REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 33 & 34 of 2006

NYAMAI MUTIA…………………………......……..……. 1ST APPELLANT

MUSEE KATEE………………..……………………… 2ND APPELLANT

-AND-

REPUBLIC……………………………………………...RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate E.K. Makori dated 29th March, 2006 in Criminal Case No. 2241 of 2004 at Kitui Law Courts)

JUDGEMENT OF THE COURT

At the trial which has led to the appeal herein, there were three accused persons, but only two have come before this Court on appeal.

The charge had been drawn in six counts: count 1, involving all the three accused, being one of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya); count 2, which involved all the three accused, being, again, robbery with violence contrary to s.296(2) of the Penal Code; count 3, which did not involve the appellants herein, being rape, with the alternative of indecent assault on a female contrary to s.144(1) of the Penal Code; count 4, which involved only 2nd appellant herein, being rape contrary to s.140 of the Penal Code, with the alternative of indecent assault on a female contrary to s.144(1) of the Penal Code; count 5, which involved only the 1st appellant herein, being rape contrary to s.140 of the Penal Code, with the alternative of indecent assault on a female contrary to s.144(1) of the Penal Code; and count 6, which did not involve the appellants herein, being, handling stolen property contrary to s.322(2) of the Penal Code.

PW1, ***Kalinda Mwanza***, was asleep on the material date, 13th June, 2004 when her dogs began barking. She was awakened by intruders marching into her home; and they crushed open her door, accessed her house, and launched an assault upon her. These intruders started demanding money with menaces. PW1 was able to flash her torch, and her sight fell upon one of the intruders – and in her testimony, it was 2nd appellant herein. PW1 testified that it was 2nd appellant who entered her house on the material night, and PW1 flashed her torch at this intruder whom she identified as ***Musee Mulonzi,*** a former employee of hers, known generally by the two names. PW1 surrendered Kshs.5,500/= to this intruder, ***Musee Mulonzi.*** It was PW1's testimony that the 1st appellant herein hit her on the hand when the intruder realised that PW1 had recognised him. PW1 was then battered repeatedly, and she lost consciousness, and did not know the manner in which the thugs exited from her house. PW1 regained

consciousness much later, as she was undergoing medical care. Following treatment, PW1 found out that several items had been stolen from her house: 10 shoals, each valued at Kshs.200/=; a wrist-watch belonging to her grand-child; a Sony radio; leather shoes belonging to PW1's grand-child; bow-and-arrows used by PW1's watchman. The stolen wrist-watch was later recovered and identified.

On cross-examination by 1st appellant, PW1 said this appellant had been doing casual work for her, and that for most of the day prior to the robbery incident, 1st appellant had been in her company. PW1 restated that the first of the robbers to enter was 1st appellant herein; she flashed her torch at the first appellant, recognised him, and raised alarm by screaming.

PW2, ***Kiema Kalinda*** was a young boy of 13 years of age, and was first taken by the trial Court through a *voir dire* examination before being sworn to testify.

On the material night, at about 2.00 a.m., PW2 was at home, with PW1 and an aunt, ***S***. PW2's wrist-watch, on which he had inscribed his name, had been laid on the table in the house where the robbery took place. He looked for his watch after the incident, but did not find it; so PW2 went to inform his grandmother who had been sleeping in a nearby house; but he found that the grandmother had been hurt by the attackers; and the attackers had taken ***S*** away***.*** ***S*** returned later and was hurt, and had to be taken to hospital.

PW2's stolen wrist-watch was later recovered, and he identified it in Court.

PW3, ***SK***, testified that she had, on the material night, been asleep in her grandmother's house, together with the said grandmother and two children. She was awakened by intruders demanding that the door be opened to them. The intruders then crushed their way into the house, and one of their number entered and ordered PW3 to remain inside. PW3 heard her grandmother screaming, and she asked her to be quiet, but she persisted in screaming. Another intruder entered, flashing a torch and wielding a machete; he closed the door, and demanded PW3's cellphone. When PW3 said she was a student and had no cellphone, the attacker retorted that he had seen her at the shop with the item; and so PW3 formed the impression that the thug did know her. PW3 started looking for her clothes; and in the meantime, the said attacker laid his torch on her bed – and this enabled her to identify the thug, as the 2nd appellant herein. In PW3's words: "I knew him quite well; I knew he is called ***Musee Katee***. I have known him quite well. He used to be a customer at our shop."

PW3's mother's shop is located quite close to the family residence. The 2nd appellant grabbed five cups, and PW3's clothes – a skirt, a blouse, and many other items. In the meantime, PW3's mother was being attacked in a different house, by other members of the gang; she was screaming.

It was PW3's testimony that the 2nd appellant injured her above the eyes and in the back; and then, in the company of "a taller person" called into the outside, he informed PW3 he was taking her to her mother's shop, to help with the collection of more loot. These two men tied up PW3 and took her outside where there was another man waiting. The lighting outside was insufficient, and PW3 could not see these attackers very well. Four men led PW3 to a river-side bush, and two of them, whom she was unable to identify, raped her; in the meantime a third thug, 2nd appellant herein, was voluble, and warned that when it came to his own turn, PW3 must desist from looking at his face. This appellant asked PW3 if she could identify him; she said she couldn't, as she feared they could kill her. The last one to rape PW3 was a tall man, 1st appellant herein, and there was a special aspect of this man's assault that stuck in PW3's memory: "The tall fellow was the last to rape me. It is the 3rd accused [i.e., 1st appellant herein]. He tried to kiss me several times. That is how I did identify him. He used to work with us. That very day he took lunch at our place. He is called ***Nyamai;*** at home, he is nick-named ***Musonso."***

This was an ordeal that hurt PW3. She testified: "When I [tried] to walk, it was difficult, but I did struggle till I reached home." And on reaching home, she found her mother "badly injured. She had been bleeding profusely." PW3 and neighbours first took her mother to a local hospital, and later to Kitui General Hospital, and after a couple of days, to Kenyatta National Hospital in Nairobi.

PW3 testified that she had been able, on the material night, to identify only the two appellants herein. She said she had had no grudges with the appellants, prior to the incidents of the material night.

On cross-examination, PW3 testified that her attackers had been armed, and it is on this account she did not attempt to repulse their assault on her. Although it was dark, PW3 had been able to see the 2nd appellant when he placed his torch on her bed, and it illuminated him; she knew the 2nd appellant, who had been a customer in her mother's shop. PW3 testified that four men had all raped her, one of whom was tall, and was the 1st appellant herein. She felt sure she identified 1st appellant, and to his cross-examination, she responded: "It is you. It is you who tried to kiss me…I could see you in the light that there was. I did recognise you then….I am telling the truth."

PW4, Police Force No. 67518 ***Police Constable Michael Kathanguli*** received a complaint from PW1 that she had been attacked earlier. Led by PW1 and PW2, PW4 had been able to arrest both the appellants herein and their co-accused in the trial Court. In the co-accused's house, many wrist-watches were found, kept in a basin, and one of them belonged to PW2 and had been stolen by the robbers of the material night.

PW5, ***Yator***, was the Investigating officer in this case. He was attached to the C.I.D., and recalled having been alerted on the material night, at 3.00 a.m. of a robbery attack. He received a report that a lady at Kisasi (PW1) had been attacked by robbers. PW5 and fellow officers promptly drove to the *locus in quo*, and found PW1 unconscious, her left leg having been broken. Force had been used to break into PW1's room and things had been stolen. PW5 and his team took both PW1 and PW3 to a local hospital. PW3 informed the Police officers that she had identified two of the attackers, and said one of them used to work for her family.

In the course of investigations, PW5 had recovered a wrist-watch, which was identified as belonging to PW2. Nothing had been recovered from either of the appellant's herein. PW3 had reported to PW5 that there had been moonlight at the scene of rape, and that she had identified two of those who raped her.

PW6, ***Dr. Joshua Matu*** of Jordan Hospital where the complainants were first treated, testified that on the material night, he had seen PW1, who had suffered multiple injuries. PW6 also saw PW3 who had hand and chest injuries, and who presented with a history of sexual assault. PW6 confirmed PW3's injuries which he typified as harm.

The 1st appellant made a sworn statement in which he denied all knowledge of the offences which led to the several charges.

On cross-examination, 1st appellant thus said:

"On 13th June, 2004 at 2.00 a.m. I was at home. I was with my people. I will call nobody to come and testify on my behalf…If they saw me [on the material night] I should have been arrested earlier."

The 2nd appellant pleaded an alibi. He said that on the material day, he had travelled to Nairobi, where he was working; and much later, when he returned home to give assistance to his grandmother, he was arrested in connection with the alleged offences of the material night. He denied any link to the offence charged; in his words:

"I was never arrested with anything. No search was conducted. I was investigated about the complaint. I used to be sent to [the 1st complainant's] shop… I was never taken for medical examination when I was at Mbitini Police Station. I did not steal or rape ***S K***. It is all false [testimony]."

The learned trial Magistrate did not convict on the charges of robbery with violence. In the words of the trial Court:

"**That element of taking has not been proved on a beyond-a-reasonable-doubt basis; [and] that**

being the case, the 2nd accused and 3rd accused will be acquitted in respect of counts 1 and 2. I remain with the offence of rape which is levelled against the 2nd accused [2nd appellant herein] and 3rd accused [1st appellant herein]….”

On the rape question, the learned Magistrate noted, quite correctly, with respect, that the evidence showed that PW3 had been the victim of a rape assault. He identified the only outstanding issue as "whether [PW3] managed to identify her assailants."

Those who lodged the attack on PW3 as she slept, had torches. PW3 said she was able to identify 2nd appellant herein: "He was the one talking too much [and] [admonishing] her to cover her face."

Did PW3 identify 1st appellant, as one of those who raped her? The trial Court thus observed:

"**The last to rape her was the tall fellow, [1st appellant], who used to work for them and had lunch with them [several hours earlier]. He is called *Nyamai alias Musonso.”***

Of both the appellants, and on the question of identification, the trial Court thus said, *vis-à-vis* PW3's perceptions:

"**[The 2nd appellant] comes from Katwala Market, where her mother carries [on] business. She actually identified or recognised who they are. She knew them quite well, as she would remember. [I have considered] the alibi raised by the [1st and 2nd appellants]…and the fact that the time was difficult in [relation] to identification. Having warned myself of the dangers of convicting under the circumstances [prevailing]…it [is to me] evident from the record that….PW3 was able to identify the [1st and 2nd appellants]. She knew them. She recognised them. Besides, ….PW1 also saw [1st appellant] enter the house. She had flashed a torch; she recognised him…I have no doubt as to the truth as [conveyed] by PW3…There are no circumstances to show she was telling lies. [Of the 2nd appellant herein], I will repeat: a regular customer at their shop in the neighbourhood at Katwala; known to her as long as she can remember. [Of the 1st appellant herein]: the tall fellow who was the last to rape her; known to her; used to work for them; even had lunch with them that day; kissed her several times during the ordeal.”**

From those scenarios as described by the learned Magistrate, the trial Court took a decision:

"**From that set of evidence, [and in the light of my assessment of the alibi evidence], [it is my finding that] the prosecution has proved [their] case beyond reasonable doubt, [in respect of] a charge of rape, as against [the 1st and 2nd appellants] herein. They will be severally convicted, as such…”**

The learned Magistrate convicted the 1st appellant of the charge of rape, in the 5th count, and the 2nd appellant, too, on the charge of rape, on the 4th count. In meting out sentence after recording statements in mitigation, the learned Magistrate stated:

"***The sentence provided for by law is [up-to] life imprisonment. That being the case, this Court will sentence each of the accused to serve 40 years' imprisonment….***

"***This will send shock waves to deter potential rapists [against] [such course of conduct]…”***

Learned counsel ***Mr. Mutinda***, for the appellants, filed a petition of appeal based on the following grounds:

(i) that, recognition was not a proper basis of identification, because the conditions of visibility at the material time were not favourable;

(ii) that, the conviction of both appellants had been entered on the basis of uncorroborated

circumstantial evidence;

(iii) that, blood samples had not been tested to obtain a match of samples that would identify the appellants as the culprits;

(iv) *that the burden of displacing the alibi evidence of the appellants lay with the prosecution*;

(v) *that the sentences imposed were manifestly excessive in view of the mitigation factors*.

In presenting the foregoing grounds, ***Mr. Mutinda*** contended that the conviction entered by the trial Court was unsafe, and should be set aside. He urged that the evidence tendered did not show the appellants to have been truly identified as suspects. Counsel urged that the appellants had been acquitted on the robbery-with-violence charges for want of identification, and, since the alleged rape and robbery had been contemporaneous acts, it was wrong in law to find them guilty on the rape charges. Counsel contended that the conditions at the material time were not favourable to identification: it was night-time, about 2.00a.m.; there were other persons in the neighbourhood; it was dark; even if there was moonlight, its intensity had not been considered; the strength of the torch-light that facilitated identification was not described; it is not clear how far the witness was from the torch-light.

Counsel next urged that PW3's evidence was unreliable, as it came from a single witness; and he submitted that the alleged rape had taken place under equally difficult circumstances, in terms of visibility.

Learned counsel contested the position of the trial Court on alibi evidence, in relation to the charge of robbery. The trial Court stated:

"**They have raised an alibi: they were never at the scene to commit the offences [in question]. An alibi, in law, succeeds in the wake of a weak prosecution case…"**

Mr. Mutinda contended that the forgoing statement amounted to a shifting of the burden of proof; and he cited several authorities, among them ***Ssentale v. Uganda*** [1968] E.A. 365, in which the High Court of Uganda had held that (p.366) "**an accused person who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer; and it is a misdirection to refer to any burden resting on the accused in such a case."**

On this point, it is not clear to us what the contest is about, as we note that the established principle of law stated in the ***Ssentale*** case is not at all contradicted by the reasoning of the trial Court. We understand that Court, simply, to be making the point that a cogent prosecution case can displace an alibi put forward by an accused person, and that, in this case, the alibi had been displaced.

Counsel urged that the sentence imposed by the trial Court had been excessive, considering that the appellants were first offenders; that they were married men; and that they were remorseful. Counsel urged that it was wrong for the trial Court to impose harsh sentences purely on the ground that the offence of rape was prevalent in the local area.

Learned counsel for the respondent, ***Mr. Wang'ondu*** opposed the appeal, and urged the Court to uphold conviction, and confirm sentence. He adverted to the question whether the appellants were properly identified as rape suspects, and was convinced that PW3 had identified 2nd appellant, who was a customer at PW1's shop and was well known to PW3. Counsel considered it most important, firstly, that the 2nd appellant had placed his lighted torch on PW3's bed, enabling her to see him; and the fact that 2nd appellant's presence in the home had also been perceived by PW1. Counsel submitted that PW5 too had corroborated PW3's evidence, by testifying that PW3's first report of the incident did identify 2nd appellant by name.

Counsel submitted that there were no doubts regarding the identification of 1st appellant who

attempted repeatedly to kiss PW3, and PW3 was in a position of immediate proximity and able to perceive him during the rape assault; and this was to be viewed in the light of PW3's prior knowledge of 1st appellant.

Mr. Wang'ondu submitted that the strength and candour of PW3's testimony was by no means lessened by the fact he was a sole eye-witness, as the offence in question was one frequently committed without a plurality of eye-witnesses being present. Counsel urged that the learned trial Magistrate, after carefully analysing PW3's testimony, had properly come to the conclusion that this was a witness worthy of belief.

On the question of the role of an identification parade in the identification process, learned counsel urged that there was no need for such, in the circumstances of this case. For PW3 did know her attackers; one was her mother's customer; the other used to be an employee of her mother's.

Mr. Wang'ondu challenged the integrity of the alibi evidence given by the appellants: they had given these alibis only well after they had testified as defence witnesses.

The principle governing alibi as a defence is that it should come at an *early stage*, thus availing itself to the challenge of cross-examination, or of contradicting evidence being proffered by the prosecution (where early notice is given).

In ***Karanja v. Republic*** [183] KLR 501 the Court of Appeal established the principle thus stated; in the words of that Court (pp. 501 – 502):

"…***where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, i.e. when he was initially charged.***

"***In a proper case, the Court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought."***

Counsel urged that the 40-year term of imprisonment imposed by the trial Court was not excessive, as it fell well within the terms of s.140 of the Penal Code which was then in force – and that section provided for *life imprisonment*. The sentence, therefore, was not illegal, counsel urged. Counsel urged that the Court had duly taken into account the appellants' statements in mitigation.

We have carefully reviewed the record of the trial Court in full, this being the first appellate Court: ***Coughlan v. Cumberland*** [1898] 1 Ch. 704. We are not convinced, contrary to the appellants' position as stated by learned counsel, that the reason for their acquittal by the trial Court on charges of robbery, was that they had *not been identified* at the material time. Indeed, there is evidence of identification, from both PW1 and PW3. But, as regards the *theft* element which attends the robbery charge, the sole, proven connecting link appears to have been a wrist-watch, which could not, however, be linked to the appellants herein. It is not, therefore, denied that the appellants, for whatever purpose, had visited the *locus in quo*, on the material night.

It is relevant to the charges of rape, therefore, that PW1 perceived one of the appellants entering the home. But the more focussed evidence regarding the identities of those who committed the rape assault, is that of PW3; and we are in agreement with counsel for the respondent that the learned Magistrate rightly considered PW3's evidence to be *credible.*

The question whether a robbery-with-violence, in respect of which the trial Court entered acquittal,

did take place, is not before this Court. We will not decide that question, secondly, because it has not been brought before us as a subject of *revision.*

The question before this Court is: were the two appellants properly identified as suspects, in the rape assault which took place on the material night?

We have seen no evidence of grudge, which would have led PW3 to claim that 2nd appellant entered her bedroom, closed the door, and lit up the room to enable her to deliver certain items, and that, in the process, PW3 was able to perceive 2nd appellant, as one of the suspects. PW3 gave detailed testimony regarding 2nd appellant's conduct; his liking of chit-chat; his concern to avoid being identified; his indication that his turn in the rape assault was due, and his admonition to PW3 to submit, without staring around. And PW3 took note of the tall man, 1st appellant, who invaded her last, and who made repeated endeavours to kiss her as he made the assault. There was no cross-examination of any consequence, on these details regarding the assault; and, we believe, the learned Magistrate rightly held the witness-account to be true.

We do not consider it right to discount the evidence of PW3, merely on the ground that it comes from one eye-witness. Evidence of such a kind is recognised to be admissible, depending on the Court's assessment of the circumstances. A relevant authority in this regard is ***Odhiambo v. Republic*** [2002] 1 KLR 241, in which the Court of Appeal thus held (p.247):

"***the law on identification is not in doubt. It has been stated and restated in several judicial decisions by this Court and by the High Court. The Court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. Where evidence of identification rests on a single witness, and the circumstances of identification are known to be difficult, what is needed is other evidence either direct or circumstantial, pointing to the guilt of the accused persons, from which the Court may reasonably conclude that identification is accurate and free from the possibility of an error***…."

As we have already noted, PW1's testimony is, in the manner we have indicated, corroborative of PW3's evidence, in relation to identification in the charge of rape. But, in addition, we hold the testimony of PW3, by its focussed details not challenged in cross-examination, to bear its inner cogency which, when taken with the trial Magistrate's stand on the *demeanour* and *truthfulness* of that witness, provides entirely believable proof of the prosecution case.

It follows, in our assessment, that both 1st and 2nd appellants were rightly convicted on the charges of rape. We will, therefore, uphold conviction.

The only question left is that of *sentence*: was it harsh and excessive? The sentence of a trial Court cannot be lightly contested; for the appellate Court will only intervene on the basis of certain recognised principles – short of which the sentence already judicially dispensed is to be taken to represent the *valid legal position.*

The Court of Appeal for Eastern Africa, in ***Ogalo s/o Owuora v. Reginam*** (1954) 21 EACA 270, on this question, thus held:

"**The principles upon which an appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v. R* (1950) 18 EACA 147, 'it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.' To this we would add a third criterion, namely, that the *sentence is manifestly excessive* in view of the circumstances of the case…."**

Is a sentence of 40 years' imprisonment, in the circumstances of this case, based on some wrong

principle? Has the Court, in dispensing that sentence, overlooked some material factor? Is the sentence manifestly excessive, in view of the circumstances of the case?

Such are broad principles, in our opinion, to guide the Court in its exercise of discretion, but they do not ordain that some particular fraction of the maximum legal term must be imposed. The Court should consider *all the circumstances of the case*, and impose a sentence that appears both practical and fair. In a persuasive decision, ***Yussuf Dahar Arog v. Republic,*** Nrb High Ct. Criminal Appeal No. 110 of 2006 such considerations in sentencing have been thus expressed:

"***Such is, of course, a maximum sentence, and within that [scope], the Court has a wide discretion which it exercises on judicial principles. Such principles would…take into account the ordinary span of life of a human being; the general circumstances surrounding the commission of the offence; the possibility that the culprit may reform and become a law-abiding member of the community; the goals of peace and mutual tolerance and accommodation among people – those who are injured, and those who have occasioned injury."***

Applying the foregoing principles, we would consider a prison term of 40 years, to be unduly harsh; and we would reduce it by **half** (by 20 years).

We dismiss the consolidated appeals on conviction; we uphold conviction; we allow the appeals on sentence, set aside the term of imprisonment imposed by the trial Court, and substitute it with a twenty (20)-year term of imprisonment.

Orders accordingly.

DATED and **DELIVERED** at Machakos this 21st day of April, 2008.

J.B. OJWANG **I. LENAOLA**

JUDGE **JUDGE**

Coram: Ojwang & Lenaola, JJ

Court Clerk: Mueni

For the Appellants: Mr. Mutinda

For the Respondent: Mr. Wang'ondu