REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NOs 13 OF 2014 AS CONSOLIDATED WITH

CRIMINAL APPEAL NO 230 OF 2013

KEITH NDONYE REUBEN ……..…….....1ST APPELLANT

BRAMUEL MUTITHI MUKOSI……...……2ND APPELLANT

VERSUS

REPUBLIC……..…….....……RESPONDENT

(An appeal against the original conviction and sentence of M.K. Mwangi Ag. SPM in Criminal Case No. 1320 of 2011 delivered on 18th September 2013 in the Chief Magistrate's Court at Machakos)

JUDGMENT

The 1st and 2nd Appellants were jointly charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code as the first Count. The particulars of the offence are that on the 10th day of May 2012 in Machakos District within Eastern Province jointly with others robbed LW of Kshs. 3,600/= and two mobile phones make Nokia 2600 and 1100 all valued at Kshs. 13,000/= and at or immediately before or immediately after the time of such robbery beat the said LW.

The Appellants were also charged with a second count of gang rape contrary section 10 of the Sexual Offences Act. The particulars of the offence are that on the 10th day of May 2012 in Machakos District within Eastern Province in association intentionally and unlawfully caused their penis to penetrate the vagina of LW without her consent.

As an alternative to the second count, the 1st and 2nd Appellant were each charged with the offence of committing an indecent act with an adult contrary to section 11 (a) of the Sexual Offences Act. The particulars were that on the 10th day of May 2012 in Machakos District within Eastern Province the Appellants intentionally touched the vagina of LW with his penis against her will.

The Appellants pleaded to the consolidated charges in the trial court on 23rd January 2012, and they both pleaded not guilty to the charges against them. They were tried, convicted of both counts of robbery with violence and gang rape, and sentenced to death for the count of robbery with violence. The sentence for the second count of gang rape was held in abeyance.

The 1st and 2nd Appellants are aggrieved by the judgment of the trial magistrate and have preferred this appeal against the conviction and sentence. The appeals of the 1st and 2nd Appellant were consolidated to be heard and determined together at the hearing held on 27th May 2015. The 1st Appellant's grounds of

appeal are in his Petition of Appeal filed in Court on 13th January 2014, while the 2nd Appellant's grounds are in the Petition of Appeal he filed in Court on 25th September 2013 and in the Amended Grounds of Appeal dated 19th November 2015 that he availed to the Court.

The 1st Appellant who was represented by learned counsel Justus M. Mutia of Mulwa Isika & Mutia Advocates, while the 2nd Appellant was unrepresented. The learned counsel for the 1st Appellant filed written submissions in Court dated 17th November 2015, while the 2nd Appellant relied on written submissions he availed to the Court dated 19th November 2015

The grounds of the appeal by the 1st Appellant are as follows:

1. **That the learned trial magistrate erred in law and fact when he relied on the evidence of identification/recognition yet failed to find the same was not affirmatively supported by a cogent first report**
2. **That the learned trial magistrate erred in law and fact when he relied on unapproved allegations to convict the Appellant.**
3. **That the learned trial magistrate erred in law and fact when he relied and acted on contradictory testimonies to convict instead of resolving the same in favour of the appellant as benefits of doubt.**
4. **That the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that he was arrested on mere suspicion.**
5. **That the learned trial magistrate erred in law and fact when he convicted the appellant and yet failed to find that the prosecution had failed to prove their case due to lack of witnesses.**
6. **That the learned trial magistrate erred in law and fact when he convicted the appellant by relying on incredible testimonies**
7. **That the learned trial magistrate erred in law and fact when he dismissed the appellant's plausible and formidable defence contrary to section 169 of the Criminal Procedure Code**

The 1st Appellant in his submissions argued that there was no cogent evidence placing him at the scene of crime, and the phone that was recovered could not be linked to PW1. He also pointed out that there was no explanation given as to why the P3 form was filled 10 days after the offence, and that the presence of spermatozoa in the vagina of the complainant did not prove that the Appellants were involved with her. He also stated that the voice recognition of was unsafe. The 1st Appellant also questioned the accuracy of the P3 form which he states was not verified by the doctor through the production of the treatment notes. He further stated that the court dismissed the defence of the Appellant therefore shifting the burden of proof to the accused. In that regard he referred to the case in **Peter Wafula Juma and 2 others V Republic (2014)eKLR.**

The 2nd Appellant on his part put forward the following grounds of appeal:

1. **That the learned trial magistrate erred in law and fact in convicting the appellant while relying on identification through recognition by PW1 single witness, whereas the circumstances of identification were not favourable for a positive identification.**
2. **That the learned trial magistrate erred in law and fact in accepting the complainant's evidence as safe whereas the evidence was insufficient and incredible**
3. **That the learned trial magistrate erred in law and fact in failing to appreciate that the prosecution had failed to prove its case to the standard required in law, that is to prove beyond reasonable doubt.**
4. **That the learned trial magistrate erred in law and fact in convicting the appellant while relying on inconsistent and contradictory evidence given by the prosecution**
5. **That the learned trial magistrate erred in law and fact in convicting the appellant whereas the appellant's constitutional rights as enshrined in Article 50(2)(b) of the Constitution were violated**
6. **That the learned trial magistrate erred in law and fact in admitting the complainant's**

evidence, whereas the evidence was incredible

7. **That the learned trial magistrate erred in law and fact in failing to take into account and to consider the appellant's defence.**

The 2nd Appellant submitted that the identification by recognition by the complainant was not safe since there was no lighting. He also noted that the magistrate did not warn himself on relying on such identification as held in **Tinega Omwega V R, (2011) eKLR, Maitanyi V R (1986)** and **Turnbull V R, (1976) All ER 549.** Further, that PW3, PW4, PW5 and PW6 gave conflicting evidence on how the phone was handled and how the Appellant was arrested. The 2nd Appellant relied on the case of **Erick Otieno Arum vs Republic (2006) KLR** and stated that nothing stolen was found in his possession and the prosecution had failed to prove their case. He also relied on the case of **Nyanamba V Republic (1983) KLR** claiming that the magistrate had dismissed his defence.

Mr. Cliff Machogu, the learned prosecution counsel opposed the appeal and filed written submissions dated 8th February 2016. It was argued therein that the elements of robbery with violence had been proven with the evidence of PW1. The learned counsel submitted that PW1 had narrated what had transpired on 10/05/2011 at 7.45 pm when she was robbed and raped by the Appellants, whom she was able to identify. He added that this case was one of recognition and the question of wrong identification should not arise. Reference was made to the decision in **Anjononi & Others vs R ,(1981) eKLR**.

The learned counsel noted that there were no inconsistencies in the evidence of PW1, PW7 and PW8, as PW7 had confirmed the treatment notes had aided in preparing the P3 form which was filled in Machakos Level 5 Hospital after PW8 had referred the complainant there. He also stated that there was enough medical evidence from the P3 form and the evidence of the doctor/clinical officer to prove rape. Further, that defilement and rape cases could be proven by oral evidence alone as was in **Kassive Ali V Republic, Criminal Appeal No. 84 of 2005.** The counsel concluded that the conviction of the Appellants was safe and within the law.

My duty as the first appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called eight witnesses. PW1 was LWN, who testified that on 10th May 2011 at 7.45 pm she was on her way to Sunset Hotel to visit a friend, and before reaching her destination she heard footsteps behind her. She stopped to give way but was engulfed from both sides by the two Appellants who dragged her as she was screaming to a thicket. She stated that one of them had a knife and the other a metal bar. She said that they removed her clothes and she narrated in detail how the two appellants had raped her in turns. She said the Appellants went on to gag her with a piece of clothes as they raped her.

PW1 stated that she spoke severally with the Appellants and was able to get the voice of the 1st Appellant who she named as Musa and a neighbour. She said that afterwards they consumed the meal she had prepared and retrieved her phone and inquired her for her Mpesa Pin which she gave them. She stated that her phone had an unclear keyboard so they used a torch to illuminate the numbers. PW1 stated that it was at that point she was able to clearly see their faces. PW1 also testified that the Appellants robbed her of two mobile phones, a Nokia 2600 and Nokia 1200, and Kshs 3,600/=.

After the Appellants left, PW1 wore some of her clothes and went to the road, and she saw a house nearby belonging to Janet Nduku where she sought help. PW1 stated that she left some of her clothes at the scene, and that the said Janet assisted her to call the friend she was going to visit and to put an alert to Safaricom, before she was taken home and from there she was taken to the police station where she described the attackers to the police.

PW1 further testified that she went to Bishop Kioko hospital the next day for treatment. She also stated

that that the 1st Appellant was arrested after two days and the 2nd Appellant after 3 months after they were able to recover her phone from a barman at 'Weavers Bar'. She identified her phone, the P3 form, a biker, a red cardigan, a skirt and a black bag with a torn strap which she had on that day.

PW2 was Janet Nduku Maina who testified that on 10/5/11 at 9.30 p.m. she was at her home when the complainant knocked at her door. She stated that she opened the door for PW1 who fell down and said that she had been injured. She stated that the complainant had fainted and could not talk for about fifteen minutes. She also said that PW1 had grass strands on her body and that PW1 had then told her that she had been attacked and kshs. 4000/=, two mobile phones and some food stolen from her. She stated that they then called her boyfriend and Safaricom customer care to block transactions on PW1's Mpesa. She also said that the complainant's children had taken them to the scene of the crime the following day. She stated that PW1 had told her that one of her assailants was a neighbour.

PW3 was Jemima Kalondu Peter who testified that in May 2011 at about 6 pm the 2nd Appellant had come by and were speaking to her husband David Mutuku. She said the 2nd Appellant was selling a mobile phone to her husband, which was a Nokia 2600. PW3 testified that her husband purchased the phone at kshs. 800 and that she had witnessed the sale transaction. She also stated said that her husband had later sold the phone. A few days later she said her husband was arrested over the said phone. PW3 identified the phone as being grey in colour with faded keypads.

PW4 Was David Muthuri Makokia who stated that in May 2011 the 2nd Appellant went to his kiosk and sold to him a mobile phone Nokia 2600 for kshs. 800/=. He stated that he was arrested later after he sold the phone to one Nduku when it was alleged the phone had been stolen.

PW5 was Janet Ndunge Mutuku who stated that between April and May she had bought a phone of Nokia make from a person know to her as 'Baite' (PW4) she said that she had later gave it to one Mutuku after two months as security for money she had borrowed. PW6 who was Dominic Mutuku Ngayu corroborated PW5's testimony and confirmed having lend her Kshs. 600/= on the security of a Nokia mobile phone. He stated that this transpired in June 2011.

PW7 was Dr. John Mutua of Machakos Level 5 Hospital who produced the P3 form on behalf of Dr. Likuku who had filled the form, and who was undertaking further studies. He stated that on examination of PW1 it was established that she had an injury to the neck, blunt injury to the lower back, blunt injury to the lower abdomen and soft tissue injuries on both lips. He stated that she had been treated and given antibiotics. In addition PW7 stated that on her genitalia there was abnormal morphological of vagina with minor bruises and there was presence of spermatozoa indicating penetration.

PW7 further testified that the lubia minora was swollen at the opening of the vagina and that swelling could be caused by forced entry during intercourse or rough intercourse. He stated that PW1 had been treated at Bishop Kioko Hospital and the Machakos Level Five hospital. He produced the P3 form as an exhibit.

PW8 was Cpl James Mwangi from Kyumbi police station who testified that on 11th May 2011 at about 10.40 pm, a case of robbery and rape was reported at the police station. He stated that the complainant had been attacked as she was walking carrying food for her friend. He stated that PW1 had been struck by a blunt objected and dragged to the bushes where she was robbed of 2 mobile phones and case and later raped. PW8 then visited the scene and recovered clothes. He also referred PW1 to Machakos General Hospital where she was treated.

PW8 further testified that the complainant was able to identify the 2nd Appellant as he struggled to operate her mobile phone with the aid of a torch. He also confirmed that PW1 knew the 1st Appellant whom she referred to as 'Musa'. He stated that the complainant had identified the 1st Appellant by name, description and home. PW8 also testified that he arrested the 1st Appellant on 12th May 2011 and the 2nd Appellant later in September 2011 after the complainant had found her mobile phone in a bar.

According to PW8, the person found with the mobile phone told him it had been left with him by a lady who had borrowed money from him, and after arresting the said lady, she informed PW8 that it is the 2nd Appellant who had sold the phone to her. He produced the complainant's clothes, handbag and phone recovered after the attack as exhibits in court

The trial court found that both Appellants had a case to answer and complied with section 211 of the Criminal Procedure Code in this respect. Both Appellants gave unsworn evidence and did not call any witness. The 1st appellant stated that on 10th May 2011 and 11th May 2011 he had woken up and gone to work at Maanzoni construction site, where he worked the whole day. He stated that on 11th May 2011 he was woken up by police and arrested. He denied seeing the complainant in a long time. He stated that on the material night he was at home sleeping.

The 2nd Appellant on his part stated on 2nd September 2011 he had been arrested as he went about his business. He said that when he returned home he was informed that he was needed at the police station where he was told that he had sold a phone to PW4. He denied knowing PW4 and denied selling the phone to him.

I have considered the arguments made by the Appellants and the Prosecution, as well as the evidence before the trial court. I find that there are three issues for determination raised in this appeal. The first is whether there was a positive identification of the 1st and 2nd Appellants; secondly, whether there was sufficient, consistent and credible evidence to convict the 1st and 2nd Appellants for the offences of robbery with violence and gang rape; and lastly, whether there was non-compliance with section 169 of the Criminal Procedure Code.

On the issue raised of the positive identification of the Appellants, the Court notes that the evidence of identification by PW1 is the only evidence that put the 1st Appellant at the scene of the crimes alleged to have been committed. PW1 in this respect testified that she was able to identify the 1st Appellant voice after talking with them as he was her neighbour whom she knew as Musa. She stated that it is the 1st Appellant who said that the property they had taken from her was not enough and that he must rape her.

PW1 also testified that "*we spoke severally and I was able to identify each*". On cross-examination PW1 stated that she had known the 1st Appellant for more than 10 years since he was a young boy. The 1st Appellant in his defence and cross examination also confirmed that he had seen the complainant in the Kyumbi area for a long time. According to PW1 she was able to identify the 1st Appellant from the light of the torch from the mobile phone when they were trying to key in the Mpesa pin in her phone.

On voice recognition, the Court of Appeal in ***Karani v Republic*** **[1985] KLR 290** and in **Mbelle v. R [1984] KLR 626** held that i*dentification by voice nearly always amounts to identification by recognition. The said Court* laid down the guidelines when a court is dealing with evidence of identification by voice, and stated that the court should ensure that –

(a) The voice was that of the Accused.

(b) The witness was familiar with the voice and recognized it.

(c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it."

In this appeal, PW1 testified that she knew the 1st Appellant as "Musa" for a long time and that he was a neighbour. She also stated that the 1st Appellant was talking during the incident. However, PW1 did not give details of her previous interactions with the 1st Appellant, and particularly if the 1st Appellant had ever talked to her before the incident, how many times and the last such interaction. The fact that the PW1 was familiar with the 1st Appellant and used to see him in the neighborhood is only reliable evidence when it comes to visual identification. For voice recognition to be established, the prosecution

needed to prove that the 1st Appellant in addition to being a neighbor, had also been talking and interacting with PW1 before the incident, which was not done. In the absence of such evidence, the Court cannot definitely find that the voice heard by PW1 was that of the 1st Appellant, or that PW1 was familiar with the said voice.

In addition, this Court is of the view that the conditions obtaining at the time were not favourable to safe and positive identification, as PW 1 was undergoing a traumatic event, and PW1 in her testimony also stated that at some point she was gagged with a piece of cloth. It was therefore not clear when her conversation with the Appellants took place. The conditions obtaining were such that there could be possibility of error. I am therefore of the view that that the evidence of identification by voice was not reliable.

On the visual identification of the 1st Appellant by PW1, I am reminded of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, *inter alia*, that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

In addition it has been stated by the Court of Appeal in **Wamunga vs. Republic, (1989) KLR 424** as follows at page 426:

> **"..where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."**

The evidence of identification at night must also be tested with the greatest care using the guidelines in **Republic - v- Turnbull, (1976) 3 All ER 549** and must be absolutely watertight to justify conviction as held in **Nzaro -v- Republic, (1991) KAR 212** and **Kiarie - v- Republic, (1984) KLR 739**. In the case of **Maitanyi -v- Republic,(1986) KLR 198,** the Court of Appeal stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect.

Lastly in **Anjononi and Others vs Republic, (1976-1980) KLR 1566 it was held** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

From the evidence adduced by PW1, the robbery and gang rape took place at night, at about 8pm, it was dark, and that the only light from which she was able to identify the Appellants was the light from a mobile phone torch. The said torch was directed at the keypad of her other mobile phone. No evidence was given as to the intensity and brightness of the light from the torch of the mobile phone, the position of PW1 and the Appellants at the time the said light was being shone on the phone, and the length of time the said light was on. This information was necessary to enable the court to test the recognition evidence. In addition, there were undoubtedly difficult circumstances obtaining as PW1 had undergone a terrible rape ordeal. As the visual identification of the Appellants was by PW1 only, I find that it would not be safe to rely on this identification evidence without further corroboration.

I will in this regard comment on the medical evidence by PW7, and the ground raised by the 1st Appellant that it was unreliable on account of PW7 not having produced the treatment notes relied upon to fill the P3 form. I am of the view that although it is desirable that medical notes are produced in the trial, failure to produce them is not fatal as long as sufficient medical evidence is produced. A P3 form duly filled in by a medical doctor using the medical treatment notes is in itself sufficient medical evidence for purposes of a criminal trial. The sufficiency of the P3 form is completed when it is supported by the evidence of the

doctor at the trial. Therefore the evidence by PW7 was reliable. However, the said evidence only indicates and serves to corroborate the fact that there was penetration and therefore rape, but cannot be used to prove who committed the rape.

Therefore, as the identification evidence was the only evidence that linked the 1st Appellant to the crimes, I find that there was insufficient evidence to convict the 1st Appellant for the offences of robbery with violence and gang rape.

As regards the 2nd Appellant, he was arrested on the strength of evidence of visual identification by PW1, and his connection to the telephone found by PW1 with someone in a bar, and which she identified as her stolen phone by unique marks on the phone including her initials on the cover.

On the issue of the 2nd Appellant's visual identification by PW1, the findings in the foregoing as regards the visual identification of the 1st Appellant and the medical evidence by PW7 also apply to the 2nd Appellant. In addition PW1 in her testimony stated that she knew both Appellants before the attack. Further, that she did not know the 2nd Appellant by name, but had known him for 3 to 4 years as a waiter in a hotel in Mbinya, and gave his description to the police as tall and mid-complexion. However, no explanation was given by the prosecution as to why the 2nd Appellant, while being known to the complainant, was not arrested immediately after the commission of the crimes, and was only arrested 4 months later after the phone found by PW1 was linked to him.

It is also noteworthy that no identification parade was carried out given the difficult circumstances in which the said identification by PW1 took place, and that PW1 pointed out the 2nd Appellant from a crowd of people who had been let out from the police cell on the basis that this was a case of recognition.

On the evidence of the stolen phone being sold by the 2nd Appellant, the Court has analysed the evidence of PW1, PW3, PW4, PW5, PW6 and PW8 in this regard. In the first instance the Court notes that the said stolen phone was not found in the actual possession of the 2nd Appellant, but was coincidentally found by the complainant (PW1) with someone in a bar, and that she then alerted PW8 on the same. According to PW8 this someone then led them to a shopkeeper who had sold him the phone, who presumably was PW6. The person who was actually found with the phone was not called to give evidence to corroborate PW1's account of how she found the phone.

PW8 also testified that PW6 then led him to a lady borrower who had given him the phone as security for money she had borrowed, and this borrower was PW5. PW5 indeed confirmed that she had given PW6 the phone as security. However, contradictory evidence was given by PW8 on one hand, and PW3,PW4 and PW5 on the other as to how PW5 came to have the phone in her possession. According to PW8, the 2nd Appellant sold the phone to PW5 and that is how he arrested the 2nd Appellant.

However, according to PW5 the phone was sold to her by PW4, Who claimed to have been sold the phone by the 2nd Appellant , and which sale transaction was witnessed by PW3. In light of the above-mentioned lapses in the prosecution case, I find that the evidence used to convict the 2nd Appellant was inconsistent and unreliable, and that the trial magistrate erroneously applied the doctrine of recent possession to the 2nd Appellant.

The last issue is whether there was compliance by the trial court with section 169 of the Criminal Procedure Code. The said section provides as follows:

> **"(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."

I have perused the judgment delivered by the learned trial magistrate, and find that he analysed the evidence that was adduced by both the prosecution and defence as well as the ingredients of the offences of robbery with violence and gang rape. The learned trial magistrate after undertaking this analysis found that the prosecution had proved their case and that the defence produced by the accused persons had not poked any holes in the prosecution's case. The reasons for his findings are therefore evident. The record also shows that the trial magistrate thereupon sentenced the Appellants to death according to the law. This ground of appeal therefore had no merit.

Arising from the foregoing reasons, I accordingly quash the conviction of the 1st and 2nd Appellants for the offences of robbery with violence contrary to Section 296(2) of the Penal Code, and gang rape contrary section 10 of the Sexual Offences Act. I also set aside the sentences imposed upon the 1st and 2nd Appellants for these convictions and order that the Appellants be and are hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 30TH DAY OF MARCH 2016.

P. NYAMWEYA

JUDGE