IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 342 OF 2009

(From original conviction and sentence in Criminal Case No. 486 of 2008 of the Principal Magistrate's court at Nyahururu – M.T. KARIUKI, Ag. SRM)

PATRICK MAINA WAHOME.....1ST APPELLANT

CYRUS WANGUKU KAGO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Patrick Maina Wahome and **Cyrus Wanguku Kago** (1st and 2nd appellants) were jointly charged with six counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, in counts I, III, IV, V, VI, and VII. In count II, the 1st appellant was charged with offence of rape contrary to **Section 3(1)** of the **Sexual Offences Act, 2006**. The appellants were acquitted of counts IV and VI under **Section 210** of the **Criminal Procedure Code**. After the appellants were heard on their defences, they were convicted on counts 1 and V and sentenced to death, while the 1st appellant was also convicted in count II and sentenced to 20 years imprisonment. They were aggrieved by the said convictions and sentences and filed Criminal Appeals Nos. 343 of 2009 and 342 of 2009 respectively. They were consolidated to proceed as Criminal Appeal No. 342 of 2009.

The grounds of appeal raised by the appellants were similar and we summarise them as follows:-

1. The appellants were not properly identified;
2. The conviction is based on insufficient and uncorroborated evidence;
3. The prosecution failed to call crucial witnesses;
4. The appellants did not understand the language of the court;
5. The trial court had no jurisdiction to try the appellants;
6. The appellants' defences were not considered.

The appellants also filed written submissions in support of the grounds. The State was represented by Mr. Omwega who supported both the convictions and sentences for the reasons that the offences were committed during broad daylight about at 10.00 a.m., and the appellants did not disguise themselves. He further urged that the appellants were properly identified as PW2 said that she was with the appellants for about 15 minutes and had ample opportunity to see them well. Counsel also submitted that the

prosecution evidence was corroborated by that of PW3 who gave a detailed account of how each of the appellants was dressed and further that PW9's mobile was found with PW5 where the appellants took it for charging. He discounted the allegation of mistaken identity.

Being the first appellate court, we have the duty of reviewing the evidence afresh, analysing it and coming up with our own findings, we hereby do. As respects counts I and II, the complainant was M. N.N (PW2). PW2 recalled that on 15/2/08 she was accosted by two people on her way to meet her husband. It was during broad day light at about 1.00 p.m. She conversed with them when they stopped her and asked where she was going and demanded money from her. She said that she pleaded with them to leave her but they dragged her into the forest where the 1st appellant raped her. She further testified that she was with them for about 20 minutes. She is the same one who spotted the appellants at Gwan Kungu Trading Centre on 28/2/2008. She later pointed the appellants out to her husband, PW4, P.N.N and PW1, Peter Kariuki. PW5 corroborated PW2's evidence. He recalled that on the same date that PW2 was robbed, i.e 15/2/08 about 2.00 p.m. two people took to him a mobile phone belonging to Baba N (PW4). He later identified the appellants as the persons who left him with the mobile for purposes of charging. PW5 recognised the mobile phone as that of Baba N, PW4), PW2's husband. The mobile was identified as Sagem 3020. the evidence of PW5 was not disputed nor did the appellants deny taking the phone for charging. He handed it to the investigating officer, PC Mimo, PW7. In addition, PW7 recalled that on 29/2/2008, the two suspects led him to Ndaragwa Forest where they had hidden the panga which the complainant also identified as the weapon they were armed with at the time of the rape.

Upon considering the evidence of the witnesses, we are satisfied that PW2 came into close contact with the two appellants and was with them for a considerable length of time that enabled her see them well and did identify them later. PW11 claimed to have been raped by the 1st appellant and that gave her sufficient time and opportunity to see him well. The recovery of the mobile and panga goes to corroborate her testimony. They were properly identified as the people who robbed PW2.

PW2 also alleged to have been raped. She did not explain exactly what the 1st appellant did to her. She only stated that she was raped. The word rape is a legal term that requires to be supported by facts. Under **Section 3(1)** of the **Sexual Offences Act,** for rape to occur, there must be penetration of the genital parts of the victim. Although the prosecution did not lead any evidence on penetration, we find that the complainant was examined by Dr. Okono on the same day and found spermatozoa on the vaginal swab and urine taken from PW2. That is evidence that she took part in a sexual activity. The complainant had had an encounter with the 1st appellant during the robbery which was fortified by the recovery of the complainant's mobile phone from the place where the 1st appellant was said to have taken it for charging. Besides, PW1 testified that she was with the 1st appellant for about 20 minutes as he raped her. The appellants had not disguised themselves. They were in close contact and PW2 was in a position to identify the 1st appellant. The lower court did believe the evidence of the complainant that the rape and robbery took place. The 1st appellant's defence was a mere denial as he alleged that he was just framed with the offence and was charged after he could not pay the police some money. There was no reason why PW2 would frame him. She was not a police officer. Apart from the

defence being a sham, it is also an afterthought that does not run through the cross examination of the prosecution witnesses and it was properly rejected by the trial court. We uphold the lower court's finding and confirm the conviction on counts 1 and 2.

The appellants were acquitted of count III for reasons that there was no evidence to support the conviction because the complainant in that charge one Hillary Mwangi (PW3) denied having identified the appellants on an identification parade. In addition, the Inspector who conducted the parade was not called as a witness. PW3 recalled that as he passed through Ndaragwa Forest, he found two people seated. One was armed with a sword while the other had a rungu (club). They started chasing him and the one with the club hit him on the head and he fell. He was pushed and robbed of a wallet which had Kshs1,000/- and documents. He later reported to Police, was issued with a P3 form. Later, he found people arrested at Police Station. He said that he identified the appellants by the clothes they wore and a sword which was

produced in court as an exhibit. Though PW3 said that he identified the sword, from a description of what happened, the events happened so fast that it may have been impossible for him to identify the sword that the assailants were armed with. He did not point to any specific mark or shape of the sword that made him to identify the one in court as the one the assailants had. PW3 did not identify the faces or any peculiar features on the assailants. He told the court that he identified the appellants' clothes but never gave a description of the said clothes nor had he given any description to the police on how the assailants were dressed. We would therefore find that PW3 did not sufficiently identify the assailants and there is doubt in our minds that he may have believed the appellants to have been the robbers just because they were arrested and were in police custody. We do confirm the lower court's finding that count III was not proved beyond all reasonable doubt.

The complainant in count V was Peter Kariuki Ngatia (PW1). He testified that he was robbed on 23/2/08 at about 11.30 a.m. He was walking on a path in the forest pushing his bicycle when he was blocked by the 1st appellant. He said the 2nd appellant was armed with a stick. He was ordered to sit down and the 2nd appellant raised the stick threatening to hit him if he did not comply. The robbers talked to PW1 asking for money, mobile phone and watch. The 1st appellant asked the 2nd appellant frisk him, PW1 showed them his empty wallet and they warned him not to tell anybody about the incident. He was later informed by PW2 that she had seen the two people who had robbed her at Gwa Kungu and he accompanied PW2 and her husband there. He said he was able to recognize the 1st appellant who later pointed out the 2nd appellant. PW4 said PW1 was able to identify both appellants.

We find that the incident occurred in broad daylight, the robbers were not disguised and they conversed with PW1 for a while. They were arrested 5 days after the incident. We are satisfied that PW1 did identify the appellants. The trial court did reject the appellants' defences as being a sham and an afterthought. We are of the same view. We uphold the conviction and sentence on that charge.

Mary Wangeci Njoroge, the complainant in count VII testified as PW7. She recalled that she was with her sister, Sarah Muriuki, on 23/1/08 when they found two men sitting near the forest. The 2nd appellant was armed with a knife. They stopped PW7, demanded money and mobile phones which she gave. When her sister resisted, she was slapped. They were later called to identify the people who had been arrested and she identified the 2nd appellant. Though PW7 claimed to have clearly identified the 2nd appellant on the parade, the officer who conducted the parade was not called as a witness. The court cannot therefore confirm whether the parade was conducted in accordance with the rules. Sarah did not testify in support of PW7's testimony and in absence of the inspector's evidence, we find nothing to corroborate the evidence of PW7, we give the appellants the benefit of doubt and acquit them of the 7th charge.

The appellants allege that they did not get a fair trial because they did not understand the language of the court as they only understand the Kikuyu language. It is the duty of the court to ensure that the proceedings are conducted in a language that the accused persons understand. It is apparent from the record that when the plea was first taken, the court never indicated what language the accused persons understood or what language the proceedings were conducted in. It is only on 11/6/08 that the court recorded that the appellants had requested for their statements and they used the Kikuyu language. After that, the record shows that all the witnesses testified using the Kiswahili language. The appellants did not raise any objection or request to be given interpreters. At no time did the appellants complain that they did not understand the language of the court. They ably communicated with the court and they even made their defence statements in Kiswahili. At no time did the appellants raise the issue of breach of their fundamental rights that they did not understand the language of the court. They cannot wait until the conviction and sentence to use the issue of language as a weapon to defeat the conviction and sentence meted on them. In our view, the appellants seem to have understood the Kiswahili language participated in the proceedings and ably defended themselves. In **BONIFACE KAMANDE & OTHERS V REP CRA 166/08 and PAUL MUTUKU KATHANZU V REP CRA 377/09** the Court of Appeal rejected the allegation that the language of the court had not been indicated resulting in breach of the right to fair hearing when the appellants had fully participated in the proceedings. This ground is raised late in the day and we believe it is being used mischievously. The trial magistrate should however note that it is the duty of the court to ensure that an accused person is accorded a fair hearing by the court ensuring that all the

requirements of a fair hearing envisaged under **Section 77** of the **Constitution** (now repealed), or Article 50(m) of the new **Constitution** are met.

The appellants have challenged the competence of the trial magistrate. On 10/3/08, when the appellants appeared before Mr. Kariuki, he was a Resident Magistrate. It is true that he had no jurisdiction to handle this matter. The Resident Magistrate did refer the matter to court No.1, which we believe is the Chief Magistrate's Court. It was mentioned before other magistrates and the hearing commenced on 2/10/08 before M. M. T. Kariuki who was then, Ag. Senior Resident Magistrate. An Ag. Senior Resident Magistrate has the same jurisdiction as a Senior Resident Magistrate which includes hearing of cases of robbery with violence. The Ag. Senior Resident Magistrate had jurisdiction to handle this case and we find no basis for the appellants claim that the magistrate was not qualified. That ground is baseless and is dismissed.

The appellants also contend that their rights to fair trial were infringed in that they were not supplied with witness statements. On 11/6/2008, the appellants applied to be supplied with witness statements and the court did make an order that they should be supplied with the statements. A further order for supply of witness statements was made on 23/7/08. The matter proceeded to hearing on 2/10/08. After 23/7/08, the record does not indicate that the application for statements was ever reviewed. If the appellants were not supplied with the witness statements at the time the hearing commenced, then they sat on their rights. They should have insisted that the same be availed before the case could commence. All through the hearing, the appellants never complained of lack of statements. Allegations of breach of fundamental rights should be raised at the earliest time possible. If indeed the witness statements were never supplied to the appellants then the appellants have themselves to blame for not asking. They cannot sit back knowing their rights are being violated only to challenge them after conviction. They ably represented themselves and defended themselves and the court finds that either they had statements or understood the proceedings.

The appellants complain that the trial court did not warn them of the seriousness of the offences that they were charged with or that it attracted a mandatory death sentence, otherwise they would have hired a lawyer to represent them. On 11/6/2008, the Ag. Principal Magistrate mentioned the case and emphasized the seriousness of the charge that the appellants were facing and directed that the witnesses' statements be availed to the appellants. It is important that the court explains to the accused persons the seriousness of the charge and whether or not one is entitled to bond. The record does not disclose that the trial court did so. However, ignorance of the law is not a defence to a criminal charge. Even if the appellants were not aware of the consequences of the charges, they are presumed to know the law. They were not entitled to bond and it is interesting that they never applied for bond. We can only conclude that the appellants were aware of the seriousness of the charges that they faced. If they did not hire a lawyer in the lower court because they were not aware of the gravity of the charges, the question is why they have not hired counsel after being made aware of the sentence. We find that ground to be without basis and we find no right to have been breached in that regard.

We wish to observe at this stage that the trial court indicated in its ruling that the 1st appellant had been acquitted of count II because the complainant did not attend court. However, the record indicates that after hearing the defence case, the court convicted the 1st appellant on count II and sentenced him to 20 years imprisonment. It was an error for the court to find that the complainant in count II had not testified. The correct position is that the 1st appellant was convicted on count II, after PW2 the complainant therein, testified in support of that charge

On the allegation that the appellants' defences were not considered, the magistrate did in the 2nd last paragraph of his judgment, find that the defences were a sham and an afterthought and that they lacked any credibility. We have come to the same conclusion. Nowhere in the judgment did the magistrate shift the burden of proof onto the defence.

In conclusion, we find no reason to interfere with the findings of the trial court. The convictions are safe. We also find no reason to interfere with the sentence on count II. Appeals are dismissed.

DATED and DELIVERED this 25th day of February, 2011.

R.P.V. WENDOH
JUDGE

M. J. ANYARA EMUKULE
JUDGE

PRESENT:
.....for the appellants.
.....for the State.
Kennedy – Court Clerk.