



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 45 OF 2013

(Consolidated with Criminal Appeal No. 41 of 2013)

STEPHEN GICHUKI GICHIGO.....1ST APPELLANT

ELIJAH WAITHAKA MUNDIA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeals against conviction and Sentence of Death for the offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code by M/s W. Kagendo Senior Principal Magistrate Mukurweini on 27/03/2013 in Criminal Case No. 516 of 2010).

1. **STEPHEN GICHUKI GICHIGO** and **ELIJAH WAITHAKA MUNDIA** hereinafter referred as 1st and 2nd Appellants respectively were jointly charged with the three Counts of the ***Offence of Robbery with Violence Contrary to Section 296 (2) of Penal Code.***

The particulars stated in the Charge Sheet were as follows:

COUNT 1:

1st and 2nd Appellants on the 9th day of August 2010 in Nyeri South District within Nyeri County jointly with others not before Court while armed with offensive weapons namely pangas and metal bars robbed G N W Of Kshs.8,000/=, mobile phone make Techno, wrist watch make Diesel, spectacles make Bifons, One Jacket, one laptop make LG, one Video player make panasonic, one motor vehicle battery, one pair of shoes all valued at Kshs.74,500/= and or immediately before or immediately after the time of such Robbery threatened to use actual violence to the said **G N W**.

COUNT 2:

Particulars being that 1st and 2nd Appellants on the 9th day of August 2010 in Nyeri South District within Nyeri County, jointly with others not before Court while armed with offensive weapons namely pangas and metal bars robbed **E N K** mobile phone make Motorola CIII valued at Kshs.2500/= and at or immediately before or immediately after the time of such Robbery threatened to use actual violence to the said **E N K**.

COUNT 3:

Particulars being that 1st and 2nd Appellants on the 9th day August 2010 in Nyeri South District within Nyeri County, jointly with others not before Court while armed with offensive weapons namely pangas and metal bars robbed P W N of cash Kshs.9,200/=, flash disc make LG, mobile phone make Sony Erickson W350. All valued at Ksh.17,199/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **PW N**.

2. Both 1st and 2nd appellant faced a charge of **Rape Contrary to Section 3(1) (a) (b) & 3 of the Sexual Offences Act No. 3 of 2006**.

The particulars were as follows:

COUNT IV:

The 1st Appellant on the 9th day of August 2010 in Nyeri South District within Nyeri County intentionally and lawfully caused his penis to penetrate the vagina of E N K without her consent.

ALTERNATIVE COUNT:

COMMITTING AN INDECENT AC WITH AN ADULT CONTRARY TO SECTION 11 (A) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2007 (2006).

Particulars being that the 1st Appellant on the 9th day of August 2010 in Nyeri South District within Nyeri County intentionally touches the vagina of E N K with his penis against her will.

COUNT V:

Particulars being that the 2nd Appellant on the 9th day of August 2010 in Nyeri South District within Nyeri County intentionally and unlawfully caused his penis to penetrate the vagina of P W N without her consent.

ALTERNATIVE CHARGE:

COMMITTING AN INDECENT ACT WITH AN ADULT CONTRARY TO SECTION 11 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2007 (2006).

Particulars being that the 2nd Appellant on the 9th day of August 2010 in Nyeri South District within Nyeri County intentionally touched the vagina of **P W N** without her consent.

3. The case proceeded to full hearing and the Appellants were convicted on all the counts and sentenced to death. Being aggrieved by the judgment they filed Appeals No.41 of 2013 and 45 of 2013 which were later consolidated by an order of this Court with HCRA No.45 of 2013 as the lead file. The following are the grounds;

1st Appellant's grounds :

- i. ***THAT the learned Magistrate erred in both Law and fact while convicting him on identifying witnesses evidence which wasn't cogent enough to point to my guilt.***
- ii. ***THAT, the Learned Magistrate erred in both Law and fact while being impressed with his mode of arrest which wasn't concively proved.***
- iii. ***THAT, the Learned trial Magistrate erred in both Law and fact while convicting him on reliance to Prosecution witness 7 and 11th evidence which was flawed with doubts and inconstinencies.***

- iv. ***THAT, the Learned Trial Magistrate erred in both Law and fact while convicting him on charges that weren't adequately proved as per Law requires in Section 50 (2) (a) of the Constitution.***
- v. ***THAT, the Learned Trial Magistrate erred in Law while rejecting his sworn defence that wasn't challenged as per Law requires in Section 212 of the Criminal Procedure Code.***

2nd Appellant's grounds:

- i. ***THAT, the Learned Trial Magistrate erred in both law and fact while convicting him on identification allegation that wasn't cogent enough to justify my conviction as she erroneously held.***
- ii. ***THAT, the Learned Trial Magistrate erred in both law facts while being impressed with his mode of arrest which wasn't conclusive to link me to the crime at hand.***
- iii. ***THAT, the Learned Trial Magistrate erred in both law and fact convicting him on reliance of Prosecution witness 6, 7 and 11 evidence which was flawed with doubts and inconsistency.***
- iv. ***THAT, the Learned Magistrate erred in both law and fact while convicting him on charge that weren't proved the required standard to the reads of justice as spelt in Section 50(2) as of the constitution of Kenya.***
- v. ***THAT, the Learned Magistrate erred in both law while rejecting his sworn defence that wasn't challenged by the prosecution side as per law requires in Section 212 of the Criminal Procedure Code and without giving cogent reasons for its rejection in light of the prosecution case to meet the needs of justice as spelt in Section 169(1) of the Cap 75 Laws of Kenya.***

4. The prosecution case revolved around the events that are alleged to have occurred on the night of 9th August 2010 10 p.m. at the home of G N W (PW'1) home.

On this night PW1 (G N W) his daughter (P W N), his house help (E N K) and houseboy were in his house. They had supper together and PW1 retired to bed at 10p.m. At 11p.m. Njoroge took a torch and said he was going to the toilet.

5. As Njoroge opened the latch, the door was pushed from outside and about five (5) men entered into the house. One man went directly to PW2 and ordered her to lie down. She identified this person as the 2nd appellant. PW3 fled calling PW1 to open the door. The attackers were armed with pangas and iron bars. She too was forced to lie down.

6. PW1 opened the door and the attackers demanded for money from him. He gave them his wallet but they appeared not satisfied and demanded for more. PW2 then told them she had some money in her bag. The 2nd Appellant took her to her room and started searching for money. Though he had covered his face the cover fell down and she saw him well. She gave the 2nd appellant Shs.2, 000/= while the 1st Appellant took Shs.1, 000/= from her wallet.

The 1st and 2nd Appellants then took them to the sitting room. They joined the others in PW1's bedroom. On demand the attackers were given a video cassette player, cassettes and compact discs.

7. After this the 2nd Appellant took PW2 to the bedroom while the 1st Appellant took PW3. They told them that since they had refused to give them money they would rape them. The 2nd Appellant forced PW2 to remove her clothes and he raped her while the 1st Appellant raped PW3. The two men then left.

8. The 2nd Appellant returned and asked PW2 how much she had on her Mpesa account. After she told

him she had Shs.3000/= he demanded for her PIN Number which she gave him and he took her sim card and transferred the money. He thanked her and left.

9. On the other hand PW1 was robbed of Shs.8,000/= from his wallet, plus Techno Mobile Phone and Wrist Watch. Some left for the girls room and he could hear screams from there. Those left guarding him demanded for his Mpesa Pin Numbers which he gave to them.

10. PW2 and PW3 reported to PW1 that they had been raped and he drove them to the Hospital and also reported the matter to the police. Also stolen was a laptop, Sony Erickson phone, car battery and PW1's Shoes. PW2 and PW3 were treated and P3 forms were filled for them (Exhibit 2, 3, 4 & 5).

11. On 20th August 2010, PW1 attended an Identification parade where he identified the person who demanded for his Mpesa Pin Number. This person was acquitted by the lower Court. He produced the receipt for his stolen phone (Exhibit 1). He said he had also seen the 1st and 2nd Appellant's in his house that night.

12. On 25th August 2010 PW2 attended an Identification Parade where he identified the 1st Appellant and 2 others. Other suspects declined the identification parade on 21st February 2011.

On 11/8/11 PW3 attended identification parades where he identified the 1st Appellant and 2 others. She did not see the 2nd Appellant at the Police Station.

13. On 25/8/10 PW4 (**Charles Chebet**) conducted the identification parade in respect of Simon Boto Ndirangu who was acquitted. He was identified by PW1- PW3. On 28/8/10 PW5 (**Inspector Salesio Nyagah**) conducted the identification parade in respect of James Maina Wairungu who was also acquitted. He was identified by PW2, PW3 and Njoroge.

14. On 21/2/11 PW8 (**Chief inspector Jackson Kiama**) arranged for an identification parade in respect of the 2nd Appellant who declined to attend the parade for the reasons that he had been sighted at the hospital by some people and he had even been photographed.

On 25th August, 2010 PW9 (**Inspector Laura Imbachira**) conducted an identification parade in respect of the 2nd Appellant who was identified by PW2 and PW3.

15. PW7 (**Chief Inspector Stephen Mutua**) received the report of the robbery through the police radio call room. Him and others went to the scene and confirmed the report. PW2 and PW3 had been rushed to hospital. He got all the details of what had happened. The next morning the complainants came to his office. PW2 & PW3 gave descriptions of the attackers and he gave them his profiling records including photo albums. They went through them and were able to identify two suspects. They identified the 1st and 2nd Appellants as the people who raped them. This was from the photo albums.

16. PW2 went to Nyeri Customer Care Safaricom and requested for a print out of her Tel. No.[particulars withheld]. It showed transfer of Shs.2970/= to No.0719586430 and the cancellation of the said transfer (Exhibit 9A & B). This witness filed an application to access the Account for Safaricom No.0719586430 (Exhibit 10 A-C). An Order was issued to that effect. He got the identification number of the Account holder which was No.10118582. He got the sim card to where the money from PW2 went. The print out in respect of 0719 – 586 430 was produced as exhibit 11 A-C..

17. A sim card was recovered from 1st Appellant's house on 14th August 2010 at 4.25p.m. It was serial No.89254028901005864305 in respect of James Maina who was acquitted, (Exhibit 12). He did a request to the Registrar of Persons on the details of ID No.10118562. The report was in respect of James Maina Wariungu (Exhibit 13-16).

18. In the course of investigations another robbery occurred and somebody was killed. His phone was

tracked and found with somebody who had bought it from the 2nd Appellant. He gave them the Telephone number of the 2nd Appellant and even identified him by the photos. Through his telephone line No. 0726516151 the 2nd appellant was traced in Kiptangweny Elementaita. He was finally arrested on 18th March 2011. Several electronics were recovered from his house after a search.

19. PW 11 (**PC Benjamin Mumo**) was the investigating officer. His evidence was basically what PW1-PW9 had told the Court and we shall not repeat it here. PW2 (**P W N**) a clinical officer produced the treatment notes and P3 forms in respect of PW2 andPW3 (Exhibit 2-5).

20. In his sworn defence the 1st Appellant denied the charges. He said on 9th August 2010 he was on his farm working up to evening. He then left, had supper and slept. He was working at home from 10th -14th August 2010. On 14th August 2010 5am police came for him and he was arrested and taken to Othaya Police Station. He denied any knowledge of the charges.

21. The 2nd Appellant also sworn stated that on 18th February 2011 he took his expectant wife to hospital. They were operating a saloon and Kinyozi. They went home and at 3p.m., while resting he was arrested by police and taken to Kiptangweny AP Post. From there he was taken to his house for a search. They took his electronics and he was taken to Othaya Police Station the next day. He denied the charges.

22. When the appeal came up for hearing we realized that this bench had handled an appeal involving these same Appellants the previous day. This was an appeal arising from Mukurweini Senior Resident Magistrate Criminal Case No.518/10. This issue was put to the Appellants herein and both of them indicated that they had no objection to us hearing this appeal.

23. Both Appellants filed written submissions to the appeal. They have challenged their visual identification by the witnesses. They submitted that PW7 showed the witnesses their photos. Both Appellants have questioned the manner of their arrest. That Cpl Macharia who arrested the 2nd Appellant ought to have testified but did not. They have also submitted that the evidence was inconsistent and full of contradictions. Finally they say the case was not proved beyond reasonable doubt.

24. Learned State Counsel opposed the appeal. He however conceded that there were technical issues in the conduct of the identification parades. He however submitted that the Learned Trial Magistrate discarded the evidence on identification parades. He however submitted that the evidence on identification at the scene of the robbery was sufficient to sustain the conviction. The reason being that the conditions were favourable for a positive identification.

25. Further he contended that the witnesses had given a description of the assailants. He relied on the case of **CALVIN PETER OMONDI OWAYO eKLR 2010** and submitted that identification without identification parades was still credible and worthy. He submitted that the evidence of the Mpesa transaction was solid. That the 1st Appellant was the beneficiary of the said transaction. James Maina had explained to the Court how he lost his identification Card which may have been used to register the SIM Card.

26. This a first appeal and this Court is enjoined to re-evaluate and reconsider the evidence on record and arrive at its own conclusion. We are alive to the fact that we did not see or hear the witnesses and we should give an allowance for that. We stand guided by what the Court of Appeal stated in the following cases;

1. **Okeno V R 1972 EA 32**
2. **Mwangi V R (2004)2 KLR 28**

27. Having been so guided we have considered the evidence on record, the grounds of appeal plus the submissions by both the Appellants and the State.

28. The evidence on record shows that there was an attack on PW1's family by a gang of five armed men, who stole from them. Two of them raped PW2 and PW3. We are satisfied that the evidence on record confirms the occurrence of the two incidents.

29. The issue for determination is whether the Appellants were part of this armed gang. This incident took place at night in PW1's house. PW1 and PW2 say their electricity lights were on and the attackers took quite some time with them and they were able to identify them. That they even gave descriptions of the attackers to the police and they were called to identification parades to identify the robbers.

30. PW1, PW2 and PW3 attended the identification parades. The person whom PW1 identified as having demanded for his Mpesa Pin Number was the 1st accused in the case before the Magistrates Court. He was acquitted by the Learned Trial Magistrate.

PW2 and PW3 identified the 1st Appellant during the Identification parades. The 2nd Appellant declined to attend the identification parades and so PW1 – PW3 were only able to identify the 2nd Appellant in the Court. This amounted to dock identification.

31. We would wish to start with the identification of the 1st Appellant by PW2 and PW3 on the identification parades. In his evidence PW7 explained how the two witnesses saw him in his office on 10th August 2010 and gave him the descriptions of the assailants. Being satisfied with their descriptions he gave them his profiling records including photo albums. They went through them and identified the 1st and 2nd Appellants. He went ahead to produce the photos of the 1st and 2nd Appellants in Court Exhibit 8A & B.

32. PW3 attended the identification parade on 11th August 2010 while PW2 attended on 25th August 2010 where each identified the 1st Appellant.

33. Mr. Njue was quick to concede that indeed there were a few technical issues in the conduct of the identification parades. He however added that the Learned Trial Magistrate discarded the evidence on identification parades. We agree with him on this and discard the said evidence.

34. In their evidence in Court PW1, PW2 and PW3 said they were able to identify the Appellants. They said there was sufficient light in the house and the attackers took quite a bit of time in the house. They explained what each of the Appellants did to them. Mr. Njue for the state relying on the case of **Peter Calvin Omondi Owayo Vs. Republic Kisumu Criminal Appeal No. 322 of 2008** submitted that identification without identification parades was not completely worthless. It had to be considered alongside the other evidence on record.

35. In the **Omondi** case the star witness Stella did not report to the police nor give descriptions of the attackers. She did not explain how long she was with them and the amount of light that was in the house. The Appellant's conviction was quashed.

36. In the present case the identification parade has been discarded and the only other evidence left is that of dock identification. In the case of **Kiarie Vs. Republic 1984 KLR 739** the Court of Appeal stated thus;

“The identification of an accused person in Court by a complainant is almost worthless without an earlier identification parade”.

Later in **Ajode Vs. Republic (2004) 2 KLR** the Court of Appeal stated;

- i. ***It is trite law that dock identification is generally worthless and a Court should not place much reliance on it unless it has been preceded by a properly conducted identification parade.***
2. ***It is trite law that before such a parade is conducted, and for it to be properly conducted, a***

witness should be asked to give the description of the accused and the police should then conduct a fair identification parade.

37. In the later cases of Nathan Kamau Muguru versus Republic (2009) eKLR and John Mwangi Kamau (2014)eKLR it has been held that dock identification is not as worthless as earlier held. The court only needs to determine how much weight to attach to such evidence.

38. Mr. Njue Learned State Counsel had also submitted that the witnesses described the 1st Appellant as short and dark with the 2nd appellant being described as a tall/slim man as if he was of Somali origin. That the 1st and 2nd appellants fitted that description.

With all due respect to counsel we have not seen the origin of these detailed descriptions by him. It is not in the evidence of the witnesses on record and neither does the record have their recorded statements.

39. We therefore find that had the witnesses PW2 and PW3 not sighted the appellants in the photographs at the police station, their identification of the appellants in the dock could have had some weight; given the circumstances prevailing no weight can be given to it without any other supporting evidence.

40. We now move to consider the evidence of the Mpesa transaction. There is clear evidence that indeed PW2 gave out her PIN number for line No.[particulars withheld] registered in her names. A sum of Kshs. 2,970/= was transferred from this line to line No. 0719 – 586 430. The transaction was however reversed. Investigations showed that this recipient line was registered in the names of James Maina Wairungu who had been charged as 1st accused but was acquitted. The said James Maina Wairungu explained to the trial Court how he lost his identification card and the Court was satisfied with the explanation and acquitted him.

41. The 1st Appellant was convicted because of being found in possession of the sim card in respect to line No. 0719 586 430. It was also stated that at the time of recovery of the simcard, 1st Appellant signed an inventory produced as Exhibit 13.

42. First of all we wish to establish how the 1st Appellant was arrested. According to PW7 it was the arresting officers who recovered the suspect sim card. PW11 was one of those who arrested the 1st Appellant. He was also the Investigating Officer. He read to the Court part of his statement at Page 107 lines 1-4 where he said;

“Later on 11th August 2010, Joseph Gichuki Gichuki and James Maina were arrested. One mobile phone was recovered. Also sim card was recovered from the house of Joseph Gichuku Gichuki”.

He further stated that the 1st Appellant was arrested on 14th August 2010 while the sim card was recovered on 11th August 2010.

43. This evidence of the Investigating Officer shows that the suspect sim card was recovered from the house of Joseph Gichuku Gichuki. Who was he? The 1st Appellant is Stephen Gichuki Gichigo. There is no evidence that the two sets of names belong to one and the same person who is the 1st Appellant.

44. It was not enough for PW11 to come before the Court and say he recovered the sim card (MFI 12) from the 1st Appellant's house. It is not clear where the 1st appellant was at the time of the alleged recovery of the sim card. A sim card is a very tiny thing. Where in the 1st Appellant's house was it recovered from? It is not clear how the simcard was recovered on 11th August, 2010 and the 1st appellant was only arrested on 14th August, 2010; was it recovered in his absence?

In the case of **ARUM VS. REPUBLIC (2006) 1** the Court of Appeal stated this on proof of possession.

- i. *In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot suffice, no matter from how many witnesses.*
- ii. *In case the evidence as to search and discovery is conflicting, then the Court can rely on the adduced evidence after analysing it and accepting that it considers it to be correct and an honest version.*

There must be proof of recovery.

45. The record also shows that the suspect sim card was only marked for identification. It was never produced in court as an exhibit. If it was not produced then the Court can not consider it as part of the evidence. This can be confirmed from the evidence of PW2&, PW11 and the list of exhibits.

46. Could the 1st Appellant with certainty be said to have been the beneficiary of the Shs.2, 970/= ? Interesting enough James Maina Wairungu had never reported anywhere that he had lost his Identity Card. Secondly and curiously this James Maina Wairungu had been identified by PW1, PW2 & PW3 during the identification parade (Exhibit 2). Identification parades in respect of him had not been botched. It was to his Mpesa Account that the Shs.2, 970/= went. He was however acquitted and the 1st Appellant convicted over this Mpesa transaction. It raises a number of questions.

47. Our finding is that the recovery of the questioned sim card (MFI 12) was not satisfactorily proved. This evidence without any other supporting evidence cannot found a conviction against the 1st Appellant on counts 1, 2 & 3. The recipient of Kshs. 2,970/= was James Maina Wairungu and not the 1st appellant.

48. According to PW7 the 2nd Appellant was connected to this case following the recovery of a phone stolen from the caretaker of Peter Thara in Chinga area of Othaya. The phone was traced to an unnamed person who said he bought the phone from Elijah of Othaya of Line NO.0726 – 516 151. This person identified Elijah on the police photos through computer. The police started tracking Elijah using the Safaricom Line. He was eventually arrested and electronics recovered from his house. None of the electronics belonged to the complainants in this matter.

49. What then was the basis of the conviction against the 2nd Appellant? From the Judgment it was based on the identification by PW2 and PW3 through photos. This identification through photos was before PW7 and not before the Court. We are not comfortable with this kind of identification, as it would lead to an injustice in the absence of any other independent evidence.

50. This was a case that required identification parades to be properly conducted for the Court to rely on that kind of evidence. This identification also goes to the charges in Count 4 and Count 6 on which the appellants were convicted.

51. Without proper identification and evidence of search and recovery it would be unsafe to uphold the convictions herein.

52. We shall therefore allow the Appeal and quash the convictions on all counts. The sentence and discharge orders are set aside.

53. On a point of correction we wish the Learned Trial Magistrate to note that upon convicting the Appellants on Count 4 and Count 6 she could not discharge them on the said counts as she did but rather she should have had the sentences in respect of the said counts held in abeyance.

Dated, signed and delivered in open court this 15th day of December, 2015

H.I. Ong'udi

Ngaah Jairus

JUDGE

JUDGE