



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 287 of 2008

PAUL WACHIRA MURIGU.....1st APPELLANT
JUSTUS GACHARA MACHARIA..... 2nd APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

Paul Wachira Murigu alias Makara and Justus Gachanja Macharia being the 1st and 2nd appellants herein, were jointly tried on a charge of four counts. In counts I and II the appellants were accused of having committed robbery with violence contrary to section 296(2) of the Penal Code. In count III, the 1st appellant faced a charge of gang rape contrary to section 10 of the Sexual Offences Act. No.3 of 2006. In count IV, the 2nd appellant faced a charge of having suspected stolen property contrary to section 323 of the Penal Code.

At the end of the trial the 2nd appellant Justus Gachanja Macharia was convicted on count IV and sentenced to 4 years imprisonment. He was however acquitted in counts I and II. The 1st appellant, Paul Wachira Murigu, was convicted in counts I, II and III. He was sentenced to suffer death in counts I and II and to serve 20 years imprisonment in count III. Being dissatisfied each appellant filed an appeal to challenge both the convictions and the sentences. The two appeals were consolidated when placed before this court.

On appeal, the 1st appellant put forward the following grounds in his petition:

- 1. The learned Magistrate erred in law and in facts in convicting the appellant on a single identifying witness, and failed to warn herself the danger therein convicting (sic) on a single witness.*
- 2. The learned magistrate erred in law and in facts in holding that the appellant indecently assaulted-raped P.W.2 in (sic) absence of him being taken to medical expert like the victim having been arrested the following day to corroborate P.W.2's evidence or in absence of any other evidence to corroborate that allegations-evidence by P.W.2*
- 3. The learned magistrate erred in law in fact in convicting the appellant on more than 1 count of death and similarly made finding (sic) on lesser charges having passed death sentence.*
- 4. The learned magistrate erred in law in convicting the appellant in reliance on identification parade evidence that was improperly conducted and the same had no credential (sic) values as no special marks or complexion had 1st been given.*
- 5. The learned magistrate erred in law and in facts in convicting the appellant in the reliance of visuals (sic) identification evidence and failed to find distance of the assailant from the victim length of time witness was under observation of the suspect was never disclosed.*
- 6. The learned magistrate erred in law and in facts in failing to uphold reasons (sic) of appellant (sic) arrest was unexplained.*

7. *The learned magistrate erred in law in failing to find the defence of the appellant meritorious which was true and honest defence by the appellant.*

On his part the 2nd appellant presented the following grounds in his petition:

1. *That the learned trial magistrate erred in law and fact for (sic) while convicting me with the charge of handling of which the alleged cell phone was mine and nobody claimed to be his/hers.*
2. *That according to all the evidences (sic) adduced before the court, nobody testified how she was aware (sic) of the alleged phone and they (sic) explained the serial numbers of their stolen phones and none was relevant to mine.*
3. *That the learned trial magistrate erred when convicting me relying that I failed to produce a receipt of the cell phone of which I claimed that the receipt got lost at the remand.*
4. *That the learned trial magistrate erred when rejecting; my sworn defence of which I stated very well how the phone was mine. She failed to explain properly why she rejected my defence failing the provisions of law under section 169 (2) of C.P.C.*

Miss Ngalyuka, the learned State Counsel conceded to the appeal by Justus Gachara Macharia, the 2nd appellant on the basis that there was no evidence to show that the 2nd appellant was found with the stolen mobile phone. She further argued that the 2nd appellant's evidence that the mobile was his property was credible hence it shouldn't have been dismissed. Miss Ngalyuka, however opposed the appeal by Paul Wachira Murigu, the 1st appellant herein. It is her argument that the 1st appellant was identified by P.W.1 hence he was placed at the scene of crime.

We have carefully considered the grounds raised by the 2nd appellant in this appeal. It is important to note that Justus Gachara Macharia the 2nd appellant was convicted for the offence of having suspected stolen property contrary to section 323 of the Penal Code. According to the trial magistrate, the 2nd appellant was implicated by the evidence of Sgt George Shikandi (P.W.6) and that of P.C. Musa Kiptoo (P.W.7). According to the trial magistrate, P.W.6 and P.W.7 gave an account of how they recovered Motorola C117 phone from the 2nd appellant. The learned Principal Magistrate proceeded to state that the 2nd appellant had failed to rebut the evidence of P.W.6 and P.W.7. We are unable to comprehend how the learned Principal Magistrate expected the 2nd appellant to rebut the evidence of P.W.6 and P.W.7 yet there is evidence to show that the 2nd appellant had stated that the mobile phone was his property. The prosecution did not tender any evidence to show that the same was stolen or illegally obtained. We are convinced that the 2nd appellant set up a plausible defence. We are satisfied that the learned Principal Magistrate improperly dismissed the 2nd appellant's defence. We are convinced that the state correctly conceded to this appeal. We allow the same by quashing the conviction and set aside the sentence. The 2nd appellant Justus Gachara Macharia is hereby set free forthwith unless lawfully held.

We now wish to consider the 1st appellant's appeal. It is the submission of Miss Ngalyuka that the appeal should be dismissed because the 1st appellant was identified by the daughter to P.W.1 who gave the police the 1st appellant's physical description. P.W.2 is said to have picked the 1st appellant in an identification parade. The appellant was of the view that his conviction was unsafe because the trial magistrate relied on the evidence of a single identifying witness without warning herself. We have carefully considered the evidence of P.W.1 and P.W.2. It is the evidence of J.W.M (P.W.1) that on 6/6/2007 at midnight there was a knock at her door. She peeped through her window whereupon she saw seven people outside her house. P.W.1 and her daughter P.M.M (P.W.2) screamed. Those people cut the window mesh and grill with an axe to gain entry into P.W.1's house. P.W.1 hid under the counter of her shop. The thugs ordered P.W.2 to surrender her mobile phone. The thugs went to where P.W.1 had gone to hide. The thugs are said to have taken mobile phones belonging to P.W.1 and P.W.2. P.W.1 admitted she was unable to identify the thugs. P.W.2 on her part said some robbers broke into their home at midnight on 6.6.2007. One robber entered P.W.2's room where he demanded to be given money. That robber had a torch and a panga. P.W.2 said she gave him her Motorola phone make C118. P.W.2 was taken to the shop by one of the robbers where she was raped. The thugs took P.W.2 to the main house. P.W.2 put on the lights, got Kshs. 500 which she handed over to the thugs. P.W.2 said the short robber raped her once again after which the other thug took over and started raping her. The robbers left and locked the door from outside. P.W.1 came and opened the door. P.W.2 said the thugs were with her for more than an hour. P.W.2 claimed he managed to identify the robber who had raped her when she put on the lights in their main house. She said he had a unique nose. The robber was not known to P.W.2. People came and took P.W.2 to K District Hospital. After two days P.W.2 was called upon to attend an identification parade. P.W.2 picked out the appellant. We have carefully examined the evidence of P.W.2. Her evidence is that of a single identifying witness. She said she was able to identify the 2nd appellant because he was short and had a unique nose. She said she managed to notice these features when she put on lights in their main house. It is the evidence of P.W.2 that when she put on the lights, one thug put off the same almost immediately. We are not satisfied that the conditions were conducive for positive identification that was free from error. We have come to the above conclusion because there is no evidence that P.W.2 gave the appellant's description to the police. Secondly, the type of light was not described. We are left to wonder whether the source of light was electric

or a lantern lamp. There is no description as to how bright was the light. Thirdly, we are of the view that the time the light lasted was too short to enable the witness get glimpse of the 1st appellant. We say so considering the fact that the 1st appellant was not previously known to the witness. Despite the fact that the learned Principal Magistrate convicted the 1st appellant on the evidence of a single identifying witness, she failed to warn herself of the danger of doing so before proceeding to convict. We have come to the conclusion that it was not safe to sustain a conviction on the basis of such evidence. We hereby give the 1st appellant the benefit of doubt. Consequently the appeal is allowed. The conviction quashed and set aside the sentence. The 1st appellant is hereby set free forthwith unless lawfully held.

Dated and delivered this 13th day of January 2010.

J.K. SERGON
JUDGE

M.S.A. MAKHANDIA
JUDGE

In open court in the presence of the appellants.

J.K. SERGON
JUDGE

M.S.A. MAKHANDIA
JUDGE