REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 662 & 664 OF 2007

(An Appeal arising out of the conviction and sentence of U.P. KIDULA - CM delivered on 17th October 2007 in Thika CMC. CR. Case No.1495 of 2005)

JOHN MAINA GICHURI…….....1ST APPELLANT

MATHIAS NJUKI MUNYAI……..2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants, John Maina Gichuri (1st Appellant) and Mathias Njuki Munyai (2nd Appellant) were charged with two counts of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 28th February 2005 at [particulars withheld] Village in Thika District, the Appellants jointly, being armed with dangerous weapons namely a panga and a rungu robbed R W K and Fl W M of personal items listed in the charge sheet, including a skirt, a wrist watch and cash all valued at Kshs.1,269/- and at the time of such robbery used actual violence to the said R W K and F W M. The Appellants were further charged with **Rape** contrary to the then **Section 140** of the **Penal Code**. The particulars of the offence were that on 28th February 2005 at the same place, the Appellants in turn, had carnal knowledge of R W K without her consent. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, the Appellants were convicted of both counts of **Robbery with Violence** and **Rape**. In respect of the robbery charge, they were sentenced to death as is mandatorily provided by the law. In respect of the rape charge, they were sentenced to serve life imprisonment. The Appellants were aggrieved by their conviction and sentence. They each filed separate appeals challenging their conviction and sentence.

In the two appeals, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the evidence of identification which was made in circumstances that were not conducive to positive identification. They faulted the trial magistrate for relying on the evidence of the recovery of a skirt which was allegedly robbed from the 1st complainant during the robbery incident when in actual fact the said recovery did not connect them to the crime. They were aggrieved that the trial magistrate had convicted them despite the fact that crucial witnesses were not called to testify. In their view, the fact that the said witnesses were not called to testify, rendered their conviction untenable. They were aggrieved that the trial magistrate had convicted them despite the fact that the evidence adduced by the prosecution witnesses did not establish their guilt to the required standard of proof. They took issue with the fact that the trial magistrate had failed to weigh the totality of the evidence adduced in the case which in their view clearly established that they had not committed the offences that they were charged

with. They faulted the trial magistrate for failing to take into account their respect defences before reaching the decision to convict them. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the sentences that were imposed on them.

At the hearing of the appeal, the two separate appeals that were filed by the Appellants were consolidated and were heard together as one. Both Appellants presented to the court written submission in support of their respective appeals. They further made oral submission urging the court to allow their appeals. Miss Matiru for the State made oral submission urging the court to dismiss the appeals. She submitted that the Appellants were properly convicted after the trial court had considered the evidence of identification and after it had applied the doctrine of recent possession. She therefore submitted that the conviction and sentence of the Appellants should be upheld.

Before giving reasons for our decision, it is imperative that we set out the facts of this case, albeit briefly. PW1 R W K, PW2 F W M and PW6 M W M were on 28th February 2005 walking from their place of work to their respective residences. The three women walked along the railway line from Thika town towards Kiganjo and Kiangombe estates. According to their testimony, between the town and the two estates there is a swamp. They reached the swamp at about 7.00 p.m. It was dark. The three witnesses testified that when they reached the swamp, they saw two men running towards them from the direction they had come from. The two men ordered them to stop. According to PW6, the two men were using torches. They decided to run for their dear lives. PW6 managed to outrun the two men. PW1 and PW2 however fell down. The two men caught up with them. They took them to an abandoned church which was near the place that they (the women) had been accosted.

According to PW1 and PW2, the two men ransacked their handbags asking them to give them money. PW1 was robbed of 110 shillings while PW2 was robbed of her wrist watch. They were robbed despite the fact that PW2 had told the men that she did not have any money. After the robbery, the two men sexually assaulted PW1. They also wanted to sexually assault PW2. She told them that she was in her periods. The two men raped PW1 in turns. In the process of the sexual assault, they removed the skirt of PW1. They took it away. PW2 meanwhile had been ordered to lie with her head facing the ground. The ordeal of the two women went on for about thirty (30) minutes before they were rescued by villagers who had been sought by PW6. The two men managed to escape.

PW1 was taken to Thika Police Station where she made the report of the incident. Thereafter she was taken to hospital where she was treated and discharged. In the first report made to the police, PW1 and PW2 told the police that they did not identify their assailants. They did not give the physical description of the two men that had assaulted them. PW6, in her testimony, told the court that she did not identify the two men because she had managed to outrun them. However, in their testimony before court, PW1 and PW2 stated that they were able to identify the Appellants during their ordeal. It should be noted that whereas PW6 testified that the two men were using torches for illumination, PW1 and PW2 testified that they were able to identify the Appellants because there was sufficient light at that time of dusk. PW1 and PW2 did not however give the description of the clothes that the assailants wore. After the arrests of the Appellants (about a week later), an identification parade was held whereby PW2 was able to identify the 2nd Appellant. She however failed to identify the 1st Appellant. The prosecution did not call the police officer who conducted the identification parade to testify in the case. That evidence of identification was therefore not placed before the trial court.

PW3 F M K testified that he was the husband of PW1. He narrated the events leading to the arrest of the 2nd Appellant. He told the court that a week after the robbery and the rape incident, he got a tip-off that someone had sold the skirt belonging to his wife to a certain woman. The skirt in question was the one allegedly robbed from PW1 during the robbery incident. The woman in question was PW4 PK. PW3 testified that after receiving a tip-off, he went to the house of PW4 at Kiandutu estate. He saw the skirt. He identified it as the one belonging to his wife. PW1 too identified the skirt as the one which was robbed from her on the material day of the robbery. Neither PW1 nor PW3 told the court what distinguishing marks the skirt had to enable them to be certain that it was the exact skirt that belonged to PW1. On cross examination, PW1 conceded that the skirt was not unique. She however insisted that the skirt belonged to her. The skirt was produced as a prosecution's exhibit during trial. PW4 testified that on 3rd March 2005

at about 2 p.m. while she was at her place of business at Kiandutu selling eggs, the 2nd Appellant went to where she was with a view to selling her a skirt. The 2nd Appellant told her that he was a hawker selling clothes. PW4 bought the skirt for Kshs.100/-. PW4 did not know the 2nd Appellant prior to the incident. It was later on 7th March 2005 that a group of people led by PW3 went to her house and asked her to surrender the skirt that was sold to her. She identified the 2nd Appellant as the person who sold her the skirt. After the arrest of the 2nd Appellant, he led the police to the arrest of the 1st Appellant.

PW5 George Maingi, a Clinical Officer, produced the P3 form which had been filled soon after PW1 was examined after the robbery and the rape ordeal. PW5 confirmed that indeed PW1 had been sexually assaulted. The case was investigated by PW7 PC Julius Ngugi. He testified that after concluding his investigations he formed the opinion that indeed the offences for which the Appellants were suspects had been disclosed. He made the decision to charge them.

When the Appellants were put to their defence, they denied committing the offences. They denied that they were at the scene at the time the robbery and the rape incidences took place. They gave alibi defence. They stated that they were elsewhere doing their normal day to day work at the time it was alleged that they committed the offence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellants on the charge of **Robbery with Violence** contrary to **Section 296(2),** and **Rape** contrary to the then **Section 140** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

We have carefully re-evaluated the facts of this appeal. We have also considered the grounds of appeal put forward by the Appellants in this appeal. We have further considered the submission both written and oral made by the Appellants and Miss Matiru on behalf of the State. The Appellants were convicted on the basis of the evidence of identification and by the application of the doctrine of recent possession. As regard the evidence of identification, it was the prosecution's case that the complainants, PW1 and PW2 had identified the Appellants at the scene of crime. The complainants testified that they were able to identify the Appellants by the light of dusk. The evidence regarding whether or not there was sufficient light for the complainants to identify the Appellants as their assailants was contradicted by the testimony of PW6 who testified that it was dark at the time. In fact, she testified that the assailants were using torches. The incident is said to have taken place between 7.00 p.m. and 7.30 p.m.

In our assessment, it was unlikely that there was sufficient light which would have enabled the complainants to be positive that they had identified the Appellants as their assailants. We are fortified in this position by the fact that when the complainants made the first report to the police, they told the police that they were unable to identify their assailants. This fact was borne by the O.B. report of the incident which was brought to court at the time PW1 was being cross examined. The report clearly indicated that PW1 told the police that she was not able to identify her assailants. The entire evidence of identification that was adduced by the complainants is riddled with uncertainties. The complainants did not tell the court the type of clothes that their assailants wore. They did not give the physical description of their assailants. Although they admitted to the court that they had not previous to the incident known the

Appellants, they did not tell the court what physical characteristics of the Appellants that made them to be certain that it was indeed the Appellants who had robbed them. In the hectic and traumatizing circumstances of the robbery and the sexual assault, it cannot be ruled out that the complainants could have been mistaken that they had identified the Appellants as their assailants. In the absence of a first report identifying the physical features of the assailants, it was useless for the police to conduct an identification parade. In any event, the officer who conducted the identification parade was not called to testify. We are of the considered view that the circumstances under which the robbery took place were not conducive for positive identification. The evidence of identification of the Appellants by the complainants therefore cannot stand up to legal scrutiny. We hold that reasonable doubt was raised regarding whether actually the complainants identified the Appellants as their assailants. The reasonable doubt raised must of necessity be resolved in favour of the appellants.

As regard the evidence of the recovery of the skirt, we noted that PW1 did not give the distinguishing marks that made her to be certain that the skirt belonged to her. She conceded in her testimony that the skirt was not unique. She told the court that the skirt had been slightly torn by a barbed wire that is why she was sure that the skirt belonged to her. The circumstances of the recovery of the skirt also raises doubt as to whether indeed the skirt was in the initial possession of the 2nd Appellant. PW4 testified that she was sold the skirt by 2nd Appellant. She did not know the Appellant prior to the sale although she testified that she had seen the 2nd Appellant prior to the sale. PW3 did not tell the court how he came to be aware that the skirt in question had been purchased by PW4. He told the court that he had received a tip-off. PW4 had not worn the skirt. The skirt was in her house. Upon evaluation of the facts in regard to this evidence of possession, we hold that the link between the skirt and the Appellants is tenuous to say the least. For the doctrine of recent possession to apply, the prosecution must establish to the required standard of proof beyond reasonable doubt that the item which was robbed or stolen was found in possession of the Appellant. In the present case, the prosecution failed to establish that indeed the skirt was in possession of the Appellants to enable them link the Appellants to the robbery and the sexual assault. The Appellants were arrested more than ten (10) days after the robbery incident. The circumstances of their arrest did not come out clearly in the evidence. A skirt is an item of clothing which is not unique. The trial court therefore wrongly applied the doctrine of recent possession to find the Appellants guilty of the charge of **Robbery with Violence** and **Rape**.

In the premises therefore, we hold that the respective appeals filed by the Appellants have merit. Their appeals are allowed. Their respective convictions on the two counts of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** and **Rape** contrary to the then **Section 140** of the **Penal Code** are hereby quashed. They are each acquitted of the two counts. They are ordered released from prison and set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF NOVEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE