REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NOs. 460 OF 2006 & 461 of 2006

BETWEEN

DANIEL GACHIE KIHARA ……..…….…… 1ST APPELLANT

ABRAHAM MURAGU MACHARIA……. 2ND APPELLANT

-AND-

REPUBLIC……...RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate D. Mulekyo dated 9th August, 2006 in Cr. Case No. 2512 of 2004 at Kiambu Law Courts)

JUDGEMENT

The appellants had been charged on several counts, but the ones on which they were found guilty and were sentenced, and in relation to which they bring this appeal, are for *rape* contrary to s.140 of the Penal Code (Cap. 63, Laws of Kenya).

Daniel Gachie Kihara, 1st appellant herein, was charged that, on *11th July, 2004*, at Marige Kwa-Maiko bridge, within Kiambu District in Central Province, he had carnal knowledge of ***Naomi Muthoni Kang'ethe,*** without her consent; and ***Abraham Muragu Macharia***, 2nd appellant herein, faced the charge that, on the said date, and at the said place, he had carnal knowledge of ***Juliana Wagikuyu,*** without her consent. Both appellants faced alternative charges of indecent assault contrary to s.144 of the Penal Code.

The appellants, through their advocate, filed amended grounds of appeal on 7th August, 2007 – and the same may here be summarised:

(a) the trial Court erred when it relied on *inconsistent evidence* adduced by prosecution witnesses;

(b) the trial Court was in error by not appreciating the inconsistency in the testimonies of the alleged victims, as regards the *period during which the offence had lasted;*

(c) the trial Court *failed to take into account the sworn defences* of the appellants;

(d) the trial Court erred when it convicted the appellants for the offence of rape, while the evidence of the doctor-witness (PW8) who examined PW1, PW2 and PW5 did not corroborate the same;

(e) the trial Court erred by not appreciating that the material time, 5.30 a.m., did not provide proper circumstances for *reliable identification*.

(f) the trial Court failed to recognise that moonlight and torches which gave lighting at the material time, did not give sufficient light for *safe identification*;

(g) the trial Court erred in law and fact by convicting the appellants;

(h) the trial Court erred in law and fact by passing sentences of *14 years' imprisonment*, which were excessive in the circumstances.

PW1, ***Juliana Wagikuyu Muriro***, a business lady trading in green groceries at Kwa-Maiko, testified that she had been attending overnight prayers (*kesha*) at the local PEFA Church, and was returning home at about *5.30 a.m.*, in the company of several other ladies – ***Naomi Muthoni Kang'ethe, Faith Wangui, Tabitha Njambi***, and ***Esther Njeri.*** Suddenly these ladies saw three men hurriedly approaching them, from behind; this scared ***Esther Njeri,*** who began running away. In the meantime, the three men reached the ladies, and ordered them, in Kiswahili: "*Kaeni chini"!* (meaning, "Sit down!"). PW1 noticed that one of the intruders was armed with a machete and a whip; and another donned a cap resembling those worn by Police officers. The intruder wearing a cap announced that they were Police officers from Marige. These intruders ordered the several ladies to face the direction they had come from, and embarked on a search of the ladies' effects, while demanding money and cellphones. The three attackers led the ladies towards a stone quarry near a river, and ordered them to lie on their bellies. As they so lay, the thugs picked on ***Naomi Muthoni Kang'ethe***, and led her to a different spot, where PW1 could hear her screaming. Another thug picked on ***Tabitha Njambi***, and led her away. The third attacker remained with PW1, E***sther Njeri,*** and ***Faith Wangui***. This attacker now ordered PW1 to "lie properly"; and he engaged PW1 by forcing down her clothes, and having carnal knowledge of her. He ordered PW1 to remain prostrate, where she had been raped, until he and his friends had departed.

After the three attackers left, PW1 went along with her lady- companions to the Administration Police post at Marige, and reported the incident. She described to the Police officers the appearance of the man who raped her; the man had "an overgrown tooth and a jutting forehead." Such a description was suspected by a person (not called as a witness) who had been at the said PEFA Church, and who had responded to the distress of the several ladies, to refer to ***Muragu,*** 2nd appellant herein: and on this basis of suspicion the officers of the Administration Police sought and arrested ***Muragu.*** As soon as they brought him along, PW1 identified him as the man who had raped her; and PW1 later pointed out this particular man, in the dock of the trial Court. The prosecutor thereupon asked ***Muragu*** to come closer to PW1 and to open his mouth; and the witness confirmed his identity by pointing out ***Muragu'***s tooth that overlapped another on the right side of the lower jaw; and she testified: "I could see his tooth as he was talking to me as he raped me."

The Administration Police officers detained 2nd appellant at about *7.30 a.m*. of the same morning when the incident took place. PW1 and her accompanying ladies waited at the Police Post until 10.00 a.m., when they were taken to Kibichoi Police Station, and there, they were referred to hospital. The doctor at Kiambu District Hospital was not able to see PW1 and her fellow-complainants until 10.00 p.m. PW1's blood sample was taken, and she was referred to Nairobi Women's Hospital where she was examined, and the medical-reporting P3 form was subsequently filled in.

PW1 testified that the 2nd appellant herein was not previously known to her, but she was able to identify him by his facial features. It is these very features, she said in the cross-examination, that she had described with sufficient clarity to signal to those responding to the distress-call, to alert them to the identity of precisely this appellant; and this was the basis of the arrest of this appellant, which now gave PW1 a definite opportunity to connect this appellant to the incident, and to confirm to Police officers that this, indeed, was the man who had raped her only some tens of minutes earlier. In a focussed response to

the 2nd appellant's cross-examination, PW1 said:

> *"You are the one who raped me. It was faintly [lit] at about 5.30 a.m. and when you replied to a question I had asked you, I noticed the tooth that appeared overgrown."*

PW2, ***Naomi Muthoni Kang'ethe***, a twenty-six-year-old housewife living at Kwa-Maiko, was walking back home at *5.30 a.m.*, on 11th July, 2004 following overnight prayers (*kesha)*. She was in the company of other ladies: PW1; ***Tabitha Njambi***; her mother, ***Esther Njeri;*** and one ***Wangui.*** As they walked on, they ran into three men who ordered them to sit on the ground, and started demanding from them extortionately certain items: money, cellphones. When these ladies told them they did not have the things being demanded, the three men ordered them to turn back, and head in the direction from which they had come. They walked back, and were led towards a quarry. At this point, the three men marched them into the quarry itself, and ordered them to lie down, on their bellies. Although PW2 obeyed and lay down, one of the intruders, on the declaimed pretext she was being difficult, ordered her to stand, and led her some distance from the other ladies. She refused to remove her clothes when asked to do so; and a struggle ensued between her and her tormentor; her attacker, whom she identified as 1st appellant herein, whipped her, using a whip, and beckoned to his associate (who was not before the Court) to come along with a machete. The attacker not before the Court placed his machete against PW2's neck, and threatened to kill her. As she screamed, the said attacker pushed his machete into PW2's mouth, cut her neck, and forced her down onto the ground; and in the meantime, 1st appellant herein stripped off PW2's under-clothing; he pulled down his trousers, and forcibly had sex with PW2. PW2 described the sex act to have been fully enacted: "He lay on me, and he penetrated me, putting his penis into my vagina. This was on for *about 10 minutes*." In the meantime PW2 kept struggling to free herself – which much annoyed 1st appellant, and when he finished, he insulted PW2 as a useless person, and "went and told his colleagues they leave."

After the incident, PW2 got up and joined the ladies who had come from the Church with her. They all walked up to the Administration Police camp, where they made a report. When asked if she could identify the man who raped her, PW2 said she could, and that she could also identify the attacker who held the machete to her neck. She told the Police officers she could give her attacker's physical description, as well as a description of the clothes he had worn. He had worn the same shirt he was wearing in Court – a dark grey shirt – and a Jeans jacket with trousers. These descriptions sounded familiar to the Administration Police officers; and they went and arrested the suspect. On two occasions the Administration Police officers tried unsuccessfully to find the suspect; but he later presented himself at the A-P post, at about *8.00 a.m.* on the material morning. The complainant and the suspect were taken to Kibichoi Police Station, where he was held in custody. PW2 was first referred to Kiambu Hospital, and then to Nairobi Women's Hospital, where she went on the following day.

On cross-examination by 1st appellant herein, PW2 testified that although he was not previously known to her, he was a familiar figure whom she has from-time-to-time seen in the neighbourhood. On the material occasion, at dawn, PW2 had been able to see this appellant, and was able to identify even the clothes he was wearing.

Both PW1 and PW2 were later recalled to testify further. PW1 said that she had been able to see her attacker (2nd appellant herein) as it was a moon-lit morning. She testified that the time elapsed between the commandeering of the several ladies and the rape incident, was *about two hours*; and she was in the company of 2nd appellant herein for *some 30 minutes*, as he raped her. Although she had observed her attacker's features, PW1 did not give the name ***Muragu*** to the Police, as she did not know his name. Of the identification process, PW1 said:

> "I visually recognised ***Muragu*** and described him to the Police. The description does not appear in my statement to the Police at Kibichoi, but I described ***Muragu*** to the AP officers who arrested the accused."

PW1 provided corroboration for PW2's testimony in a significant particular. PW2, **Naomi Muthoni Kang'ethe**, had testified that her attacker had accused her of being difficult, and had sought the help of

another attacker in subjecting her to violence. And PW1 now testified: "***Muthoni*** was difficult, and she was escorted by two of the attackers"; this attacker then came back for the third rape-victim: ***Tabitha Njambi***. PW1 gives the complete picture of the rape assault: "Three of us were raped. ***Njeri*** was not raped, and another lady who had a child was also not raped.... These two ladies were ordered to sit close to where I was being raped."

PW2 when recalled, testified that the rape attack took place when there was some light. The attackers had approached the five ladies from behind, and they had come running. PW2 said the man who raped her was 1st appellant herein, and this is a person she used to see in the neighbourhood when she attended Church. She said she had described 1st appellant to the Administration Police officers, at the time she first reported the incident; and she had recognised the man when he was brought to the Administration Police camp.

PW3, ***Esther Njeri Gituro,*** had on 10th July, 2005 gone to the local PEFA Church, for overnight prayers. She and four others – ***Naomi Muthoni, Juliana Wagikuyu, Tabitha Njambi,*** and ***Faith Wambui*** – left for home on the following morning. As the five ladies approached a bridge, a voice ordered them in the Kikuyu language to stop; and when PW3 looked back, she saw three men, some 10 – 15 metres away. These men ran past the five ladies and then turned back on them. They identified themselves as Police officers, and ordered the five ladies to sit on the ground, in Kiswahili. The men were armed with a machete and a whip. After the ladies sat down, they were now ordered menacingly to surrender their money and cellphones. After the intruders frisked the five ladies and found them not to have much, in the form of effects, they led them to a different place, and ordered them to lie on the ground. One of the attackers (not apprehended) announced that each one of their number would pair for the purpose of sex with someone among the ladies; and ***Naomi Muthoni*** was taken away by 1st appellant herein. When the said leader of the three men ordered PW3 to sit on the ground, she protested, and sought to know if this man wanted to rape her in front of her own children; and, in PW3's words, "he then ordered me to stand up, and led me about 8 metres away [under] a tree, and ordered me to keep quiet."

PW3, from the place where she had been confined, "could hear and see what was going on." The leader of the gang "went back and took ***Njambi".*** The 2nd appellant escorted PW3's daughter, ***Faith Wambui*** to the same place where PW3 had been confined; and then he went back, took PW1, and raped her. Of this particular rape, PW3 said: "I could see them from where I was. When [this rape was over] [1st appellant] ordered the [other ladies] to join us, and sit facing the river...and remain silent". As 1st appellant made these orders, he declaimed in Kiswahili: "*Sisi hatuna ugonjwa, sisi ni askari"* – meaning, "we are not infected with disease, we are policemen." The three attackers then took positions in a formation behind the five ladies, already commanded to peer in one direction, at the river. The attackers vanished; in PW3's words: "We remained in silence facing [the front], before I suggested to the [other ladies] that we check behind, only to find that the attackers were gone."

After the escape-ruse, the ladies were at last free, and they walked up to the road, and sought out the next Police post – Marige Administration Police Post. With the descriptions which the complainants gave to the Administration Police officers, these officers were able to arrest 2nd appellant herein; and later on the 1st appellant herein was also arrested, and, when he was brought along to the Administration Police camp, PW3 and her colleagues identified him, just as they had done with 2nd appellant earlier. The complainants then went with the AP officers to Kibichoi Police Post, where the incident was booked in the Occurrence Book. The ladies who had been the victims of rape were first taken to Kibichoi Hospital, and later to Kiambu District Hospital, where they were further referred to Nairobi Women's Hospital.

PW3 testified that the two appellants herein had both been perpetrators in the rape-assaults of the material morning. She had previously seen 2nd appellant in the neighbourhood of her Church; and indeed, she believed she had seen this particular appellant in Church on the evening leading to the material morning. It was PW3's testimony that 1st appellant also came from the same neighbourhood.

On cross-examination by counsel for the appellants herein, PW3 said her attendance at the Church, at

Marige, had made her familiar with faces she notices around Marige – and the faces of the appellants were such. PW3 said the dawn hours, at about 5.30 a.m., when she and the other ladies were attacked, were not exactly dark, and she had had a chance to see the appellants herein for *four-to-five minutes, as they frisked her for personal effects.* The witness said she had identified the two appellants herein, after they were arrested and brought to the Administration Police post.

PW4, ***Faith Wangui Gituro***, who is a Form 2 student at Nyagah Secondary School, testified that on the material morning, at *5.40 a.m.*, she was in the company of her mother ***Esther Njeri*** (PW3) and other ladies – ***Tabitha Njambi, Juliana Wagikuyu*** and ***Naomi Muthoni*** – and they were walking home from an overnight Church service. A voice calling from behind ordered, "*Simameni*!" – Kiswahili for "Stop your movement!" PW4's testimony is consistent with that of earlier witnesses, that the said command set her mother, PW3, on her feet, trying to escape, out of fear. But PW4 dissuaded her mother against running away, in the following words: *"My mother made as if to run, [but] I told her it was daylight, and there could not be any danger*." A group of men caught up with PW4 and her companions; they passed; PW4 saw three men. These men then ordered: *"Simameni; hamusikii tunawaambia msimame!"* – which means in English: *"Stop! Didn't you hear us tell you to halt?"*

The intruders ordered PW4 and her colleagues to sit on the ground; and they complied. One of the men had in his hand a yellow paper bag, from which the intruders took out a machete, knives, and a whip. They warned the five ladies not to yell, lest they be harmed. The intruders ordered them to stand, to be frisked for personal effects; and once this was done, the ladies were ordered to sit again on the ground. To the demand for cellphones, the ladies answered that they had none. The intruders next announced that the five ladies would do as ordered; failing which the men would "cut us up and throw us into the river." The ladies were ordered to turn, and walk in the direction of the Church, from which they had come. Soon thereafter, the ladies were led into a thicket, and ordered to lie on their bellies. The 1st appellant herein then picked on ***Muthoni***, and led her some distance from where the other ladies lay; PW4 could hear them talking, but did not get exactly what they were saying to each other. Next, a man who was not brought before the Court, grabbed ***Esther Njeri*** (PW3), PW4's mother. And PW3 "asked them if they would dare assault her in the presence of her children"; the intruder not in Court then led PW3 away, to sit under a tree. This same intruder returned to the recumbent ladies, and took away ***Tabitha Njambi***. Thereafter, 2nd appellant herein went for PW4, who lay down where she had been confined. PW4 told this intruder that she had a baby strapped to her back, and it would cry if there was any interference with it. The 2nd appellant then took PW4 to the place where PW3 was already under confinement, and went back for ***Juliana Wagikuyu*** (PW1). PW4 did not see very well what 2nd appellant was doing to ***Juliana Wagikuyu***; but after some time he brought ***Wagikuyu*** to the place of confinement where PW3 and PW4 already were.

PW4's testimony covered the intrusion upon, and the arrest and detention of herself and her lady-colleagues by three men who included the appellants herein; the commandeering of the five ladies, and their being intimidated and led into a thicket; the selective taking away of three of their number – ***Juliana Wagikuyu, Naomi Muthoni Kang'ethe***, and ***Tabitha Njambi*** – respectively by each of the three intruders; and the re-assembling of all the five ladies under a tree, after some time.

PW4's testimony is in perfect agreement with that of PW3: that after the commandeering, detention and removal of the three ladies named in the foregoing paragraph, all these ladies were made to sit in a particular mode, and to stare in one single direction. In PW4's words: "the [intruders] ordered us not to look, to see where they were heading. After they were gone, we waited for *about 10 minutes* before we went to report the matter at the Police station."

At the time of reporting, the affected ladies gave a description of their assailants; and this led to the arrest of the two appellants herein, who were brought into the Police post *that very morning, while the complainants were present.* PW4 testified that it was dusky, but not dark, at the time of the material incident, and it was a moonlit morning. PW4 had recognised 2nd appellant, who had been known to her prior to the incident. She testified that she had seen 2nd appellant well, as it was this appellant who had rummaged in her clothing, searching for valuables; and this search process had taken something like *10*

minutes. PW4 had previously seen 2nd appellant in the area of the Church, and indeed, this appellant had sometimes attended overnight prayers at the same Church. PW4 said she had been able to see 1st appellant too, clearly, at the time of the material incident; although she had not known him before, this appellant was a familiar face, in the local area; *he used to work at the quarry*. The 2nd appellant had been armed with a machete, and 1st appellant, with a whip and a machete, on the material morning.

PW5, ***Tabitha Njambi***, a 13-year-old girl attending Ngewa Primary School, was taken through the *voir dire* examination, and found by the Court to be "competent to give evidence on oath."

PW5 testified that she was in the company of her mother ***Esther Njeri*** (PW3), ***Naomi Muthoni*** (PW2), ***Faith Wangui*** (PW4) and ***Juliana Wagikuyu*** (PW1) on 11th July, 2004, as they walked back home, from overnight prayers in the local Church. From behind, a man's voice ordered the five ladies to stop; and this scared PW5's mother (PW3), who started running away – but she was dissuaded and stayed on. By PW5's testimony, it was not dark at the time, and she was at first not at all scared; "but I got scared when they now ran and passed us, before ordering us to stop."

The intruders had a machete and a whip, which they carried in a yellow paper-bag. After 1st appellant took a whip from the paper-bag, his colleagues each followed, by taking some weapon from the same paper-bag. The ladies were frisked for valuables, a *process which took some 10 minutes*; and thereafter they were held captive, and some of them subjected to sexual assaults, for *another 20 – 30 minutes.*

It was PW5's testimony that one of the three attackers was wearing a Jeans suit and a cap, and resembled someone in a Police officer's uniform; and the other attackers referred to this particular one as "Corporal". The attackers, who were armed with machetes, whips and knives, frisked the five ladies, and then marched them into a thicket, and ordered them to lie on their bellies. They threatened the ladies with death, in the event of non-cooperation.

After making the said threats, one of the attackers picked on ***Naomi Muthoni Kang'ethe***, and led her a few paces away. When Naomi sent out a scream, the other attackers headed in that direction; and this gave PW5 a chance to lift her head, and told her sister ***Faith Wangui Gituro*** (PW4) that they should take advantage of this opportunity and run away; but ***Faith*** said it would be dangerous, and they should continue lying on the ground. The attackers soon got back, and now took PW5's mother (PW3). After PW3 pleaded with the attackers not to assault her in the presence of her children, they took her away and confined her under a tree, some 5 metres away. The attackers then returned for PW5; and one of them took her to a thicket, and ordered her to lie down. When PW5 refused, a machete was held against her neck, forcing her to lie down. The attacker then removed her underwear, pulled out his own under-clothes, and raped PW5; and this process took *some 5 – 10 minutes*. He *persisted with the sex act even when his fellow-attackers called him so they would escape*. The other men came right up to this scene of rape, and an order was issued to all the five ladies not to look at the attackers; and in the meantime, they departed. PW5 and her colleagues were able immediately to proceed to Marige Administration Police Post, to report the incident.

PW5 *had known both appellants* herein, prior to the material incident. On the very evening preceding the morning attack, PW5 had *seen 2nd appellant herein at the Church* where she had gone for overnight prayers; and she had noticed that it was this very appellant who came *second*, in the group of three men intercepting them as they walked home, on the material morning. The 1st appellant was the *first,* in the morning chase after the five ladies. She was clear that it was *neither* of the two appellants who had raped her; the one who assaulted her was *not before the Court*. In PW5's words: "I was able to recognise them, as there was moonlight, and it was not very dark." For some two months, PW5 had seen *2nd appellant* in the neighbourhood, hanging around; and she had also seen *1st appellant* before, and knew that he *used to work at the local quarry.*

On cross examination by counsel, PW5 said she was able to see the three attackers *consistently for about 20 minutes*, and the appellants were known to her. PW5 had not disclosed the names of the attackers, but had given a *description of them* which enabled the Police officers to arrest them easily, within a short time

of the incident.

PW6, Police Force No. 97071296 APC ***Henry Chanzu***, of Githiga Chief's Camp, testified that on the material morning, at *7.00 a.m*. Five ladies, ***Esther Njeri, Juliana Wagikuyu, Faith Wambui, Tabitha Njambi*** and ***Naomi Muthoni***, came to him at the Chief's Camp, at Marige, and reported that they had been attacked at a bridge as they came from the local PEFA Church, and the attackers had raped three of them. The five ladies said they could identify the attackers, and disclosed the names of ***Abraham Muragu*** and ***Daniel Gachie.*** PW6 went out with one ***Sgt. Gikonyo***, arrested the two suspects, and escorted them to Kibichoi Police Station for further investigations.

PW7, Police Force No. 218438, ***Chief Inspector Jonathan Itu*** was at Kibichoi Police Station on 11th July, 2004 when ***AP Sgt. Gikonyo*** brought in two suspects, together with complainants. PW7 received the report that three of them had been raped by the suspects, and he asked that they be taken to hospital, along with the suspects.

PW8, ***Dr. Samson Gitonga*** of Kiambu District Hospital, examined ***Juliana Wagikuyu*** (PW1) on 11th July, 2004 when she presented with a history of having been raped by a person known to her at 5.30 a.m. on the same morning. There were *no external physical injuries*. PW1 was a *29-year-old female*, with a pregnancy of about 32 weeks. There was *no bleeding* or *discharge* from the genitalia, and there were no *visible injuries.* A vaginal swab revealed *no spermatozoa*, but *red blood cells* and *pus cells* were seen. PW8 filled in a P3 form, which he gave in as an exhibit.

In the same hospital, ***Naomi Muthoni*** (PW2) was seen when she presented with a history of having been sexually assaulted, on the same morning the incident is said to have taken place. She was a *26-year-old lady*. She had *no injuries*, *bleeding* or *discharge* on the genitalia. A vaginal swab revealed *no spermatozoa*, and only a few *pus cells* were seen. PW8 filled in the medical-reporting P3 form, which he now produced as an exhibit.

PW8 also examined *13-14 year-old* ***Tabitha Njambi***, who presented with a history of having been sexually assaulted at about 5.30 a.m. on 11th July, 2004. He found the *labia minora to be bruised*, but the *hymen was intact*; there was *no bleeding or discharge*. A vaginal swab revealed *no spermatozoa*, but only *pus cells*. PW8 filled in a P3 form, which she submitted as exhibit.

PW8 said he had seen the complainants some *14 hours since the sexual assaults were alleged to have taken place.* The witness testified that he found *no sign* on ***Juliana Wagikuyu*** (PW1) to show that she had been subjected to a rape experience. Had any spermatozoa been ejaculated during the incident, PW8 would have expected to find signs of it. PW8 also did *not* observe any signs of rape on ***Naomi Muthoni*** (PW2); but on ***Tabitha Njambi*** (PW5), his opinion was that the bruising of the labia minora was a *sign that rape had taken place*; and the fact that the hymen remained intact "means that there was no penetration beyond the hymen." There was, in PW8's opinion, "sexual assault which in my view, is rape" – PW8 testified.

The 1st appellant made a sworn defence in which he pleaded alibi: on 11th July, 2004 he did all the normal things; he woke up at 7.30 a.m., went to have tea and to buy newspapers; and on his way home he was arrested, entirely without cause. The 2nd appellant had a similar kind of alibi.

The learned Magistrate, in his assessment of the evidence, observed as follows:

> ***"The evidence against the accused [persons] ....was corroborated by all the prosecution witnesses who narrated how, after they [the five ladies, including the three complainants] were found not to have any money or mobile phones [1st appellant] resolved that they should be punished, and they were then led to a thicket, and PW1, PW2 and PW5 raped. PW1 was unwavering in her testimony, saying...she identified [2nd appellant]. A particular distinguishing feature she gave of the accused was an overgrown tooth on the lower jaw [which] she saw as he raped her. This overgrown tooth was confirmed by the prosecutor during the trial when he***

asked the accused to open his mouth. Her identification of the accused was corroborated by PW3 who told the Court that he had picked on her daughter [PW4] but when she protested that she had a small baby on her back, he [took] PW1 instead. On the other hand PW2 told the Court...she was raped by [1st appellant]. Her evidence was corroborated by all the other witnesses. That [1st appellant] was present at the scene appears not to be in doubt, as he was identified by PW3, PW4 and PW5 who told the Court...he was [a person they used to see in the neighbourhood], and PW5 even added that she used to see him working at the quarry. The finding that he was properly identified would appear to be confirmed by [1st appellant's] own defence when he told the Court that prior to his arrest – he used to do quarry mining. It would appear therefore that the witnesses, and in particular PW5, were not mistaken in their identification of [1st appellant]."

The learned Magistrate then dealt with the question whether or not there was, indeed, *rape* in the terms of s.140 of the Penal Code (Cap. 63, Laws of Kenya). He held that rape, as a fact, did take place, as there was *no consent* (***Oyier v. R*** [1985] KLR 353) to the liaison which the appellants carnally effected with the complainants. The Court relied on the evidence on record, and stated thus:

"In the present case evidence was led that the accused persons were armed and indeed, PW2 told the Court that when she attempted to resist [1st appellant] he called for the third person who was not before the Court, and he came and placed a panga [machete] against her neck, warning her he would cut her if she resisted. This evidence is confirmation the sexual acts were committed under duress."

On the fact that PW8 had found no spermatozoa in the genitalia of the complainants, the learned Magistrate held that, that fact alone did not disprove rape having-taken-place; for the Court of Appeal had held in ***Mwangi v. Republic*** [1984] KLR 595 (at p.603) that:

"The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has had sexual intercourse, nor is the absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact to the offence of rape..."

The finding, which led to the conviction of the two appellants, is set out as follows:

"I am satisfied from the evidence given by both PW1 and PW2 and the other witnesses that PW1 and PW2 were raped by the 1st accused [2nd appellant] and 2nd accused [1st appellant], and that penetration without their consent did take place. Having found that both accused were positively identified by the witnesses and that they did rape PW1 and PW2, I dismiss the defence by the accused persons as evasive and untruthful."

The learned Magistrate proceeded, in sentencing, by virtue of s.3(3) of *Sexual Offences Act (Act No. 3 of 2006),* and imposed upon each of the appellants a fourteen-year prison term.

Learned counsel ***Mr. Sane***, who appeared for the appellants, urged that a finding of guilt on the charge of rape, as the learned Magistrate did make, was a miscarriage of justice. On what account? In learned counsel's words: "[The appellants] conducted their defence in respect of two counts, robbery and indecent assault, but not rape; and subsequently they were convicted for rape, but there was no finding in respect of indecent assault."

Counsel's contention does not, with much respect, shed much light on the issues taken on appeal: for the charges specified on the charge-sheet are concerned with having carnal knowledge of the complainant without her consent; and the charge is in each case labelled as *rape.* Since the appellants had the assistance of counsel when they gave their sworn defence, they would not have failed to respond to the rape-charge, which had been on record all the time.

Since indecent assault was the *alternative charge*, there would be no procedural impropriety, I think, if the trial Court proceeded as it did, by convicting on the charge of rape, but making no finding on the alternative charge.

Mr. Sane further contested the trial Court's judgement on the ground that the learned Magistrate had *ignored* the doctor's evidence (i.e. PW8) – that he had found no evidence of any injuries on complainant PW2, who had testified that her attacker had whipped her.

Learned counsel next contended that the lighting conditions prevailing at the material time, were not favourable to safe identification of the suspects – and so the appellants herein were not correctly identified as the culprits.

Were the witnesses inconsistent, in their account of the circumstances attending the assaults on the complainants? ***Mr. Sane*** submitted that the witnesses were not agreed on the *locus in quo* – whether it was in a stone quarry, or in a thicket; and that, neither were these witnesses agreed on the *time* during which the complainants remained under the charge of the attackers: was it two hours, ten minutes, etc?

Although learned counsel placed two Court of Appeal decisions before the Court, namely ***Nathan Browne Birundu v. Republic***, Criminal Appeal No. 588 of 2001 and ***Bernard Kebiba v. Republic***, Criminal Appeal No. 104 of 2000, he did not endeavour to extract any particular principle from them which he would urge; and so it remains unclear how exactly he saw these decisions as coming in aid of his clients' appeal.

Learned respondent's counsel, ***Mr. Makura,*** by contrast, urged that there was overwhelming evidence of the offence of rape, against the two appellants. Counsel urged that the hours of dawn when the incident took place, had not been an impediment to visibility, and more particularly so as the assault on the complainants *had gone on* well upto some time after 7.30 a.m. – when visibility was quite good. PW1 for instance, had clearly identified the appellant who assaulted her; the man kept talking during the assault process, and she was able to identify his features. PW2 who had been in PW1's company, was also able to identify the appellants as the offenders. PW3 and PW5 had recognised the 1st appellant during prayers in Church on the material morning; and other witnesses were clear that the appellants' faces were common faces in the locality.

It is beyond doubt that, on the material morning, three men accosted and held prisoner the five ladies, including PW1 and PW2, who were walking home after overnight prayers. The time of attack was *about 5.30 – 5.40 a.m.*, and thereafter the three men took the said ladies through *a series of acts of assault and harassment*. Some time was taken in frisking the ladies for valuable property; some more *time* was taken marching them along the road in the reverse direction; some more *time* was taken leading them towards a quarry, into thickets, and threatening and cowing them to adhere to the instructions of the attackers.

This Court will take judicial notice that, given the inexorable *passage of time*, the actual time when the alleged rape assaults took place, would have been *well after 5.30 a.m. – and probably later than 6.00 a.m.* Thus, with or without the moonlight which is referred to in the evidence, this Court takes judicial notice that the dusky morning illumination would have allowed the complainants to see their attackers.

The evidence of PW1, ***Juliana Wagikuyu Muriro***, that the bodily proximity between 2nd appellant and herself enabled her to observe 2nd appellant's overlaid lower teeth, is proof beyond doubt that 2nd appellant assaulted her, and that she correctly identified this appellant.

The fact that the descriptions by the five ladies could lead the Administration Police officers to arrest both appellants so soon after the incident, is proof that these ladies very well observed their attackers, and that the lighting conditions were by no means an impediment to visibility.

The learned Magistrate, in his record, raised no point of demeanour such as might tend to colour the credibility of the witnesses; but for my part, I have been impressed by the substantial consistency in all the evidence emanating from the five ladies, among whom were the complainants herein. *The detailed*

match of the evidence given by each one of them, is, in the nature of things, quite inconsistent with falsehood. While it is the consistent evidence of several of the witnesses that the faces of the appellants were familiar, within the locality – a matter ascertained by the evidence of PW5 and, indeed, of 1st appellant himself – dependable circumstantial evidence was given which *confirmed* the safe identification of the appellants; and noteworthy in this respect is the overlay in 2nd appellant's lower teeth.

I hold that both appellants were properly identified as the suspects, in the attacks of the material morning.

PW5, who was in my opinion, a truthful witness, while testifying that one of the morning attackers penetrated her sexually, did not lay blame for this on the appellants herein; she did observe that the assault on her was by a suspect who escaped; and the fact that penetration did take place, was confirmed by the doctor (PW8).

The question to resolve this appeal is: *Were PW1 and PW2 raped?* If they were raped, of course, it would, in the light of the evidence, have to have been done by *the appellants* herein. There is clear evidence that the 2nd appellant took PW1 away from the other women, and assaulted her in what PW1 says was a rape incident. And there is clear evidence that 1st appellant took PW2 away, laid her down, and did something to her which she says was rape.

The learned Magistrate referred to the definition of rape in the Court of Appeal decision, ***Mwangi v. Republic*** [1984] KLR 595. A condition for rape to have taken place, is *penetration*; but it is not relevant whether there is an emission following penetration.

From PW8's evidence, both PW1 and PW2, unlike PW5 (who clearly, had been defiled) are *adult* ladies, one being 26 years old, and the other 29 years old and several months pregnant. If the doctor (PW8) had been asked whether evidence of rape on PW1 and PW2 would be expected to express itself the same way as it would do for the infant PW5 (aged 13), the Court would have seen quite clearly whether or not PW1 and PW2 were the subject of penetration. But the medical evidence which was given in Court did not indicate that there were tell-tale signs of rape. So, was there a penetration of PW1 and PW2, by the respective appellants herein?

Could 1st and 2nd appellants have stopped at *indecently handling and manipulating* PW1 and PW2, but not effecting a penetration? It is possible. However, beginning from the clear evidence that 1st appellant took PW2, and 2nd appellant took PW1 a distance from the other ladies, laid them down, removed their under-clothing, and engaged in a physical act upon both; and then proceeding to the *testimonies of both PW1 and PW2* that they were raped, the Court must determine the matter on the basis of the credibility of the witnesses. And as I have already noted, it is hardly possible to doubt the *credibility of the complainants as witnesses.* Their testimonies mutually interlock, and, in my assessment, clearly flow from conviction. This Court must hold that both PW1 and PW2 have said the truth; they were, indeed, raped by the two appellants, respectively.

I hold that proof of guilt was achieved beyond any reasonable doubt.

The charge was laid under s.140 of the Penal Code (Cap. 63, Laws of Kenya) – since repealed. That section provided:

> ***"Any person who commits the offence of rape is liable to be punished with imprisonment with hard labour for life."***

That section has since been repealed, and replaced with s.3(3) of the Sexual Offences Act, 2006 (Act No. 3 of 2006). This Act, which bears the date 21st July, 2006 as the date of commencement, has transitional provisions (see First Schedule, Clause 3) which state:

> ***"Any proceedings commenced under any written law or part thereof repealed by this Act shall continue to their logical conclusion under those written laws."***

Section 3(3) of the Sexual Offences Act, and in relation to rape, thus provides:

> ***"A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."***

In view of the transitional provision in the Sexual Offences Act, as set out above, I hereby quash the sentencing of the appellants herein by the trial Court under the Sexual Offences Act, 2006; I substitute the same with sentence under the repealed s.140 of the Penal Code (Cap. 63).

I otherwise dismiss the two appeals, uphold the conviction of each appellant, and affirm the fourteen-year term of imprisonment imposed by the trial Court.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 18th day of June, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellants: Mr. Sane

For the Respondent: Mr. Makura