REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 363 OF 2013

(Appeal from the Original Conviction and Sentence in Criminal Case No. 5046 of 2007 dated 16thApril 2009 in the Chief Magistrate's Court at Thika by Hon. C. W. Meoli - CM)

JOHN NZOMO MATHEKA……..APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

JUDGEMENT

The Appellant John Nzomo Matheka was convicted by the Hon. CM Meoli for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He had been charged on that main Count and in the alternative with handling stolen goods and malicious damage to property as count II. He was sentenced upon conviction on the first Count to suffer death.

He has appealed to this Court against the said conviction and sentence. In the Petition of Appeal filed on 12th May 2009, he set out the points as follows:-

1. That the learned trial Magistrate erred in law and facts by in convicting the Appellant while relying with (sic) the evidence of identification whose prevailing circumstances were not conducive for a positive identification.

2. That the learned trial Magistrate erred in both points of law and fact in convicting the Appellant and failed to observe that the identification parade conducted was worthless as it did not meet the required principles of law as in Section 6(iv) of the Police Force Standing Orders Chapter 46.

3. That the learned trial Magistrate erred in both points of and fact in convicting the Appellant and failed to observe that he was denied his fundamental rights as per Section 77(2)(c) of the Constitution was violated.

4. That the learned trial Magistrate erred in both points of law and fact in convicting the Appellant when she was impressed by the mode of arrest which had no nexus with the crime in question.

5. That the learned trial Magistrate erred in both points of law and fact in convicting the Appellant and failed to resolve the material contradictions created by the prosecution witnesses in his favour.

6. That the learned trial Magistrate erred in both points of law and facts in convicting the Appellant and failed to put due consideration to his defence which was plausible ad outweighed the prosecution contrary to Section 169(1) of the Criminal Procedure Code.

He was furnished with the certified proceedings and filed an Amended Memorandum of Appeal on the date of the hearing of his Appeal on 14th October 2013. These were as follows:-

1. That the learned trial Magistrate erred in law and facts when she relied on the evidence of purported visual identification to convict yet failed to hold that the circumstances could not enable a positive identification to be made.

2. That the learned trial Magistrate erred in law and fact when she relied on the evidence of the identification parade failing to find that the same was conducted in breach of Chapter 46 of Force Standing Orders.

3. That the learned trial Magistrate erred in law and fact when she relied on contradicting statements to base and sustain a conviction.

4. That the learned trial Magistrate erred in law and fact when she dismissed his defence on weak reasons and shifted the burden of proof against him.

The Appellant appeared before the two judges of the first Appellate Court at Muranga on 14th October 2013 and urged his appeal. The learned State Counsel Mr. Naulikha appeared for the Republic and opposed the Appeal. He submitted that the Appellant was charged with the offence of robbery with violence contrary to Section 296(2). The Appellant was tried, convicted and sentenced to suffer death as ordered in law. A summary of what transpired at the material time of the offence is that on 7th November 2007 at Kiambaa Farm, the Appellant while with others not before Court armed with offensive weapons namely *pangas* and *rungus* robbed the complainant of Kshs. 3,000/- a slasher worth 150/- and a pair of scissors worth 1,500/- and immediately after that or before robbery did wound the complainant. The onus was upon prosecution to prove the offence. The prosecution called 7 witnesses. The first was PW1 the complainant who testified that she was sleeping with a toddler and the maid who testified as PW2 in the house when they heard a bang on the door and windows. The attackers forced their way into the building and robbed the complainant and went to the maid's bedroom and beat her and dragged both out of the building. Appellant was being referred to as Number One. They took the two women to the bush where the Appellant was the first to rape PW1 while an accomplice held the toddler and the others raped PW2 the maid. While the break-in was ongoing, PW1 had called the Police on patrol and raised the alarm. While going through the ordeal, the neighbours and police were on their way. The Appellant commandeered the group towards the road. The learned State Counsel stated that the identity of the accused was critical. At the time of the offence was the complainant and her maid able to positively identify the Appellant?

The Appellant was speaking in vernacular but the victim is from Kiambu and the Appellant is from Ndia and she could tell from the accent that he was from Ndia. His mouth had a red mark on the lower lip. She was categorical. As they raped the women in turns, the Appellant was close to her and she identified him. She was able to see the Appellant in the house which was well lit. The ID parade was mounted at Makuyu Police Station. PW1 and PW2 were called to identify and they both positively identified the Appellant. The Appellant was arrested barely three hours after the ordeal. He was arrested with the slasher and the scissors. He never produced evidence of ownership. Mr. Naulikha urged that the doctrine of recent possession would apply. Appellant was arrested less than 300 metres from the scene, the Appellant is not a resident of the place. It was 5.00am, what was he doing there?

Mr. Naulikha submitted that as regards the ID parade, the identification parade was conducted in accordance with Rule 46 of the Forces Standing Orders. The Appellant signed the form without duress. He appended his signature endorsing the process as correct. Procedure was followed to the letter. When the Appellant was put on his defence he gave an unsworn testimony. The Court considered his defence but it could not stand against the overwhelming evidence of the prosecution. His defence was displaced. State Counsel submitted that the evidence tendered by the prosecution was consistent, overwhelming, credible and believable. There was no contradiction or inconsistency in the evidence and it corroborated each other in all material respects. The victims had enough time and proximity to the Appellant to be able to identify him. The Court did not shift the burden of proof and

submitted that on the foregoing arguments the Appeal should be dismissed and the appellate Court should uphold the conviction and sentence of the lower Court.

The Appellant denied having participated in the incident. He stated that he was taken to the complainant's house after the arrest. He said that the complainant did not testify about him being red-lipped. The P3 did not show signs of sperms but the 2 women were given medication.

We have evaluated and analysed the facts of the case and the verdict of the learned trial Magistrate. The Appellant did not raise the issue of identification during his trial. He had opportunity to cross-examine the prosecution witnesses. Notably, PW1 and PW2 positively identified the Appellant as the person with a red lower lip nicknamed Number One and wearing a black shirt. PW1 stated that he spoke to her rudely and insulted her. He is the one she identified as having raped her first while another fingered her anus. PW2 also stated that the Appellant also raped her. They had the unenviable occasion to meet the Appellant at close quarters and interact with him closely as he subsequently raped both women. They were able to see him, the security lights outside and the lighting in the house sufficed to identify the Appellant. The evidence they gave placed the Appellant as the ringleader of the gang. He was armed with a *rungu* and beat PW1 repeatedly. The ingredients for the offence of robbery with violence were there. An additional offence no lesser than rape was also committed. Both PW1 and PW2 identified the Appellant in an Identification parade and his comment after the parade was that *nimetosheka*. He signed the form. He claims to have been picked in the morning and taken to the scene but the police officers who arrested him state that they arrested him in the night shortly after the theft and took him to the Police Station and later he led them to various places in an effort to trace his accomplices. The Police officer PW5 the arresting officer denied taking the Appellant to the scene. He was categorical that he did not take the Appellant to he scene of crime. In cross-examination conducted by the Appellant both PW1 and PW2 denied seeing the Appellant at the scene in company of police officers. In all, the Appellant's defence was displaced by the overwhelming and consistent evidence adduced by the Prosecution witnesses. Regarding the alleged shifting of the onus of burden of proof, at no time did the record reflect a shifting of the burden of proof. The Appellant was not required to prove his innocence.

We have carefully considered the rival submission on the Grounds and Petition of Appeal and find that the learned trial Magistrate did not err either on the law or facts. The conviction was safe and the sentence lawful. We thus find no merit in this Appeal and dismiss it in its entirety.

Dated, signed and delivered this 28th day of November 2013

Maureen Onyango

JUDGE

Nzioki wa Makau

JUDGE