REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 104 OF 2010

PETER MATIVO KILAKA ……..APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 787 of 2008 in the Chief Magistrate's Court at Thika L.W.Gicheha (SRM) on 16th February 2010)

JUDGEMENT

Introduction

1. Peter Mativo Kilaka, the appellant herein was tried and convicted for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in **count I**, and for the offence of rape contrary to **Section 3(1)** of the **Sexual Offences Act No. 3** of **2006** in **count II**, by the learned Senior Resident Magistrate at Thika law courts.

Brief Particulars of the Case

2. The chief facts were that on the 17th day of January 2008, in Ndithini Location of Yatta District within the Eastern Province, jointly with others not before court, while armed with dangerous weapons namely, axes, bows, arrows and pangas they robbed D M M of a wallet containing ID Card, electors card, a SIM card and cash Kshs.5800/= and at or immediately before or immediately after the time of such robbery they used actual violence against the said D M M.

Summary of the Case

3. The case for the prosecution was that **PW1** was walking home with his wife **PW2** on the evening of 17th January 2008 at 8 p.m., when the appellant and another accosted them. They beat **PW1** senseless and robbed him of the property in count I and then proceeded to rape **PW2**. The matter was reported to the police the following day and after investigation the appellant and two others were arrested and charged.

4. In his unsworn defence the appellant told the court that he was arrested from a drinking den by the area Assistant Chief. That he was subsequently charged when he failed to produce Kshs.10,000/=

to bribe his way out. He denied any involvement in the offence.

Grounds of Appeal

3. Upon conviction he was sentenced to suffer death as prescribed by law in count I, while in count II the sentence was deferred. Being aggrieved by the conviction and sentence, the appellant filed an appeal whose grounds we have compressed as follows:

i. ***The visual identification was not free from error and mistake as it was made under difficult circumstances.***

ii. ***The identification parade was not properly conducted as it contravened CAP 46.***

iii. ***The prosecution's evidence was contradictory.***

iv. ***Vital witnesses were not produced in court.***

v. ***The defence was rejected without plausible reasons***.

4. Learned state counsel Miss Ndombi, opposing the appeal on behalf of the state, submitted that there was sufficient evidence to support both conviction and sentence, and urged the court to dismiss the appeal.

Analysis

5. We have analysed and re-evaluated the evidence on record afresh in line with the decision in **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR.** In the said case the court of Appeal held that:

> ***"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".***

We therefore subjected the evidence before us to a fresh scrutiny to reach our own independent conclusion.

6. We are in no doubt that **PW1** was violently robbed and that **PW2** his wife was raped in the process. That the weapon employed against **PW1** was not identified but injured him enough to render him unconscious for a while. That **PW2** also sustained injuries to her body. **PW4 Dr**. Kamau of Thika hospital confirmed that the two witnesses sustained injuries which he classified as harm and were occasioned by a blunt object.

7. The questions for determination are first, whether there was sufficient evidence to find that the appellant was one of those who attacked and robbed **PW1** and also raped **PW2** on the night of infamy and second, whether the offence of robbery with violence was proved in view of the contradictions in the evidence alleged by the appellant in his grounds of appeal.

Visual Identification

8. The appellant submitted that the visual identification by **PW1** and **PW2** lacked a basis and was not free from error and mistake as it was made under difficult circumstances. That whereas **PW1** recognized him as "Peter," **PW2** heard the appellants name called out as "Kisee". He also recalled that when **PW1** initially testified before the Senior Resident Magistrate A. K. Kaniaru on 30th April 2009 he did not identify the appellant or state anything to that effect. Further, that **PW1** was drunk at the time and was not in a position to identify anybody. Finally, that the

assertion by **PW2** that she identified him as having worn Reebok Shoes, blue jeans trouser and white shirt were not true and not corroborated by **PW1** and **PW3**.

9. In response Miss Ndombi urged that the appellant was properly identified. She submitted that the period it took to carry out the robbery and rape was sufficient for **PW2** who was one of the complainants to identify him. Further that **PW1** testified of there being sufficient moon light to enable him to identify and the appellant who was known to **PW1**.

10. Indeed, the prosecution case rests on the evidence of visual identification by **PW1** and **PW2**. In this regard we have made a careful direction regarding the conditions prevailing at the time of identification and the length of time for which the witnesses had the appellant under observation, together with the need to exclude the possibility of error. See - the Court of Appeal decision in the case of **JOSEPH NGUMBAU NZALO VS. REPUBLIC (1991) 2KAR Pg 212**. We are cognisant of the fact that the offences herein took place at night and that therefore, the circumstances of identification were difficult.

11. The observation of the appellant began when **PW1** saw two people alight from a motor bike and walk towards **PW2** who was walking ahead of him. One of the two men held her hand and detained her. **PW1** approached them and intervened to help **PW2**. The intruder who was holding **PW2** punched **PW1**. Other people at the scene began to beat and kick **PW1**. **PW1** tried to run away but the first man followed and hit him with an object he did not identify. He fell down and lost consciousness and remained at the scene for a long time. When he regained consciousness he found his wallet missing along with Kshs.5,800/=, ID cards, Elector's card and sim card which were in it.

12. **PW1** testified that he identified the man who held on to **PW2** as "Peter" the appellant now before court. He testified thus:

> **"I only identified Peter. I then managed to run away and Peter chased me. He managed to pass me and passed in front of me and hit me on the head and I fell".**

He also testified that he was drunk but on cross-examination, he clarified that he was not very drunk, and that he had seen the appellant in the bar where he was coming from. In cross-examination he stated thus:

> **"I saw you. I usually see you. I even knew where you live. We have never had business with you. I do not know how long I have known you".**

The appellant was therefore someone known to **PW1** prior to the attack.

13. The fact that **PW1** had not mentioned his prior acquaintance with the appellant when he testified before one court, but alluded to it in his subsequent testimony before another court is explainable on the premise that the testimony before the first court did not reach its conclusion. At any rate the case started de novo and the appellant had opportunity to cross-examine **PW1** on the subsequent evidence.

14. **PW2** testified that it was the appellant who first accosted her at about 7 p.m. and held her hand. He asked her whether she knew him and told her that he was a police officer. We observe that at that point as they talked to each other there is no evidence of any obstruction or interference with her observation of the appellant.

15. When **PW1** joined in and told the appellant to let **PW2** go, the appellant punched him and a struggle ensued. **PW2** said she tried to hold onto the appellant to stop him from pummeling **PW1** and that was when a second person came in to hold her back. She broke loose and ran screaming into the bushes where she hid. From her hide out she could hear **PW1** screaming that he was dying.

16. Her hiding was short-lived because in a short while the appellant found her and hit her in the face. He held her by the hand and told her he would take her where sleep would not disturb her. He took her into an orange grove and raped her. When they emerged from the orange grove that they met the man who would later become the 3rd accused person.

17. We note that none of the men was camouflaged during the attack neither did they blind fold **PW2**. From an assessment of all the surrounding circumstances we are satisfied that **PW2** could see and identify the appellant because, as she was walking along with him they met a couple on the way who were able to see and identify the appellant. They addressed him as "Kisee" and wanted to know where he was taking **PW2**. He lied to them about the circumstances and they did not pursue the matter further. **PW2** also did not interject to ask for their help.

18. We also note that the appellant was able to see and identify the 3rd accused person when they met on the road, and asked him how many bullets he had left, because they would need them to kill **PW2**. It is also in evidence that the appellant and the 3rd accused took **PW2** into a house where they detained her from about 8.00 p.m. to 3 a.m.

19. **PW2** testified that although there were no lights in that house, she was able to see the faces of the two men together with that of a third man whom they found in the house who later became the 2nd accused person, by the light of the moonlight filtering in through the windows whose curtains they had cut down. Further that they kept striking matches to rifle through and read the documents found in **PW1**'s wallet and that this gave **PW2** the opportunity to observe them further.

20. Interestingly, the prosecution's case received support from unlikely quarters. The 2nd accused person lent credence to the testimony of **PW2** by confirming that she arrived at the house in the company of the appellant and the 3rd accused person. He told the court that **PW2** was crying even as she sat in the house with the three of them. The 2nd accused inquired from **PW2** why she was crying but it was the appellant who answered him and told him that **PW2** was his girlfriend and he should desist from asking any further questions.

21. The 2nd accused also confirmed the testimony of **PW2** that it was he who helped her escape from the said house, escorted her up to a junction and showed her which way to go. From our observation it was obvious that he was trying to exonerate his cohorts from blame by denying that any offence occurred in his presence. In particular it appears that he was trying to save the 3rd accused person when he denied that he witnesses any offence. He was however telling the truth in respect of the appellant since the evidence shows that the appellant raped **PW2** before they got to the house where they found the 2nd accused. His evidence also corroborated that of **PW2** that he did not rape her.

22. We however treated him as an accomplice and considered the probative value of his evidence as a co-accused and an accomplice. Evidence given by a co-accused person against another should only be considered if it is evaluated and found believable and if it is corroborated by independent evidence pointing to the guilt of the accused person and also if it implicates the person giving it. See - the case of **Matheka v Republic [1983] KLR 351**.

23. In the case before us there was other independent evidence from **PW3** and **PW6** to link the appellant to the offence. **PW6** was the area Assistant Chief of Ndothoni who said that **PW1**'s ID card was recovered from the appellant at the time of his arrest while **PW3** was the Identification Parade Officer who confirmed that both witnesses identified the appellant from the Identification Parade. Although the giver of the evidence was a co-accused who was subsequently acquitted, we find that his testimony was credible in so far as it placed **PW2** in the company of the appellant and the 3rd accused at the same time and location as she had stated. The 2nd accused confirmed that the appellant was found with **PW1**'s ID card in the pocket at the time of arrest. In our view his testimony lent credence to the evidence of **PW2** in material facts.

Identification Parade

24. We made an inquiry of the evidence to establish whether the parade as conducted by **PW3** passed the acid test in the cases of **Sentale** and **Mwango**. In the case of **SENTALE VS. UGANDA 1968 EA 365**, the Court of Appeal stated that the identification parade therein had been held in a manner contrary to the rule approved by the Court of Appeal in **REPUBLIC V MWANGO S/O MANAA (1936) EACA 29,** which set out 13 Parade Rules as provided in the Kenya Police Standing Order No. 15/26.

25. **PW3,** CIP Makatha the Parade Officer in the instance case narrated to the court in detail how he went about conducting the parade. He testified that the parade had eight members of almost similar colour, height and facial appearance as the appellant and that they were sourced from the members of the public and the police cells. He also stated that he gave the appellant the opportunity to choose, where to stand in the line-up and that the witnesses waited at the front of the block from where they could not see the parade arrangements. That both witnesses positively identified the appellant.

Contradictory Evidence

26. On the ground that the prosecution evidence was contradictory, the appellant submitted that the testimony of **PW1** that he was robbed was not corroborated by **PW2**, while her testimony that she was raped was not supported by **PW1**. We have assessed the evidence and find that **PW1** and **PW2** corroborated each other on the robbery itself. The fact that **PW1** said he was robbed of a wallet containing Kshs.5,800/= together with several cards, while **PW2** said that the wallet contained only documents does not go to the substance of the charge or occasion any failure of justice. **PW2** may not have known that **PW1** had money on him but both agreed that **PW1** was robbed. We also find that the fact that **PW1** referred to the appellant as 'Peter' while **PW2** heard some passersby call him 'Kisee' does not amount to contradiction. The two names are not mutually exclusive.

27. On the lack of corroboration on the evidence of rape, there is no legal requirement for corroboration. **Section 124** of the **Evidence Act** provides that where in a criminal case involving a sexual offence, the only evidence available is that of the alleged victim of the offence, the court shall receive the evidence of the victim and may proceed to convict the accused if it is satisfied that the complainant is telling the truth. The law only requires that the reason for believing that the complainant is telling the truth be recorded in the proceedings.

28. **PW2** said that she was raped by the appellant and the 3rd accused but that the 3rd accused used a condom. No swab was done on her because she presented at the hospital after several days had passed. The doctor observed that although she had no injuries to her genitalia or a discharge, she had injuries to her body which he classified as harm.

29. From the interjection of the 3rd accused when he wondered about having sexual intercourse with a woman of his mother's age just before he raped her, it is safe to assume that **PW2** was not a young woman. We opine that it is possible for a woman that age to have sexual intercourse without consent and without sustaining injuries to her genitalia. Lack of injury is therefore not synonymous with absence of rape.

30. The trial court did find that there was no plausible reason for the appellant and his cohorts to detain **PW2** after the robbery other than for sexual purposes. We find that the conclusion which commends itself to our minds in these circumstances is that they detained her for their sexual gratification. From her tearful state adverted to by the 2nd accused we infer lack of consent and find that indeed she was raped.

Vital Witnesses not called

31. On the complaint that vital witnesses were not called we are alive to the fact that **Section 150** of **Criminal Procedure Code** empowers the court to summon a witness or examine any witness at any stage. The prosecution however has latitude to call those witnesses necessary to prove their case. In **High Court Criminal Appeal Number 54** of **2011**, **Martin Ochieng Opiyo vs The Republic**, the court had this to say:

> **"As the practice is, the prosecution is always at liberty to call the witnesses they deem relevant to their case. Those witnesses called were able to establish the prosecution case."**

We agree with those views and find that they apply in the case before us.

Defence Evidence

32. Lastly the appellant complained at the evidence of the defence was rejected without plausible reason. We have scrutinized it afresh in the context of the evidence on record, bearing in mind that this being a criminal case the appellant was under no burden to prove his innocence. We find that the evidence of the prosecution was overwhelming and the defence did not create any reasonable doubt whose benefit might be accorded the appellant. We find that the trial magistrate rejected it rightfully.

33. The evidence was that the appellant was with another with whom they came riding on a motor bike before they accosted **PW1** and **PW2**. That the appellant used an unidentified object to strike and wound **PW1** before he robbed him. Two ingredients of **Section 296(2)** of the **Penal Code** were therefore satisfied.

34. In sum we find no reason to depart from the conclusion reached by the learned trial magistrate in the two counts. We therefore find that the appeal is lacking in merit and dismiss it.

SIGNED DATED and **DELIVERED** in open court this **15th** day of **April 2014**.

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A.MBOGHOLI MSAGHA **L. A. ACHODE**

JUDGE **JUDGE**