REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI Criminal Appeal 153 of 2007

ROBINSON CHARO KIRINGA ….….…..……….APPELLANT

VERSUS

REPUBLIC ……………………………………RESPONDENT

JUDGMENT

Robinson Charo Kiringi (the appellant) was convicted on a charge of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. He was also convicted on a charge of indecent assault on a female contrary to section 144(1) Penal Code and sentenced to five years imprisonment - this was an alternative charge to the main charge of rape contrary to section 140 of the Penal Code.

He was also sentenced to serve 6 months imprisonment on a charge of stealing contrary to section 275 of the Penal Code. He had denied the charges.

The evidence presented to the trial court was that on 22nd February 2006, H.N.M (PW1) was asleep inside her house at R, M village, in Kilifi with her children, when a gang of people went there demanding for money at about 1.00am. She opened the door and was taken to the bedroom, punched and threatened with a panga and knife. The gang ransacked her house, robbing her of Kshs. 1300/-, a Motorolla mobile hone, chargers, a generator, a Phillips TV, standard bicycle, a suitcase, a bath towel, battery, cables and utensils – all worth Kshs. 56,000/-. They also had carnal knowledge of her without her consent.

In her testimony to the trial court, PW1 stated that while sleeping, people came with torches which they shone through the window and demanded for money and the goods which her husband kept. She opened the door, passed the gang, proceeded on. She was grabbed from behind and taken to the bedroom where her child was sleeping, then she was pushed down on the bed and she gave them her phone, on demand. They threatened her with a knife and panga, punching and hitting her several times before being raped. After the gang left, PW1 ran to her neighbour’s house, for help and informed them that she had recognized one person whom she knew as Charo Kiringi. So in the morning when police came, Charo Kiringi was arrested.

In court, she identified some items in court being a suitcase, generator, TV, knives, generator cable, utensils, towel, two phones, a wallet, charges and a thermoflask as property which had been stolen.

According to S.M (PW2) who is PW1’s husband – he was at his bar known as N Inn, in M, when his wife called to say there had been a robbery at their home. He went with police to the scene and says:-

> *“My wife mentioned CK…we went to C home and ….he was found with 2 phones which I recognized as ours. One had been stolen earlier and I had reported….the phones are in court – MFI 10…”*

When PW2 went to the police station, he was shown a generator, TV, and a suitcase with assorted items, which he recognized as their property.

B.S.M (PW3), is the neighbour to whom PW1 ran to seek for help immediately after the robbers had left. His testimony was:

> "*She said, she suspected two people, Charo and Nyamawi."*

Alphonse Sharif Keya (PW4) a wine tapper in Mwas tapping wine on 23-2-06, when he spotted items from afar. He got down the palm tree and went to have a look – there he saw a TV, a generator and a suitcase which were under a tree. He went and alerted the owner of the nearby house and the items were later collected.

Pc Kaingu (PW5) who received the report about the robbery told the trial court that upon getting to the complainant's house, she said she had identified one Robinson and Noah Nyamawi. A search carried out by police led to recovery of two mobile phones, two chargers and 4 suitcases – the complainant identified the items as his. Police officers went to the appellant's (Robinson) home and in the shamba, they found a generator, Tv, a suitcase which had simcards and cash.
Since complainant said she had been raped, she was examined at the Kilifi District Hospital by Dr. Essajui who filled the P3 form and whose findings were that she had no special injuries, a swab done found no spermatozoa, there were pus cells and bacterial cells. The P3 form was produced by Dr. Otieno as it was indicated that Dr. Essajue had proceeded to Russia for further studies.

The appellant in his unsworn testimony told the trial court that he was a student in form III at Chumani Secondary School and he knew the complainant as his class teacher. When police visited his home upon receiving reports about the robbery, he was asked for one Japheth who was away then. Police wanted him to explain about items taken from the said Japheth. He was detained, then released and told that if they failed to find Japheth, he would be arrested – then he was charged.

The trial magistrate upon evaluating the evidence, noted that appellant and complainant were known to each other and that some of the stolen items were recovered – that complainant had mentioned the appellant. His finding was that the complainant positively identified the appellant whom she also mentioned as the one who raped her and that all the evidence pointed to the appellant.

The appellant challenged these findings:

1) The learned trial magistrate erred in law and fact by relying on the evidence of a single identifying witness.

2) The learned trial magistrate erred in law and fact by relying on unsatisfactory evidence regarding identification.

3) The case was not properly investigated

4) The trial magistrate shifted the burden of proof onto the appellant

5) The case was not proved beyond reasonable doubt.

He sought to rely on the written submissions in which he stated that the charge is defective because it refers to the dates of 21st and 22nd February 2006, yet the complainant referred to 22nd February. We take note that:

a) This was not contained in the grounds of appeal.

b) The charge clearly refers to the night of 21st/22nd – the incident having occurred after midnight – according to PW1 it was at 1.00am.

He challenges the evidence on identification, arguing that the witness PW1 didn't describe the assailant's features on clothing or anything that could enable her to recognize him – he has cited the case of Juma Ngodia v R cr. App. 118/83. It is his contention that the offence took place at night and the complainant in her evidence did not state the source of light inside or outside her house which could allow her to see, identify or recognize any of the alleged robbers. He drew to this court's attention the evidence of PW1 which was that the robbers had torches which they shone through the window.

He also urged this court to consider the fact that whereas the information she gave her husband was that one of the robbers was Doschi Charo

Kiringi, he is Robinson Charo Kiringi and it would seem he is merely being a victim for sharing some names with other members of the extended family.

And it is on this basis that he points blame on the police, saying they did not carry out proper investigations to establish which Charo Kiringi had participated in the incident. Appellant also made oral submissions to the court, where he pointed out that none of the stolen items were recovered from him.

The State does not support the conviction and sentence. Mr. Ogoti (the ADPP) conceded that the offence took place at night, and there was no evidence as to lighting.

Further, that there were contradictions in the trial with the main witness contradicting herself on identification, initially she said:-

> "*I saw him chanting that night as the light was on"*

Then on cross-examination she said:

> "*When the group entered, I did not recognize you. You had torches. This is your torch which assisted me in identifying you"*

Mr. Ogoti poses the question that if there was light in the house, then how did the torches assist PW1 in identifying the appellant. He also urged the court to take note that, there was no evidence as to what the position of the torches were in relation to the appellant.

Then there was the reference to two phones, Motorolla and Sagem – one of the phones was stolen earlier. Mr. Ogoti pointed out that, the only evidence came from her husband (PW2) yet from the particulars in the charge sheet. It is PW1 who should have identified the phones because she is the one named as the complainant. The learned ADPP submitted that the trial magistrate did not deal with these facts singularly and evaluate them.

From the evidence we note that this was a single identifying witness who confirmed that the incident took place at night. Her evidence in chief was that she saw the appellant chanting that night, as the light was on. It is not clear which light was on – was it inside the house or outside? And just where did she see him under this light – inside he house or outside. If that is the case, then it defeats logic in her answer on cross-examination where she says, when the group entered, she did not see the appellant, and that it is the torches which the gangers had which enabled her to identify the appellant. This then leaves the question – which really was the source of light, and how was it positioned in relation to the appellant? This is further compounded by PW1's own answer in cross-examination when she stated:

> "*You shone the torch on the chest not on my eyes, I recognized you"*

There was a need to describe in detail the size of the torch and its brightness so as to comprehensively establish whether positive identification was possible.

We can do no better than draw from the decision in Charles O. Maitanyi v R (1986) KLR which laid down principles of identification by a single witness under difficult circumstances. Indeed the evidence regarding conditions was not satisfactory to enable PW1 positively identify the attackers – to our minds, it was an honest but not conclusive belief on the part of PW1 that the person she saw was without a doubt the appellant. The upshot is that circumstances and conditions for identification were not satisfactorily addressed and indeed the trial magistrate did not reconcile the apparent contradiction in the evidence of PW1 regarding the actual source of light which enabled her to identify the appellant.

As regards the charge of stealing, we are in agreement with Mr. Ogoti, that:-

a) the evidence was simply glossed over

b) there is no evidence that either of the phones were recovered from the appellant.

The charge of rape cannot stand as it is pegged on to the issue of identification, we therefore find that the appeal is merited and we allow it. The convictions are quashed on all the counts and sentences set aside. The appellant shall be set at liberty forthwith, unless otherwise lawfully held.

Delivered and dated this 18th day of March 2010 at Malindi.

H. A. OMONDI	**M. ODERO**
JUDGE	**JUDGE**