



WILLIAM WANYOIKE.....1ST APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 90 of 2008 in the Senior Resident Magistrate’s Court at Kigumo presided over by Hon. M.W. Mutuku – S.R.M.)

CONSOLIDATED WITH

CRIMINAL APPEAL NO.192 OF 2009

PATRICK MAINA MWANGI.....2ND APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 90 of 2008 in the Senior Resident Magistrate’s Court at Kigumo presided over by Hon. M.W. Mutuku – S.R.M.)

A N D

CRIMINAL CASE NO.193 OF 2009

JOHN KAMAU NDABIA.....3RD APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 90 of 2008 in the Senior Resident Magistrate’s Court at Kigumo presided over by Hon. M.W. Mutuku – S.R.M.)

J U D G M E N T

The appellants herein, namely: **William Wanyoike Kamau, John Kamau Ndambia and Patrick Maina Mwangi** were jointly tried on a charge of six (6) counts with alternative counts. The trio jointly faced a charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** in first four counts. **The**

particulars of the offence in Count I are that on the 4th day of January 2008 at K[...] Village in Murang'a South District of the Central Province, with others not before Court being armed with dangerous weapons namely: pangas, sticks and iron bars robbed L.W.M of cash Ksh.15,000/=, two mobile phones make Siemens C25 and bird, one VCD Player, one panga, one amplifier, one radio speaker, 40 VCD Discs, one Aucma TV Remote and three electrical torches all valued at Kshs.20,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said L.W.M.

In Count II, the particulars of the offence are that on the 4th day of January, 2008 at K[...] Village in Murang'a South District of the Central Province, with others not before Court being armed with dangerous weapons namely: pangas, sticks and iron bars robbed A.W.T of Ksh.600/= and at or immediately before or immediately after such robbery threatened to use actual violence to the said A.W.T.

In Count III, it is alleged that on the 4th day of January, 2008 at K[...] Village in Murang'a South District of the Central Province, with others not before Court being armed with dangerous weapons namely: pangas, sticks and iron bars robbed Christopher Maina Ngugi of one mobile make Nokia 1200 valued at Ksh.2,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Christopher Maina Ngugi.

The particulars of the offence in Count IV are that on the 4th day of January 2008, at K[...] Village in Murang'a South District of the Central Province, with others not before Court being armed with dangerous weapons namely: pangas, sticks and iron bars robbed Timothy Muiru Mwaniki of cash Ksh.1,990/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Timothy Muiru Mwaniki.

William Wanyoike Kamau, hereinafter referred to as the 1st appellant faced a charge of Gang Defilement Contrary to Section 10 of the Sexual Offences Act No.3 of 2006 in Count V. The particulars of the offence are that on the 4th day of January, 2008 at K[...] Village in Murang'a South District of the Central Province, gang defiled G.M.M.

He also faced an alternative count of Indecent Act contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that on the 4th day of January 2008, at K[...] Village in Murang'a South District of the Central Province, committed an indecent act with G.M.M a girl under the age of 18 years by touching her private parts.

On the other hand Patrick Maina Mwangi, hereinafter referred to as the 2nd Appellant faced the charge of Gang Rape Contrary to Section 10 of the Sexual Offences Act No.3 of 2006 in Count VI. The particulars of the offence in this count are that on the 4th day of January 2008, at K[...] Village in Murang'a South District of the Central Province, gang raped L.W.M.

The 2nd appellant also faced the alternative count of Indecent Act contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars of the offence under this count are that on the 4th day of January 2008, at K[...] Village in Murang'a South District of the Central Province committed an indecent act with L.W.M by touching her private parts.

John Kamau Ndambi, hereinafter referred to as the 3rd appellant was accused of Indecent Act contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006 in Count VII. The particulars of the offence are on the 4th day of January, 2008 at K[...] Village in Murang'a South District of the Central Province committed an Indecent Act with L.W.M by touching her private parts.

At the end of the trial, the appellants were acquitted in Count III but were convicted in Counts I, II and IV and sentenced to suffer death. The 1st appellant was acquitted in Count V. The 2nd appellant was convicted in Count VI. The 3rd appellant was also acquitted in Count VII. The appellants being aggrieved,

each filed an appeal. Those appeals were consolidated before the appeal could be heard.

On appeal, William Wanyoike Kamau, the 1st appellant, put forward the following grounds in his petition:

- 1. The Learned Trial Magistrate erred in law in not having P.W.1 sworn, before she gave her evidence and if she was sworn then the Court record does not indicate so. This is a serious omission on the part of the Trial Court.***
- 2. The Learned Trial Magistrate erred in law and fact in convicting the appellant when the evidence of P.W.1, P.W.2 and P.W.3 is full of material contradictions with regard to the actual events during the alleged robbery.***
- 3. The Learned Trial Magistrate erred in law and in fact in convicting the appellant on counts 1, 2 and 4 whereas it was clear that there was no evidence of robbery with violence proved beyond reasonable doubt against the Appellant.***
- 4. The Learned Trial Magistrate misdirected himself by concluding that the prosecution had proved the offences against the Appellant beyond reasonable doubt and thus convicting the Appellant notwithstanding that none of the witnesses stated that they saw the face of the Appellant. The witnesses did not give the names of the Appellant to the police and no description of the appellant was given by the witnesses to the police.***
- 5. The Learned Trial Magistrate put himself in serious error when he failed to caution himself against believing the evidence of P.W.1 and P.W.2 against the Appellant when it was clear that they never saw the face of the appellant even though his face was not covered. Notwithstanding the bright light from the torches, the only identification was through the alleged voice of the appellant which is not in any way unique.***
- 6. The Learned Trial Magistrate erred in concluding that the identity of the appellant was proved whereas the arresting officer P.W.7 clearly states that the names of the alleged assailants were not recorded in the Occurrence Book when the report was first made.***
- 7. The Learned Trial Magistrate erred in convicting the appellant notwithstanding glaring gaps and loopholes in the prosecution's case.***
- 8. The Learned Trial Magistrate misdirected himself in convicting the appellant which conviction was against the weight of evidence, law and procedure.***

On his part, John Kamau Ndambia, the 2nd appellant, listed the following grounds in his petition:

- 1. The learned Trial Magistrate erred in law and fact in not giving proper consideration to the evidence of the defence at all in her judgment for no reasons at all.***
- 2. The Learned Trial Magistrate erred in law and fact in failing to deal properly with the issue of identification of the appellant which was very important in this case.***
- 3. The Learned Trial Magistrate erred in law and fact in failing to consider that the identification of the appellant by the prosecution witness was made under difficult circumstances. P.W.1 had been hit on the left eye, P.W.2 and P.W.4 were under the bed and so identifying the attackers was difficult.***
- 4. The Learned Trial Magistrate erred in law and fact in failing also to find that the identification was done at night and the rooms were dark and that no identification parade was done.***
- 5. The Learned Trial Magistrate erred in failing to hold and inform the appellant his Constitutional right under Section 72(2) of the then Constitution in force was infringed as he could have been taken***

to Court within 24 hours in respect of the rape charge.

6. The Learned Trial Magistrate erred in law in holding that P.W.3 J.W was a child capable of testifying on oath without testing her as provided by the Oaths and Statutory Declaration Act.

7. The Learned Trial Magistrate erred in failing to hold that none of the prosecution witnesses saw the faces of the attackers so as to convince the trial court the appellant was really the attacker nor give the description of the assailants at all.

Patrick Maina Mwangi, the 3rd Appellant put forward the following grounds in his petition:

1. The Learned Trial Magistrate erred in law and fact in not giving proper consideration to the evidence of the defence at all in her judgment for no reasons at all.

2. The Learned Trial Magistrate erred in law and fact in failing to deal properly with the issue of identification of the appellant which was very important in this case.

3. The Learned Trial Magistrate erred in law and fact in convicting the appellant with the offence of rape in absence of medical evidence that he was indeed the one who committed the offence and not any other person.

4. The Learned Trial Magistrate erred in law and fact in failing to consider that the identification of the appellant by the prosecution witness was made under difficult circumstances. P.W.1 had been hit on the left eye, P.W.2 and P.W.4 were under the bed and so identifying the attackers was difficult.

5. The Learned Trial Magistrate erred in law and fact in failing also to find that the identification was done at night and the rooms were dark and that no identification parade was done.

6. The Learned Trial Magistrate erred in failing to hold and inform the appellant his Constitutional right under Section 72(3) of the then Constitution in force was infringed as he could have been taken to Court within 24 hours in respect of the rape charge.

7. The Learned Trial Magistrate erred in law in holding that P.W.3 J.W was a child capable of testifying on oath without testing her as provided by the Oaths and Statutory Declaration Act.

8. The Learned Trial Magistrate erred in failing to hold that none of the prosecution witnesses saw the faces of the attackers so as to convince the trial court the appellant was really the attacker nor give the description of the assailants at all.

When the appeal came up for hearing, Miss Maundu, learned State Counsel, conceded the appeal on two main grounds. First, it is her submission that the record shows that L.W.M (P.W.1) gave unsworn testimony. In the opinion of Miss Maundu, that was a fatal mistake which will render the whole trial as a nullity.

Secondly, it is the submission of Miss Maundu that the evidence of voice recognition was unreliable hence the conviction cannot be sustained.

Mr. Kibanya, learned advocate for the 1st appellant, urged this court to allow the 1st appellant's appeal on the ground conceded by the learned State Counsel. It is Mr. Kibanya's submission that the evidence of P.W.1 being unsworn was contrary to provisions of **Section 151** of the **Criminal Procedure Code**. It is also argued that P.W.1 though she alleged she recognized the 1st appellant's voice, she did not give such details nor names to the police. Mr. Gacheru, learned Advocate for the 2nd and 3rd appellants adopted the submissions of his colleague Mr. Kibanya. He urged this Court to find that there was no satisfactory evidence of identification.

We have on our part re-evaluated the case that was before the trial court. We have also taken into account the grounds argued in support of the appeal. The case before the trial court is short and straightforward. It is the evidence of L.W.M (P.W.1) that on 4th January, 2008, she together with her four daughters plus a house help were asleep when at 11.00 p.m. she was woken up by noise of her door being hit. P.W.1 rushed to the bedroom of her daughters where she gave one of them a mobile phone with instructions to hide under the bed. P.W.1 hid herself in the ceiling of the house. Shortly, P.W.1's door was smashed open using a stone. Those people stormed into the house, and flashing the torches they had. They broke into the ceiling making P.W.1 fall down. P.W.1 said she was assaulted in the eye by one of them. She claimed the others assaulted her using whips. She alleged that she managed to recognize the three appellants with the help of bright light emanating from torches. P.W.1 stated that the trio had worked for her during the day. The assailants had demanded to be given Ksh.100,000/= but P.W.1 could only manage to give them Ksh.15,000/=. The 2nd appellant is said to have forced P.W.1 to lie on her bed, ripped off her skirt and pant before raping her. P.W.1 claimed she managed to recognize the 1st appellant when the robbers quarreled over the sharing of the money in her living room. She claimed the 1st appellant was her brother-in-law. P.W.1 alleged he recognized the 1st appellant's voice. G.M.M(P.W.2) a girl aged 16 years and daughter to P.W.1 stated she was woken up by the loud bang. She claimed the 1st appellant got into her bedroom pulled her out of the bed, removed her clothes and raped her after covering her face with bed sheets. P.W.2 claimed the bedroom was sufficiently lit by torches. She claimed she recognized the voice of the 3rd appellant. J.W(P.W.3) said she was under the bed when the robbers came calling. She alleged she saw the 1st appellant rape her sister (P.W.2) with the help of sufficient light from flashed torches. A.W.T (P.W.4) gave a near similar story like that of P.W.1 and P.W.3. She said she was able to recognize the voice of the 1st appellant since the thugs spoke while demanding to be paid money. Timothy Muiru (P.W.5) claimed he wondered what the 1st and 2nd appellants were doing there at night. P.W.5 was unable to identify any of the robbers. Cpl. Moses Thurania (P.W.7) stated that he proceeded to the scene upon receipt of the information regarding the robbery. At the scene P.W.7 said the victims told him they were able to identify their assailants. The police took P.W.1 and P.W.2 for treatment at Maragua and thereafter to Nairobi Women's Hospital.

When placed on their defence, each appellant denied the offence. The 1st and 2nd appellants stated that they had worked for P.W.1 during the day before leaving for home. They simply set up the defence of *alibi*, claiming they were asleep in their respective homes at the time of the alleged robbery. The 3rd appellant on his part raised a similar defence. He averred that he had gone to repair a water pump for P.W.1 before leaving for his place. The learned Trial Magistrate formed the opinion that the appellants were placed at the scene of crime. He noted that the appellants were people known to the complainant hence they were able to recognize their voices. He also came to the conclusion that there was sufficient light.

We have carefully re-evaluated the evidence and it is clear in our minds that the source of light relied by P.W.1 and P.W.2 to place the appellants at the scene of crime was that emanating from a flashed torch. The duo also alleged they recognized the 1st appellant by his voice. It is clear from the evidence of P.W.2 that her face was covered using bed sheets. It was therefore not possible for her to clearly recognize anybody during the robbery. P.W.1 on her part had climbed on her ceiling to hide. The robbers broke into that ceiling causing her to fall down. She was assaulted in the eyes. In our view, it was not possible in the circumstances for P.W.1 to positively see and identify anybody. She was injured by the robbers on the eye. She had already sustained injuries when she fell down from her ceiling. With respect, we are in agreement with the submissions of Miss Maundu, that the circumstances surrounding this appeal were not favourable for a positive identification free from error. In cross-examination, P.W.7 admits that P.W.1 did not give the details of her attackers. In our minds, we have come to the conclusion that the complainants did not recognize their assailants. They had strong suspicion that their attackers were the people who worked in their home during the day. Their evidence fell short of the required standards in criminal cases. Both Miss Maundu and Mr. Kibanya have pointed out that the record does not show that the key witness i.e. P.W.1 gave sworn testimony. We have examined the record and agree with the learned counsels. The evidence of P.W.1 was received in violation of **Section 151** of the **Criminal Procedure Code**. A breach of the aforesaid section is not curable under **Section 382** of

the *Criminal Procedure Code*. The appeal was therefore properly conceded by Miss Maundu.

In the end and for the above reasons, we allow the appeal. The conviction is quashed and the sentence of death set aside. The appellants are hereby set free forthwith unless lawfully held.

Dated and delivered this 23rd day of March, 2012.

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J. K. SERGON

JUDGE

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J. WAKIAGA

JUDGE