



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

*(Coram: Ojwang & Lenaola, JJ.)*

**CRIMINAL APPEALS NOS. 183 & 184 OF 2004**

**(CONSOLIDATED)**

**BETWEEN**

**COSMAS MUSYOKI MUSILA.....1<sup>ST</sup> APPELLANT**

**JOSIAH MUTUA MUTUNGA.....2<sup>ND</sup> APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

*(An appeal from the Judgement of Senior Resident Magistrate Mr. M.N. Njagi dated 10<sup>th</sup> November, 2004 in Criminal Case No. 827 of 2004 at Kangundo Law Courts)*

**JUDGEMENT OF THE COURT**

Both appellants were 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 the appellants, on 24<sup>th</sup> July, 2004 at Tala Sub-Location, Tala Location in Machakos District within Eastern Province, jointly with another not before the Court, robbed **Mary Avandi** of cash in the sum of Kshs.20,000/=, and, at or immediately before, or immediately after the time of such robbery, used actual violence upon the said **Mary Avandi**.

There was a second count, which concerned only 1<sup>st</sup> appellant herein, of rape contrary to s.14 of the Penal Code (Cap.63); and the particulars were that this appellant, on the night of 24<sup>th</sup> – 25<sup>th</sup> July, 2004 at Tala Sub-Location, had carnal knowledge of **Mary Avandi** without her consent. The 2<sup>nd</sup> appellant too, faced a similar charge in a third count; and both charges in the 2<sup>nd</sup> and 3<sup>rd</sup> counts carried an alternative charge, of indecent assault on a female contrary to s.144(1) of the Penal Code.

PW1, **Mary Avandi Lusasu**, a married lady aged 21 and running a salon business at Tala, had Kshs.24,000/= as she left her workplace in the evening of 24<sup>th</sup> July, 2004. She called in at a restaurant, located only some 80 metres from her house, and remained there until 10.30 pm when she left for home. As she walked home, all alone, along a road that was lighted with electric lights, she saw three people at a road junction, coming from behind. PW1 heard them speak, and saw them. It was her testimony that, among the three people, were 1<sup>st</sup> and 2<sup>nd</sup> appellants herein, and these were people PW1 knew, as she had worked with them at the market-place. She did not, however, know the third man who was in the company of the two appellants herein. PW1 said she knew the appellants herein even by their names; and

one of them, **Cosmas Musyoki**, was at the time carrying an axe, while the other appellant, **Mutua Mutungi**, was carrying a wedge-like metal bar. From a distance of 30 metres, PW1 saw 1<sup>st</sup> appellant run towards her, reached her, grabbed her from behind, and held her by the neck. The other two men also came up to PW1, and 2<sup>nd</sup> appellant herein held her by her legs. They forced her into a back street running parallel to the wall of a shop, and then forced her to lie down. **Cosmas** showed PW1 the axe, and admonished her to be silent. The 2<sup>nd</sup> appellant then removed PW1's skirt and petticoat, which caused her much concern as she had tucked in the petticoat her day's earnings, in the sum of Kshs.24,000/=. She attempted to stop the theft, for which act 2<sup>nd</sup> appellant battered her on the hand – and the resulting scar was shown in Court during the trial. PW1's underpant was also removed, and 1<sup>st</sup> appellant and the man not before the Court, pulled her legs apart as 2<sup>nd</sup> appellant, **Mutungu**, penetrated her sexually. **Mutungu**, who was wearing a condom, engaged in some ten minutes of sexual assault on PW1; he was followed by 1<sup>st</sup> appellant (for some eight minutes) and then the man not before the Court. Each of the attackers then had a second round of sex, and it is **Cosmas** (1<sup>st</sup> appellant) who went in last. Before the attackers left, **Cosmas** called out PW1's name, **Mary**; but she did not answer; and **Cosmas** then remarked that PW1 be left alone as she was dead. One of the attackers hit PW1 in the back with a metal bar, and the lot of them ran away. PW1 remained on the ground, writhing in pain for some time, and found her way to her house only at 2.30 a.m. She remained in the house and did not take a bath, but reported to Tala Police Post after daybreak. PW1 had medical attention, and the P3 medical-reporting form was filled in as evidence. She reported to the Police that she had seen the appellants herein, among her attackers.

On cross-examination by the 1<sup>st</sup> appellant, PW1 said she had seen this appellant at the restaurant where she had been in the evening. On her recognition of 1<sup>st</sup> appellant at the material time, PW1 said: "...You grabbed me with your hands. You were holding [an] axe with your left hand." She said she had particularized to the Police at the time of reporting, that one of her attackers was **Cosmas Musyoki alias Kayolo**. She stated that, in the back street where the sexual assault took place, there was lighting from moonlight. The attack took place at 10.30 pm, and persisted for several hours.

To cross-examination by 2<sup>nd</sup> appellant, PW1 said she had known this appellant for some seven-to-eight years – since 1996 when she had come to live at Tala. She clarified the mode of rape she had suffered at the hands of 2<sup>nd</sup> appellant: in the first round of attack, this appellant was wearing a condom; in the second time, he did it without a condom.

PW2, **Kyalo Muthoka**, an egg trader at Tala, testified that his working hours are between 8.00 pm to 11.00 pm when the town's bars are closing. He testified that he was at Broadways Bar on the material date, selling eggs. Within the bar he saw and sold eggs to PW1, 1<sup>st</sup> appellant, and 2<sup>nd</sup> appellant. On that night, the two appellants were seated together with another man; and PW1 was also at the bar, having a drink. PW2 had sat close to the two appellants, and could hear the conversation unfolding between those in the appellants' group. He heard 2<sup>nd</sup> appellant say to his colleagues: "Finish your beer; that woman is not lucky at all."

At 10.30 pm, PW2 left Broadways Bar to ply his trade at another bar, Jimmy's Bar, some 100 metres away; and as he went, he heard somebody scream. On his way to Jimmy's Bar, PW2 saw 2<sup>nd</sup> appellant herein, as there was electric lighting in a neighbouring shop. At that moment, PW2 was walking along the road; and 2<sup>nd</sup> appellant was on the side of the road, holding an axe and admonishing PW1 to remain silent. PW2 says he proceeded to Jimmy's Bar and went on with his trade. He was not sure 2<sup>nd</sup> appellant had seen him (PW2) pass by. It was his testimony that PW1 was at that moment down on the ground, and 1<sup>st</sup> appellant was on top of her engaged in a sexual assault. PW2 said he was passing at a distance of some 30 ft (about 8 metres) from the *locus in quo*. Then on the following day PW2 was at Tala Market, where he met PW1 and talked to her; she had just come from Tala Police post, where she had gone to report that she had been raped; and PW2 informed her he had witnessed the incident.

On cross-examination, PW2 said he had known 1<sup>st</sup> appellant for about a year, and when he witnessed the sexual assault on PW1, he had alerted nobody as he was all alone. He said he had known 2<sup>nd</sup> appellant for

two years. He confirmed that he was at the Broadways Bar at the time PW1 had been there, on the material night.

PW3, **Dr. Thomas Muthoka**, of Kangundo Hospital had been requested by the OCPP in charge of Tala Police Post to examine the complainant. PW1 had presented with a history of rape by people known to her, and she had sustained injury to the face, neck, wrist, and back. PW1 had bruises and scratches on the face, and had pain in the back and the upper limbs. PW1's hand was swollen, tender and painful on touch. There were bruises on the right wrist and thighs. The bruises on the left and right thighs were fresh, and less than 24 hours-old. It was PW3's assessment that the said injuries had been caused by a blunt weapon. There had been no treatment of these injuries prior to the medical examination, and the degree of injuries would be classed as harm.

PW3 checked PW2's genitalia, both internal and external, and found minor lacerations on the vaginal wall; the cervix was intact. On taking a high vaginal swab, PW3 found a condom inside; there were many pus cells, and spermatozoa were seen; the urine showed pus cells and spermatozoa.

PW3 also examined 1<sup>st</sup> appellant, and found him to have injuries on the penis and anus. He also examined 2<sup>nd</sup> appellant, on 27<sup>th</sup> July, 2004 but found no injury to the genitalia. He found 2<sup>nd</sup> appellant to have pus cells.

PW4, Police Force No. 49756 **Police Constable Harrison Malalo**, who had been serving at Tala Police Post, recalled the morning of 25<sup>th</sup> July, 2004. The complainant reported to PW4 that, on the night of 24<sup>th</sup> July, 2004 at 10.00 p.m. she had been confronted by three men as she left Broadways Bar in Tala, and they had raped her. PW1 had reported that one of the three men was unknown to her, but she recognized the two appellants herein, who, while armed with an axe, had dragged her into a dark alley and assaulted her in turns. PW1 had reported that at the place where she had been grabbed, there were electric lights, and she saw her attackers well; they hit her with an iron bar, injured her, and robbed her of Kshs.20,000/= . PW4 saw the facial injuries, and gave PW1 a note to take to hospital, for medical attention. The complainant returned to the Police post on 26<sup>th</sup> July, 2004, and several Police officers went with her to Tala Bus Stage, and arrested the appellants herein.

PW4 had received information that the appellants herein had been at Broadways Bar at the same time as PW1, on the material night, and they followed her when she left the bar. PW4 paid a visit to the scene where the complainant was said to have been attacked, and found that that area had lighting, and he formed the opinion that visual identification would be possible at night, at that place.

The 1<sup>st</sup> appellant, when put to his defence, made an unsworn defence, and called no witness. He said he was a businessman selling maize and beans at Tala, and that he was arrested as he went to his place of work, on 25<sup>th</sup> July, 2004 for no reason at all. The 2<sup>nd</sup> appellant, similarly, made an unsworn statement; indicated he had no witness to call; and only stated: "I am **Joshua Mutunga** from Kalimani, Kangundo; I recall 24<sup>th</sup> July, 2004; I did not see the complainant; I only saw the complainant when I was arrested; I did not go to the bar. I know nothing about the case."

The Court reached its decision, as regards the charge of robbery with violence, in the following manner:

**"In this case it is only the complainant (PW1) who has testified that she was able to identify the accused at the time of the robbery. It has been her testimony that [1<sup>st</sup> and 2<sup>nd</sup> appellants herein] were well known to the complainant...as they used to stay and work at Tala Market where the complainant also does business. On the night of the attack, the complainant was in Broadways Bar and Restaurant taking some beer and she was able to see the accused [persons] in the same bar also taking beer. When she left, even the accused [persons] left and, from the evidence adduced by PW2, it is clear that he heard the accused [persons] talk to each other....At the scene of the attack the complainant told the Court that there was electric light which enabled her to see her attackers. She was able to see them well, and even when they talked she was able to recognize their voices. It is therefore clear that the voices of**

**the accused [persons] were recognized by the complainant and she was able to see her attackers well. The complainant reported the matter to the Police officer, P.C. Malalo (PW4) and gave the names of [1<sup>st</sup> and 2<sup>nd</sup> appellants herein] as the persons who robbed her of her money and also raped her.....The Court notes that.....the [accused persons] were properly identified/recognized by the complainant. The Court is convinced that the complainant properly identified the accused [persons] because she had all the time with them from 10.30 p.m to 2.00 a.m....The [appellants herein] at the time of attack were in [the] company of another man who was not known to the complainant..... and [they] were armed with an axe and a [club].”**

On the specific charge of rape, the trial Court thus found:

**“The complainant....testified....that she was raped by [the appellants herein]. The accused persons have denied the offences....but PW3 [the doctor] has demonstrated that there are no doubts at all the complainant was raped. The doctor found pus cells and spermatozoa in the complainant’s vagina. It is therefore this Court’s finding that there was penetration by men in her vagina. She knew the men who were raping her, and she identified them as [the appellants herein]. The Court is convinced that the evidence by the prosecution all taken in [its] totality, points to the accused [persons]’ guilt.”**

The trial Court considered the defences of the appellants herein, and held that these were mere denials.

The Court held that the case against the appellants herein had been proved beyond any reasonable doubt. The Court found the appellants guilty, and convicted them on all the three counts. There was no need, in the circumstances, to make a finding on the alternative charges of indecent assault on a female, in respect of both appellants. The death sentence was imposed against both appellants, in respect of the first count; and in respect of both the second and the third count, the appellants were respectively sentenced to life imprisonment, with hard labour. In what order were the different sentences to be executed? The learned Magistrate ordered:

**“The accused [persons] to start with the life sentence and hard labour, and thereafter death sentence to follow. Sentences to run consecutively.”**

The appellants came to Court with written submissions, accompanied by amended grounds of appeal. Although this mode of amending grounds of appeal has no legal basis and could be unfair to the respondent, we have taken into account the fact that the appellants appeared as lay persons before the Court, whereas the respondent had proper professional representation. We were inclined, in these circumstances, to accommodate the appellants with their papers.

The grounds of appeal, in respect of both appellants, may be thus summarized: (i) the visual identification relied on by the trial Court to convict, was unreliable as it was evidence of a single identifying witness who had been in a state of stress at the material time; (ii) the charges laid against the appellants remained unproven; (iii) the trial Court erred in rejecting the defences raised by the appellants.

In his oral submissions, 1<sup>st</sup> appellant contended that both PW1 and PW2 were false witnesses, and that this was apparent from the fact that PW2 who claims to have seen the rape incident take place, had raised no alarm, and had taken no action to stop the offence from continuing. This appellant particularly impugned PW2 as a witness, for failing to disclose even to PW1 after he (PW2) overheard the appellants’ conversation in which they are said to have made a plot to commit crime against PW1.

The 1<sup>st</sup> appellant urged that PW1’s evidence was untrue; because although she said she left her salon with Kshs.24,000/=, only Kshs.20,000/= was stolen from her, and this must mean she was in drunken stupor after taking alcohol worth as much as Kshs.4000/= on the material evening; and if she was so drunk, then how could she have accurately identified 1<sup>st</sup> appellant as a suspect? The 1<sup>st</sup> appellant also urged that the medical examination conducted on him by PW3, following the incident, was not intended to prove he had

committed rape, and it did not disclose that he had committed a rape. The 1<sup>st</sup> appellant contended that PW1's gravamen had been rape, and not robbery; and hence he should not have been convicted of robbery with violence.

Learned counsel, **Mr. Omirera** contested the appeal, and urged that the appellants had been properly identified, among those who robbed from the complainant, and who also raped her in turns. He stated the core issue in the appeal as: *Were the appellants properly identified as the robbers and rapists?*

Counsel considered as most relevant the following facts: the complainant well knew the appellants herein, and did see them at the bar where she had been sitting for several hours; she had known the appellants for several years, and she used to see them regularly at the market-place; she saw the appellants, at the material time, armed with an axe and an iron bar, and they were in the company of a third person; there was electric lighting at the place where the appellants grabbed the complainant, before taking her to a back street and raping her; she saw the manner in which the rape was conducted, and knew that one appellant used a condom for part of the rape-act; the act of rape took hours.

**Mr. Omirera** urged that the testimony of PW2, who said he perceived vital scenarios attendant on the rape assault, should not be doubted; for not all people will react the same way, and so it was not strange that PW2 did not raise any alarm when he heard or saw the appellants in the planning and execution of the criminal acts. Counsel urged that the defences consisted in bare allegations which did not in any way compromise the strength of the prosecution case.

**Mr. Omirera** urged that the acts of rape and robbery had taken place during the same transaction, and that, indeed, the act of rape could be regarded as part of the *personal violence* to which the complainant was subjected, as she was being robbed. Counsel urged that sufficient proof had been adduced, establishing both offences beyond any reasonable doubt, against the appellants herein.

It is the duty of this Court, as first appellant Court, to consider and to assess all the evidence on record, and to determine whether or not the same establishes guilt beyond a reasonable doubt: **Coughlan v. Cumberland** [1898] 1 Ch. 704. We have reviewed all the evidence on record, and it discloses certain factual positions: the complainant who was born in Western Province, had been living and working at Tala in Eastern Province for just under ten years; she is familiar with Tala, and with numbers of people, among them the appellants herein, at that place; she specifically knew the appellants herein, even by their names; on the material night, the complainant, on her way home from her salon, called in at Broadways Bar for a drink, and she remained there until just after 10.00 pm; the complainant had money on her, the sum of Kshs.24,000/=; it is not known what she did with Kshs.4000/= thereout, but she kept the balance of Kshs.20,000/= tied up in a handkerchief, and hidden away in private, inside her knickers; while the complainant was having her drink, the appellants (and a third man) were also at Broadways Bar, having a conversation which PW2 said he overheard, and this suggested the three men had an interest in the complainant's movements that night; there was a real opportunity for the appellants to see the complainant, and to follow-up on her movements; the complainant left Broadways Bar at about 10.30 pm, and, while walking along a lighted street to her nearby house, she noticed three men following her, and they gave chase, grabbed her, took her to a back street, and raped her; the complainant knew two of the attackers, the appellants herein, and they knew her – as one of them called her by her name after the rape-assault; the complainant was detained and continuously assaulted for several hours, and she saw that one of the attackers, the first time, used a condom while raping her; medical evidence showed that, the said attacker did not use the condom the second time, because the contraption had lodged inside the complainant's genitalia; the attackers removed Kshs.20,000/= hidden-away in the complainant's knickers, and they viciously battered her in the hands when she tried to stop this theft; all this time, the complainant perceived persons well known to her – the appellant's herein; it was PW2's testimony that he had not only seen the appellants at Broadways Bar while the complainant too, was in there, but he saw them again in the act of assaulting the complainant, some time later. Although PW2's failure to rescue the complainant may be questioned on moral criteria, this Court will take judicial notice that his explanation, that he was all alone at the time, and so could do nothing, is not in all respects contrary to human instincts of self-preservation. We find PW2's evidence to be significant, in relation to the time-element, and in the manner in which it interlocks with and sheds light on the complainant's experience on the material

evening. Those elements, in the natural and sequential way in which they explain the complainant's situation, are more consistent with true account, than with a fabricated story.

The complainant's considerable detail on the intimate manner in which she had kept her money, on the extraction of the same by the robbers, on her endeavour to protect that money and on the punishment she suffered for it, in our opinion, bespeaks true testimony; and so we hold that her money, the sum of Kshs.20,000/= was stolen by those who raped her.

It is clear to us, from the evidence, that the charge of rape is proved beyond a reasonable doubt. We believe that the prosecution did adduce sufficient evidence to prove both rape and robbery.

The legal doctrine of *res gestae* would, in addition, crown the contemporaneous proof mounted by the prosecution, of rape and robbery. By this doctrine, *Professor Sir Rupert Cross and Nancy Wilkins* in their work, *An Outline of the Law of Evidence* 4<sup>th</sup> ed. (London: Butterworths, 1975) state (p.157):

***“A statement is received because it was made contemporaneously with the event to which it relates, or a fact is allowed to be proved because it is inextricably connected with a fact in issue.”***

The evidence which proves the rape, in the instant case, specifically that which shows how the complainant was dragged from the lighted area into a back street, undressed and raped, is one and the same as that which shows that, in the act of undressing her, her money was found, and wrenched from her by the rapists. It is by one continuous process, and by *contemporaneous acts*, that both the robbery and the rape were achieved; and so *the same evidence is relevant for both acts*.

We hold it to have been sufficiently proved, for the purposes of criminal liability, that the appellants herein committed the offences charged.

Accordingly, we dismiss both appeals, and we uphold conviction as recorded by the trial Court. As to the sentences, however, we order that the sentence of death imposed in respect of the first count, shall be executed in the first place, and the terms of imprisonment imposed in respect of the second and the third count, shall remain suspended in the meantime.

***Orders accordingly.***

**DATED and DELIVERED** at Machakos this 22<sup>nd</sup> day of April, 2008.

**J.B. OJWANG**

**JUDGE**

**I. LENAOLA**

**JUDGE**

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

**Court Clerk: Mueni**

**For the Respondent: Mr. Omirera**

**Appellants in person**