REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 189A & 189B of 2007

*[From Original Conviction and Sentence in Criminal Case No. 755 of 2006 of the Senior Resident Magistrate's Court at Voi: **J.M. Gandani – S.R.M**.]*

JAFFERSON MWAKIO …… 1ST APPELLANT
TOFIL MWADIME …….. 2ND APPELLANT
VERSUS
REPUBLIC ……...…….……. RESPONDENT

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JUDGEMENT

The two Appellants **JEFFERSON MWAKIO** (hereinafter referred to as 'the 1st Appellant') and **TOFIL MWADIME** (hereinafter referred to as 'the 2nd Appellant') have both filed this present appeal to challenge their conviction and sentence by the learned Senior Resident Magistrate sitting at Wundanyi Law Courts. The two Appellants had been jointly charged before the lower court on the following counts - **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE** particulars of which stated that –

"On the night of 23rd and 24th day of June 2006 at S sub location W Location in Taita Taveta District within Coast Province, jointly being armed with dangerous weapons namely a panga, a knife and a rungu robbed G S beans valued at Kshs.6,000/- at or immediately before or immediately after the time of such robbery used actual violence to the said GE S"

The two appellants were also jointly charged on a second count of **RAPE CONTRARY TO SECTION 140 OF THE PENAL CODE**. The 2nd Appellant faced a third count of **ATTEMPTED DEFILEMENT OF A GIRL CONTRARY TO SECTION 145(2) OF THE PENAL CODE**, and in the alternative he faced a charge of **INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 144(1) OF THE PENAL CODE**.

The trial commenced for hearing in the lower court on 18th September 2006 and the prosecution led by **INSPECTOR MUNGA** called a total of nine (9) witnesses in support of their case. The facts in brief were that on the night of 23rd June 2006 the complainant **G S<u>PW1</u>** was asleep inside her house with her two children **JS <u>PW2</u>**and **C M <u>PW3</u>**. **<u>PW3</u>** heard a knock on the door at about 3.00 A.M. and he awoke to find a torch being shone into his face. Two men entered and demanded to know the contents of the sacks inside their house. **<u>PW3</u>** replied that the sacks contained maize and beans. Then **<u>PW1</u>** who had been awoken by the sound of people talking got up. She heard a knock on her bedroom door before the door was kicked in and two men entered, one armed with a panga and the other with a knife. They ordered her not to make a noise. **<u>PW1</u>** told the court that she was able to identify the two men, whom she knew very well as ***'Mwakio'*** the 1st Appellant and ***'Mwadime'*** the 2nd Appellant. The two Appellants pulled both **<u>PW1</u>** and her daughter **<u>PW2</u>** to the back of the house and ordered them both to remove their panties. Then the 1st Appellant raped **<u>PW1</u>** whilst the 2nd Appellant lay on top of **<u>PW2</u>** intending to defile her. The 2nd Appellant later complained that he could not penetrate **<u>PW2</u>** and pushed her away but proceeded to rape **<u>PW1</u>** instead. After this the two Appellants ordered **<u>PW1</u>** to remove the two sacks of beans which she had inside her house. As **<u>PW1</u>** was transferring the beans from one sack to another some poured out onto the ground. **<u>PW1</u>** pleaded with the Appellants to leave her some of her beans and they allowed her to retain four tins. They then forced **<u>PW1</u>** to carry one sack of beans and accompany them to a nearby thicket where they deposited all the stolen beans. They then raped her yet again in turns and threatened to burn

down her house if she revealed what had happened. Meanwhile the two children **PW2** and **PW3** had gone to alert a neighbour about what had befallen the family. The village elders were also informed. The following morning both Appellants were arrested and taken to the police station where they were eventually charged.

At the close of the prosecution case the learned trial magistrate placed both Appellants to their defence. Both gave unsworn statements and did not call any witnesses. On 9th October 2007 the learned trial magistrate delivered her judgement in which she convicted both Appellants on the 1st count of Robbery with violence as well as Count No. 2 of Rape. She further convicted the 2nd Appellant on the alternative charge of Indecent Assault on a Female. After listening to mitigation from both the Appellants the trial magistrate sentenced them both to death on Count No. 1, ten (10) years imprisonment on Count No. 2 and 2nd Appellant was sentenced to a further five (5) year term on the alternative charge. It is against these convictions and sentences that the Appellants now appeal.

Mr. Oguk learned counsel appeared for the 2nd Appellant whilst the 1st Appellant appeared in person and relied on his written submissions. **Mr. Monda**, learned State Counsel appeared for the Respondent State and opposed the appeal.

This being the court of first appeal we will in coming to our decision be guided by the Court of Appeal decision in **AJODE –VS- REPUBLIC [2004] KLR 82**, where their Lordships held –

"In law, it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that"

Mr. Oguk for the 2nd Appellant stated that the main ground for his appeal was identification. A look at the 1st Appellant's grounds of appeal reveals that he too raised this issue of identification as the main ground for his appeal. There can be no disputing that this incident in question occurred at night. All the witnesses testify that their home was broken into at about 3.00 A.M. In her evidence **PW1** told the court that she did not have electricity in her compound. She further states that when the robbers struck she did not have time to light up her lamp. However **PW1** states that she was able to see and identify the Appellants due to the moonlight and by way of the torchlight from the torch which they had. Under cross-examination by the 1st Appellant PW1 at page 6 line 6 says –

"You are the ones who had the torch. You did not direct the torch on my eyes. I saw you well"

The fact that the torch was not shone directly into the face of **PW1** rules out the possibility that she was blinded by the torch light and could not see. We do note from the narration of **PW1** that she was in the presence of both Appellants from 3.00 A.M. to 5.00 A.M. when they finally released her. This was a period of roughly two (2) hours. The Appellants did not keep **PW1** inside her house. They did take her behind the house where they raped her in turns. At page 4 line 16 **PW1** says that visibility was good outside her house as –

"It was not very dark outside since the sky was clear and there were stars and moonlight".

At that point the Appellants were ordering the witness to transfer her beans into a sack for them to carry away. They even forced **PW1** to help them carry away their loot to a nearby thicket before they finally released her. It is abundantly clear that during this two (2) hour period and being in the presence of the Appellants throughout **PW1** had ample time and opportunity to see them well.

Apart from visual identification made by **PW1** there was also clear evidence of recognition. **PW1** in her evidence told the court that she was able to identify both Appellants whom she had known for a long time before this incident. It actually transpired that they were fellow villagers. At page 3 line 20 **PW1** states –

"I looked at the robber's faces and I recognized them as Mwakio Accused 1 and Mwadime accused 2. Accused 2 had worn a red hat. I have known them since they were young especially accused 1. He used to attend a nearby school. I knew accused 2 less than a year ago."

On the same page **PW1** goes on to state that neither Appellant made any attempt to disguise their faces from her.

The identification of the Appellants at the scene was not only that of a single witness. **PW2** ***'JS'*** the complainant's 14 year old daughter also told the court in her evidence that she identified the two Appellants as the men who robbed her family. At page 8 line 15 **PW2** states –

"The two of them pulled mum outside. I followed but they ordered me to go back into the house. I refused. Mwadime A2 pulled me. I knew his face. I saw his face through light from the torch which was bright. I did not know his name by then but I used to see him pass outside our farm. Accused 1 pulled mum outside. I used to see him pass outside our school. I saw his face through the light from the torch. I also know him well."

PW2 has described the torch light as ***"bright",*** such that enabled her to see and identify both Appellants. As in the case of **PW1**, **PW2** also relies on recognition. She states that the two Appellants were men whom she knew by appearance as she had seen both before this incident. Again we note that like **PW1**, **PW2** got far much more than a fleeting glance at the two men. She was also taken out behind the house. She certainly spent a fair amount of time in their presence. At page 10 line 26 **PW2** under cross examination by the 2nd Appellant says –

"You did not point the torch light on my face. You had pointed to the wall but there was enough light to enable me see you. I did not have a torch. I was able to see you".

Here again the fear that the torch light may have been pointed directly into the face of **PW2** thereby blinding her vision is disabused. The torch was directed to the wall thus giving a clear an uninterrupted beam of light in the room.

Mr. Oguk for 2nd Appellant submits that contrary to the evidence of **PW1** and **PW2** there was no moonlight outside and if so it was not sufficient to aid identification. He quotes the evidence of **PW5 JAMES JIMSON MWAWUGANGA KISAKA** a village elder who at page 18 line 20 said they went to the scene at complainant's house but –

"G [PW1] was not in. The house was empty. We decided to go and sleep since it was still dark."

Our understanding of these words of **PW5** is **not** that he left the scene and went home because it was dark, but that he left because the complainant whom they had gone to assist was not at her home. He decided to go home and await the next day to pursue the matter further. No direct question was put to **PW5** about what type of light was available at the scene and he gave no evidence on this.

The two appellants were arrested the day after the robbery but there is evidence on record that **PW1** did name her attackers even before they were arrested, which confirms her identification of the Appellants. **PW4 MARTWELL MWADIME**, a village elder told the court that he was informed of the incident on 24th June 2006 at 6.00 A.M. He went immediately to the complainant's home. At page 16 line 36 **PW4** states –

"I went to G's home and I found the village elder ST and other villagers. G was also present. G said she had been attacked by robbers the previous night who went to her son's room and when she enquired who it was, the robbers went and broke her door. She said the robbers were Jefferson Mwakio and Mwadime".

PW5also a village elder who went to the scene told the court at page 19 line 3 –

"G said it is Mwakio who raped her while Mwadime tried to defile the daughter but was unable".

It is clear that **PW1** did not identify the two appellant merely as an afterthought. She was clear about who had robbed her throughout and she named them to the village elders which led to the arrest of the appellants. Finally on this issue of identification it is significant that upon his arrest the 2nd Appellant immediately denied having stolen the complainant's beans. How would he have known that **PW1** was robbed off her beans unless he had also been at the scene. **PW5** at page 19 line 14 states –

"We continued following the footprints till Mwadime Accused 2's house. On seeing us Mwadime accused 2 told G that he did not have her beans, we were surprised how he knew G was complaining about her beans which were

stolen."

This evidence only goes to confirm the identification of the 2nd Appellant as one of the robbers. This evidence of identification was in our view properly interrogated by the learned trial magistrate when he found at page 45 line 15 –

"I particularly note that G PW1, had a lot of opportunity to observe the robbers inside the house when they burst in, outside the house while they raped her in turns, while walking to take the beans to the bush, they walked her back to the house and again raped her in turns. This gave her a chance to look at the robbers well and so was able to recognize them as fellow villagers. She even knew their names well which she gave to her neighbours in the morning."

We find ourselves in agreement with the trial magistrate on this point. There is no doubt in our minds that there was a clear, reliable and positive identification of both appellants not only by **PW1** but by **PW2** as well. Their visual identification is well buttressed by evidence of recognition which has been held severally to be more reliable than visual identification alone. We do therefore dismiss this ground of the appeal.

The incident as described by the witnesses without doubt amounted to Robbery with Violence contrary to S. 296(2) of the Penal Code. There was more than one assailant, they were armed and violence by way of rape was meted out to the victims. We are satisfied that the conviction of the two Appellants on the first count of Robbery was sound both in law and on the facts of the case. We therefore do confirm their convictions on this first count.

On the second count of rape we note that both Appellants were jointly charged in Count No. 2 of Rape. The question of whether two or more suspects can possibly ***'jointly'*** rape a woman was considered by the Court of Appeal in the case of **DAVID JEFWA KALU –VS- REPUBLIC [2007] e KLR)** wherein their Lordships stated –

"We were not addressed on the issue of how three men can jointly commit a rape on one woman at the same time when it is known that in rape the issue of the man's male organ penetrating the female's vagina is an element of the charge which has to be proved."

We could not agree more. It is physically impossible for two men to ***'jointly'*** rape one woman at the same time. They can only rape her '***in turns'*** one after the other. It is a misnomer to charge two or more men on a single count of Rape. The proper thing is to charge each suspect on a single individual count of Rape. Having said that and being mindful of the provisions S. 382 of the Criminal Procedure Code, we find this irregularity not to be fatal to the validity of the charge.

PW1 in her evidence told the court that the two appellants after breaking into her house led her behind the house and raped her in turns. In fact she states that 1st Appellant raped her first. 2nd Appellant tried to rape her daughter but on failing to penetrate her he decided to rape the complainant instead. **PW1** tells the court that the two appellants after forcing her to carry the sacks of beans to the thicket raped her in turns a second time. Once again we find that this allegation of rape could not have been a mere afterthought on the part of **PW1**. There is evidence that **PW1** did immediately tell others that she had been raped. **PW9 DR. MWIKAMBA ANDREA** told the court that on 27th June 2006 he examined **PW1**. He told the court that he carried out a vaginal examination which revealed the presence of semen as well as pus cells which were indicative of an infection. This corroborates the testimony of **PW1** that she had been raped. It is true as Mr. Oguk pointed out that no blood or saliva samples were taken from either appellant thus no typing was done to provide medical proof of a link between the appellants and the rape of the witness. We do not agree with Mr. Oguk that the absence of medical evidence means that no conviction can be rendered on this charge. In the case of **CHILA –VS- REPUBLIC [1967] E.A. 722** it was held thus –

"The judge should warn himself of the danger of acting on the uncorroborated testimony of the complainant, but

having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful …"

In this case the evidence of **PW1** was not uncorroborated. This is one of those extremely rare circumstances where a rape is witnessed by a third party. In this case it was **PW2** the daughter to **PW1**. **PW2** also narrated how she and her mother were taken behind the house and ordered to remove their underwear. At page 9 line 1 she states plainly –

"Accused 1 had sexual intercourse with my mum."

Both **PW1** and **PW2** have identified the two appellants as the perpetrators of the rape. As discussed earlier this identification was found to be sound and reliable. Even without medical corroboration the facts and the circumstances clearly point to the two appellants. We are satisfied that their conviction on this ground of Rape was sound and we do hereby uphold that conviction.

Lastly the 2nd Appellant appeals his conviction by the learned trial magistrate on the alternative to Count No. 3. In her evidence at page 8 line 26 **PW2** said –

"We were all pulled to behind our home. They ordered us to remove our panties. We all removed our panties and were ordered to lie down … Accused 2 attempted to put his penis (mdudu) into my vagina (pointing to it) but he could not penetrate. Accused 2 told my mum I had refused and he left me."

This again was reported immediately to neighbours who came to assist. At page 28 line 10 **PW7** says –

"G said that the robbers asked her and Shali [PW2] to remove their panties and then she was raped but they were unable to rape Shali because they could not penetrate her"

PW9 the same doctor who examined **PW1** told the court that on the same day she examined **PW2**. No injuries were noted on her vagina and her hymen was intact. This was to be expected since **PW2** testified that her attacker failed to penetrate her. In her judgement at page 46 line 12 the learned trial magistrate notes –

"Due to lack of penetration that there were no injuries on her vagina as shown by the P3 Pexb2. I find that 2nd accused here indecently assaulted the minor here Jedidah Shali."

It is clear that this was another instance where the attempt to defile **PW2** had a witness who was her mother. Both give corroborative testimony and both positively identify the 2nd Appellant. By telling **PW2** to remove her underwear and placing his penis in her vagina it is clear the 2nd Appellant had only one intention and that was to defile her. His attempt only failed because he was unable to penetrate her and not for want of trying. His actions were clearly an indecent assault upon the person of **PW2**. We are therefore satisfied that his conviction on this alternative charge was sound and we do uphold the same.

Finally a brief word about the sentences which were imposed on the Appellants by the trial court. With respect to Count No. 1 of Robbery the learned trial magistrate did impose the only lawful sentence for this offence being the death sentence. We do confirm that sentence.

On Count No. 2 of Rape the trial magistrate sentenced each appellant to ten (10) years imprisonment as against the maximum sentence of life imprisonment. The 2nd Appellant was further sentenced to serve seven (7) years on the alternative charge. We find these sentences to be lawful. They are in our view neither harsh nor excessive given the circumstances, in that the two women were violated in pursuance of a robbery against them. We do similarly uphold these sentences.

The upshot of the above is that we find no merit in this present appeal. It is dismissed in its entirety. We do uphold the convictions rendered by the learned trial magistrate and likewise confirm the sentences imposed on both Appellants.

Dated and Delivered at Mombasa this ……10th……
day of ……May …….. 2010.

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F. AZANGALALA **M. ODERO**

JUDGE **JUDGE**