REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal 4 ,5,6,10, & 14 of 2008

MALACH OJWANG.....1ST APPELLANT

THOMAS SITIMA MORACHA.....2ND APPELLANT

SAMWEL ONDIEKI GESUKA.....3RD APPELLANT

JOSEPH MOGAKA NYANGAU.....4TH APPELLANT

PHILIP OENGA OKEMWA.....5TH APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The five appellants were jointly convicted in count 1 of robbery with violence contrary to *section 296(2) of the PenalCode* by the Senior Resident Magistrate, Ogembo and each sentenced to death. In counts II and III, the 5th and the 1st appellants were, respectively, convicted of indecent assault contrary to *section 6(a) of the Sexual Offences Act* and their sentences left in abeyance. The particulars of count 1 were that on the 2nd /3rd December, 2006 in Gucha District of Nyanza Province ,the appellants jointly with others not before the court and while armed with dangerous weapons namely axes, pangas, swords and iron bars, robbed N.M.M (PW1) of cash Kshs. 5,600/=, two National radio cassettes, Motorola cell

phone, Kodak camera, two pressure lamps, shoes, two plastic containers, two kettles, one set of hot pot, four dozens of cups, two dozens of plates and one umbrella, all valued at Kshs. 43,680/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said

N. M.M (PW1). In counts II and III it was alleged that during the incident the respective appellants unlawfully and indecently assaulted S.K (PW2) by touching her vagina.

The brief facts of the case were that PW1 and PW2 are husband and wife who were asleep in their house during the night of 2nd and 3rd December 2006 at about 12.30 a.m. They were woken up by loud bhang which threw the door to the house open. They found attackers in their bedroom with bright torches showing. PW1 could tell one attacker had a panga and another had an axe. The couple screamed *"thieves, thieves"* but were slapped into silence. Four men were in the bedroom but the house had more attackers. The attackers robbed money and also ransacked the house for goods. They were dressed like police officers. After a long time in the room and house, PW2 was taken away by three of the attackers to show them the house of one Onderi**.** On the way, she was forced down into a maize plantation and raped in turns by two of those three. They were 1st and 5th appellants. The 4th appellant who was with them did not rape her. They left her to return home. Those left in the house with PW1 were the 2nd and 3rd appellants. They used a tie to tie PW1's hands before leaving him here. When PW2 returned PW1 was still tied. Neighbours had been called and he was untied. The attackers had taken with them the items named in the particulars of the charge in Count I. PW2, fearing she may have contracted HIV Aids, washed herself clean. At about 7.a.m PW1 went to report to the area Assistant Chief, Evans Onsoro Magomba (PW3), who came to the scene and confirmed the incident. He told court she gave him the names of his attackers who included the 1st, 2nd and 5th appellants. PW3 called a baraza that morning. Among the people who attended was the 5th appellant whom he arrested. On 5/12/2006 PW3 was with PW1 and PW2 at N market. PW2 pointed the 4th appellant out as being one of her attackers. He was arrested. On 15/12/2006 the couple were at the same market. They saw the 2nd and 3rd appellants whom they got arrested. From each appellant nothing was recovered. PW1 and PW2 said they were assisted to identify the attackers by the bright torch light in their bedroom produced by the torches they had. PW2 further told court she was with the 1st, 4th and 5th appellants out there for about 1 ½ hours and

there was moonlight and she saw them well and identified them. The 1st appellant was subsequently arrested in Nairobi. According to PW1, of the four attackers in the bedroom, he knew two by name and knew the other two by appearance.

Each appellant made sworn statement denying he was in the attack and did not call witnesses.

Mr. Momanyi represented the 2nd and 3rd appellants. The 1st, 4th and 5th appellants were unrepresented. Mr. Kemo represented the Republic. Each appellant raised several grounds in his petition of appeal, but the main complaint was that they had not been properly identified or recognized in the attack; that the evidence of identification and recognition was riddled with material contradictions and inconsistencies as not to be believed. Mr. Kemo took the position that the circumstances were favourable for positive identification and recognition and that the appellants had been convicted on cogent evidence. It is the duty of the this appellate court to reconsider the whole evidence and evaluate it and draw its own conclusion to be able to decide whether or not the judgment of the trial court should be upheld . (See Okeno *–v-Republic [1972] E.A 32}.* The court should however bear in mind that it did not have the advantage of seeing or hearing witnesses who testified in the trial court.

The 1st and 5th appellants were each charged with indecent assault contrary to *section 6(a) ofthe Sexual OffencesAct,* but the evidence of PW2 which the court accepted was that she had been raped by the two appellants. After the finding that PW2 was raped it was not open to the court to find that a charge of indecent assault had been established beyond doubt against either 1st or 5th appellant. The evidence did not support the charges in counts II and III.

Regarding count I, it is clear that the court did not caution itself of the need for exercising the greatest care in dealing with evidence of identification or recognition. The robbery was committed at night. The circumstances revealed by the recorded evidence were that the attackers were many, banged the door open to wake up the couple and in the house there was no light except that from the torches the intruders had. When the couple raised alarm they were each slapped to keep quite. The attackers were armed and threatened to kill. The bed room was about

6 x8 meters. It was congested, according to PW1. It had 2 small tables, clothes boxes, and stool and cloth lines. The attackers were ransacking the room and house for property. There was a lot of movement and yet, according to PW1, such movement was restricted. PW1 estimated that in all 15 people were in the

house. The attack may have taken along time, but the circumstances were difficult. The court was persuaded that PW1 and PW2 had told the truth and that they had had a good opportunity to see and identify their attackers . The court ought to have reminded itself that even the most honest of witnesses may be mistaken.

In the Court of Appeal decision in *Dzombo Chai –Vs-Republic, Criminal Appeal No. 256 of 2006* at Mombasa it was observed as follows:

"*This Court has said on many occasions that the evidence of identification and recognition of an accused should be tested with the greatest care and should be water-tight to justify a conviction. It is also recognized that there is a possibility for a witness to be honest but mistaken and for a number of witnesses to be all mistaken (See Kiarie –vs- Republic [1984] 739). Further, although evidence of recognition is more satisfactory, more assuring and more reliable than the identification of a stranger (See Anjononi –vs- Republic [1980] KLR 50),such evidence should not only be credible but also should be free from any possibility of error before it can be relied on to implicate an accused person."*

Was the prosecution evidence carefully tested before confirming that the appellants, or any of them, had been properly identified or recognized?. The difficult circumstances indicated in the foregoing were not appreciated by the court. This court may not tell whether the Magistrate could have reached the same conclusion had she considered them. When PW1 was cross-examined by the 1st appellant he accepted that he told police in his statement that he had recognized 4 people in the attack, but not by their names. In court he said he had known the 5th appellant since birth and by name. PW5, Benson Nduva of Nyangusu police station, testified that PW1 gave names of the 1st and 5th appellants only but said she had recognized the others by their appearance only. PW2 was cross- examined by Mr. Momanyi to admit that she told police in her statement that she could identify only the 2nd and 4th appellants by appearance only, and only 5th appellant by name. No description of the attackers was given to either PW3 or to PW5 that would have helped to arrest them. PW1 told court when cross examined by Mr. Momanyi that:

"The 3rd and 4th accused were unknown to me till that date."

In evidence in chief he stated:

"*on 15/12/2006 while at N market with my wife we spotted accused 3 and 4 at the market. My wife had*

seen them well……..…..”

The totality of PW1’s evidence is that he had not identified the 3rd and 4th accused (that is 2nd and 3rd appellants) in the attack.

In short, PW1 and PW2 were inconsistent witnesses and their evidence as to identification or recognition was materially contradictory as to be incapable of belief. It would be unsafe to base a conviction on such evidence.

In the result, the appeal is allowed. The `convictions are quashed and the sentence set aside. The appellants are ordered to be set free immediately unless they are otherwise being lawfully held.

Dated, signed and delivered at Kisii this 3rd Day of February, 2010.

D.K.MUSINGA **A.O.MUCHELULE**

JUDGE **JUDGE**

3/2/2010

Before A.O.Muchelule-J

Court clerk-Bibu

Mr. Mutai for State

Applicants-present

COURT: Judgment delivered in open court.

A.O.MUCHELULE

JUDGE

3/2/2010