REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 110 OF 2008

MOSES NDUNGU KARANJA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. The appellant, Moses Ndungu Karanja was charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code, one count of rape contrary to Section 10 of the sexual offences Act No. 3 of 2006 and one count of unnatural offence contrary to Section 162(a) of the Penal Code. In the alternative to each of counts 3 and 4 he was charged with an indecent act to an adult contrary to Section 11(b) of the sexual offences Act No. 3 of 2006.

2. Briefly stated, the prosecutions' case was that PW3, 4 and 5 were asleep in their home in Kiambu when a gang of robbers attacked them while armed with pangas, sticks and stones and robbed PW3 of a mobile phone valued at Kshs.2500/- and raped her. The robbers sodomised PW4 and then moved to the next house where they found and robbed PW1 of cash Kshs.500/-. They used violence against each of the victims during the robbery.

3. At the close of the trial the learned trial magistrate acquitted the appellant on count I and convicted him on counts II, III and IV respectively. Subsequently the appellant was sentenced to death on count II while the sentences in counts III and IV remained in abeyance.

4. The appellant filed an appeal against conviction and sentence, and in his grounds of appeal he stated that:

1) *His rights under Section 72(3)(b) of the repealed constitution were violated since the police detained him for too long before producing him in court,*

2) *That he was not accorded a fair trial within reasonable time as provided under Section 77(1) of the repealed constitution.*

3) *That the evidence of identification was hearsay.*

4) The charges in counts 3 and 4 were not proved against him since there was no primary evidence.

5) The credit of the prosecution witnesses was doubtful.

6) The identification parade held in his respect was unprocedural.

7) The evidence of arrest was contradictory and inconsistent.

8) The prosecution did not prove their case against the appellant beyond reasonable doubt.

9) The trial magistrate did not evaluate or analyse the evidence in her judgment.

10) The defence was plausible and was not displaced by the prosecution.

5. We have analysed and re-evaluated afresh the evidence that was adduced before the lower court, as expected of us as the court of first appeal bearing in mind that we neither saw nor heard the witnesses as they testified. This is in line with **NJOROGE VS. REPULIC [1987] KLR Pg 99.**

6. The issues for determination are whether the appellant was identified positively in all three counts in which he was convicted and whether the charges of sexual assault in count 3 and 4 were proved against him.

7. PW3 and 4 told court that there were three robbers who burst into the house of PW3 and PW5 on 11th September 2005 at about 1.30 a.m. One man dragged PW4 out of the house and took her next to the fence where he held a panga against her neck and raped her, when he was through with her his two companions also took turns in raping her. PW3 said that the appellant was one of those who attacked them and was the first one to rape her. The robbers took her phone make siemens C35. According to PW3 the robbers were armed with pangas and carried sacks.

8. PW4 said that there were three robbers and that two of them sodomised her. She also testified that she saw PW3 in the process of being raped.

9. From the record the robbers numbered more than one, were armed with pangas and they assaulted PW3 and PW4 in the process of robbing PW3 of her mobile phone. These are the ingredients of the offence of robbery contrary to Section 296(2) of the Penal Code. Anyone of these ingredients if proved is enough to form the basis of a conviction for the offence of robbery contrary to Section 296(2) Penal Code. In this case all the ingredients were proved and we find that the offence of robbery contrary to Section 296(2) of the Penal Code was proved.

10. On the charges of sexual assault in count 3 and 4, PW4 testified that she saw PW3 in the process of being raped as she herself was being led out of the house to be sexually assaulted. PW3 also saw PW4 being sodomised as she herself was being raped. They corroborated each other in their evidence since they each witnessed the other being violated. PW2 Dr. Gitonga of Kiambu District hospital testified that he found a whitish discharge with puss cells in the genitals of PW3 and the anus of PW4 when he examined them. He however found no injuries or spermatozoa on either of the two witnesses. The Doctor testified that it was possible for an adult victim to be raped without sustaining physical injuries. He also testified that a man may rape or sodomise a victim without ejaculating and there would therefore be no evidence of spermatozoa.

11. We are therefore satisfied that during the robbery PW3 was raped and PW4 was sodomised. PW3 reported immediately to her husband when she returned to the house that she had been raped, and both PW3 and 4 were examined within hours of the assault.

12. On the issue of identification we bore in mind the case of **Cleophas Otieno Wamungu v. Republic** Kisumu Criminal Appeal No. 20 of 1984 (unreported), in which the court rendered itself thus on the issue of identification:

"Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimise this danger whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken. The court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

13. PW3 testified that she was dragged out of the house and raped near the fence. She said that the scene of her rape was well lit by security light from the neighbouring building. She recalled that the appellant was the first to rape her as he held a panga against her neck. Further that she was able to identify two of her assailants.

14. PW4 testified that she identified two of the robbers outside in the light where they sodomised her. She specified that the appellant was the second in turn to assault her sexually. Thereafter the robbers walked with her for 1½km threatening her with a knife and an axe before they released her to return home.

15. Their evidence as to the lighting of the scene outside was corroborated by PW7, Sgt Ngeno, the Investigating Officer. In his testimony he told the court that he visited the scene severally at night and was able to observe, on first hand basis that there was bright light from the neighbouring building illuminating the scene where the two women were sexually assaulted. PW7 confirmed that the two witnesses took the earliest opportunity to inform the police that they could identify two of the people who assaulted them. PW8, Inspector Kimutai organised the identification parade in respect of the appellant ten days after the attack. The identifying witnesses were PW3 and PW4 and he confirmed that both witnesses were able to pick the appellant from the line-up.

16. We are satisfied that the evidence of identification was not hearsay. Even though PW1 is the one who knew the appellant by name and who enabled the police to arrest the appellant, PW3 and PW4 spent ample time with the appellant as he assaulted each of them and later they picked him from the identification parade. After analyzing the evidence of PW8 we are satisfied that the rules governing identification parades were followed and the parade was arranged in a proper manner. We found no contradictions of material worth in the evidence of the witnesses.

17. The learned trial magistrate did evaluate the evidence quite well in her judgment and she did address herself to the alibi defence raised by the appellant and found it to be:

"a mere sham lacking in merit. Both DW2 and DW3 could not corroborate the alibi defence of the appellant as they could not account for the whereabouts of the appellant at exactly and about the times the offences were committed."

18. This being a criminal trial the appellant was under no obligation to give any explanation. He however elected to give evidence and call two witnesses and we are therefore obliged to evaluate their evidence too. We found no difficulty agreeing with the Honourable trial magistrate that none of the two defence witnesses corroborated the appellant's alibi defence. DW2 only testified about his arrest and admitted that he only learnt later that DW3 who was girlfriend to the appellant was previously a girlfriend to PWI. To believe that PWI fabricated evidence against the appellant because of a grudge over a girlfriend who left him for the appellant would leave the evidence of PW3 and PW4 unexplained.

19. DW3 on the other hand testified about being with the appellant on an unspecified night in September 2006 when the police woke them up and arrested the appellant. She also spoke of previously having been married to one James Ndung'u who appears to have no bearing on this trial.

20. After carefully analysing and re-evaluating the evidence on record we are satisfied that the Honourable trial magistrate comprehended the facts of the case well and applied the applicable law properly to reach her conclusion. We therefore find that the appellant's appeal lacks merit and is dismissed accordingly.

SIGNED DATED and **DELIVERED** in open court this 31st day of January 2012.

F. A. OCHIENG **L. A. ACHODE**

JUDGE **JUDGE**