REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 3 OF 2014

STEPHEN MUNYAO *alias* MUNYWALI..……...……. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Being an appeal from the original conviction and sentence in ***Kangundo Senior Principal Magistrate's Court Criminal Case No. 229 of 2013*** *by* ***Hon. I. M. Kahuya Ag. S R M on 11/10/13)***

J U D G M E N T

1. **Stephen Munyao *alias* Munywali,** the appellant, was charged with three (3) counts:

i. **Robbery with Violence** Contrary to **Section 295** as read with **296(2)** of the **Penal Code.** The particulars of the offence being that on the night of the **31st** day of **May, 2013** and the morning of **1st** day of **June, 2013** at **[particulars withheld] Village,** in **Kingoti Location** in **Matungulu District** within the **Machakos County,** jointly with another not before court, robbed **L M N N M** of **Kshs. 2,000/=** and a keg pump valued at **Kshs. 20,000/=** and at or immediately before or immediately after the time of such robbery wounded the said **Lilian Mbithe Nzau Nee Muthini.**

ii. **Rape** contrary to **Section 3(1) (a) (b) (c)** as read with **Section 3** of the **Sexual Offences Act No. 3 of 2006.** The particulars of the offence being that on the night of the **31st** day of **May, 2013** and the morning of **1st** day of **June, 2013** at **[particulars withheld],** in **Kingoti Location** in **Matungulu District** within the **Machakos County,** intentionally and unlawfully caused his penis to penetrate the vagina of **L M N N M** by use of force and threats.

On the alternative charge (Count II) he was charged with the offence of **Committing an Indecent Act with an Adult** contrary to **Section 11 (b)** of the **Sexual Offences Act No. 3 of 2006.** The particulars of the offence being that of the **31st** day of **May, 2013** and the morning of **1st** day of **June, 2013** at **[particulars withheld] Village,** in **Kingoti Location** in **Matungulu District** within the **Machakos County,** intentionally and unlawfully caused the contact with the female reproductive organ (vagina) of **L M N N M** with his male reproductive organ (penis) against her will.

iii. **Being in possession of Narcotic Drug** namely **Canabis** contrary to **Section 3(1)** as read with **Sub-section 3(2)** of the **Dangerous Drugs and Psychotropic Substances Control Act No. 4 of 1994.** The particulars of the offence being that of the **4st** day of **June, 2013** at **[particulars withheld] Village,** in **Kingoti Location** in **Matungulu District** within the **Machakos County,** was found in possession of **Narcotic drug** namely **Cannabis** to wit **10 grams** with a street value of **Kshs. 100/=** which was not in medicinal preparation.

2. Facts as presented by the Prosecution were that on the **3rd** day of **May, 2013** at about **11.00 p.m.,** PW1, **L M** was inside her house when she heard a knock on the door. Persons who were knocking threatened to burn down the house unless she opened the door. Due to trepidation, she complied. The individuals seized her hands, stripped her naked and had carnal knowledge of her in turns. Thereafter they took away her keg pump and cash – **Kshs. 2,000/=.** Her husband, PW2, **M N** was promptly notified of the ordeal. The matter was reported to **Kangundo Police Station.** She was examined by PW4, **John Mulwa,** a Clinical Officer who found her having sustained a bruise on the knee. Her private parts were normal but inside it was red and swollen. The hymen was long torn and no spermatozoa were noted.
3. On the **4th** day of **June, 2013,** the Appellant was arrested by members of public following allegations that he had stolen. He was rescued from the angry mob and escorted to **Kangundo Police Station.** PW5, **No. 213963 C I Johnson Bulemi** recovered some substance that was believed to be cannabis. Subsequently he was charged.
4. When put on his defence, the Appellant stated that on the material night he was at home with his parents. Denying having committed the offence, he stated that he was arrested for no reason where it was alleged that he had raped the Complainant.
5. The trial that followed culminated into his conviction. He was sentenced to death.
6. Being aggrieved by the conviction and sentence the Appellant appealed on grounds that:

- It was erroneous on the part of the court to find that PW1 identified her assailants by aid of light whereas she stated that identification of her attackers was by voice.
- There was no report to the police suggesting that PW1 recognized the Appellant.
- PW1's mother-in-law an essential witness was not called to testify.
- PW4 and PW5 testified in a language that the Appellant was not conversant with which contravened his rights as he was not accorded interpretation services.

7. At the hearing of the appeal, the Appellant reiterated what was stated in his written submissions. The State/Respondent through learned counsel, **Mrs. Saoli** responded orally. Opposing the appeal, she argued that the evidential burden of proof was discharged. The Appellant was identified by voice. There was light from moonlight that enabled the Complainant to see him. Evidence adduced was consistent and well corroborated. She called upon the court to uphold the conviction and confirm the sentence.
8. This being a first appeal, we are duty bound to re-evaluate all evidence on record and come up with our own conclusions and inferences. **(See Okeno vs. Republic (1972) EA 32).**
9. We have taken into consideration rival submissions of the Appellant and Respondent (State).
10. On the first issue of identification, PW1 testified that she identified the Appellant by voice, having known him for **Six (6) years.** This was a case of voice recognition. Her assailants purportedly asked for her husband **M N** who was away and demanded to sleep with her. Individuals may have different behavioural characteristics when it comes to speaking, that is why a trial court must critically examine evidence adduced by the Complainant to ensure that she/he was not mistaken. In the case of **Republic vs. Turnbull (1976) 3 ALL ER** it was stated thus:

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

11. In the case of **Karanja vs. Republic (1985) KLR 290** the court held that:

> ***"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other case care has to taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognised it and the conditions favoured safe identification."***

12. In her testimony the Complainant stated that the incident happened at **11.00 p.m.** When she opened the door, the individuals pounced on her, held her hands and hair an act that culminated

into a struggle. It happened in darkness. She could only identify them by voice. In believing her, the trial magistrate stated that she had known the Appellant by name for over **six (6) years.** The witness did not state that there were lights in her house, but the learned magistrate stated that there were lights inside her house. This was a misdirection that amounted to distortion of evidence.

13. It is contended that PW1's mother-in-law was an essential witness who should have been summoned by court. This, the Appellant argues, was in contravention of **Section 150** of the **Criminal Procedure Code.** It was stated by PW1 that after the ordeal she notified her mother-in-law who in turn reported to her husband. In his testimony PW2, her husband told the court that he received a telephone call from his mother who informed him that his house had been broken into and his wife raped.
14. **Section 143** of the **Evidence Act** provides:

> ***"No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."***

15. In the case of **Julius Kalewa Mutunga vs. Republic Criminal Appeal No. 31 of 2005** the Court of Appeal held:

> ***".....As a general principle of law, whether a witness should be called is a matter within their discretion and on appeal the court will not interfere with the exercise of the discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."***

16. It has not been alleged by the Appellant that failure of the Prosecution to call the mother-in-law of the Complainant was disingenuous. Therefore this reason perse would not be a proper argument to sway the court into reaching a finding that is favourable to him.
17. It is further argued that there was a barrier of communication when PW4 and PW5 testified in English, a language that the Appellant did not understand. Consequently he was not able to cross examine them. In the case of **George Mbugua Thiong'o vs. Republic (2013) eKLR** it was stated:

> ***"for the court to nullify proceedings on account of ..... (the) language used during trial, it should be clear from the record that the accused did not understand at all what went on during his trial."***

18. The fact that there was an interpreter present is evidence that he must have performed his professional duty of interpreting as he did when other witnesses testified. The Appellant responded to the charge at the time of plea-taking. He participated in proceedings and cross-examined PW1 and PW2. When PW3 testified in Kiswahili he was not cross examined by the Appellant. Therefore it cannot be alleged that failure to cross examine PW4 and PW5 was due to language barrier. **(Also see John Kamau Githuku & Another vs. Republic (2011) eKLR).**
19. Finally, this was a case of a single identifying witness. It was imperative for the trial magistrate to not only carefully scrutinize the evidence and consider all prevailing circumstances prior to safely convicting on it, but, also to discharge the duty to caution herself of the requirement to do so. In the case of **Kiilu & Another vs. Republic (2005) IKLR** it was stated thus:

> ***"Subject to certain well known exceptions, it is trite that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge ..... 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 probability of error."***

20. This is a case where the trial court failed to caution itself of the need to ensure that the evidence adduced was free from error. PW1 identified her assailants by voice. She said she had known **Mboloto** and **Munywali** for **six (6) years.** No explanation was given as to why **Munywali** is indicated as a false name having been assumed, and whether the identity of **Stephen Munyao Mutinda** was indeed concealed. Such evidence could not be asserted to have been free from any error.
21. The third count is for possession of narcotic drugs. The offence was alleged to have been committed on the **4th** day of **June, 2013.** Evidence in support of the charge was stated by PW5 who stated that:

> ***"..... On 4/6/2013 we received information that 1 of the suspect had been arrested after stealing and was undergoing mob justice. Fortunately the APs came on time and escorted the accused to Kangundo District Hospital. On arrival, we took him to hospital for treatment. Thereafter, he was searched and found with 10g of plant material suspected to be bhang. I charged him with the offences before court. It is believed they stole from her after the rape, while in possession of bhang. I took the substance to government chemist and it was confirmed to be cannabis."***

It is recorded further thus:

> ***"Prosecutor: We mark the report as PMF 2(a) and the bhang PMFI 2(b) and produce them as Pexh. 2(a)(b) respectively."***

22. "Possession" is defined as:

> ***"(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;***
>
> ***(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;"*** **(See Section 4 of the Penal Code).**

To prove the charge the Prosecution had the duty of proving under what circumstances the accused was found in that amounted to possession. The witness should have described the act that constituted possession. It was not enough for the witness to casually say that he found him with the plant material.

23. Circumstances in which the plant material was taken to the government chemist, examined and a report made were also not explained. In the circumstances the Prosecution did not discharge its duty of proving the charge beyond any reasonable doubt.
24. Having re-considered evidence adduced afresh, it is our view that the conviction in the circumstances was unsafe. The appeal is therefore allowed, the conviction is quashed and sentence imposed set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

Dated and **Signed** this **7th** day of **December,** 20**15.**

B. THURANIRA JADEN **L. N. MUTENDE**

JUDGE **JUDGE**

Dated, Signed and **Delivered** at **Kitui** this **11th** day of **February,** 20**16.**

L. N. MUTENDE

JUDGE