**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 188 OF 2007**

***(From Original Conviction and Sentence in Criminal Case No. 41 of 2007 of the Senior Resident Magistrate's Court***

***at Taveta: J.M. Githaiga – S.R.M.)***

**MICAH HAGAH SAMUEL.........................................................................APPELLANT**

**VERSUS**

**REPUBLIC..................................................................................................RESPONDENT**

**JUDGEMENT**

The Appellant herein **MICAH HAGAH SAMWEL** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Taveta Law Courts. The Appellant had been arraigned before the trial court on 19th January 2007 facing a 1st count of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the offence were that:

***"On the 7th day of January, 2007 at about 3.00 A.M. in Taita Taveta District within Coast Province being armed with dangerous weapons namely pangas and stones jointly with another not before court robbed K. J S one VCD machine make Panasonic, 4 kg of unga ngano, 5 kgs of rice, 3 kgs of sugar, ½ kg of magadi soda, 28 pieces of chapatti and cash Kshs.10,600/- all to the total value of Kshs.28,500/- the property of the said K.J.S and immediately before the time of such robbery wounded the said K.J.S."***

On Count No. 2 the accused is charged with **MALICIOUS DAMAGE TO PROPERTY CONTRARY TO SECTION 339(1) OF THE PENAL CODE**. The particulars of the charge were that:

***"On the 7th day of January 2007 at about 3.00 A.M. in Taita Taveta District within Coast Province jointly with another not before court willfully and unlawfully damaged one Television Set make AUCHA valued at Kshs.4,700/- the property of K.J.S"***

On count No. 3 the accused was charged with **DEFILEMENT OF A GIRL UNDER THE AGE OF 15 YEARS CONTRARY TO SECTION 8(1) & (3) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**. The particulars of this offence were that:

***"On the 7th day of January, 2007 at about 4.00 A.M. in Taita Taveta District within Coast Province in association with another still at large committed an act which causes penetration with a girl namely S.N.B a girl under the age of 15 years"***

On Count No. 4 the accused is charged with **RESISTING ARREST BY POLICE CONTRARY TO SECTION 253(b) OF THE PENAL CODE** and the remaining counts Nos. 5, 6, 7, & 8 the accused faces charges of **ASSAULTING A POLICE OFFICER CONTRARY TO SECTION 253(b) OF THE PENAL CODE**. The prosecution later withdrew Count No. 7 due to absence of the complainant. The Appellant pleaded ***'not guilty'*** to all the charges which he faced. His trial commenced on 15th February 2007 and the prosecution led by **INSPECTOR MUASYA** called a total of nine (9) witnesses in support of their case.

The complainant **J.K.S** told the court that on 6th January 2007 she was asleep in her home in Mahoo Village, with her niece **S** and her son **S** At about 3.00 A.M. they were awakened by the sound of a stone hitting the door. Two men burst into the house demanding money. The men each had a torch and one had a sword whilst the other had a panga. The two men had covered their mouths but the cloth fell off the mouth of one of them enabling **PW1** to identify him as the Appellant whom she knew well as a neighbour. The men began to assault **PW1** demanding money. S **PW3** who was the niece of the complainant offered to take the men and show them where the money was kept. Meanwhile the robbers had already stolen a mobile phone, TV, VCD machine and food items from the cupboard. **PW3** led one of the men to her grandmother's house where the complainant had hidden money, whilst the other man remained guarding **PW1**.

After retrieving the money from the grand-mother's house the men returned to the house. **PW3** told the court that Appellant raped her on the bed whilst **PW1** and her son lay under the bed. The men then forced **PW3** to walk with them carrying the stolen items to a gully where she was ordered to lie down. The two men raped her in turn before releasing her to go back home. **PW3** ran back to her aunt's house. The matter was reported to police. Both **PW1** and **PW3** were taken to Taveta District Hospital for treatment for the injuries they had sustained. The Appellant was eventually arrested at his home where he engaged police in a violent battle before he was eventually overpowered. He was then charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. Appellant gave an unsworn defence in which he denied the charges. On 16th July 2007 the learned trial magistrate delivered his judgement in which he convicted the accused of all 7 counts and thereafter sentenced him to death. The Appellant being aggrieved by both his conviction and sentence filed this appeal. **MR. ONSERIO** who appeared for the State opposed the appeal.

Being a court of first appeal we are obliged to re-examine and re-evaluate the evidence adduced before the trial court and to draw our own conclusions on the same **[AJODE –VS- REPUBLIC [2008] KLR 817**. We have carefully perused the written submissions filed by the appellant. His major ground of appeal is that of identification. The incident occurred at night – at 3.00 A.M. to be precise. Both **PW1** and **PW3** told the court that they were awoken from their sleep by the sound of a stone hitting their door. Indeed the said stone which fell into the house was retrieved by police and was produced as an

exhibit **Pexb2**, Though it was dark **PW1** and **PW3** both state that both of the robbers had torches which they flashed all over the room as they searched the house and emptied out the cupboards. The witnesses were thus able to see the 2 men by the aid of these very torches. Both eye-witnesses state that though the two men had covered their mouths the cloth slipped off the face of one of the men whom they immediately recognized as their neighbour. **PW1** stated in her evidence at page 2 line 28:

***"The attackers were wearing black caps. They had covered their mouths with black clothes. One of the attackers dropped the cloth around his mouth. I noted it was the accused MICAH"***

Likewise **PW3** stated in her evidence at page 6 line 22:

***"At one point the cloth the man had tied under his mouth fell and I saw it was the accused in the dock a neighbour"***

The other witness who was present in the house at the time of the attack was **PW5** **S.K** was a young child aged 7 years old. He was honest enough to admit that he did not recognize any of the robbers. However he confirms that the two men who attacked the family both had torches. We are therefore satisfied that there was a source of light being the torches on the night in question.

The robbery incident took a fair amount of time. The robbers terrorized and taunted the complainant and her family over a long period of time. They even spoke to them. **PW1** said that the Appellant asked her if she had recognized him. **PW1** answered in the negative as she feared the Appellant would kill her. This was not an idle fear as the accused had already cut her on the head. In the case of **PW3** she spent even more time in the company of the robbers since they forced her to carry the stolen items to their destination. Clearly both these witnesses had ample time and opportunity to see and identify the Appellant. Indeed it appears that the accused was not particularly worried about being recognized as he taunted **PW1** that she would spend her money in hospital i.e. treating her injuries. The Appellant further told **PW3** that he was out to teach her aunt [**PW1**] a lesson as she was very boastful of her wealth. It is clear then that this was not a random attack but that the Appellant had directly targeted the complainant.

Aside from the visual identification of the Appellant there is also evidence that the two witnesses were able to recognize the Appellant whom they both knew well as he was their neighbour. It was held by the Court of Appeal in the case of **ANJONONI –VS- REPUBLIC [1980] KLR 59** that:

***"recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"***

The fact that both **PW1** and **PW3** were able to recognize the Appellant and even knew him by name lessens the possibility of any mistaken identity. On this crucial issue of identity we find that there has been a clear, positive and reliable identification of the Appellant as one of the men who broke into the complainant's house on the material day.

The ingredients of offence of Robbery with Violence were well established in the case **of OLUOCH –VS- REPUBLIC [1985] KLR 549** where it was held that:

***"Robbery with Violence is committed in any of the following circumstances:***

***(a) The offender is armed with any dangerous and offensive weapon or instrument or***

***(b) The offender is in company with one or more other person or persons or***

***(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person"***

In the circumstances of this case all the above ingredients appear to have been met. The three eye witnesses **PW1, PW3** and **PW5** all testified that their two (2) attackers were armed with a panga, a sword and toy pistols. These were used to threaten and harass their victims. **PW1** was cut and beaten and sustained injuries. Indeed **PW3** in an attempt to rescue her aunt pleaded with the Appellant to stop cutting her and she promised to lead him to her grandmother's house to show them where **PW1** had hidden her money. **PW1** did seek medical attention after the incident at Taveta District Hospital. **PW7 DR. HENRY N'GENO** told the court that he did examine **PW1**. He noted injuries on her head and right arm caused by a sharp object like a panga. He filled and signed her P3 form which was duly produced as an exhibit. The evidence clearly shows that the robbers who were two in number subjected their victims to violence in pursuance of this robbery. The robbers made away with electric goods as well as ordinary food items which were stolen from the complainant's cupboard. The fact of this robbery is further confirmed by the evidence of **PW4 BONFACE SAMUEL** who is the complainant's brother. He told the court that on the material night he heard the commotion and tried to leave his house to rescue his sister. However he was unable to exit his house as the door had been locked from the outside. He looked outside and with the aid of the moonlight he saw the Appellant leading his daughter ***'S'*** **PW3** to her grand-mother's house. Clearly the door of **PW4** had been locked to prevent him coming to the rescue of his sister. From the evidence presented to the lower court we are indeed satisfied that the charge of Robbery with Violence was sufficiently proven. The Appellant was properly identified as one of the perpetrators. As such his conviction on this first count was sound and we have no hesitation in upholding the same.

With respect to Count No. 2 it is alleged that in the course of the robbery incident the Appellant hit the complainant's TV set and damaged it. The damaged TV set make ***'Aucha'*** was produced before the court as an exhibit. This incident was witnessed by **PW3**. From the evidence it is clear that the Appellant hit the TV set with the panga and broke it in a fit of rage due to his frustration at finding no money inside the house. The act was done with malice and was intended to strike fear into the hearts of the victims. This action of the Appellant did constitute the offence of Malicious damage to Property. We find his conviction on this count sound and we do uphold the same.

The third charge which the Appellant faces is that of defilement. The victim was **PW3** ***'S.B'***. This act of defilement was allegedly committed during the course of the robbery. **PW3** told the court that the Appellant first led her to her grand-mother's house nearby where she showed him where her aunt **PW1** had hidden her money. The Appellant then led her back to their house. He then ordered **PW1** and **PW5** to get under the bed and cover their heads. The two obliged. Then **PW3** states at page 6 line 24:

***"The accused told me to lie on the bed. I refused. He placed me on the bed an ordered me to remove the clothes. I was cearing [crying]. He refused. He tore the pyjama I was wearing. This is the torn pajama trousers the accused tore when I refused to undress. …. The accused then tore these panties 'MFI7' I was wearing. He then had sexual intercourse with me. His colleague was outside. I did not scream as I feared the accused. He threatened to kill me if I screamed …."***

The victim here has given a very vivid account of what happened to her. The torn clothes were produced as an exhibit. This was not the end of the ordeal for **PW3**. She told the court that the Appellant and her companion later forced her to help them carry the stolen goods. When they reached the gulley the two men proceeded to rape her in turn. Upon being released **PW3** ran back to her house and told her aunt **PW1** what had happened to her. She was rushed to Taveta District Hospital for examination and treatment.

**PW2** **DR. OMONDI AYARO** is the doctor who examined **PW3**. He noted that upon arrival at the hospital her clothes were dusty corroborating her evidence that she had been raped in a gulley. The doctor's findings as stated from page 5 line 5 were as follows:

***"Her general condition was fair. Her genitalia had injuries. The labia major and labia minora had bruises. The posterior vaginal wall was injured. There was a whitish discharge in the vagina and soil could be seen inside the reproductive organs …"***

The medical evidence corroborates the evidence of **PW3** that she had been raped and shows that penetration had indeed occurred. The presence of dirt in her private parts once again confirms her evidence that she was raped in the open inside a gulley. The P3 form filled and signed by the doctor was produced before the court as an exhibit **Pexb4**.

**PW3** has identified the Appellant as the man who raped her. As we have stated earlier **PW3** had ample time and opportunity to see the Appellant. She spent much time in his presence – walking with him to her grandmother's house and walking with the robbers to the gulley. Though the incident occurred at night **PW3** told the court that there was moonlight which enabled her to see and identify the Appellant. In addition the Appellant was a neighbour whom she knew well.

**PW3** told the court that she was 14 years old. Indeed the trial court did take the precaution of conducting a ***'voire dire'*** examination before receiving her evidence. The court found her to be of sufficient intelligence to understand the nature of an oath and the **PW3** gave sworn evidence. The P3 form filled by a medical expert gives the approximate age of **PW3** as 14 years. We are satisfied that **PW3** was within the 12 to 15 age bracket referred to in S. 8(3) of the Sexual Offences Act. In her evaluation of the evidence the learned trial magistrate observes at page 24 line 24:

***'PW3 S who impressed the court as a credible witness spent more time with the two men than any other witness"***

The trial magistrate who had the advantage of seeing and hearing the witnesses testify found **PW3** to be a ***"credible witness".*** We have no reason to question this finding. All said and done we are satisfied that there exists sufficient evidence to prove this offence of defilement against the accused and we do confirm his conviction on Count No. 3 of the charge.

Finally we propose to deal with Count Nos. 4, 5, 6, and 8 together as the offences all occurred at the same time i.e. during the arrest of the accused by police. Evidence is given by **PW6 PC JACKSON SANGORI, PW8 PC JAMES KIRWA, PW9 PC ZAKARIAH SHITANDA** all police officers from Taveta Police Station. They all testified that on 8th January 2007 they went to the Mahoo area, to the home of the Appellant in order to arrest the Appellant in connection with the robbery incident. By all accounts the Appellant put up a fierce fight to prevent his arrest. He tried to run away then called out to his wife to bring him a panga. The officers had identified themselves and stated the reason for their presence in his compound. The accused still did not calm down. The 3 officers had to struggle with the accused in order to subdue him. **PW6** told the court that the Appellant bit him on the hand. This fact is proven by his P3 form **Pexb5** which was produced in court by **PW2** **DR. OMONDI AYARO** – the doctor confirmed that upon his examination of **PW6** he noted ***"multiple deep small wounds on his left forearm near the wrist point"***. The doctor further observes that the injuries noted were consistent with biting. **PW8** on his part told the court that the Appellant bit him on the left arm between the 3rd and 4th fingers. Once again this is corroborated by **PW7** **DR. HENRY NGENO** who filled and signed his P3 form and produced the same as an exhibit **Pexb7**. He noted that **PW8** had a scar on the left arm which injury could have resulted from injury by a sharp object.

**PW9** told the court that he too was in the party of police officers who went to arrest the Appellant. He states that in his attempt to evade the officers and resist arrest the Appellant butted him in the left eyebrow and punched him on the left side of the head. The Appellant then kicked him on the left leg. His P3 form duly filled and signed was also produced as an exhibit **Pexb6**. He was found to have ***"subconjective haemorrage on left eye and had tenderness on right side"***. The evidence is conclusive and shows that the Appellant was not going to go with the police officers quietly. He resisted arrest and assaulted the officers who had gone to execute a lawful arrest. The charges on Counts 4, 5, 6 and 8 were satisfactorily proved and we do confirm the conviction of the Appellant on those four counts.

Upon conviction the Appellant was allowed an opportunity to mitigate. The trial court did give due consideration to his mitigation before passing sentence. On Count No. 1 the accused was sentenced to death. For Count No. 2 he was sentenced to serve two (2) years imprisonment. For Count No. 3 he was sentenced to serve 20 years imprisonment in accordance with S. 8(3) of the Sexual Offences Act. On Count No. 4, 5, 6 and 8 the Appellant was sentenced to serve 1 year imprisonment on each count. The trial court further directed that in view of the death sentence imposed with respect to Count No. 1 the remaining sentences would be held in abeyance. We are in full agreement. The sentences imposed were lawful and were also appropriate in the circumstances. We do uphold the same. Finally this appeal fails in its entirety.

**Dated and Delivered at Mombasa this 6th day of June 2011.**

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|---|---|
| **J.B. OJWANG** | **M. ODERO** |
| **JUDGE** | **JUDGE** |