



**SIMON MUTETI NTHENGE..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

***CONSOLIDATED WITH***

**CRIMINAL APPEAL NUMBER 144 OF 2010**

**ANTHONY MUTISYA KIOKO..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

***AND***

**CRIMINAL APPEAL NUMBER 146 OF 2010**

**JOSEPH MBOLU..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

(Being an appeal from original conviction and sentence in Cr. Case No.1189 of 2008 by Hon. A.W. Mwangi SRM at Kithimani Law Courts on 7<sup>th</sup> August, 2010)

### **JUDGMENT**

The 3 appellants, **Simon Muteti Nthenge**, **Joseph Mbolu** and **Anthony Mutisya Kioko**, hereinafter 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Appellants respectively were each charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act in that on 25<sup>th</sup> October, 2008 in Yatta District within the Eastern Province, in association with each other intentionally and unlawfully penetrated their penis into the vagina of **M.K** hereinafter “*the complainant*” without her consent.

Each was also charged with the alternative count of indecent Act contrary to section 11(b) of the Sexual Offences Act in that on the same day and place, they each committed an indecent act with **M.K** by touching her breasts and vagina.

The appellants pleaded not guilty and a total of 5 prosecution witnesses testified. The complainant is an imbecile. She testified that on 25<sup>th</sup> October, 2008 she went to the river to fetch water. The 3 appellants who were well known to her accosted her and took her to Roman’s home, tore her bikers and did what she preferred to call “*bad acts*” to her in turns. The 1<sup>st</sup> appellant had covered her mouth as the rest held her

hands. The 1<sup>st</sup> appellant tore her biker. PW.1 took very long to go back home and PW.2 her mother decided to go looking for her. On her way to the same river she met 2<sup>nd</sup> appellant carrying a jerrican of water. On seeing her, the 2<sup>nd</sup> appellant fled. PW.2 went on to the river where she found the complainant's water containers. Shortly thereafter, the complainant, emerged from Roman's shamba, her head and back covered with soil. The complainant explained that the 3 appellants had sexually assaulted her.

The matter was reported to Ndithini Police Post the following day. PW.3 a police officer booked the report and referred the complainant for treatment and issued her with a P3 form. On 27<sup>th</sup> October, 2008 the complainant was taken to Matuu District Hospital where she was treated and her P3 form filled. On 28<sup>th</sup> October, 2008 she was examined at Nairobi Women Hospital.

PW.4 a Clinical Officer confirmed examining and treating the complainant. He also filled her P3 form in which he concluded that the complainant was mentally retarded and had been raped since she had bruises on her genitalia.

PW.5 a Police Officer investigated this case and on 20<sup>th</sup> November, 2008 had the appellants arrested. They were then arraigned in court where they were charged with the offences.

Put on their defence, each appellant gave a sworn statement, and called a total of 3 witnesses. The evidence of the appellants and their witnesses was that on 25<sup>th</sup> October, 2008, they had been hired by DW.4 to construct a house for him. They were laying the slab on that day and hence they were very busy. DW.4 was present. Present too was DW.5 who is a mason and DW.6 who was one of the women hired to fetch water to be used in the construction. It was the evidence of these witnesses that on that day they all worked from 9 a.m. till 5 p.m. without leaving the premises. They even took lunch within the premises. One week later the appellants heard rumours that they had allegedly raped the complainant. They reported to the area chief that their names were being tarnished. The area chief called them and PW.2 for a meeting severally but the latter refused to turn up. On 19<sup>th</sup> January, 2009 each of the appellants was arrested from his home and escorted to Ndithini Police Post. They were later escorted to Yatta Police Station and then to court where they were charged with the offences.

The learned magistrate having evaluated the evidence on record both by the prosecution and defence found the case against the appellants proved. She proceeded to convict each one of them of the offence and sentenced each one of them to fifteen (15) years imprisonment. Aggrieved by the conviction, the appellants separately lodged an appeal to this court on similar grounds to wit; that the evidence of identification was weak particularly so since it came from a mentally retarded person, the charge sheet was defective, the evidence was contradictory, the court did not consider the fact that they were victims of circumstances, crucial witnesses were not summoned, and their defences were rejected without any reasons.

When the appeals came up for plenary hearing, **Mrs. Gakobo**, learned Senior State Counsel applied that the same be consolidated. The appellants did not oppose the request. Accordingly an order of consolidation was made. All the Appellants elected to canvass their respective appeals by way of written submissions.

In opposing the appeals, **Mrs. Gakobo** submitted that the complainant knew the appellants prior to the date the offence was committed. She therefore recognized them in the act. After all the offence was committed in broad day light. Thus the conditions obtaining were favourable for positive recognition. PW.2 observed the complainant and noted that she had soil on her head and back. She observed her private parts and noted a discharge. Medical evidence confirmed that the complainant had been raped. The trial court in analyzing the evidence and observing the demeanour of witnesses as they testified was satisfied that PW.1 was telling the truth. The court further analyzed the appellant's defences and found them not to be credible in the light of the evidence adduced by the prosecution linking them to the offence. The conviction of the appellants was therefore safe. Sentence imposed was not illegal. She urged the court not to interfere with the same.

I have considered the record, the submissions and the law. In my view, the trial of the appellants was vitiated and one ground support this view. On 19<sup>th</sup> March, 2010, just before the prosecutor could close its case, he applied to substitute the charges so that each appellant was charged separately. The appellants did not object to the application. The application was therefore allowed. It is not clear under what provisions of the law that the application was made but presumably it was done under section 214 of the Criminal Procedure Code.

The substituted charge was subsequently read over and explained to the appellants and they all returned a not guilty plea. Immediately thereafter the prosecutor is recorded as saying:

***“I am told doctor Muhombe is still unwell. We shall do away with her evidence since there is a P3 form on record. I close the prosecution’s case .....*”**

In her subsequent ruling, the learned magistrate placed each appellant on his defence. The appellants elected to give sworn statement of defence and called witnesses. Thereafter the learned magistrate proceeded to craft and deliver a judgment in which she convicted the appellants and sentenced them as appropriate.

Section 214.1 (ii) provides inter alia:

***“ (ii) where a charge is altered under this sub-section the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.”***

The record before me, the relevant portion of which I have reproduced above, clearly shows that **Mrs. A.W. Mwangi, SRM** did not comply as was required of her with the aforesaid provisions of the law. She did not explain to the appellants their right to demand that the witnesses or any one of them be recalled and give their evidence afresh or be further cross-examined. The written law makes that requirement mandatory. It was even more deserving of the appellants’ case since the substitution of the charge was done at the close of the prosecution case and each appellant was then charged separately.

For the aforesaid reason, I would declare the trial of the appellants a nullity.

What next? A retrial comes to mind first. However, I have anxiously considered whether or not to order such a retrial. The relevant principles to consider when faced with such a matter were set out in the case of **Muiruri Vs. Republic (2003) KLR 552** thus:

***“3. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.***

***4. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution’s making or the court’s.”***

In this case I do not think that the interest of justice will be best served by an order of retrial. I have looked at the evidence tendered during the trial and I am satisfied that if the self same evidence was tendered at the retrial a conviction may not result. Again the mental status of the complainant militates against an order of retrial. If at the time of trial it was so difficult to get her to say what really happened, couldn’t it have become more difficult with the passage of time. In any event, the mistake leading to the quashing of the conviction was entirely the courts. I do not see then how the appellants should be penalized.

In the upshot, the appeal is allowed. The conviction and sentences imposed upon the appellants are set aside. The appellants should forthwith be released unless otherwise lawfully held.

**Ruling dated, signed and delivered at Machakos, this 29<sup>th</sup> day of February, 2012.**

**ASIKE-MAKHANDIA**  
**JUDGE**