



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**HCCRA. NO. 20 OF 2015**

**PATRICK MAINA WANJIRU .....APPELLANT**

**-VERSUS—**

**REPUBLIC ..... RESPONDENT**

(Being an appeal from the original conviction and sentence by **Hon. J N Nyaga** - Senior Principal Magistrate dated 15th September 2011 in Nanyuki Chief Magistrate's **Court Criminal Case No. 74 of 2011**)

**JUDGMENT**

1. Appellant **PATRICK MAINA WANJIRU** was charged before the Chief Magistrate court Nanyuki with two counts. On the first count appellant was charged with the offence of robbery **Contrary to Section 296 (1) of the Penal Code**. On the second count he was charged with the offence of rape contrary to **Section 3 (1) (a) (b) (3) of the Sexual Offences Act Cap 62A**.
2. After trial he was convicted on both counts and sentenced to serve imprisonment of five years on the first count and 10 years on the second count.
3. The prosecution's case was that **JWW**, an adult, was on her way home from her job on 2<sup>nd</sup> January 2010 when she was held by the throat by the appellant, taken to a bush then raped and robbed of her mobile phone two phone batteries and Ksh. 100/=.
4. This is the first appellant count. The duty of this court as the first appellant court has been reiterated severally. In the case **GABRIEL KAMAU NJOROGE – V- R (1982-88)** the court of appeal stated what that duty is, thus:

*“As this court has constantly explained, it is the duty of the first appellant court to remember that the parties to the court are entitled, as well on the question of fact as on question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (SEE **PANDYA V.R.[1957] EA 336.**”*

5. I shall bear in mind the above duty as I proceed to consider appellant's appeal.
6. Appellant's grounds of appeal present the following issues for determination by this court;

- a. Did the prosecution's evidence on identification of appellant meet the standard of proof in a criminal case?
- b. Were the two counts proved against appellant to the required standard?
- c. Did the trial court err in rejecting appellant's defence?

## 7. FIRST ISSUE ON IDENTIFICATION OF APPELLANT

8. J W W worked as a hairdresser at Naromoru town. She left her place of work at 5 pm on 2<sup>nd</sup> January, 2011 (though recorded as 2010) and began to walk home. As she left the main road and came to the path that led to her home she noticed someone was behind her. She saw that the person was running towards her. When the person reached her he asked where she was going. She told him that she was going home. At that point the person held her by the throat. Although she screamed the person threatened to kill her if she screamed again. The person dropped her on the ground while still pressing her throat he pulled her to the bush. As he did so he carried her bag that he had taken from her. He continued to threaten to kill her if she screamed. He demanded that she lie down but she resisted. He proceeded to remove her long trousers, a pair bikers and under pant. He then raped her. He raped her for about 5 minutes and then told her to get dressed. He then took her mobile phone, phone batteries and Ksh. 100/= from her bag. The whole incident, according to her evidence took 10 minutes.
9. Appellant submitted that the trial court erred to have convicted him on J W W's evidence of identification when she was a single identifying witness and she had failed to give his description when she first made her complaint to the police.
10. Mr. Tanui Principal Prosecution Counsel, who opposed the appeal, submitted that J W W had ample time to see the appellant and hence identify him. Learned Counsel repeated the evidence given by J W W of how she was confronted by appellant who dragged her to the bush and thereafter raped and robbed her.
11. The trial court was very alive to the fact that appellant was identified by a single identifying witness. The trial court in its judgment stated thus;

*"The complainant (JWW) is the only witness to identify the accused (appellant) as the person who raped her. The court is aware that it is dangerous to rely on the identification of a single witness to convict an accused person however in this case the circumstances were favourable for positive identification as it was during the day. There is no possibility of mistaken identity. The accused was a person that the complainant used to see at Naromoru township."*

12. In the case **MAITANYI – V- REPUBLIC [1986] KLR** THE COURT stated:

*"Subject to well-known exceptions it is trite Law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."*

13. In this case as correctly stated by the trial court in its judgment, the offences occurred at 5p.m. It was in the day time. J W W in describing that fateful day said;

*"It was sunny at that time (the time of the offence)."*

14. Further J W W in her testimony both in examination in chief and in cross-examination

consistently stated that she had known appellant prior to the incident. That she used to see him at Naromoru town. She therefore recognized him as that person she used to see rather than identified him. It was not a case of identification it was a case for recognition. To clearly set that out from J W W 's evidence I will reproduce part, thus:

*“I (JWW) used to see the accused (appellant) at Naromoru town before. I knew him (appellant) by physical appearance as a person I used to see in town. I stayed with the accused for about 10 minutes when he raped me.*

*... I identified you (appellant) by face... I could not have mistaken your face as I had seen you clearly when you raped me.*

*... The accused is the one who robbed me and raped me.”*

15.JWW after the incident ran to her sister's house crying and carrying one shoe in the hand while the other one was still on her foot. She informed her sister what had happened. When her sister P W 2 gave evidence before court she stated:

*“She (JWW) told me that she had been raped by a person that she could identify by physical appearance like a person I have seen at Naromoru Township.”*

16.The husband of J WW'S wife, in other words JWW's brother in law, was P W 4. He was instrument in having appellant arrested. He too confirmed, in his evidence that JWW said she could identify the person who raped her.

17.Appellant in his unsworn defence gave evidence of what he said he was doing on the day he was arrested, that is 12<sup>th</sup> January, 2011. He did not deny, what JWW had consistently stated to those that she reported that she had been raped and that she knew the appellant, physically, because she used to see him in Naromoru town. It therefore follows that appellant accepted that aspect of J W W'S evidence, that she knew him prior to the incident.

18.Since J WW knew the appellant, physically, before the incident the holding of the case **R – V TURN BULL [1976] 3 ALLER** is pertinent. It was held in that case

*“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”*

19.There is no basis laid by the appellant why this court should interfere with the trial court's finding that JWW identified the appellant because she knew him previously. The trial court stated in the judgment that there was no reason to doubt JWW's evidence. The magistrate in that judgment stated:

*“The attacker removed the cap... she saw him clearly when he talked to her before he attacked her and when he was removing goods from her bag.”*

20.J WW had ample time to observe appellant. There was no evidence of mistaken identity of the appellant.

21.The issue (b) is based on appellants submissions that the two counts were not proved on the required standard.

22.On the first count appellant was charged with robbery Contrary to Section 296 (1) of the Penal Code.

23.JWW testified how after raping her appellant robbed her of her mobile phone, phone batteries and

Kshs. 100/.

24. I have closely examined the appellant's cross-examination of J WW and I have not found that the appellant cross-examined JWW on that testimony of robbery. That evidence of J W W remained unchallenged, in that respect.

25. The appellant in his defence simply stated;

*"I did not commit such offence (in relation to the second count of rape)."*

26. Even in his defence he did not deny that offence of robbery.

27. The trial court that had the opportunity to see and hear and observe JWW testify, believed her testimony. No ground is laid by the appellant why this court should interfere with the finding of the trial court on count one.

28. On count two, it is important to examine what Section 3 of Cap 62A provides. It provides:

*"A person commits the offence termed rape if –*

- a. *he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;*
- b. *the other person does not consent to the penetration; or the consent is obtained by force or by means of threat or intimidation of any kind."*

29. JWW in her evidence stated that when the appellant told her to lie down she resisted. Previously he had threatened to kill her held her by her neck and it does seem that she relented, and did not resist much, because even when the appellant removed her inner clothed before raping her, those clothes were not torn. JWW repeatedly stated that it was the appellant who raped her which means the sexual act was not consensual at all. P W 6 PC Julius ole Pagalach stated that JWW produced the clothes she was wearing when she was raped at the police station. According to the police officer and contrary to what JWW said, the blouse was torn and the trousers and sweater were dirty with mud, again this is an indication of non consensual act.

30. P W 5 Ndegwa Wachiuri the clinical officer produced the P3 form which was filed after JWW was examined two hours after the rape. The P3 form indicated that JWW was found to have *"obvious discharge, lab results spermatozoa seen."* P W 5 further stated that JWW had bruises on the right side of the neck.

31. In my finding the offence of rape was proved by the prosecution. And the prosecution proved that the appellant committed the rape. Even though appellant denied committing the offence in his unsworn defence his actions, when JWW saw him again, after the incident, speaks of one who had a guilty conscience or was fearful of being recognized.

32. J WW in evidence stated that on 11<sup>th</sup> January, 2011, again at 5.00p.m. as she was on her way home, she saw the appellant who was dressed in the same manner as he was dressed when he attacked her. She further stated that when the appellant noted that she had noticed him, he ran away. However on 12<sup>th</sup> January, 2011 when JWW was in the company of her brother in law near Naromoru market JWW saw the appellant and on alerting her brother in law, the brother in law gave chase to the appellant who had started running. Appellant was eventually found at a video shop which he ran into.

33. Appellant in his unsworn evidence stated that on the day he was arrested he had sold scrap metal to someone and that someone had paid him. It was while that transaction was going on and after he was taken to the police station that *"a woman appeared."* and said that the person who raped her was wearing clothes similar to the ones appellant was wearing. He attributed his arrest to the

theft by those who chased him, of his money that he gotten paid when he sold the scrap metal.

34. In my view that defence, which was raised for the first time when the appellant gave his unsworn defence, is for rejection it is in my view an afterthought.

**35. ISSUE (C) DID TRIAL COURT ERR IN REJECTING APPELLANTS DEFENCE?**

36. Even though the burden of proof of guilty solely lies with the prosecution I do find that if indeed appellant was in the middle of a transaction when J W W's brother in law and the crowd that gave him chase, then he could have called the person he was transacting with. He had the burden to prove what he alleged. That is what Section III of the Evidence Act Cap 80 provides. It was only the appellant who could have proved that he, on the day of his arrest, sold scrap metal and after being paid for that scrap metal, people stole his money and then covered up the theft of that money by alleging appellant had raped JWW. Appellant did not prove that fact, it follows that the trial court did not err in rejecting appellant's defence.

**37. OTHER ISSUE**

The appellant submitted that there was failure on the part of the prosecution in failing to call members of the public who assisted in his arrest.

38. It was held in the cause **BUKENYA – VRS- UGANDA [1971] EA** that:

*“ The prosecution is duty bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent with its case.”*

39. The above holding is qualified by what was stated in the case **MWAN – V- REPUBLIC [1984] KLR** thus:

*“Whether a witness should be called by the prosecutor is a matter within the discretion of the prosecutor and the court will not interfere with that discretion unless it may be shown that the prosecutor was influence by some oblique motive.”*

40. One needs to consider what value there would have been to call the whole crowd that arrested the appellant. In my view, none. After all, prosecution did call JWW's brother in law who gave immediate chase of the appellant, when the appellant began to run away. It sufficed that he the brother in law, was called and he confirmed that the appellant was chased and arrested after JWW recognized him as the person who raped and robbed her.

**41. SENTENCE**

42. The trial court on convicting appellant on both counts proceeded to pronounce sentence of imprisonment of count one to five years and on count two to 10 years. The Learned trial Magistrate failed to order whether those sentences were to run concurrently or consecutively. Having failed to so order I do find that I can then interfere with that sentence. In doing so I am guided and persuaded by the case **GEORGE MWANGI CHEGE & 2 OTHERS – V- REPUBLIC [2004] EKLK**. In that case Justice J M Khamoni (as he then was, now retired) partly quoting Halbury's Laws of England stated:

**“Concurrent sentences are frequently passed so that if an appeal is successful on one or more counts of an indictment, but not all, the appropriate sentence appears on the counts which are upheld. It is also necessary to pass concurrent sentences on counts for offences the maximum sentence for which is less than the sentence deemed appropriate for a more serious offence charged on another count.**

*That is the “rule” OR “practice”, and I would like to refer to it as the “rule” because in this*

country it emanates from Section 14 and Section 333 (2) of the Criminal Procedure Code, applies both to felonies and misdemeanors, so that where the prisoner is convicted of several offences on different counts of the same indictment or on different indictment, the court as a general rule has power to direct that the sentence shall run consecutively or concurrently. It is good law for a sentence of imprisonment to be ordered to commence from and after the termination of an imprisonment to which the prisoner had been before sentenced for another offence. It is also good law to order those sentences or their respective parts to run concurrently.”

43. In my view the trial court ought to have ordered the sentences to both counts to run concurrently because there was no basis laid by prosecution why they should have been ordered to run consecutively.

44. In the end I find no merit in the appellant’s appeal on conviction and the appeal against conviction is dismissed on sentences, **I order that the appellant’s sentence on count one, of imprisonment of five years, and on count two of imprisonment of ten years shall run concurrently.**

45. It is so ordered.

*Dated and Delivered at Nanyuki this 25<sup>th</sup> February, 2016*

**MARY KASANGO**

**JUDGE**

**Coram**

**Before Justice Mary Kasango**

**Court Assistant – Kiruja**

**For state .....**

**For Appellant .....**

**Appellant .....**

**COURT**

**Judgment delivered in open court**

**MARY KASANGO**

**JUDGE**