REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL 39 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 240 of 2008 of the Senior Resident Magistrate's Court at Mariakani: ***Andayi W.F. – S.R.M.)***

SUDI KALAMA MASHA ……...…….…… APPELLANT

=VERSUS=

REPUBLIC …….…….……... RESPONDENT

JUDGEMENT

The Appellant **SUDI KALAMA MASHA** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Mariakani Law Courts. The Appellant was first arraigned in court on 4th June 2008. He faced counts 1, 2, 3, 4, and 6 of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. On count Nos. 5 and 7 the Appellant was charged with the offence of **RAPE CONTRARY TO SECTION 3(1)(a) as read with SECTION 3(3) OF THE SEXUAL OFFENCES ACT**. He also faced alternative charges to Counts 5 and 7 of **COMMITTING AN INDECENT ACT WITH ADULT CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT**. Finally the Appellant faced Count No. 8 of **STORE BREAKING AND COMMITTING A FELONY CONTRARY TO SECTION 306(1) OF THE PENAL CODE.** The appellant entered a plea of ***'Not Guilty'*** to all 8 counts and his trial commenced on 29th July 2008. The prosecution led by **INSPECTOR NGOMO** called a total of eight witnesses in support of their case. The prosecution case revolved around a series of robbery incidents which occurred on the night of 22nd May 2008 at Kaloleni District. The victims of the robberies who were **PW1 RAYMOND MWAKIBOYA MAZAI, PW2 SK, PW3 CAROLYNE SALIMU NASIB, PW4 VERONICA MASHA** and **PW6 MARY KAHUNDA NERI**. These witnesses all testify that on the night in question they were all asleep in their respective houses in the plot which they shared. At about 3.00 A.M. a group of men armed with pangas broke down the main door and began to move from room to room roughing up the occupants. The men ransacked each house and stole various items including cash, mobile phones, and electronics. In the case of SK **PW2** who was five months pregnant at the time, one of the robbers threw her onto the bed, removed her underpants and raped her. After terrorizing the residents the robbers took off with their loot.

In the case of **PW6** she told the court that the robbers accosted her at 4.00 A.M. as she was waiting

for transport to Mombasa where she was going to sell her dried coconuts. The men broke into the church store where **PW6** had kept her goods and she told court that she saw them emerge with a suitcase full of clothes and a packet of scones. The matter was reported to police after which the Appellant was arrested and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed onto his defence. He gave a sworn defence in which he denied any and all involvement in the spate of robberies. The Appellant called two (2) defence witnesses.

On 18th January 2010 the learned trial magistrate delivered his judgement in which he convicted the Appellant on Counts 1, 2, 3, 4, and 6 of Robbery with Violence. The Appellant was also convicted on the alternative charge to Count No. 5 of Committing an Indecent Act with an adult and Count No. 6 of store breaking. After hearing mitigation on behalf of the Appellant the trial court sentenced him to death. Being aggrieved by both his conviction and sentence the Appellant filed this appeal.

The Appellant who was acting in person opted to rely entirely upon his written submissions which with the leave of court had been duly filed. **MR. TANUI** learned State Counsel who appeared for the Respondent State made oral submissions opposing the appeal. It is now our obligation as the first Court of Appeal to re-examine and re-evaluate the evidence adduced before the trial court and to draw our own conclusions on the same.

At the outset it is clear from the evidence on record that no single witness was able to positively identify the accused as one of the robbers. **PW1** in his evidence at page 5 line 20 said:

"I did not identify the two people who came to my house as they kept shining the torches directly into my eyes."

He goes on to state under cross-examination at page 20 line 31:

"I did not identify any of them [the robbers]. I did not see the accused among them. I know the accused well for the eight years I have stayed in the area. I am used to seeing him. I did not identify him among the robbers"

Since **PW1** admits that the Appellant was a man whom he knew well for the past eight years, he obviously would have had no difficulty in positively identifying the Appellant if indeed he was one of the robbers who raided his home on the material night. **PW2** told the court at page 12 line 18:

"I did not identify the people who stole from me and raped me"

PW3 the other victim stated at page 16 line 15:

"The people got to my door and knocked it twice and it broke in. Three men two with torches came to me, shining at me. One had a vest and a long trouser. I was not able to see their faces due to the torch lights shining in my face"

PW3 goes on to reiterate this testimony when she states under cross-examination at page 17 line 25:

"I did not identify the thieves by facial appearance"

Initially the Appellant was acting in person in his trial but on 25th February 2009 **MR. LEWA** Advocate came on record for the Appellant. He applied to have the witnesses re-called for further examination which application was allowed by the trial court. The prosecution witnesses to their credit did not change their evidence at all. **PW2** under further cross-examination by Mr. Lewa said at page 24 line 23:

"The people who entered my house had masked their faces …… I was alone and scared and could not have the courage to check them"

On her part **PW4** also a victim of the same robbery stated at page 29 line 1:

"I did not identify anybody in the circumstances. I did not see accused in the vicinity during the ordeal"

Aside from visual identification **PW1** and **PW3** also told the court that they heard the robbers call out to each other referring to each other by name. However no witness heard anyone call out the name of the Appellant. **PW1** stated at page 21 line 5:

"The thieves called out the names Kamau and Omondi saying they should leave as time was up. I only heard those two names. I did not hear the name of accused being called. I did not hear the accuseds voice"

This was a witness who had already told the court that he had known and interacted with the Appellant for a period of eight years. We have no doubt that if he had heard the voice of the Appellant he would have been in a position to recognize the same. On this same point **PW3** testified as follows on page 25 line 11:

"As they left, they shouted "Kamau, Njoroge, how long would we take here, a motor vehicle had come and we should go" I did not hear the accused's name being called out at the time"

Therefore aside from failure to avail evidence of visual identification of the Appellant at the scene, the witnesses also claim that even though the robbers were so brazen as to refer to each other by name, no person mentioned the name of the Appellant leading to doubt as to whether he was actually present.

We have no doubt that the circumstances prevailing at the time were not conducive for these victims to make a clear identification of their attackers. It was night time. They were scared, apprehensive and feared to look at their attackers eyeball to eyeball. This is hardly surprising.

PW6 was not in the plot when the robbers struck. They accosted her outside as she waited for transport to Mombasa where she intended to take her goods for sale. **PW6** gave a very lengthy narration about her interaction with the robbers. She claims to have heard them plan how to execute the deed. She also said that she saw them break into the church store and leave with a bag of clothes and scones. **PW6** even told the court that she held a lengthy conversation with the robbers in which she exhorted them not to kill or injure anybody as they went about their business. One would have expected this witness to have been able to identify one of the robbers but finally **PW6** too told the trial court that she was unable to identify any of the men she had spoken to. She states at page 48 line 7:

"I was alone. There was moonlight. I would not identify them due to their mode of dress. I know the accused. I did not identify anybody that night. I have known him for long"

This is surprising given the amount of time **PW6** spent conversing with these robbers. Surely if **PW6** knew the Appellant as well as she claims to have done and if as she claims she spent a great length of time talking to the robbers then she would not in our view have failed to recognize the Appellant if he was there. The fact that even witnesses who had known the Appellant for a long period of time failed to identify him at the scene raises grave doubt in our minds as to whether the Appellant did actually participate in this robbery. As a court we wonder whether the witnesses have for reasons best known to themselves deliberately declined to identify their attackers. Be that as it may – the evidence on record clearly shows that there is no eyewitness testimony placing the Appellant at the locus in quo.

Aside from the lack of reliable eyewitness testimony placing the Appellant at the scene, there is evidence from his two defence witnesses suggesting that the Appellant was somewhere else when these robberies occurred. **DW2 KENGA MGALLA KENGA** a brother-in-law to the Appellant and his wife **NYEVU KENGA MGALLA DW3** both testify that on 21st May 2008 the Appellant came to visit them in their home at Chanagande. Both state that the Appellant got to their home at 6.00 p.m., ate the evening meal with them and passed the night in their house. This is alibi evidence which has not been discounted

at all by the prosecution. The evidence of these two witnesses gives rise to very real doubt as to whether the Appellant actually participated in these robberies. In our view the learned trial magistrate ought to have awarded the benefit of this doubt to the Appellant.

The only piece of evidence which the prosecution relied upon to link the Appellant to this crime was the recovery of a radio and cap said to belong to the Appellant in the house of **PW4**. The question that immediately comes to mind is whether the recovered radio and cap did infact belong to the Appellant and whether their recovery at the scene of the robbery is sufficient proof of the Appellant's participation in the crime. There is also evidence that a sack containing carpentry tools were recovered at the scene and the Appellant was known to be a carpenter.

PW4 in her evidence told the court that one of the men who entered her room and with whom she struggled left his cap inside her room. She stated at page 27 line 11:

"As I struggled with the man, he removed a hat he was wearing and put it on a stool …. The cap was blue. He opened his zip in order to "enter" me. …….. He had not entered me when the 3rd person ordered him to stop. He stopped and ordered me to get into bed. He forgot his cap on the stool. They then left"

The recovered cap was later produced in court as an exhibit **Pexb1. W**ith respect to the other recovered items **PW7 RAPHAEL RINGA BUCHUTI** whose store had been broken into told the court that he went to the scene the day after the incident. He confirmed that indeed his store had been broken into and clothes and Kshs.5,000/- stolen. **PW7** told the court that outside his store he recovered a sack containing a screw driver, clamp, old toast and a radio believed to belong to the Appellant. The sack and its contents which were produced in court as exhibits **Pexb2** were taken to the police station.

We will first deal with the issue of the recovered cap and whether it provides satisfactory evidence of the Appellant's participation in this robbery. All the prosecution witnesses said that they knew the Appellant before as a resident in their village. They all state that he was often to be seen wearing a cap similar to the one which was recovered in the room of **PW4**. A cap is a common item of clothing and court takes judicial notice of the fact that in this country several men are fond of donning caps. Apart from its appearance and colour [blue with yellow stripes] there was no distinguishing mark on the cap to single it out as the very cap which belonged to the Appellant. **PW1** by his evidence did not initially identify the cap as belonging to the Appellant. He only came to this conclusion after other residents had said so. **PW1** stated at page 5 line 10:

"It [the cap] was a blue cap with two yellow stripes at the front. I did not identify it at the time. The chief said we put the cap in a public place at a hotel where people coming in would identify it. While I was at the hotel, a teacher at Mikiriani, Mr. Besaro came and identified it as belonging to Sudi Kalama Masha also commonly known as "Kenga wa Neko"

PW1 goes on to state under cross-examination at page 21 line 25:

"Besaro identified the cap on the morning of 22nd. I then recalled that I had seen accused many times with it."

Thus it is only **after** this Mr. Besaro allegedly identifies the Appellant as the owner of the cap that **PW1** also recalls the same. This Mr. Besaro was never called to testify to explain how he came to the conclusion that said cap belonged to the Appellant. **PW1** goes on to admit that at the time when he made his statement to the police he made no mention of the cap or the fact that it belonged to the Appellant. He explains this omission by stating at page 23 line 5:

"It may be that I did not mention the cap and the radio in my statement as I was answering questions as asked by the police officer"

Our own view is that if **PW1** knew whom the cap belonged to he would not have failed to mention such a

crucial clue in his statement to the police.

PW3 directly contradicts the testimony of **PW1** with regard to the cap. She denies that the cap was ever put on display at a hotel as she insists that she was able to immediately identify it as the Appellant's cap. **PW3** states at page 25 line 14:

"The cap was found in Veronica's room. It was blue in colour with stripes at the front. I identified it at one as belonging to a technician known as Kenga. Kenga is accused in the dock. It was never said that it had not been identified at the time so it be taken to a hotel. It was taken there for further identification."

If **PW3** had already identified the caps owner then what need was there to display the cap at a hotel for ***'further identification'***? The contradictions in evidence of **PW1** and **PW3** the failure to call this Mr. Besaro as a witness and the fact that no mention was made of the owner of the cap in the initial statements to police convince us that this is merely an afterthought and an attempt by the prosecution to link the Appellant to this offence. The cap had no specific distinguishing marks to positively identify it as the Appellant's cap. This evidence is tenuous at best and on its own cannot amount to sufficient proof of the Appellant's involvement in the robbery.

The same argument would apply to the tools and radio allegedly recovered at the scene. Carpentry tools are common items to be found in possession of the several carpenters country wide. A radio too is a common item. There is nothing to set apart these tools or the radio as belonging to the Appellant. The court is not even told what type of radio it was. We find it highly unlikely that robbers going out to commit a crime would carry with them a radio. **PW5 CORPORAL CHRISTOPHER MAGAIWA** the officer who visited the scene admits that though the radio and tools were at the scene when he first went there he did not collect them as he thought the items belonged to the residents. This means that when police first went to the scene the prosecution witnesses did not tell them that the radio and carpentry tools belonged to the Appellant. They appear to have only come to this conclusion much later. This again is clearly an afterthought and a desperate attempt by the prosecution to find some piece of evidence to link the Appellant to the crime. Our conclusion is that there is no proof that any of these items did actually belong to the Appellant and their recovery is not proof of his presence at the locus in quo on the material night. As a result we find no evidence to prove the participation of the Appellant in the robberies complained of. The evidence of identification does not in our view pass muster. The learned trial magistrate himself clearly harboured these same doubts. In his judgement at page 4 line 29 he states:

"All the items are common and not unique in any way that they would be described to the accused and him alone"

Given these doubts the magistrate ought not to have proceeded to convict the Appellant. We therefore quash the Appellant's conviction on Count Nos. 1, 2, 3, 4, 6 and 8.

The Appellant was convicted on the alternative count No. 7 of Committing an Indecent Act with an Adult. The main charge was that of Rape. After the testimony of **PW2** who told court that one of the robbers who entered her room raped her, which testimony was heard in the trial court on 11th August 2008, the court prosecution applied to substitute the charge of Rape to one of Gang Rape. This application was allowed, and the charges were duly substituted. However despite having carefully and anxiously perused the record, we have been unable to trace the substituted charge sheet. Even in the original file all that exists is the initial charge sheet in which Count No. 7 was that of Rape. Thus the substitution if any was not lawfully effected. Be that as it may, even in this charge the evidence falls short. **PW2** told the court that she could not identify the man who raped her. She sates in her evidence at page 12 line 18:

"I did not identify the people who stole from me and raped me"

If as **PW2** said she knew the Appellant very well and given her testimony that the man who raped her held a brief conversation with her, then it is more than likely that she would have been able to identify that person if indeed it was the Appellant. Her failure to identify the Appellants leaves room for the

possibility that it was a man other than the Appellant who raped her. As we have earlier found the evidence suggesting that the cap worn by her attacker belonged to the Appellant is not reliable at all and cannot possibly amount to proof that the Appellant was the man who raped her. Given the paucity of the evidence on identification the learned trial magistrate ought not to have convicted the Appellant of the alternative charge of Indecent Act with an Adult. We find no legal basis for this conviction and hereby quash the same.

Finally having quashed all the convictions imposed upon the Appellant we hereby set aside both the death penalty imposed for Counts 1, 2, 3, 4, and 6. The four (4) year terms of imprisonment for Count 7 and Count 8 are also set aside. This appeal therefore succeeds. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 22nd day of June 2012.

……	**.....……**
M. ODERO	**G. NZIOKA**
JUDGE	**JUDGE**

In the presence of:

Mr. Tanui for State

Appellant in person