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

**Criminal Appeal 258, 311 & 313 of 2004**

**FRANCIS WANYOIKE MWANGI ………………. APPELLANT**

***Versus***

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

***(Being an appeal against the conviction and sentence***

***by G. K. MWAURA Principal Magistrate, in the Principal Magistrate's Criminal Case No. 1044 of 2003 at Muranga)***

**Consolidated with**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**Criminal Appeal 311 of 2004**

**MICHAEL MACHARIA NJAMBI ……………. APPELLANT**

***Versus***

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

***(Being an appeal against the conviction and sentence***

***by G. K. MWAURA Principal Magistrate, in the Principal Magistrate's Criminal Case No. 1044 of 2003 at Muranga)***

**Consolidated with**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**Criminal Appeal 313 of 2004**

**GERALD KURIA MUTAHE …………….........…. APPELLANT**

***Versus***

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

***(Being an appeal against the conviction and sentence by G. K. MWAURA Principal Magistrate, in the Principal Magistrate's Criminal Case No. 1044 of 2003 at Muranga)***

**JUDGMENT**

The appellants appeals were consolidated in that ***Criminal Appeal No. 258 of 2004*** was made the lead file and the appellant thereof as the ***first appellant*** and ***Criminal Appeal No. 311 of 2004*** the appellant thereof became the ***second appellant*** and in ***Criminal Appeal No. 313 of 2004*** the appellant thereof was made the ***third appellant.*** The appellants were charged with two counts of robbery with violence contrary to ***Section 296(2)*** of the Penal Code. In the third count they were charged with attempted robbery with violence contrary to ***Section 297(2)*** of the Penal Code and the fourth count was a charge of rape contrary to ***Section 140*** of the Penal Code. The learned magistrate in the lower court on hearing the case convicted the appellants and sentenced them to suffer death on count one, two, and three, and also to serve life imprisonment on count four.

This court is duty bound to re-evaluate the evidence of the lower court and in this regard the case of ***OKENO vs REPUBLIC 1972 EA 32*** is relevant. It was stated in that case as follows:-

*"an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya VS R., (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R.(1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958) E.A. 424."*

PW1 on $16^{th}$ March 2003 at about 9 p.m. received two visitors J W and M M. They visited her at her home at Iyego. They took a meal together and whilst she was relaxing with the visitors realized that there were intruders outside the house. On opening the door the intruders entered the kitchen where they were relaxing. Those intruders inquired who the owner of the home was and when PW1 identified herself they asked her to give them money. They led her to the main house. Outside she noticed that the moon was bright. She also noted that outside the kitchen there were bout 10 armed men. She said that the moon was so clear that she was able to see the armed men in particular she noticed a man who was standing at the door of the main house. This man wore a stripped shirt and a jacket. The jacket was white in colour. She noted that he had an axe. She also noted that he was brown in complexion. She said that that was the first time to see that man. She also saw the faces of other robbers who were outside. One man was black and slender in physique. He wore a T-shirt and a jacket. This man was standing closely to the previous man she had noted. In the main house she had lit the lantern lamp on the table. The initial three men took her to the bedroom and demanded money threatening to kill her with an axe. In the bedroom there was a lantern lamp that she had lit prior to this incident. Because of the threat of being killed with an axe she removed kshs. 10,000. They demanded for more money with threats and she gave them a further kshs.4,600. That money she said was from the church. The robbers were relentless and threatened to kill her unless she gave them more money. She was made to remove some clothes from a box where she had hidden Kshs.60,000. She gave them that money as well. They inquired on when she expected her husband and she responded that he had taken someone to hospital. The robbers said that they would wait for him. In the bedroom they took her to her adjacent shop where they took kshs.200 in coins. At this time in the shop they were using their torches. She also realized that the other robbers were taking items from the shop. At that time one of the robbers who was outside shouted that her husband had arrived. Then one person told her to open the gate. That person she described as being dark by complexion and he wore a jacket that was zipped up to the neck. She said that she saw him very well and identified him as

the first appellant. She said he had a panga and was standing at the main house near the door. She went to open the gate but because of nervousness the gate did not open properly. It was then that her husband went to open the gate. She was ordered back into the main house. Whilst there she heard her husband being told to give money. On hearing that voice she instantly recognized the voice as being that of the third appellant. She said that she knew the third appellant very well. That he was a tout at Iyego stage. She often met him as he was seeking for passengers and sometimes he was contracted to get passengers for her matatu. She said that in those dealings they often talked and she therefore knew his voice. She however stated that she had not noticed him amongst the robbers. She heard her husband pleading with the robbers not to kill him. Soon the two visitors were brought in the main house where she was and one of the visitors by the name of Jane told them that she had been raped by one of the robbers. They were able to get out of the main house through the rear door. They went and reported the matter to the chief. Later on returning to the home, she found that her husband had been cut on the head and his hand had been fractured. He was taken to Muranga district hospital. She later recorded her statement and told the police that she could identify two of the robbers. In making that statement she said that she was referring to the man who wore a stripped shirt and the black slender man. She also informed the police that she identified the voice of one of the robbers. She was invited to an identification parade. She identified the man who was holding an axe and wore a stripped shirt and a jacket as the second appellant. She said that he was the one who was standing at the entrance to the main house. She also attended another identification parade and was able to identify the slender dark man as the first appellant. She said that that was the person she saw when she was being taken to open the gate. She said that besides the money the robbers also stole her mobile phone. PW1 was stepped down to be cross examined on another day. When she was recalled the proceedings do not indicate the language in which she gave her evidence. The appellant in arguing their appeal stated that they were prejudiced by the further testimony of PW1 because of lack of interpretation as required by ***Section 77*** of the constitution. In our view we find that the appellants did not suffer prejudice for the lack of recording the language of PW 1 at a subsequent hearing. PW 1 when she began testifying the learned magistrate clearly indicated that she was testifying in Kikuyu interpreted into English. We have no reason to believe that she may have changed her language of communication when she was recalled for cross examination. Indeed as correctly stated by the learned state counsel the court clerk in both those hearings was Muchoki and therefore it will follow that he conducted interpretation of the proceeding on those two occasions. We find no merit therefore in the argument of the appellants. PW 2 was MMI. She confirmed that she had gone to visit PW 1 on 16th March 2003. She was also in the company of J. During their visit they noticed beams of torches outside the kitchen. Suddenly three men came into the kitchen and ordered them to lie down. PW 1 was taken to the main house. Whilst she was out two men were left guarding her and J. One stood at the door while the other was inside the kitchen. One of the robbers ordered J to remove her clothes. When she declined he threatened to stab her with a panga. She then removed her clothes and he raped her. At that time the kitchen was dark since there was no lamp. Shortly when they heard a vehicle driving to the gate the two robbers left locking them inside the kitchen. They heard the robbers demanding money from the person who had come with the vehicle. After some time one of the robbers opened the door and took them to the main house where they joined PW 1. PW1 told them that she had identified the third appellant. Thereafter they exited the house through the rear door. This witness said that she did not identify any of the accused persons as robbers. She saw one person who she described as being slim and dark but that that person was not before court. PW 3 J W M confirmed that she together with PW 2 had visited PW 1. That they were hosted in PW1's kitchen. At around 11 p.m. they realized that there were people outside the kitchen. The intruders entered the kitchen and she noted there was a bright moon shine. The three men who entered were armed with a panga an axe and a stick. The lamp that was in the kitchen was thrown out by the robbers. PW 1 was taken by some of the robbers to the main house. Two men were left guarding them in the kitchen. One of the men inside the kitchen began to inquire whether she was married then ordered her to remove her clothes. She refused and he began to pull down her skirt. She held on to her clothes and at that point he threatened her with a panga. Out of fear she removed her clothes. He raped her and afterwards they heard a vehicle approaching. They heard PW 1 being ordered to open the gate. They heard a person pleading for his life and for about 10 minutes there was a lot of shouting and commotion outside. One of the robbers removed them from the kitchen and ordered them to go into the main house. In the main house they met PW 1 who said that she had identified the third appellant. This witness was taken to Muranga district hospital for treatment. She said that she could identify the two men that were in the kitchen if she saw them. She however stated that they were not

before the court. PW 4 was Clinical Officer who gave evidence on the treatment of PW 5 whose injuries were assessed as harm. They were caused by blunt and sharp objects. PW 5 was the husband of PW 1. He said that on 16th March 2003 he sat in their matatu as the driver went about his normal rounds of picking and dropping passengers. At the end of the day they reached the gate to his house and the driver hooted for the gate to be opened. He saw his wife come to open the gate. He was able to see her because there was a bright moonlight and because the vehicle's lights were on. His wife was unable to open the gate and he got out to inquire what the matter was. As he opened the gate he was ordered to lie down. He immediately hit that person and he fell down. He saw five men come towards him and they fought. In that confrontation and because the vehicle's headlights were on, he identified the second appellant. He saw that he had an axe. He also recognized the first appellant. He noted that he had a panga. He said that he had noted that the first appellant had boarded his matatu during the day and he was dropped at Karugia. As the commotion was going on, he heard a voice ordering him to give him money. He recognized the voice was familiar to him. It was the voice of the third appellant. He continued to fight the robbers until he was hit on the head. He ran away. He said that the robbers did not take any money from him. He confirmed that the robbery was reported to the CID. He in cross examination stated that he identified the second appellant who was wearing a stripped shirt and a jacket. On being cross-examined by the third appellant he said that he identified him by sight and sound. PW 6 was an employee of PW 5. He was the driver of his matatu. He said that one of the robbers stole from him a mobile phone and Kshs. 1700. He was not able to identify any of the robbers. PW 7 mounted up the identification parade where PW1 was able to identify the second appellant and first appellant. The arresting officer PW 8 stated that he arrested the third appellant on 25th July 2003. His file indicated that the first and second appellants were arrested four days after the incident and that would make the date of arrest to be 20th March 2003. PW 10 was the one who arrested the first and second appellants and he did confirm that they were arrested on 20th March 2003. The trial court did find that the appellants had a case to answer.

We shall only deal with the defence of the third appellant for reasons that will become apparent hereafter. The third appellant in an unsworn statement stated that on 25th July 2003 he boarded a matatu for Muranga. He worked as a tout. On arrival in Muranga passengers boarded the vehicle to be driven to Nairobi. It was at this time he was arrested and charged with the present offence. The first and second appellants were arrested on 20th March 2003. They were taken to court on 30th July 2003. That was a period of 4 (four) months detention before being charged with the present offence. Section 72(2)(b) requires that a person facing a capital offence be brought before court within 14 (fourteen) days. The burden to prove that such a person has been brought before court as is reasonably practicable rests with the prosecution. In re-examination of the evidence before the trial court we are unable to find any explanation that was given by the prosecution why they were not taken to court within 14 days. The Court of Appeal in **Criminal Case No. 35 of 2006 PAUL MWANGI MURUNGU vs REPUBLIC** stated as follows:-

"***We do not accept the proposition that the burden is upon an accused person to complain to a magistrate or a judge about the lawful detention in custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person has been in custody for more than the twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. Under Section 72(3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the prosecution does not offer any explanation then the court, as the ultimate enforcer of the provisions of the constitution must raise the issue.***

***That is what this court said way back in the case of NDEDE V REPUBLIC already cited herein. Of course the Magistrate before whom most of the accused persons first appear do not normally have the jurisdiction to deal with the matters touching on the Constitution, but that is no reason for not asking relevant questions regarding where the accused person has been since the date of arrest and then recording what explanation has been offered by the prosecution. That will help either the High Court or this court to see if the explanation offered by the prosecution was reasonable in all the circumstances of the case."***

There being no explanation that was offered by the prosecution, we do find that the first and second appellants' constitutional rights were violated. The Court of Appeal in regard to such violation had the following to say in the case of ***ALBANUS MWASIA MUTUA vs. REPUBLIC CRIMINAL APPEAL NO. 120 of 2004;-***

*"At the end of the day it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The Jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced to support the charge. In this appeal, the police violated the constitutional right or the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72(3) (b) of the constitution also amounted to a violation of his rights under Section 77 (1) of the constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin, obviously resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone"*

In regard to the third appellant, he was arrested on 25th July 2003 and was taken to court on 30th July, 2003. He was taken to court within the period required by the constitution. PW1 recognized the third appellant's voice when he was demanding money from her husband. She knew him well as a tout at Iyego stage. She often met him there and even used him to get passengers for their matatu. In their dealings they often conversed. PW 5 identified the third appellant through his familiar voice and sight. On that night there was a bright moonlight and also because of the vehicles lights he was able to see the robbers. We find that there was sufficient evidence to convict the third appellant on the robbery with violence charges and the attempted robbery with violence. On his conviction on the charge of rape we respectfully disagree with the learned trial Magistrate. PW 3 who was raped was unable to identify the rapist as being one of the accused. Similarly PW 2 did not recognize the rapist. The learned magistrate in his considered judgement had the following to say:-

"***Since the accused persons and the others who were with them all set out to commit the robbery at J home, in the house of which (sic) the rape was committed I find the accused person guilty of the rape as well. I do not doubt the prosecutions case at all. I find the accused persons guilty as charged and proceed to convict them accordingly."***

On our part we find that there was no evidence to support the rape charge against the appellants. In addition we find that the charge of rape could not stand against the accused because it was defective. All the accused persons were lumped together in the particulars as having raped PW 3. It is not clear how all of them could have raped PW 3 at the same time. It was necessary for each individual accused person to have his own particulars of the rape charge.

The learned magistrate was also in error for sentencing the appellants to death on the two counts or robbery with violence and additionally to impose a life imprisonment on all the accused on the count of rape. The case in point on this issue is the case of **ABDUL DEBANO MBOYE & ANOTHER VS REPUBLIC CR. APPEAL NO. 19 OF 2001 (*Unreported*).** They stated as follows:-

"***We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the first appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentence of death is carried out? We can find no sense at all in such a proposition and the long practice which we are aware of is that once a sentence of death is imposed the other counts***

***are left in abeyance so that if there was a successful appeal on the count which the death penalty has been imposed, the court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed. We hope that sentencing courts will take heed of these simple requirements and act appropriately."***

In the end we find that the convictions against the first and second appellants cannot stand in view of the violation of their constitutional rights. Accordingly, we do hereby quash the conviction and set aside the sentences of **FRANCIS WANYOIKE MWANGI** and **MICHAEL MACHARIA NJAMBI.** The two are hereby ordered to be set free unless otherwise lawfully held. In respect of the third appellant **GERALD KURIA MUTAHE** we find that there is no merit in his appeal. We find that the prosecution met the criminal standard of proof. His appeal is hereby dismissed.

**DATED AND DELIVERED THIS 22ND DAY OF MAY 2008**

**MARY KASANGO**

**JUDGE**

**M. S. A. MAKHANDIA**

**JUDGE**