



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL 17 & 164 OF 2009**

**GERALD WACHIRA KINYURU.....APPELLANT**

**Versus**

**REPUBLIC .....RESPONDENT**

*(Appeal arising from judgment of Senior Principal Magistrate's*

*Court at Murang'a criminal Case No.3052 of 2007)*

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 161 OF 2009**

**JOHNSON WANGUNYU NDEMI.....APPELLANT**

**Versus**

**REPUBLIC .....RESPONDENT**

*(Appeal arising from judgment of Senior Principal Magistrate's*

*Court at Murang'a criminal Case No.3052 of 2007)*

**JUDGMENT**

The appellants Gerald Wachira Kinyuru and Johnson Wangunyu Ndemi were both charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

They also faced a count of gang rape contrary to section 10 of the Sexual Offences Act No.3 of 2006 the particulars of which were that on 30<sup>th</sup> October 2007 at Kiawanjugu village in Murang'a District within Central province jointly, intentionally and unlawfully had carnal knowledge of P.N.K without her

consent.

They were tried convicted and sentenced to death on count 1 and count II held in abeyance since they had been sentenced to death on count 1.

Being aggrieved by the said conviction and sentence they filed these appeals which we consolidated for the purposes of hearing since they both rose from the same trial.

Through the firm of Muchoki Kangata the first appellant raised six grounds of appeal namely:

- 1. The honourable court erred in fact and in law in failing to consider sufficiently or at all the defence of the appellant.**
- 2. The honourable court erred in fact and in law in relying on the contradictory evidence of the prosecution witnesses.**
- 3. The honourable court erred in fact and in law in failing to hold the appellant was not sufficiently recognized and or identified during the said robbery.**
- 4. The honourable court erred in fact and in law in finding that the appellant had committed the offence of rape whereas the evidence tendered was insufficient.**
- 5. The honourable court erred in fact and in law in finding that the appellant was guilty whereas evidence tendered did not tally with the charge sheet (where was also defective ab initio)**
- 6. The honourable court erred in fact and in law in upholding unreliable evidence of vivors witnesses**

and for the 2<sup>nd</sup> appellant the same firm filed petition of appeal which in addition to the above grounds at paragraph 7 thereof stated that **the honourable court erred in fact and in law in admitting hearsay evidence.**

This appeal was argued by Mr. Ombongi on behalf of Mr. Kangata who submitted that the second appellant had established an alibi through D.W.2 who was the wife of the accused person before the trial court who established that he was at home during the alleged robbery and that the prosecution did not ask any question to challenge this and submitted that the issue is not addressed in the judgment.

He further submitted that there was contradiction regarding the money recovered as to whether the same was Ksh. 33,000/- or 32,000/- and therefore this shows that there was confusion as whether any money was recovered.

He further submitted that the issue of recognition was not considered and since the source of light was a lamp the strength thereof was never indicated and for this he relied upon the authority of KARANJA & ANOTHER v R CR. APPEAL NO. 193/95 of 2003.

On the issue of rape he submitted that the evidence by the clinical officer P.W.4 was not sufficient since he was not qualified to give evidence of a chemical nature and therefore no sufficient evidence had been submitted to prove that rape had been committed.

He further submitted that the charge sheet was defective since it was not possible to rape jointly and without amendment the trial court ruled that it was rape in turns and further held that the appellant must have been armed with dangerous weapon without supporting evidence.

Miss Maundu for the state opposed the appeal on the ground that there was no law that barred a clinical officer from producing the P3 form. She submitted that the trial court dismissed the appellants' defence as mere denial and that identification was sufficient since P.W.1 had known the appellant for over 17 years

and that the evidence on record was that the appellant had raped the complainant in turns.

This being a first appeal this court is duty bound to reevaluate the evidence tendered before the trial court and to come to its own conclusion based upon the said evidence though taking into account the fact that it did not have the advantage of hearing and seeing witnesses.

To enable us arrive at a just decision in this matter we have taken time to analyse the evidence tendered before the trial court.

P.W.1 P.N.K testified that on 27<sup>th</sup> October 2007 her daughters had visited her and they gave her Ksh. 22,000/- and 10,000/- respectively that at 10.00 p.m. as they were cooking in the kitchen they heard the dogs barking and that she told her daughter in law that she would give the dogs ugali to make them stop barking. That at 2 a.m. she had a bang on the door and went to see what was happening when she met two men with torches near the bed room. They pushed her inside and as she screamed they started to strangle her when she asked them what they wanted to which they said they wanted money. She gave them the sales for the day while one of the appellants grabbed her and took her to the bed. They demanded Ksh.100,000 from her they thereafter put on the lamp and she was able to recognize the appellant since she had seen the first appellant earlier in the day. In addition to robbing her off the money they raped her.

Under cross examination by the 1<sup>st</sup> appellant she testified that they stayed in her house for 3 hours and that the appellant demanded Ksh. 100,000/- since they had information that her daughters had left her the said money.

P.W.2 P.W testified that on the material night she had someone call her husband peeped outside and did not see anyone but after two minutes she heard a door being banged and a scream. She went to her mother in laws house and heard someone ask **“where is the small girl”** when she heard this she turned back closed her door and hid in the thicket until 5 am. That she was able to see the appellants come out of P.W.1’s house and that she knew them since she used to attend to them at the shop. That on 28<sup>th</sup> October 2007 the first appellant had come to the shop and gave her Ksh. 100/- without saying what he wanted and that P.W.1 told her to give him back the money and later on he said he wanted rocket cigarettes which he was given and change. That the second appellant came to where she was and set on her thighs whereas the first appellant said he wanted to sell a phone to P.W.1 and that she was therefore able to identify them well after the said robbery.

P.W.3 testified on how the appellants were arrested.

P.W.4 Patrick Mwangi a clinical Officer at Murang’a testified how by the time he examined P.W.1 she had taken a bath and changed cloths and that he concluded that penetration had taken place but no spermatozoa was noted because she had taken a bath.

When put on their defences the appellants offered to give sworn evidence with no witnesses to call.

The first appellant stated that on 29<sup>th</sup> October 2007 he was busy working in his farm. On 31<sup>st</sup> October 2007 at 10 p.m. he heard a knock on his door and when he opened the door a police got in and started conducting a search in his house. He was thereafter escorted to the police station and on 3<sup>rd</sup> November 2007 was charged with the offence. On cross examination he confirmed that on 29<sup>th</sup> October 2007 at 6 pm. He met the second appellant at the complainant’s shop and that he bought cigarettes at the said shop. He further confirmed that he knew the complainant’s home but did not go there at 2.00 p.m.

The second appellant testified that on 20<sup>th</sup> October 2007 he was operating his boda boda business and closed down at 6 pm. He went home but passed through the complainant’s shop where he bought cigarettes and that he met the first appellant there. On 31<sup>st</sup> October 2007 at 9 p.m. the son of the complainant went to his house. Immediately thereafter the police came conducted search and arrested him.

Under cross examination he confirmed that P.W.2 was at the complainants' shop on the material day. He testified that he had never quarreled with the complainant and P.W.2 before.

D.W.2 Margret Nduta Maina testified that on 20<sup>th</sup> October 2007 the second appellant came home at 6.30 p.m. he then went out to buy cigarettes at a nearby shop came back and spent the night at home.

We have therefore reevaluated the evidence tendered before the trial court and the submissions by the appellants.

We have looked at the defence by the second appellant as presented by D.W.2 and note that the said evidence contradict the evidence of the second appellant. Where as D.W.2 stated that the second appellant left home at 6.30 p.m. for the shop the second appellant under cross examination stated that he left the shop at 6.30 p.m. We are therefore of the considered opinion that the appellant's defence of alibi was not attainable and therefore find no merit on this ground of appeal.

On ground two of the appeal we agree with submissions by Miss Maundu for the state that the contradiction on the amount of money was not material in her evidence in chief P.W.2 stated that her two daughters had given her Ksh. 22,000/- and 10,000/- respectively making a total of Ksh. 32,000/- and that she bought two bed locks at Ksh. 3000/-.

It is only P.W.2 who stated that P.W.1 had told her that she was robbed of Ksh. 33,000/-. This to our mind did not affect the quality of evidence tendered before the trial court.

On the issue of identification the evidence tendered before the trial court P.W.1 testified that the appellants had torches with them and that they later on lit a lamp through which she was able to recognize the appellants. The appellants were in P.W.1's house from 2.00 p.m. to 5.00 p.m. and during all this period of time there was no evidence tendered to show that the said light was ever put off.

We are therefore of the considered opinion that the opportunity was ideal for the complainant to identify and recognize the appellants whom she had known for over 17 years. The 2<sup>nd</sup> appellant confirmed that there has never been any quarrel or grudge between him and P.W.1 and the evidence tendered confirmed that both appellants were at the complainant's shop before the said robbery.

P.W.1 was also able to see the appellants at 5.00 p.m. when they were leaving the house of the complainant and that they were in the same clothes she had seen them in earlier in the day at the shop.

On the final issue of the defect on the charge sheet we agree with the submission by Mr. Ombongi for the appellants that the same was defective on count 11 as regards the particulars of the offence as it is on authorities of the court that rape can not be jointly but the same is a defect that could be cured by an appropriate amendment and was therefore not fatal to the appellant case herein.

In the final analysis we find no merit on the appellants' appeal herein and therefore dismiss the same and uphold the conviction and sentence by the trial court.

Dated and delivered at Nyeri this 30<sup>th</sup> day of May 2012.

J. WAKIAGA

JUDGE