REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 139 OF 2012

CONSOLIDATED WITH NO. 140 OF 2012

(From Original Conviction and Sentence in Criminal Case No. 2177 of 2010 of the Chief Magistrate's Court at Mombasa – T. Ole Tanchu, SRM)

RICKY KITETA MWEMA …..……..
…….1ST APPELLANT

ALBERT KITONYI NZWII ….……...…..…….
2ND APPELLANT

V E R SU S

REPUBLIC ……..…….
RESPONDENT

JUDGMENT

1. Both Appellants were charged before the Mombasa Senior Resident Magistrate's Court with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. They were convicted as charged and were sentenced to death. They have appealed against both conviction and sentence.

2. The Appellants broad grounds of appeal are two- firstly it was submitted that the charge before the trial Court did not disclose an offence and it ought not to have been the basis of a conviction. In this regard the learned Counsel for the Appellants Mr. Magolo submitted that Section 296(2) was a sentencing section and did not disclose an offence. Secondly, it was submitted that the prosecution had failed to prove the case beyond reasonable doubt.

3. The prosecution's case was that Faith Mbatha Mutua the complainant was on the night of 2nd and 3rd July 2010 asleep at her home. She woke up feeling something pressing on her throat. She later recognized that it was a piece of metal. She heard someone telling her to keep quiet otherwise she would be killed. She did not obey that command. She began to scream and continued screaming. She also began to struggle with that person who was pressing the metal on her. In that struggle they got out of the bedroom and they reached the sitting room. She was able to switch on the sitting room lights. She was then able to see the person she was struggling with and she also saw two other persons who were in the balcony of her house. Those two persons in the balcony were the two Appellants.

4. In cross examination she stated that she was aided by the security lights that were always on as well as the light in the sitting room in recognizing the Appellants. The person she was struggling with switched off the lights then proceeded to rape her. Thereafter they ran away. She continued to scream and her neighbours came to her house in response.

5. She stated that the intruders stole from her her Nokia mobile phone and Kshs. 5,000/-.

6. She was called to attend an identification parade and she was able to identify both Appellants. It was her evidence that she previously had seen the second Appellant. She used to see him when he came visiting her neighbour who lived above her apartment.

7. PC Patrick Murira together with another officer PW6 attended the complainant's home where they confirmed that the complainant had been robbed and raped. They noted that the complainant's home was 'disturbed' and was disarranged. Both officers noted that a door had been broken by the attackers.

8. The complainant's rape was confirmed by PW5 who was a doctor at Coast Provincial General Hospital.

9. Inspector of Police Pius Kilonzo conducted the identification parade. This officer's evidence that seemed to be confused was as follows-

> ***"The persons I arranged for parade, two of them are here. Both accused persons identified. Accused 1 was the one identified. Accused 2 was not identified by the complainant."***

That testimony as noted by the learned trial Magistrate was contrary to exhibit No. 6 which was produced by the same witness. That exhibit shows that the 2nd Appellant (2nd Accused) was identified in the identification parade by the complainant. The complainant as it would be recalled above stated that she identified both the Appellants at the identification parade.

10. PW7 Charity Kandula was the complainant's neighbour. She said in evidence that she was the aunt of the 2nd Appellant. She confirmed that the complainant told the neighbours that she had been robbed of a phone and money and that she had been raped. Charity said that the 2nd Appellant used to visit her.

11. Charity stated that she wrote her statement over the incident following a visit by the complainant's husband who went to her to inquire about the robbery at his home. She stated-

> ***"I know the complainant's husband. He came and inquired about what we knew about the matter. He told me I would see and I feared because he is a police officer and I went to record my statement."***

12. The content of the statement she recorded was the basis of the evidence that she adduced before Court. She proceeded to say in cross examination that the complainant on the night of the attack said she did not know her attackers. She further said that when she entered the complainant's home she noted that the window had not been removed.

13. In their defence both the Appellants chose to give evidence under oath.

14. The 1st Appellant denied the offence and stated that on the night in question he was at home in the company of his mother watching World Cup Match. The Match they were watching was between Ghana and Uruguay. In the night while asleep his mother alerted that there was someone screaming. They however did not go out. He was then arrested on 11th July 2012 by two police officers one of whom was the complainant's husband. His arrest took place at a house where he was taking alcohol '***Mnazi***'. He also confirmed that the complainant identified him at the

identification parade.

15. His mother DW5 in evidence confirmed that she and the first Appellant watched the World Cup Match between Ghana and Uruguay. The match ended at 12.30am. On ending the 1st Appellant went to sleep whilst she watched T.V for another one hour. On being cross examined she stated that she was the one who usually locked the doors and no one could get out of the house without her knowledge. She confirmed she heard the screams in the night and that the 1st Appellant also confirmed to her that he heard the screams.

16. The second Appellant in evidence stated that he lived with his aunt PW7. His aunt PW7 lived on the second floor whilst the complainant lived on the first floor. It is important to note that PW7 did not state that the second Appellant lived with her when she gave her evidence both in chief and in cross examination. The second Appellant in his further evidence in his defence confirmed that on the night in question he heard screams. The complainant came to his aunt's door and knocked. His aunt and uncle went to the door. He remained inside the house. During the identification parade he said that he was forced to wear someone else's clothes and that he was seen by the complainant before the parade was undertaken. He confirmed that the complainant did pick him out in that identification parade.

17. The second Appellant's uncle and husband to PW7 stated that he heard screams then the complainant went to their door and told them that she had been robbed and raped. He in the company of PW7 accompanied the complainant back to her house but he requested the 2nd Appellant to remain in the house with the children.

18. This is the first appellant court as such we are duty bound to reconsider the trial Court's evidence, re-evaluate it and draw our own conclusion. In doing so however, we shall make allowances for the fact that the trial Court had the advantage of hearing and seeing the witnesses. See the case of **OKENO -VS- REPUBLIC[1972]EA**.

19. The Appellants by this appeal submitted that the prosecution had failed to prove its case on the required criminal standards. The trial Court in considering the evidence presented before it stated-

> ***"... I heard the witness myself while she*** *(complainant)* ***was giving evidence and I observed her demeanour and she held out to me to be a*** *(sic)* ***honest and truthful person and therefore credible witness …. She gave consistent evidence which I have no reason to doubt."***

The Court of Appeal in the case **NJUKI & 4 OTHERS -VS- REPUBLIC [2002]IKLR 771** held as follows-

> ***"The trial Magistrate who saw and heard the witnesses, was the best Judge on the issue of credibility of witnesses and the appellant Court could not fault her unless there was a proper basis for doing so."***

20. On our part we have reconsidered the evidence tendered during the trial. We cannot find a basis to fault the finding of the trial Court on the credibility of the witnesses. The complainant informed PW2 one of the police officers who responded to the neighbours telephone call that she would be able to identify her attackers and more particularly that one of the attackers ordinarily visited her neighbour on the upper floor. Although the circumstances of identifying the attackers on the night in question were difficult the evidence adduced clearly shows that there was electric light in the room and security lights outside that enabled the complainant to see her attackers. We are therefore satisfied that the complainant had sufficient opportunity to observe the attackers. That identification was bolstered by the complainant's picking out of the Appellants at the identification parade. On our part just like the learned trial Magistrate we find that the evidence of PW3 the Inspector of Police who carried out the identification parade did not detract the evidence of the complainant in her identification evidence of both Appellants. The complainant in her evidence in

chief stated that she identified both the Appellants. The identification parade forms exhibit No. 3 and 6 prove that both Appellants were identified. In the light of that identification of the Appellants, we find that the evidence of PW3 does not create contradiction.

21. PW7 the aunt of the second Appellant in her evidence in chief and in cross examination did not state that the second Appellant lived with her nor did she state that on the night in question he was in the house. When she was cross examined by the first Appellant's learned Counsel in regard to the charges against the Appellants this is what she said-

> ***"I have known Accused persons. I am surprised about the allegations about them. I have known them for more than five years."***

The evidence of the presence of the second Appellant in her home on the night in question was in our view so vital and she could not have failed to state it if indeed he was in her home. Even the learned Counsel for the second Appellant in his cross examination of this witness did not question her on whether or not the second Appellant was in her house on the night in question. We therefore find that the evidence of the second Appellant and his uncle to have been an afterthought. We find that the prosecution by the evidence produced before the trial Court sufficiently disproved the second Appellant's alibi evidence.

22. We also find that the second Appellant's evidence in his defence where he stated that he was made to wear clothes at the identification parade and that he had seen the complainant prior to that parade to be an afterthought. We so find because that was not put to the complainant when she was cross examined. That also was not put to the Inspector of Police who carried out the identification parade.

23. The first Appellant called his mother (DW5) to confirm that he was home with her while watching World Cup Match on the night in question. We have considered that alibi evidence and being aware that the Accused person does not assume the burden of proving a defence of alibi we are however of the view that in view of the evidence of identification of the Appellant that alibi evidence cannot be sustained. See **NJUKI & 4 OTHERS** (supra).

24. We therefore find just like the trial Court that the prosecution met the burden of proof of the criminal trial and we therefore reject the ground raised by the Appellants.

25. On the submissions that the charge the Appellants faced was defective

because they were charged under Section 296(2) we shall rely on a five Judge bench decision of the Court of Appeal in the case **JOSEPH NJUGUNA MWAURA & 2 OTHERS V REPUBLIC [2013]eKLR**. This case sufficiently responds to the submissions by the Appellant's learned Counsel. The Court of Appeal in that case having discussed its previous decisions on whether a charge on Section 296(2) was defective had this to say-

> ***"We agree that this is the correct proposition of the law. Indeed, as pointed out in JOSEPH ONYANGO OWUOR & CLIFF OCHIENG ODUOR V R (Supra) the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is Section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under Section 296(2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.***
>
> ***The offence of robbery with violence is totally different from the offence defined under Section 295 of the Penal Code, which provides that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to***

use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 296(2) as this would amount to a duplex charge."

26.In the end we find that the Appellants appeal has no merit and the same is hereby dismissed.

Dated and delivered at Mombasa this 27th day of November, 2013.

MARY KASANGO

JUDGE

M. MUYA

JUDGE