



**No.36**  
**REPUBLIC OF KEN YA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NOS. 203 B OF 2009 AND 82 of 2010**  
**(CONSOLIDATED)**  
**BETWEEN**

**JAMES TANJI ..... 1<sup>ST</sup> APPELLANT**  
**RICHARD OMBASA MAUTI ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**  
**(Being an appeal from original conviction and sentence of the SRM's Court at Ogembo in criminal case No. 2092 of 2006 Hon. J.K. Kwena, dated 13<sup>th</sup> August, 2007)**

**JUDGMENT**

1. The two appellants herein, **James Tanji** and **Richard Ombasa Mauti** were the 3<sup>rd</sup> and 2<sup>nd</sup> accused in Ogembo SRM's criminal case number 2092 of 2006. They were charged alongside Zablon Momanyi Otondi (1<sup>st</sup> accused therein) with one count of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

2. The particulars of the offence were that on the 18<sup>th</sup> day of December 2006 at Tabaka market in Gucha District within Nyanza province, jointly with others not in court robbed **JAMES KANGETHE** of one mobile phone make Motorola C113 S/NO.359814009788440, Simu ya Jamii, make EUROTTEL, cash money 10,000/= all valued at Kshs.18,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said **JAMES KANGETHE**.

3. The two appellants, together with their co-accused Zablon Momanyi Otondi, denied the charge. The case then proceeded to hearing.

4. The facts of this case are discernible from the evidence of James Kangethe Musyoka, PW1. On the 18<sup>th</sup> December 2006 at about 1.00 a.m., PW1 who was asleep in his house was woken up by people knocking on his door and asking him to open the door for them as they were policemen. PW1 instead called police. Then 4 people broke the door and entered the house. They held PW1, snatched the motorolla phone C113 from him. The people were armed with a panga and rungu. PW1 was tied up as the robbers demanded money. He gave them Kshs.10,000/= contained in a wallet but they started beating him and demanding for more. They took the Jamii phone and at the same time two of the robbers raped B.K, PW2, wife of PW1.

5. Police who had been contacted arrived at PW1's home and found PW3 still being raped by Zablon Momanyi Otondi. The robbers had a torch which they shone around as they raped PW2 in turns and chided PW1. That the light from the torch was very bright. The police arrested the two appellants as well as Zablon Momanyi Otondi. One of the robbers was arrested in a maize plantation some 10 metres from PW1's home and was found in possession of a motorolla phone and a Marvin cap. The 1<sup>st</sup> appellant was arrested first and it was him who assisted the police in arresting the 2<sup>nd</sup> appellant and Zablon Momanyi Otondi. The three were all escorted to Ogembo police station and charged with the offence of violent

robbery.

6. The prosecution called four witnesses in support of their case against the appellants and their co-accused. PW1 a business man at Tabaka market stated that when he was attacked and before the robbers entered the house by force, he called the police who answered his distress call and found the robbers in the act. That it was the two appellants who raped PW2 and that he was able to see the two of them with the help of very bright light coming from the torch carried by the robbers and which light was being directed at the two appellants. PW1 stated further that he reported the robbery to Ogembo police station and accused 1 was arrested. PW1 did not know how the two appellants were arrested. PW1 also stated that he knew the 2<sup>nd</sup> appellant before the robbery because the 2<sup>nd</sup> appellant had sold soapstone to him many times, though the police did not conduct any identification parade in respect of the appellants and their co-accused. PW1 also testified that he had no electricity supply at his house, and that there was no other light in the house at the material time.

7. PW2 was Number 89015319 AP Dominic Odero. On the night of 17<sup>th</sup> and 18<sup>th</sup> December 2006, he was woken up from sleep at about 1.00 a.m. and asked to accompany his colleagues to answer a distress call by PW1. Armed with rifles, they rushed to PW1's home. He said that the suspect ran away but was eventually arrested in the nearby maize plantation. PW2 recovered a motorolla phone and Kshs.1000/= from the suspect. They also recovered a Marvin cap. The suspect led them to arrest the 1<sup>st</sup> appellant herein James Tanji. The police recovered a EUROTEL, Jamii Phone from 1<sup>st</sup> appellant's house. In the morning at about 11.00 a.m., the 2<sup>nd</sup> appellant was arrested from his place of work.

8. B.K testified as PW3. She was asleep with her husband in their house at about 1.00 a.m. when their house was broken into by a gang of 7 robbers. The robbers, who were 7 in number were armed with torches and that she was able to see them using the light from these torches. The robbers stole cash and a motorolla phone from PW1, together with a EUROTEL Jamii phone. They also tied PW1 across the trunk. They then raped her at panga point though she was 9 months' pregnant. That the police who arrived on the scene while the 2<sup>nd</sup> appellant was still raping her arrested him while he was still inside the house. He had on him Kshs.1500/=. The robbers used condoms during the rape ordeal on PW3.

9. On the following morning (day break) PW2 reported the matter to the police and also found her husband's motorolla phone and the EUROTEL Jamii Phone, and also saw condoms in a basket where the phones were. That Zablon Momanyi Otondi raped her first, followed by the 1<sup>st</sup> appellant and then the 2<sup>nd</sup> appellant who did not take much time with her because the police came. PW3 was admitted into hospital on 18<sup>th</sup> December 2006 until 28<sup>th</sup> December 2006 when she gave birth.

10. During the proceedings the prosecution applied to stand PW2 down for purposes of identifying certain exhibits which were not in court at that time. However, from the records, PW3 was never recalled to identify the exhibits.

11. PW4 was Number 819105 police constable Geoffrey Otieno, attached to Ogembo Police Station performing crime duties. He produced the following exhibits:- Eurotel "Simu Ya Jamii" – **P. Exhibit 1** - which was recovered from the 1<sup>st</sup> appellant; a motorolla mobile phone 713 – **P. Exhibit 2**; a panga recovered from the scene of the robbery – **P. Exhibit 3** and a metal bolt headed club also found at the scene as **P. Exhibit 4**.

12. PW4 also told the court that the phones were positively identified by PW1, and that PW1 also confirmed that the robbers were armed during the robbery.

13. At the close of the prosecution case, each of the two appellants was placed on their defence. Each of the two appellants gave unsworn testimony. The 1<sup>st</sup> appellant, James Tanji testified that he was arrested on 4<sup>th</sup> December 2006 from his place of work and charged with an offence he knew nothing about.

14. The 2<sup>nd</sup> appellant, Richard Ombasa Mauti, stated that on the 18<sup>th</sup> November 2006, police went to his place of work arrested him, took him into the bush and beat him and also threatened to shoot him. He denied the charge and said that the offence was planted on him by the police.

15. The trial court gave its judgment on 13<sup>th</sup> August, 2007. The two appellants together with their co-accused Zablon Momanyi Otondi were each found guilty of violent robbery and sentenced to death as by law provided.

16. Being dissatisfied with both conviction and sentence, the appellants preferred their respective appeals which were consolidated by an order of this court dated 19<sup>th</sup> January, 2011. The Petition of Appeal raises the following grounds of appeal:-

**“(a) That the trial court erred in law and fact in failing to see that the appellants were not positively identified during the robbery which took place in the wee hours of a dark night.**

**(b) That the trial court erred in both law and fact in failing to see that the prosecution had not established its case beyond any reasonable doubt.**

**(c) That the trial court erred in law and fact when it failed to consider the appellants’ defence.**

**(d) That the trial court erred in both law and fact by failing to evaluate the whole of the evidence that was placed before him.”**

17. At the hearing of this appeal, we heard submissions from each of the two appellants and from the Senior Principal State Counsel, Mr. Mutuku on behalf of the Respondent. Each of the appellants submitted by way of written submissions. We have carefully read and considered those submissions. Each of the appellants has urged this court to quash the conviction, set aside the sentence of death and set them free.

18. On his part, counsel for the Respondent submitted that the findings of the trial court were well supported by the evidence on record. Counsel submitted that there was sufficient light from the torches possessed by the robbers which enabled PW1 and PW2 to clearly see and identify the two appellants who were both well known to the victims. That it was that same torch light that was used to aid the appellants put on their condoms as they raped PW3 in turns. Counsel also submitted that it was easy for PW2 to arrest the appellants because their names had already been furnished to the police by PW1 and PW3.

19. It is worth noting that Zablon Momanyi Otondi, the first accused before the trial court filed his appeal number 121B of 2008. That appeal has already been heard and judgment delivered on 10<sup>th</sup> December 2007. In their judgment, our brothers, Musinga and Muchelule, JJ were uneasy about the circumstances prevailing at the time of the robbery and concluded that the conviction by the trial court was not safe. Accordingly the appeal filed by Zablon Momanyi Otondi was allowed. The conviction was quashed and sentence of death meted out to the said Otondi was set aside.

20. The above notwithstanding, we still have a duty as the first appellate court to reconsider and evaluate the evidence afresh; with a

view to reaching our own conclusions in the matter. See **Okeno –vs- Republic [1972] EA 32** and **Patrick & another –vs- Republic [2005] 2 KLR 162**.

21. We have reconsidered and evaluated the entire evidence which we have set out hereinabove. We note from that reconsideration and evaluation that the only available light in the house of PW1 and PW2 was the light from the torches that were carried by the appellants. Though PW1 and PW3 both stated that the

light was very bright, no evidence was given as to whether there was only one torch or several torches. Secondly we have noted that there are material contradictions in the testimony of PW1, PW2 and PW3. While PW1 stated that the police arrived at the scene and made arrests when the 2<sup>nd</sup> appellant was still in the act of raping PW3, PW3 stated that the 2<sup>nd</sup> appellant was arrested at the door, though inside the house. On the other hand, PW2 stated categorically that before they got into PW1's house, the robbers took off and the first arrest was made in a maize plantation. This is what PW2 said in answer to questions put to him in cross-examination:-

**“We arrested accused 1 first in a maize plantation not at the door steps of complainant's house”.**

22. What we are saying here is that the contradictions found in the testimonies of these three critical witnesses go a long way in showing that the conditions for the proper identification or recognition of the appellants were difficult and therefore it was not even possible for both PW1 and PW3 to keep a tab on how the events unfolded. For this reason and on the basis of the principles established in the cases of **Wamunga –vs- Republic [1989] KLR 424; Karanja & another –vs- Republic [2004] 2 KLR 140 and Republic –vs- Turnbull [1976] 3 All ER 549**, we are satisfied that the conviction of each of the two appellants by the trial court was not safe.

23. Accordingly, we allow this appeal, quash the conviction and set aside the sentence of death meted out to each of the two appellants. Unless otherwise lawfully held, each of the two appellants shall be set free forthwith.

24. It is so ordered.

**Dated and delivered at Kisii this 07<sup>th</sup> day of March, 2011.**

**ASIKE-MAKHANDIA  
JUDGE.**

**RUTH NEKOYE SITATI  
JUDGE.  
07/03/2011**

Coram: Ruth Nekoye Sitati, J.

***HCCRA NOS. 203 B OF 2009 AND 82 of 2010***

***(CONSOLIDATED)***

c/c – bibu

Both appellants present in person

Mr. Mutai (present) for Respondent

Language: English into Ekegusii

**Court:** Judgment read and delivered in open court.

**RUTH NEKOYE SITATI  
JUDGE.**