REPUBLIC OF KENYA

HIGH COURT OF KENAY AT NAIROBI

CRIMINAL APPEAL 79 OF 2011

ANTHONY MWANGI alias TONNY ……………………….. APPELLANT

VERSUS

REPUBLIC ……………………………………………... RESPONDENT

(Appeal from original conviction and sentence in Criminal Case 2388 of 2008 in the Chief Magistrate's Court at Kibera – Nyakundi)

JUDGEMENT OF THE COURT

The charge –

1. Anthony Mwangi alias Tonny (the Appellant) faced two counts one of robbery with violence, one of gang rape and an alternative charge of indecent act with an adult. After a full trial, the appellant was found guilty of the offence of robbery with violence and was convicted and sentenced to death. He was acquitted of the offence of rape and the alternative charge of indecent act with an adult. The charges facing the Appellant were: Robbery with violence contrary to section 296(2) of the Penal Code, gang rape contrary to section 10 of the Sexual Offences Act and the alternative charge of indecent act with an adult contrary to section 10(6) of the Sexual Offences Act. The particulars of this charge read that on 31st day of July 2008 at ***[particulars withheld]*** Valley Estate within Nairobi area Province, jointly with others not before court while being armed with dangerous weapons namely knives robbed M N Z of her cash Kshs.15, 000/- and a mobile phone make Nokia all valued at Kshs.25, 000/- and at the time of such robbery used actual violence to the said M N Z. The same night, the appellant jointly in association with another intentionally and unlawfully committed an act of rape by inserting the male genital organ (penis) into the female genital organ of M N Z which caused penetration without her consent. The particulars of alternative charge were that the appellant on the night of 31st July 2008 at ***[particulars withheld]*** valley estate in Nairobi intentionally committed indecent act by placing his penis on the surface of the vagina of M N Z.

Facts

2. M N Z (PW1) was on 31st July 2008 in her house at Loresho and while in her bedroom and her child in the sitting room, she heard the child, S M (PW2) scream. PW1 rushed to the sitting room, and along the corridor met a man who had a knife and was covering his face with a mask, leaving only his eyes and mouth visible. This man started threatening her and said that he had been sent to kill her which was a surprise to PW1 who demanded to know who had sent the man as she was only two months old in the areas and only knew the landlord. The man lifted the knife intending to slash her but PW1 got hold of him and lifted the mask up the forehead. She realised the person was Tony, the appellant whom she used to see at the house of the landlady. The appellant pushed her to the bedroom, demanded money and she gave

out Kshs.15, 000/-. Her daughter was brought in the bedroom where PW1 was by another masked man and the appellant demanded that he put maize cobs in the mounts of PW1 and PW2 and to tie them with celotape and wire. PW1 was released and undressed but asked her attackers not to rape her in front of her child, PW2 and was taken out to another room and put on the bed and raped by the appellant who then called the other man who also proceeded and raped her. Before leaving her bedroom, the appellant asked for PW1's phone, a Nokia valued at kshs.7, 000/-.

3. PW2, aged 12 years at the time was also in the same house with her mother, PW1 and at 9.00 p.m. there was a knock at the door and she opened it thinking it was a girl living with them who had come back but instead, a man wearing a mask and carrying a panga came in and placed a panga on her neck. Her screams attracted her mother who came to the room and before she could get to the sitting room the man threatened her with death and warned PW2 not to scream. PW2 was taken at the back of the house and tied with a piece of wire and some timber, the person who tied her went into the house but came back, untied her and took her to the bedroom where her mother was and was kneeling with her hands tied. She was also made to kneel and both of them had their mouths filled with maize cob and celotape and PW1, the mother was taken out of the room to the kitchen and the light in the bedroom were put off. She was later taken to the bedroom where her mother was and made to lie on the bed. The two men then took cash from PW1's handbag.

4. PW1 said there were lights in her house all through the attack; the lights were only put off before the robbers took off and she was able to identify the appellant when she pulled out the mask and called his name out, Tony. The appellant left his mask in the kitchen and was taken to the police station. PW1 reported the matter to the landlady and later to Spring Valley Police Station where she gave the name of the appellant and told them where he lived; she went for treatment at Nairobi Women's Hospital where she was treated. She learnt later that appellant was arrested but the other man was never arrested.

5. PC Ezekiel Momanyi, PW3 the investigations officer followed the descriptions of the appellants given by PW1 and the directions of where he used to stay and had the appellant arrested. On 16/8/08 Sgt. Mwaniki made the arrest and took the appellant to Nairobi Women hospital where samples were taken, with these samples results, the recovered mask, the appellant was charged.

6.The trial magistrate considered all the materials placed before the court at the trial of the appellant, was convinced that the offence of robbery with violence took place but the offence of rape was not proved beyond the required standard and hence no finding in this respect. The defence of the appellant was rejected on the basis that PW1 had positively identified the appellant as PW1 knew him well before the robbery and thus proceeded to convict the appellant and sentenced him to death as prescribed by law for the offences under section 296(2) of the Penal Code. The appellant being dissatisfied with the conviction and sentence preferred this appeal.

Grounds of appeal

7. The appellant filed six (6) grounds of appeal; and upon our scrutiny we note these are essentially seven (7) grounds of appeal. the appellant was aggrieved that the trial court convicted him without considering that the conditions allowing identification at the scene were not favourable, that there was no exhibit recovered hence no link to the doctrine of recent possession, the investigation officer failed to produce the OB to keep the court clear on the date of arrest, the defence was rejected without giving reasons and that the conviction was wrong as it was based on a single witness identification.

Submissions

8. In submissions the appellant supported his appeal that the only evidence the trial magistrate relied on to convict him was that of identification and recognition but that this was a mistake made by PW1 and that this evidence was unsatisfactory as the circumstances prevailing at the *locus quo* were not conducive for positive identification. That the evidence of PW1 and PW2 was that the men who attacked them were masked and they were frightened to be able to recognise them. That when most women are under threat, their reaction is to scream or run away and in this case PW1 and PW2 must have been in shock. The

appellant referred to the case of **Robert kitau Wanjiku versus Republic, App. 63 of 1990,** where the court held that the evidence of identification should be tested with the greatest care especially when it is known that conditions favouring a correct identification were difficult. That in this case, the identification by recognition that was made by PW1 was not in conducive circumstances. That PW1 gave evidence that she was attacked on 31st July 2008 but the report was made to the police on 13the August 2008 which indicates that she was not sure of who had attacked her. That the delay in reporting resulted in mistaken identity and an afterthought.

9.On the mode of arrest, the appellant submitted that he was a victim of circumstances as PW3 could not explain on how arrest was effected, the OB was not produced and his request to have PW2 recalled was declined and hence he was denied of material necessary for his defence. That vital witnesses were not summoned the arresting officer and those in his company and the members of the public who assisted in the arrest of the appellant, all these witnesses were never called.

10. The learned state counsel opposed the appeal and submitted that the trial court correctly convicted the appellant on the offence of robbery with violence. That the appellant while armed with a knife robbed PW1 and phone and cash and in the course of robbery raped her together with another person not arrested. Even though the appellant wore a mask, PW1 managed to lift it and since there was electricity, she recognised him well and called out his name as Anthony. PW1 child of 10 years, PW2 was in the house and corroborated the evidence of PW1 and she knew the appellant well and used to hear him speak and could recognise his voice as well. PW1 was able to take PW4 to the appellant's house and when he saw PW4 he run away, an indication that he was guilty but he was arrested. That the evidence is consisted with the ingredients of robbery with violence, this was proved and the findings of the lower court should be upheld and the appeal be dismissed.

Determination of the issues

11.We are aware of the requirement that this court sitting on first appeal is under a duty to examine and evaluate afresh all the evidence adduced at the lower court with a view to arriving at its own independent conclusions whether or not to uphold the judgement of the lower court. The court is also alert to the fact that it did not have the advantage of observing the witnesses as to form an opinion of their demeanour.

12. On whether there was recognition and identification, the main ground in this appeal is that of identification. The lower court relied on the evidence of the complainant, PW1 in that she did not only identify the appellant but recognised him being a person she had known prior to the incident in question. The learned trial magistrate was alive to the fact that she was dealing with the evidence of a single identifying witness. This evidence must be watertight as held in **Roria versus Republic [1967] E.A. 583.** There is nevertheless some measure of reassurance when the case rests on recognition as stated in **Anjononi and others versus Republic [1980] KLR 59** where the court held;

> *The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable that identification of a stranger person because it depends upon the personal knowledge of the assailant in some form or other*

13. In this case, PW1 evidence was that the robbery took place at night, there was light as electricity was on and even though the appellant wore a mask, she was able to lift it as he raped her. Indeed this mask was later recovered in her house after the robbery the appellant was somebody known to her prior to that day as PW1 used to see him at her landlady's house. This makes the evidence of identification, although by a single witness, free from any possibility of error as it was evidence of recognition. PW1 gave evidence that;

> *… I recall on 31/7/08 at 8.45 p.m. I was at the house. I heard my kid screaming. I asked*

> *her what was happening. After that I saw a person coming with a mask on his face. That time I was in the bedroom and the kid was in the sitting room. There were 2 bedrooms in the house. When the guy came in the bedroom he told me that he was told to kill me. Then I tried to scream. Then he touched me in my throat as I tried to scream and he had a knife he was trying to kill me. Then I pulled the hand that had the knife then I pulled the mask. That is the time I saw his face. Then he returned the mask again. They were 2 men so I he called the other guy who was holding my kid and told him to tie me with a wire on the hands … they were so scaring when they came in when I notice. When I pulled the mask I saw the face – I called him by name Tony – the one I pulled the mask is the person I knew. He's called Tony. I know him when he was coming at the landlady's house. I was not so familiar with him. I had known him for 3 months. I used to see him over the weekends when I was free at home. … When I went to the police station I found Tony is the one who had been arrested. I saw him a police station.* [Emphasis added].

14. We have considered this evidence and the entire record and find that the prevailing circumstances in the house of the complainant, PW1 were conducive for her to recognise a person she knew and even called his name as she knew him as 'Tony'. Even though PW2 the daughter is a minor, the learned trial magistrate warned herself of relying on the evidence of a minor and the record of this enquiry is clear. She was seated in the sitting room, there was light from electricity and when she heard a knock on the door, she thought it was a girl who used to visit them and had no hesitation to open the door. There is no reason whatsoever for this child to have opened the door when it was dark. We also believe her evidence with regard to support PW1 evidence that there was sufficient light in the house which light was on during the entire time when the appellant was there.

15. The other issue for our determination is whether the conviction had proper basis as key witnesses were never called by the prosecution. In this regard we find the appellant was charged under section 296(2) of the Penal Code and section 10(6) of the Sexual offences Act. He was acquitted of the offences under the Sexual Offences Act, the offence of rape and the alternative charge of indecent acts on a female. The appellant ground that there were witnesses that the prosecution failed to call especially the members of the public who assisted the police in his arrest, we find as a misplaced ground as this could only incriminate him further noting that he was arrested as he tried to run away from the arresting officer upon a report by PW1 who had recognised him in the course of robbery with violence. We are satisfied the witnesses that the prosecution presented in court had sufficient evidence to support the charge under section 296(2) which reads;

> *If the offender is armed with any dangerous or offensive weapon or instrument, or in company with one or more other persons or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.*

16. We find the appellant was properly charged for robbery with violence as all the ingredients of the offence under section 296(2) were met. He robbed PW1 while armed with a panga, he was in the company of another person and before the robbery and after the robbery, the appellant made threats of violence. At the time of the hearing of the case before the lower court, PW1 still complained of wounds suffered on her hands due to the effect of the wires that tied her hands. On the witnesses that were called by the prosecution to argue their case we note in the case **of *Bukenya and others versus Uganda (19720 EA 549,*** the court of Appeal for East Africa stated;

> *It is well established that the Director has the discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call and make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law*

of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tendered to be advance to the prosecution case.

17. We, with respect share the view of the lower court on the finding that the witnesses called by the prosecution before the court, sufficiently established that the appellant was the person who in the company of another not arrested robbed the complaints and used violence.

18. In conclusion, having carefully analysed and determined all issues raised, we are of the view that the appellant was correctly sentenced by the trial court. On our part, we have examined all the evidence afresh and satisfied that the grounds of appeal raised by the appellant have no basis. We therefore reject this appeal, uphold the conviction and sentence. It is so ordered.

Signed dated and delivered this 20th Day of December 2013.

M. Mbaru **J. Rika**

Judge **Judge**