



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

**CRIMINAL APPEAL NO. 146 OF 2012**

**JACKSON MUTUNGA MATHEKA..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(Being an appeal from the original conviction and sentence in Kajiado Principal Magistrate's Court  
Criminal Case No. 1072 of 2012 by Hon. S.O Temu, SRM on 23/5/2012)

**J U D G M E N T**

1. **Jackson Mutunga Matheka**, the appellant, was charged as follows:-

**Count 1:**

Robbery with violence contrary to **Section 296(2)** of the **Penal Code**. Particulars of the offence being that on the 10<sup>th</sup> day of July, 2010 at **Kitengela Township** in **Kajiado District** within **Rift Valley Province** being armed with an offensive weapon, namely, a kitchen knife robbed **A K N** her mobile phone, make Nokia 1112 valued at Kshs. 2800/= (two thousand eight hundred) and cash Kshs. 4000/= (four thousand) and immediately or before at the time of such robbery beat the said **A K N**.

**Count 2:**

Attempted rape in violation of **Section 4** of the **Sexual Offences Act No. 3 of 2006**. Particulars thereof being that on the 10<sup>th</sup> day of July, 2010 at about 3.00am at **Kitengela Township** in **Kajiado District** within **Rift Valley Province** intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **A K N** without her consent in violation of the **Section 4** of the **Sexual Offences Act No. 3 of 2006**.

2. In the alternative, he faced a charge of committing an **indecent act** contrary to **Section 11(6)** of the **Sexual Offences Act No. 3 of 2006**. Particulars thereof being that on the 10<sup>th</sup> day of July, 2010 at about 3.00am at **Kitengela Township** in **Kajiado District** within **Rift Valley Province** did intentionally and unlawfully cause his penis to come into contact with the thighs of **A K N** contrary to **Section 11(6)** of the **Sexual Offences Act No. 3 of 2006**.
3. Facts of the case were that the appellant herein was an employee of **PW1, A K N (complainant)**. On the 10<sup>th</sup> July, 2010 at about 3.00am the appellant woke up the complainant claiming that he was unwell. She opened the door and the appellant forced his way inside. He threatened to stab her with a kitchen knife as he demanded for money from her. He removed a rope from his pockets that he used in an attempt to tie her. As he struggled to tie her, his pair of trousers was open. He searched the house and took away the complainant's cellphone make Nokia 1112 and Kshs.

- 4,000/=. After the commission of the offence the appellant left the complainant's residence. He was arrested eight (8) days later. The cellphone was recovered by the investigators. The appellant was arrested and charged.
4. When put on his defence he opted to remain silent and leave the court to reach a decision based on evidence adduced.
  5. The trial magistrate evaluated evidence adduced and convicted the appellant on both counts. He sentenced him to death on the first count but failed to impose a sentence on the second count.
  6. Being aggrieved by the conviction and sentence, the appellant appealed on grounds that:-
    - i. The conviction was based on circumstantial evidence and a doctrine of recent possession that was wrongly invoked;
    - ii. Evidence adduced was contradictory; and
    - iii. The appellant was prejudiced as he was not cautioned by the court of the consequences of failing to adduce evidence in his defence.
  7. At the hearing of the appeal the appellant canvassed the appeal by way of written submissions. In response thereto **Mrs Gakobo**, Senior Principal State Counsel for the State opposed the appeal. In her oral submissions she urged the court to make a finding that the appellant was convicted on credible evidence and confirm the conviction on both counts. She also called upon the court to impose a sentence on the 2<sup>nd</sup> count which could be held in abeyance.
  8. This being the first appeal, our duty as a court is to re-evaluate the evidence, draw our own inferences and come to a logical conclusion knowing that we did not have an opportunity of seeing or hearing witnesses who testified at the trial court. (*See Okeno versus Republic (1972) E.A. 32*).
  9. In his submissions the appellant sought a re-trial in the interest of justice. What informed the appellant to make such a prayer was the fact that he tendered no evidence in his defence. He argued that he was prejudiced as the trial magistrate failed to explain to him the procedure to be adopted.
  10. **Section 211** of the **Criminal Procedure Code** provides:-

*(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).*

*(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses”.*

11. At the ruling stage the magistrate stated:-

*“As per evidence adduced by the prosecution a case has been established against the accused requiring him to give his defence. Accused is thus placed on his defence. Accused is explained (sic) on the manner of giving his defence in English and Kiswahili”*

The question to be answered is what was the “manner of giving defence” explained that made the

appellant elect to keep quiet and wait for the courts judgment?

12. It is not specifically stated that **Section 211** of the **Criminal Procedure Code** was complied with. Had the appellant adduced evidence in his defence, it would be presumed that the law as provided was complied with. Having elected to remain silent, it is possible that he did not understand what he was expected to do. In the premises, it can be authoritatively stated that he was prejudiced. The error having been on the part of the Court, the trial was vitiated. We must therefore determine if a retrial should be ordered.
13. Principles upon which a retrial may be ordered were set out in the case of *Ahmedi Ali Dharamsi Sumar –versus- Republic [1964]E.A. 481* and re-stated in *Fatehali Manji –versus- Republic [1966] E.A. 343* where the Court of Appeal stated:-

*“... a retrial will be ordered only when the original trial was illegal or defective: it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not be ordered where it is likely to cause an injustice to the accused”.*

14. Evidence adduced in the instant case was cogent. The appellant was sentenced to death. He has been in custody for two (2) years. He will not be prejudiced by a retrial. This being a proper case for retrial, we quash the conviction and set aside the sentence imposed. The appellant shall be produced before **Kajiado Principal Magistrate’s Court** on the **26/3/2015** for a retrial.
15. In the meantime he will be remanded in custody.

**DATED, SIGNED and DELIVERED at MACHAKOS this 19<sup>TH</sup> day of MARCH, 2015.**

**B. THURANIRA JADEN**

**L.N. MUTENDE**

**JUDGE**

**JUDGE**