



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CRIMINAL APPEAL 519 OF 2006**

ROBINSON NGUGI KARIUKI.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate

M.W. Mwai dated 11th September, 2006 in Criminal Case No.749 of 2006 at Limuru Law Courts)

JUDGEMENT

The appellant was charged firstly with robbery contrary to s.296(1) of the Penal Code (Cap.63, Laws of Kenya); secondly, with rape contrary to s.140 of the Penal Code; and thirdly, with indecent assault on a female contrary to s.144(1) of the Penal Code.

The particulars on the first count were that the appellant, on 6th April, 2006 at Kiambu District, within Central Province, robbed *M M M* of Kshs.2000/= and a cellphone, Motorola C13 valued at Kshs.2,500/=.

The particulars on the second count were that at the same scene and on the same date, the applicant had carnal knowledge of *M M M* without her consent.

In the third count, it was charged that the appellant had, at the same place and date, unlawfully and indecently assaulted *M M M* by touching her private parts.

The prosecution case was that the complainant, while carrying her child, was proceeding home from her place of business, at about 7.00 pm on the material date. The appellant herein came from behind, hit the complainant, and demanded cellphone and money, with menaces. The appellant came to the front, and proceeded to assault the complainant more squarely. He seized the complainant's cash and cellphone, assaulted her further, and held her by the neck so she could not scream. The appellant then tore off the complainant's trousers, felled her, and raped her on muddy ground.

The complainant said it had not been dark, and she had observed the complainant, who was a man known to her. The complainant's five-year-old child had run home, to report that her mother was being assaulted on the way. The child, who however could not identify the attacker, gave unsworn evidence in which she said she had heard the attacker demanding money and cellphone from her mother. The child spoke to her uncle (PW4) at about 9.30 pm, and reported that a man had attacked the complainant. PW4, who went out to help, met the complainant on the way; and the complainant told PW4 she had been raped and robbed by *Robinson Ngugi*.

PW4 took the complainant for medical attention, and she was examined by **Dr. Githuka** of Tigoni Hospital. She was injured on the face and neck, and had a swelling on the right knee and was

complaining of back pains. The doctor found that the complainant had a painful scalp, with hair ripped off. No injuries were found in the genital areas; but a swab test showed the presence of spermatozoa.

PW5, the investigating officer who went to the appellant's home, did not find him; but he was arrested one month later, after the complainant identified him.

The learned Magistrate after considering the evidence, including that of alibi tendered by the defence, found that the doctor's evidence corroborated the complainant's testimony that she had been sexually assaulted by the appellant. From the evidence of struggle shown in the torn and muddied appearance of the complainant's clothes, the trial Court concluded that rape had indeed taken place.

On the question whether the appellant had been positively identified as the man who raped and robbed the complainant, the Court considered that complete darkness was not prevailing at the time of the incident; the appellant stood face-to-face with the complainant as he made his demands; the appellant was not a stranger to the complainant.

The trial Court concluded that the prosecution had proved their case as required by law; it convicted the appellant for both robbery and rape; and sentenced him to serve six and 15 years respectively for robbery and rape – the sentences to run concurrently.

The appellant contended that the incident had taken place at night, and he had not been properly identified; that there was only one identifying witness, and that her evidence was uncorroborated; that the standard of proof was not beyond reasonable doubt; that the defence evidence had raised doubts which were not taken into account in the judgement.

Learned counsel *Mrs. Kagiri* who appeared for the respondent in this appeal, urged that the complainant had given clear, consistent, and credible evidence, which showed that she knew the appellant, and the appellant had attacked her at 7.00 pm when it was not yet dark, and she had been able to observe him. This was a case, counsel urged, of recognition of a person already known, rather than that of identification of a stranger. The complainant had given a consistent account, notably to the doctor (PW3), regarding the identity of his attacker.

Apart from the unsworn testimony of PW2, there were other circumstances corroborating the complainant's testimony. PW5 (the investigating officer) had shown that the appellant had endeavoured to evade arrest – by being absent from his home for long periods, even after the Police had left a request that he should report to them. Such conduct, counsel urged, was inconsistent with innocence. Besides, it was recorded that the appellant had been in the habit of issuing threats to those who were attending Court as prosecution witnesses. This, counsel urged, could only mean the appellant was the culprit. She submitted that all the ingredients of the offence of robbery were duly proved, just as the offence of rape had also been proved.

The appellant said in Court that he knew nothing about the matter, and he accused the trial Court of bias, in favour of the complainant. He submitted that the evidence given in the trial Court had been contradictory and should not have led to conviction.

I have carefully considered the reasoning of the trial Court, and the submissions made on both sides. I have attached considerable weight to the fact that the complainant had well known the appellant before the material date, and the acts constituting the offence took place in the early hours of the evening, before complete darkness set in, and, in these conditions, the complainant was in the closest possible physical proximity to the appellant during the happenings in question. My conclusion, on the basis of these circumstances, is that the appellant was able to perceive the wrong-doer with clarity. And this state of affairs is well corroborated by the appellant's conduct following the commission of the criminal acts; if he was entirely innocent, he would not avoid Police summons, and would not be motivated to issue threats to witnesses. There is credible evidence that the criminal incidents in question entailed both robbery and rape; and I must conclude that the commission of these two offences was fully proved.

Consequently, I hereby dismiss the appellant's appeal; uphold conviction as entered by the learned Magistrate; and affirm sentences as imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 6th day of October, 2008.

J. B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Huka

For the Respondent: Mrs. Kagiri

Appellant in person