. In addition her version of events was fully corroborated by the evidence of PW2, PW3 and PW4.

20. As regards the appellant's involvement in the offence, the prosecution established by production Safaricom records that the MPESA account at mobile phone number to which the complainant was forced to transfer the business monies float in the business mobile phone was registered with the national Identity Card belonging to the appellant. In addition, a transaction for the deposit of Ksh100/- was made shortly before the robbery incident to the same mobile phone MPESA account. Further, PW2 testified that the appellant was a neighbour at his home village in Makueni County and that the appellant was the son of the witness' employee at the rural home.

21. Although the complainant PW1 could not identify any of her attackers or the person who deposited the Ksh.100/- to the mobile phone MPESA account to which the attackers later in the robbery forced her to transfer the monies float in the business mobile phone, the circumstantial evidence raised reasonable inference that the owner of the MPESA account and Identity Card under which it was registered

participated in the robbery as the beneficiary of the transfer of the money, and that the deposit of the paltry Ksh.100/- was a ruse to allow a reconnaissance mission before the planned attack.

22. Is the appellant the owner and holder of the mobile phone MPESA Account to which the robbery monies were deposited? The appellant's defence – an alibi really – that it was not him and that he had lost his identity card and that he did not know Mlolongo where the offence took place – was given in an unsworn statement upon being put on his defence. As held in ***May v. Republic***, C.A. Cr Appeal No. 24 of 1979 (1981) KLR 129:

> "*An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case.*"

23. Considered in relation to whole evidence does the unsworn alibi statement raise a reasonable as to the involvement of the appellant in the robbery? We appreciate the position of the law that an accused person who raises an alibi defence does not assume the burden to prove it and that the prosecution must prove its case to the usual standard. However, as held by the Court of Appeal in ***Kossam Ukiru v. R.*** (2014) eKLR the defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and where, when weighed against all the other evidence, it is established that the appellant's guilt has been established:

> *"We are fully alive to the principle that an accused person who sets up an alibi does not assume any burden to prove the same (see **Karanja vs Republic** [1983] KLR 501). In this case, however, the two courts below rejected the appellant's alibi defence on the basis first, that it had not been raised at the earliest opportunity in the proceedings and second, that weighing the defence with all the other evidence adduced, the appellant's guilt was established beyond all reasonable doubt. The appellant's complaint that his defence was not considered is therefore without merit and we reject it."*

24. The reasonable doubt to be raised in a criminal trial must one that is reasonably probable not one that is whimsical and fanciful. While it is tenable in the realm of possibilities, the probability that the appellant's national Identity Card is lost and found by a person who uses it to acquire a mobile phone line and register an MPESA mobile money transfer account in the appellant's name and subsequently uses it to receive money robbed from an employee of an MPESA agency at Mlolongo township, Machakos County owned by the employer of the appellant's father and village neighbor back home at Makueni County is too remote. It is a fanciful possibility which does not, in our view, raise a reasonable doubt to the appellant's guilt established by the evidence presented by the prosecution.

25. There is no evidentiary basis for holding, as urged by the appellant, that he had been framed by the owner of the MPESA agency PW2. All that appears to have happened is that the appellant, being aware of the MPESA money transfer business of the PW2 through their neighbourly connection and his father's employment by PW2, planned to rob PW2's MPESA shop at Mlolongo and on the material date went to the shop ahead of the robbery, as submitted by counsel for the DPP, to spy on the PW2's worker PW1 and pretended to genuinely deposit a small sum of Ksh.100/- into his mobile phone account, and during the subsequent robbery, after taking the cash money from PW1, the appellant, driven by greed, demanded that the PW1 transfer whatever money was held in the MPESA business's mobile phone to his own mobile phone account.

26. Accordingly, we find that the prosecution has proved its case against the appellant on the charge of robbery with violence contrary to section 296 (2) of the Penal Code.

27. There was no evidence to specifically connect the appellant to the rape of the complainant, which though it be proved by the evidence of the complainant in terms of the Proviso to section 124 of the Evidence Act, could have been occasioned by any of the three abductors who she did not identify. The

alternative charge of indecent act was similarly not proved against the appellant.

***Judgment of the trial court***

28. In its judgment the trial court ruled that –

> *"I have weighed the evidence of the prosecution and that of the defence and I find that the explanation given by accused that his identity got lost on a date he did not specify, is not a reasonable explanation as to how his identity card was used in the robbery. I proceed to dismiss the defence of accused as a mere denial. There is overwhelming evidence that must have been among the people who were involved in robbing PW1 on the material day from the sequence of events herein. Prosecution has not proved count 2 against accused. I find him not guilty in count 2. And I proceed to acquit him of the same under section 215 of the CPC. Count 1 of robbery with violence has however been proved against accused. I find him guilty as charged in count 1 and I proceed to convict him of the same under section 215 CPC."*

29. We agree with the conclusion by the trial court save to observe that the trial court should have specifically have stated in accordance with section 169 of the Criminal Procedure Code section 296 (2) of the Penal Code and section 3 (1) (a) (b) (c) [and] (3) of the Sexual Offence Act as the provisions of penal law under which the appellant had been, respectively, convicted and acquitted in counts I and II. Section 215 of the Criminal Procedure Code, is not '*the section of the Penal Code or other law under which, the accused person is convicted*' contemplated by section 169 (2) of the Criminal Procedure Code; section 215 of the CPC merely the decision making provision that empowers the court "having heard both the complainant and the accused person and their witnesses and evidence [to] either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him."

30. The trial court's sentence of imprisonment for life for the offence of robbery with violence contrary to section 296 (2) of the Penal Code was based on the court's appreciation of the law as it stood on the 9th October 2013 when the sentence was passed. On 18th October 2013, however, barely a week after the trial court's decision in this case, a five-judge bench of the Court of Appeal (Mwera, Warsame, Kiage, Gatembu-Kairu and Mohamed, JJA.) in ***Joseph Njuguna Mwaura & 2 Others v. Republic*** [2013] eKLR held that the death sentence is a mandatory sentence in capital offences and emphatically declared:

> *"We hold that the decision in **Godfrey Mutiso v R** [supra] to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences. Our reading of the law shows that the offences of murder contrary to section 203 as read with 204 of the Penal Code, treason contrary to section 40 of the Penal Code, administering of oaths to commit a capital offence contrary to section 60 of the Penal Code, robbery with violence contrary to section 296 (2) of the Penal Code and attempted robbery with violence contrary to section 297 (2) of the Penal Code carry the mandatory sentence of death."*

31. However, as the appellant was not warned at the hearing of his appeal that confirmation of his conviction for the offence of robbery with violence contrary to section 296(2) of the Penal Code may lead to the sentence of imprisonment for life being enhanced to death sentence, we do not propose to exercise the power of the court to enhance sentence under section 354 (3) (a) (ii) of the Criminal Procedure Code**.**

**ORDERS**

32. Accordingly, for the reasons set out above, we find that the appellant's appeal herein has no merit and we dismiss it.

**DATED AND DELIVERED THIS 18TH DAY OF JANUARY 2016.**

**P. NYAMWEYA**

**JUDGE**

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

**……. for the Appellant**

**…… for the Respondent**

**……., Court Assistant.**