



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 264 of 2006**

NJUKI MURIITHI NDUATI.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

*(An appeal from the Judgment of Senior Resident Magistrate G.M. Njuguna dated 28<sup>th</sup> January, 2001 in Criminal Case No. 33 of 1999 at Kiambu Law Courts)*

**JUDGEMENT OF THE COURT**

The charge brought against the appellant herein was laid in three counts. Firstly he was charged with the offence of robbery with violence, the particulars being that, on 6<sup>th</sup> April, 1998 at Muguga in Kiambu District, within Central Province he, jointly with others, while armed with dangerous weapons namely clubs and machetes, robbed **SM K** of cash in the sum of Kshs. 200/=, one blanket and two table-cloths valued at Kshs.900/=, and at, or immediately before, or immediately after the time of such robbery, used actual violence against the said **SMK**.

In count 2, again, the appellant was charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that on 6<sup>th</sup> April, 1999 at Muguga aforesaid, the appellant while armed with dangerous weapons, namely clubs and machetes, robbed **George Kamau Karanja** of a wrist-watch, ASAHI by make valued at Kshs. 70/=, and at, or immediately before, or immediately after the time of such robbery, used actual violence against the said **George Kamau Karanja**.

In the 3<sup>rd</sup> count, the appellant was charged with defilement of a girl, contrary to s.145(1) of the Penal Code. The particulars were that, on 6<sup>th</sup> April, 1998 at Muguga aforesaid, the appellant had carnal knowledge of **S M K**, a girl under the age of fourteen years.

PW1, a Form 2 pupil, was asleep in her mother's house at 3.00 a.m on the material day, when she felt somebody touch her. The intruder held her firmly as she screamed, and he then made a threat to kill PW1 unless she stopped screaming.

After making the threat, the intruder undressed PW1 and defiled her. Of her experience during the attack, PW1 thus testified: "The rape was very painful. I had not had any sex prior to the incident". The rape took place in darkness, and PW1 could not at the time see anything.

The intruder did not defile PW1 and then depart. He now demanded money from PW1. She

extricated herself from the intruder and walked into the bedroom of her mother (who had left earlier in the night, to do milk-sale business); she switched on the light, which showed sheets of paper strewn all over the floor. The attacker was following her, and he switched off the lights. PW1 started looking for money in the dark; and she found the money left for her by her mother, for bus-fare to school; it was Kshs. 200/= in coins. PW1 gave this money to the attacker, who said it was too little, and demanded more. The attacker now defiled PW1 again, in her mother's bedroom.

In the course of this incident, PW1 noticed that the attacker's voice was familiar. He was also wearing a wet jacket, and a cap.

When PW1 returned to her bedroom, the attacker still followed; and she remembered that she had saved some Kshs. 100/=; so she took it out and gave to the intruder.

In the meantime, PW1's brother **George Kamau Karanja** who had been sharing PW1's bedroom at the time of the attack, had hidden himself in a wardrobe. The attacker once given the said Kshs.100/=, departed after asking PW1 to follow and close the door behind him. As he was leaving, PW1 looked through the window and saw that the security lights outside were on. She saw one side of the attacker as he walked away. This was a person PW1 used to see at Muguga Railway Station as she went to and came from school. She did not know the man's name. After a short while, PW1 switched on the alarm. In response, a worker came, and PW1 sent him to go and call her grandfather, **Jotham**. Her grandmother, her aunt, and her grandmother's sister came along, and PW1 told them what had just happened. These relatives took PW1 to hospital. When they returned from hospital, it was noticed that some roof-tiles had been removed from the roof, and it was assumed that the attacker gained entry through the roof.

The incident was reported to Kikuyu Police Station, and PW1 informed the Police she could identify the person who defiled her.

On 13<sup>th</sup> April, 1998 Police officers at Kikuyu Police Station called PW1 to go to an identification parade. She was asked to identify the attacker by touching him, if she saw him on the parade. PW1 saw a person whom she touched on the shoulder; it was the appellant herein.

The Police had taken the slacks PW1 had been wearing on the material night, the T-shirt she had, and one bed sheet which was soiled with blood.

Things stolen on the material night included a blanket, a wrist-watch, and a table cloth, and these details had been given to the Police at the time of reporting.

PW1 went with her mother to the Police station, and they found the appellant herein wearing the said stolen wrist-watch, which belonged to **George Kamau Karanja**.

On cross-examination, PW1 testified that she had recognized the appellant herein, as the man who defiled her on the material night; she had recognized him as the man she used to see at the railway station; she said the attacker had been with her on the material night for about 45 minutes. PW1 said she had seen the attacker at the railway station since the time she was in Primary School Standard 8, in 1997.

PW2 was a young boy of 11 years of age, a brother to PW1, by the name **George Kamau Karanja**, who had been asleep in PW1's bedroom at the material time. The trial Court first conducted a *voir dire* examination of the witness, concluding that "[the] witness [understands] the nature of the oath", before PW2 was sworn and gave his testimony.

PW2 testified that his mother had left the house in the small hours of the morning, on 6<sup>th</sup> April, 1998 to buy milk supplies at Limuru, for sale in Nairobi; he was left with his sister (PW1) and he was sleeping in the sister's bedroom. He was awakened by the screams of his sister, and he was under the impression that somebody was assaulting her. Out of fear PW2 jumped into the wardrobe and hid there. From his hiding place, he heard somebody tell PW1 not to scream, in the Kikuyu language. The security lights on the outside were on, at the time, and PW2 could see the figure of a man, in the dark of the bedroom. This

man was demanding money. PW2 was so distraught, he burst out crying. In the meantime, PW1 and the strange man left the room, and went to PW1's mother's bedroom. But they returned to PW1's bedroom, the stranger still making demands for money. PW1 asked the stranger to be so gracious as to leave her alone, and God would forgive him. He then left; and in the meantime, PW2 went up to the window, and peeped outside. He recognized the departing intruder as the man he used to see at the railway station when he was going to and coming from school. This intruder, whenever PW2 saw him at the railway station, used to greet PW2 and to call him by the name **Kariuki**. It was the security lights and the moonlight outside, that enabled PW2 to see the intruder, through the window.

As soon as the night intruder had left the scene, PW2 and PW1 pressed the alarm device, and their worker then came, and immediately went to call PW2's grandfather. The children's grandmother came along, and they recounted to her what had just taken place. Their grandmother took them away to her own house, and PW1 was taken to hospital.

PW2 testified that it was found after the night attack, that his wrist-watch, which he had kept on a small table, had been stolen, as were also table cloths, and, inside his mother's bedroom, papers were scattered all over the place.

PW2 testified that the attacker had removed tiles from the roof, in order to gain entry, and the window glass was also broken, so the intruder might have attempted to use it too. Blood was found on the window to PW2's mother's bedroom, which had a metal grille for reinforcement. Police officers visited the scene, and took the broken glasses and other items, such as the clothes PW1 had been wearing, and the bedsheet.

On 13<sup>th</sup> April, 1998 PW2 was called to an identification parade at the Police station. PW2 identified the attacker of the material night by touching him, and this was the appellant herein.

PW2 saw a man wearing his stolen watch, at Kikuyu Police Station on 16<sup>th</sup> April, 1998. He had gone to that Police station with his mother, and they informed the Police officers who then arrested the man. On this wrist-watch was inscribed PW2's initials, G.K. The person found wearing this watch was jointly charged with the appellant herein.

On cross-examination, PW2 confirmed that the appellant herein was the attacker on the material night. He had seen the appellant, who was alone, when he (PW2) peeped through the window. PW2 testified that the appellant, on the material night, was wearing a jacket and a cap, and he had seen the appellant's face quite clearly.

PW3, **Joan Wanjiru Karanja**, was a milk-seller during the period covering the material time, and on 6<sup>th</sup> April, 1998 she had left home at 3.00 a.m., after locking the door, with the children inside, sleeping. While she was on her way, at about 7.00 a.m. she was told that her children had been attacked. She returned, to find that one window of her house had been broken, and a person had entered the house through the ceiling. She found the bed-sheet in the children's room bearing blood stains, and things in her own bedroom were scattered. Certain items, such as a blanket, a table cloth, and her son's watch were missing. The matter was reported to the Police and Police officers visited the house, taking away the clothes which PW1 had worn. PW3 found her daughter (PW1) befouled, and having bad odour in her private parts. She took PW1 to hospital for treatment; and a doctor at Kinoo filled in the medical-reporting P3 form, in respect of the daughter.

PW3's children told her they had recognized the attacker, who they used to see at the railway station. From this information, PW3 when she perceived the appellant herein, and noticed he had a fresh wound on the hand, informed the Police who arrested him. On 16<sup>th</sup> April, 1998 PW2 who was in the company of PW3, identified his stolen watch being worn by the 2<sup>nd</sup> accused (who was acquitted).

PW3 learned that the night attacker had defiled her daughter; and the doctor found the said daughter to be infected with venereal disease.

PW4, Police Force No. 40620 **P.C. Zablou Wambani**, at the material time, had been a CID officer attached to Kikuyu Police Station. **Chief Inspector Wekesa**, on 10<sup>th</sup> April, 1998 asked PW4 to conduct investigations into the defilement case involving the appellant herein, which had been reported. PW4 visited the complainant's home, and noticed that the attacker had tried to gain entry through the window and had broken the window panes; attempted entry had failed because of the reinforcing window-grilles. PW4 produced in Court pieces from the broken window panes, which had blood stains. PW4 found that the attacker had gained entry through the roof, by removing the covering tiles. He collected as an exhibit the bed sheet, which had blood stains. He collected also the blood-stained clothes which had been worn by PW1. These several leads resulted in the arrest of the appellant herein. When arrested, the appellant had bruises on both hands. He led PW4 to his house, where PW4 recovered a blood-stained jacket. The appellant was then escorted to Kikuyu Police Station. PW4 later took him to Kinoo Health Centre, where his injuries were examined, and a sample of his blood was taken for analysis. The doctor who examined the appellant found him to be infected with a venereal disease. PW4 also received the P3 medical-reporting form for PW1, duly filled in by a doctor.

PW4 requested **Insp. Kenneth Mwaniki** (PW6) to conduct an identification parade, and the suspect was identified by the complainant. He also sent the samples recovered from the *locus in quo* to the Government Chemist for analysis.

PW5, **Dr. Ndung'u Kung'u Mwaura**, a medical practitioner at Kinoo, was on 9<sup>th</sup> April, 1998 requested by Police to examine PW1, who presented with a history of defilement. PW5 found her to be 14 years old; her genitals were bruised and tender; there was fresh wound on the hymen; she had a white discharge from the vagina. It was his conclusion that the foregoing features were consistent with defilement. He completed the P3 form, which he now produced in Court.

On 16<sup>th</sup> April, 1998 PW5 examined the appellant herein who was alleged to have defiled a girl. The urine test showed that the appellant had a venereal disease. He also had a laceration on the right index-finger and the left thumb. PW5 found in the appellant's genitalia a white discharge, which was a mixture of semen and venereal disease.

PW6, Police Force No. 219544, **Inspector of Police Kenneth Mwaniki** had been serving at Kikuyu Police Station, at the material time. **Police Constable Zablou Wambani** (PW4), on 13<sup>th</sup> April, 1998 requested PW6 to organize an identification parade, in which the suspect was the appellant herein. He arranged for 8 parade members, the suspect being the ninth. The appellant herein consented to appear on parade, he was asked if he wanted to have a lawyer or friend at the parade; but he did not want. The appellant duly signed the forms, confirming the said representations. The two witnesses, PW1 and PW2 were kept at the general office, while the parade was being set 60 metres away. The parade was in an enclosed place which was not visible from the general office. PW1 came along, and identified the appellant herein, by touching him, in the position between No. 3 and No.4 which he had himself elected. The appellant had no comments to make, when PW1 touched him on the right shoulder.

After PW1 had been taken away to the Crime Branch Office, PW2 was now called to the parade. This witness also touched the appellant on the right shoulder. Though PW6 had informed the appellant of his right to change positions, he opted to stay in the position he had earlier occupied. He made no remarks after the identification, save to say the parade was conducted well; and he signed the parade form which was also countersigned by PW6.

PW7, **James Kiarie**, testified that he was a porter at Muguga Railway Station. He knew the appellant herein who used to work for him as a labourer. On 6<sup>th</sup> April, 1998 the appellant turned up at his workplace with injuries on his fingers, and he told PW7 that he would, in the circumstances, be unable to work. When PW7 inquired how the hand injuries had been sustained, the appellant's answer was that he had been injured by robbers. PW7 himself was arrested by Police officers from Kikuyu Police Station on 7<sup>th</sup> April, 1998 at 5.00 a.m., and he was asked whether he knew the appellant herein, to which question he gave an affirmative answer. He was released only after the appellant was arrested, on the following day. The Police officers, however, did not reveal to PW7 why they were looking for the appellant herein.

PW8, **Albert Gathuri Mwaniki**, a Government Analyst attached to the Government Chemist Department, testified that he had, on 30<sup>th</sup> April, 1998 received exhibits from **P.C. Jackson Kieti** of CID, Kikuyu, and these were:

- (i) red apparel of the complainant;
- (ii) blue polythene jacket from the appellant herein;
- (iii) pair of trousers belonging to the complainant;
- (iv) a multi-coloured bed cover;
- (v) two glass louvers;
- (vi) blood sample of the complainant;
- (vii) blood sample of the appellant herein.

After examining these items, PW8 found as follows:

- (i) the clothes received were not stained with semen or spermatozoa;
- (ii) but these clothes were lightly stained with human blood – Group B;
- (iii) the complainant’s blood was Group A;
- (iv) the blood stain on the two glass louvers and on part of the cloth material received, matched the blood group of the appellant herein;
- (v) the blood stains would have originated from the appellant after he was injured.

PW9, Police Force No. 60986, **P.C. Jacob Mungare** of Kikuyu Police Station testified that he was in office on 16<sup>th</sup> April, 1998 at 4.30 p.m. when **George Kamau** (PW2) came along, accompanied by his mother. They reported to PW9 that they had seen the 2<sup>nd</sup> accused (who was subsequently acquitted) within the same Police station wearing PW2’s wrist-watch which had been stolen on the material night. They gave details of the said watch to PW9, indicating the marks which PW2 had made on it. PW2 and his mother pointed out the suspect, who was then arrested by PW9. PW9 took the wrist-watch and kept it as an exhibit, finding that it had PW2’s initials inscribed on it.

When put to his defence, the appellant herein elected to make an unsworn statement. He said he was a buyer and seller of diesel at Muguga, and that there had been competition between him and his friend, and that this is what led to his arrest and prosecution. He denied the claim in the complainant’s evidence, and questioned her truthfulness. Of the reason he was charged with the offence, the appellant contended: “I was charged because I lacked money to [give a] bribe at the Police station.”

In coming to his decision the learned Magistrate thus remarked:

**“I have duly gone through the evidence on record. From the evidence of PW1...she was able to recognize the first accused after she had been defiled in her bedroom...she also recognized the first accused through his voice. When she reported the matter to the Police she clearly indicated that she had recognized the accused as the person she used to find at the railway station as she and her brother would be going to and coming from school.**

**“...She also saw him quite clearly as he left the house, [with the help of the] security lights. Her evidence was [very well] supported by her brother, PW2...who also informed the Police...he**

recognized the accused [with the help] of the security lights, as the person they used to find at Muguga Railway Station as they were going to and coming from school....The evidence of these two witnesses is supported very well by the evidence of PW3, J W K the mother of the two who stated that once the children gave the description of the [suspect] she realized who it was. The only thing that PW1 and PW2 did not know was the name of [the appellant herein]. It is quite clear that as the [appellant herein] tried to break [into] the house he got injured on the head, and left blood on the louvers. This blood on the louvers and the blood that was found on PW1's bed was taken to the Government Analyst..., who also examined blood samples of the accused and [the] complainant. According to the evidence, the [appellant] was [of] blood group "B" which was similar to the one found on the bed sheet [on which] he had defiled PW1."

The learned Magistrate held the appellant herein to have been properly identified as a suspect, as this was corroborated by the testimony of the appellant's employer, PW7 who said that the appellant could not do his work a few hours after the material moment, as he had hand injuries. Although the appellant claimed to PW7 that he had been injured by robbers, he made no such report to any Police station – a fact which the trial Court interpreted, quite rightly in our view, to mean that he was lying about the causation of his hand injuries.

Further corroboration of the testimonies of PW1 and PW2 was found in the testimony of the doctor (PW5) who examined the complainant and found her with a bruised labia, and fresh tear to hymen which was consistent with defilement. Several days later the doctor treated PW1 of venereal disease; and he also found the appellant herein to be infected with the same kind of venereal disease.

In the petition of appeal filed after conviction and sentence, the appellant contended as follows: that the trial Magistrate erred by basing conviction on the uncorroborated evidence of a single witness; and that proof beyond reasonable doubt was not achieved.

The appellant took up these points in his oral submissions, and stated that he had not broken into the house on the material night. He said PW1 had been his friend and indeed, had invited him into the house, on the understanding that her mother (PW3) was away that night.

Learned counsel **Mr. Makura** had preliminary points to make, at the beginning of his submissions. Firstly, the trial Court had treated the robbery in question as simple robbery, and counsel gave notice that he would seek enhancement of the charge to capital robbery. He urged that the trial Court, on this point, had misdirected itself.

Since the appellant had no objections to the notice and asked the Court to proceed with the hearing, **Mr. Makura** made his submissions and called for enhancement of sentence, if this Court should find the appeal to be of no merit.

**Mr. Makura** urged that the two counts of robbery with violence, and the third count of defilement, had been proved beyond reasonable doubt. Identification of the appellant as suspect, counsel urged, had been well conducted: both PW1 and PW2 had for long periods of time been seeing the appellant at the rail station, and so he was a familiar figure; in the reports made to PW3 and to the Police, both PW1 and PW2 had pointed a clear finger of accusation at the appellant who was later also identified at identification parades; PW1 had spent a long period of time with the appellant during the night attack, and she and PW2 had also seen him under the security lights when he left the *locus in quo*. PW3's evidence corroborated that of PW1 and PW2, as PW3 returned to the ruffled house where the attack took place and found house effects missing. The medical and forensic evidence from PW4 and PW5 and PW8 further established the veracity of the testimonies of PW1 and PW2. Learned counsel submitted that it was duly proved, that the appellant had been involved in robbery and defilement, on the material night.

**Mr. Makura** submitted, quite correctly in our view, that the trial Magistrate had misdirected himself when he reduced a charge of robbery with violence to simple robbery on the grounds that the appellant had not come in company, was not armed with a dangerous weapon, and did not strike the complainant. PW1's evidence was to the effect that the appellant had threatened to kill her, and had then executed his

violence through the act of repeated rape. This, counsel urged, was violence, a sufficient ingredient of capital robbery.

The learned Magistrate had sentenced the appellant, in respect of each of the robbery charges, to 14 years imprisonment with 8 strokes of the cane; and for the offence of defilement he had imposed a sentence of 14 years' imprisonment with hard labour, together with five strokes of the cane. These sentences, as **Mr. Makura** submitted, were misguided as a matter of law. By Criminal Law (Amendment) Act 2003 (Act No. 5 of 2003), all references to corporal punishment had been deleted and so, this penalty is no longer applicable. So on those grounds, the trial Court sentences were a nullity and are hereby declared so to be.

As required of a first appellate Court, we have carefully reviewed all the evidence and, as regards the collation and analysis of the evidence, we would commend the work done by the learned Senior Resident Magistrate.

The testimonies of PW1 and PW2 are fully corroborated, in our view, by the evidence of PW3, PW5, PW7 and PW8, and all this evidence points an accusing finger at the appellant, as a person who committed both robbery and defilement, at the *locus in quo*, on the material night. The said evidence proves, in our view, beyond doubt that the appellant committed both offences, and thus, that he ought to have been duly convicted.

Then, certainly beyond peradventure, identification parades duly conducted, showed the appellant herein to be the intruder who, on the material night, committed the offences charged.

Like the learned trial Magistrate, we come to the conclusion that, flawless identification of the appellant herein as the suspect, had taken place.

S.296(2) of the Penal Code (Cap. 63, Laws of Kenya) thus provides:

***“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”***

The last phrase in the foregoing provision ought to be properly understood: ***“if, at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other personal violence....”***

We hold that a person who, in the dark of night, makes the verbal threat to kill his victim, has already satisfied the required element of violence as contemplated by s.296(2) of the Penal Code; the *verbal* threat by itself satisfies the test, because the victim is impelled to succumb to the threat, being at that stage unable to *see* the means of violence in the hands of the suspect. It follows that a rape or defilement attack in the night is, as far as the victim is concerned, an execution of the attacker's *violent intent*, and it will be held to accomplish the ingredient of violence, in relation to s.296(2) of the Penal Code. Such a scenario, we would hold, depicts at least two separate offences committed simultaneously, namely, (i) rape or defilement, and (ii) robbery with violence.

We hold the scenario in the instant case to be one in which *two separate offences* were involved; and we find the appellant guilty, and convict him of robbery with violence, and of the defilement of the complainant.

The offence of robbery with violence itself was framed in two counts, *vis-à-vis* PW1 and PW2; and the offence of defilement was framed *vis-à-vis* PW1. We find that the appellant herein robbed PW1 of cash and several items of clothing, with violence. As regards PW2, who was in hiding in the wardrobe and was not, it appears, seen at all by the intruder, what he had lost was a watch. The violence executed by the appellant forced PW2 into the wardrobe, and later it was found that his watch was missing. There

is not much evidence on how this watch went missing, but it was later found being worn by somebody other than the appellant. No evidence was led on how the appellant if he is the one who grabbed that watch, may have disposed of it to his co-accused (who was acquitted by the trial Court). Therefore, there was, in our opinion, no proof beyond reasonable doubt on count No. 2 of the charge. We therefore give the appellant herein the benefit of the doubt, and acquit him on this particular count.

The upshot is that we find the appellant guilty on the *first* and *third* counts, we convict him accordingly, and sentence him as follows:

- (1) In respect of the 1<sup>st</sup> count, we sentence the appellant to suffer death, as mandated by s.296(2) of the Penal Code (Cap.63).
- (2) In respect of the 3<sup>rd</sup> count, we sentence the appellant to a fourteen-year term of imprisonment, running from the date of original sentence.
- (3) In the light of the sentence imposed in respect of the 1<sup>st</sup> count, the sentence in respect of the 3<sup>rd</sup> count shall remain *suspended*, pending execution of the 1<sup>st</sup> sentence.

***Orders accordingly.***

**DATED** and **DELIVERED** at Nairobi this 11<sup>th</sup> day of March, 2008.

**J.B. OJWANG**

**G.A. DULU**

**JUDGE**

**JUDGE**

**Coram: Ojwang & Dulu, JJ.**

**Court Clerks: Huka & Erick**

**For the Respondent: Mr. Makura**

**Appellant in person**