REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CRIMINAL APPEALS 55A & 55B OF 2006

JOHN KIPLAGAT KOSKEI……..……..…..1ST APPELLANT

ELLY KIPKOECH KORIR……..……2ND APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

JUDGMENT

The appellants in the consolidated appeals Nos.55A and 55B of 2006, John Kiplagat Koskei and Elly Kipkoech Koriri were arraigned before the Senior Resident Magistrate, Hon. A. G. Kibiru, at the Kericho Principal Magistrate's Court where, on 25th January, 2005 they were charged with two counts of Robbery with violence contrary to Section 296(2) of the Penal Code, to which they pleaded not guilty. They also faced rape charges contrary to Section 144(1) of the Penal Code and, in the alternative, indecent assault charges contrary to Section 140 of the penal Code. In addition to the above further charges of assault contrary to section 251 of the Penal Code were also preferred against the appellants, to which they equally pleaded not guilty.

All the above offences were said to have been committed on the night of 12th January, 2005 at Kisitet Girls Secondary School in Kericho District within the Rift Valley Province, whereby the appellants, in the company of others not before court and while armed with rungus and pangas were alleged to have robbed one Caleb Engunza Lugalia of a video deck, two mobile phones, and Kshs.5000/=, all valued at Kshs.22,000/= and used actual violence to the said Caleb in the course of the said robbery. They are said to have also robbed one Joseph Ruttoh (in the same fashion and at the same place) of a Nokia mobile phone valued at Kshs.7000/=.

According to the particulars recorded in the charge sheet, the rapes, indecent assault and the assaults under Section 251 were committed on the same date and at the same place against the persons of N C R and V C K. The assaults contrary to section 251 were alleged to have been jointly committed by the two appellants on the same date and at the same place against Paul Korir, Jeremiah Chemiyot and Benson Wangombe Nganga in the course of the robbery. Actual bodily harm is said to have been occasioned to the latter two.

After a full trial in which 11 prosecution witnesses testified the appellants were, on the 2nd of December, 2005 convicted of the robbery with violence on both counts but were acquitted of all the other offences. They were sentenced to suffer death as prescribed under the law. Being dissatisfied with both their conviction and sentence the appellants then preferred the present appeals on the grounds that:

1) The robbery charges were not proved to the required standard.

2) That the learned trial magistrate erred both in law and fact in convicting them when the prosecution's evidence before court was both insufficient and contradictory.

3) That the appellants were not properly identified as being the robbers.

4) That the learned trial magistrate erred in law and fact in finding that the identification parade to which the appellants were subjected was properly conducted when in the appellant's opinion this was not so.

5) That the learned trial magistrate erred both in law and fact in rejecting the appellants' defences of alibi.

6) That the learned trial magistrate erred both in law and fact in shifting the burden of proof to the appellants.

Submitting for the appellants in the appeal learned counsel, Mr. Ndubi, told this court to note that the complainant in the 2nd count of robbery, Joseph Rutto, was not called to testify and that the only Joseph called to testify (P.W.6) was known as Joseph Kipyegon. Counsel noted that an assumption that this was one and the same person cannot be entertained in law and that for that reason, the conviction was quite unsafe. He urged this court to critically examine the evidence on identification and to find that the same was not watertight, since the circumstances under which identification at the scene was carried out were not conducive to positive identification, owing to lack of adequate lighting, the sudden nature of the attack, the injuries inflicted on some of the identification witnesses. Also that the identification parade carried out a week after the incident (on 19/5/2005) was stage-managed and irregular. He also urged us to note that none of the identifying witnesses described the attackers either by name or any special features to enable the court draw a conclusion that there could not have been a possibility of error. Counsel submitted that the reverse existed in the form of the evidence adduced at the trial which was riddled with contradictions. That the only person who claimed to have positively identified the attackers was P.W.10, the wife of P.W.1, who happened to have been asleep when the robbers struck. Also that P.W.1 himself did not identify anyone, nor did P.W.4, Jeremiah Kipsang Cheruiyot, who was himself, a victim of the attack. Counsel submitted further that according to the testimony of P.W.8, (the arresting officer) the appellants were only arrested upon information being given to him to the effect that they had travelled out of the village. Counsel concluded his submissions by stating that, taking this in mind, the learned trial magistrate ought to have duly considered and accepted the 1st appellant's alibi that he had gone to visit his sister between the 24th December, 2004 and 13th January, 2005.

The state, represented by the learned State Counsel Mr. Mugambi has conceded the appeal, particularly on the grounds of identification. He noted that the record clearly showed that two identification parades were conducted in relation to the same offence and that P.W.3, N C, testified to having attended two parades in which she picked out two different suspects. Mr. Mugambi submitted therefore that doubt existed as regards the appellant's identity and whether he can be said to have been among the robbers, particularly since the investigating officer, IP. Reuben Omboga (P.W.9) did not explain the reasons leading to the arrest of the appellants several days after the robbery incident.

As is required of us, we have studied the proceedings and judgment of the trial lower court and analyzed the evidence tendered by both sides. There is no doubt that the complainants were attacked and assaulted on the night of 12th January, 2005 as alleged and various items stolen from some of the victims. According to the witnesses, including P.W.1, a teacher at the school at which the incident occurred, commotion was noted as groans were heard emanating from the headmistress's house. As P.W.1 went to check what was going on he was hit on the head so hard that he fell down and could not stand. Later, himself, his wife (P.W.10) and a watchman, Paul Kiplangat Korir (P.W.7), were frog-marched towards the house of two teachers – housemates Mr. Wangombe and Mr. Njoroge, where P.W.1 saw Mr. Wangombe being hit three times as he tried to push his door closed on realizing what was amiss. Soon thereafter the attackers moved to the headmistress's house where they harassed the headteacher's husband, her relative and housemaid as P.W.1 run towards the girls' dormitories to ask them to scream thus raise alarm. P.W.1 also stated that the robbers, one of whom "***threatened to remove a gun"*** forced the "***school team"*** to show them the school office and the bursar's office.

Despite having been with the attackers all this while P.W.1 clearly told the trial court, in his own words, that:

"***I did not see any of the people because I was still confused……. Throughout the incident I did not see anyone of the attackers due to the blow, even hearing was difficult."***

P.W.1, the complainant in the robbery charge testified that he only learnt from his wife that two mobile phones, a video deck and Shs.5000/= had been stolen in the process and also that others in the school had been robbed. Regarding any weapons, he testified that he saw something like a piece of wood and the metal bar, which was used to break Mr. Njoroge's window. He testified to having never seen the appellants and that he did not know them.

P.W.2, the house-help at the headmistress's house and an alleged rape victim testified that on the material night she was woken up by P.W.1's wife – P.W.10 who appeared to have been in distress. Two people entered the house with P.W.10 and with the lights on, they walked about the house demanding money. That they took a mobile phone and asked everyone to go out. Outside they joined about 10 others and everyone was forced into the offices after which she and Nancy were taken away by three of the thugs and raped, she by one of them, N by two. Although P.W.2 said she saw the faces of the people who entered he employer's house, she never described them to anyone save to say that one had a rungu and the other a metal pipe. She also said she could not tell the facial appearance of the person who raped her. Despite testifying that she attended two parades in which she identified two different people she was emphatic in he testimony that

"***The people who entered the headmistress's house are not here……"***

and

"***the person who raped me is not here in court."***

Nancy, P.W.3 confirmed that two people did enter the headmistress's house and ordered her and others to take them to the offices. She testified she was in "***shock and could not see their faces clearly",*** particularly since, at the office, everyone was ordered to lie face down. She too said she attended two parades and picked out two different persons whom she claimed to have seen during the attack.

P.W.4 never testified to having identified anyone although he was hit hard on the head as he came to check on the on going commotion. He said he only came to learn of the attackers' arrest while in hospital. P.W.5, Benson Wangombe Nganga did not testify to having seen the attackers and his only means of identifying them at the parade was by asking them to say the words "***Nyumba ya mkubwa ni nani?"*** He did not tell the court, however, how the question helped him identify whose voice. He said that he identified the 2nd accused (1st appellant) by scratch marks on his hands which he "***knew were scratched by thorns from the route they took"*** without explaining further.

P.W.6, Joseph Kipyegon testified that he was woken up by 4 people and he did not switch on his lights for fear of attack. The attackers were strangers to him and used dim torches to search and ransack his bedroom while demanding money. Although he said he knew the appellants at the dock as his neighbours P.W.6 clearly testified that he had not seen them on the night of the attack. It was the same case with P.W.7, Paul Kiplangat Korir, who was the watchman on duty on the material night. He said he was hit on the head with a metal bar and that he could not see the attackers clearly (since he was bleeding over his eyes). He was certain that he did not see the appellants at the material time. He too said they were well known to him.

The investigating officer P.C. Anthony Morege, P.W.8, confirmed having received a report of the robbery and other incidents of 12th January, 2005. He testified that on 17/1/2005 it was reported that the 2 appellants were not in the village but had been spotted in Nandi South. He went to the alleged location and found one Erick Kipkoech "***alias Rabuyo"*** (Accused No.1). The latter led P.W.8 and his companions to Accused 2 (1st appellant's) house at Kipsitet where (presumably) P.W.8 arrested him and arranged for

the identification parade after which both appellants were charged. Under cross-examination by the 2nd appellant, P.W.8 testified that the appellants had been identified by the complainants and that they had scratches similar to those appearing on P.W.2 (V C) and P.W.3 (C N). Our finding are that the scratches theory was introduced by P.W.10, Caroline Chepkoech (wife to P.W.1), who also testified to attending two parades and identifying ***"the 1st accused"*** (2nd appellant) from scratch marks on his body similar to the ones she had observed on P.W.2 and P.W.3 the morning after the incident, and which they attributed to their being scratched by the bushes through which they were escorted and allegedly raped. P.W.10 also said that she identified the 2nd accused (1st appellant) from the clothes he wore when he attacked her husband. She never described those clothes.

Clearly, the evidence as to scratch marks is mere hearsay and most unreliable in as far as the offences of robbery with violence is concerned. We find it to be of no value at all and ought not to have been relied upon by the learned trial magistrate as he did in the judgment. It surprises us that the learned trial magistrate would base reliance on such evidence to justify a conviction of robbery with violence having refused to accept the same as supporting the rape charges!

As observed by the learned trial magistrate, that all witnesses were in agreement that security lights were on outside the houses of P.W.1, P.W.5 and P.W.6, leading the learned trial magistrate to conclude that the same

"***was enough to see someone,"***

we are however not satisfied that such light could, given the facts and circumstances herein, be considered adequate for one to see anything more than a silhouette. That being the case, we refuse to accept the learned trial magistrate's finding that the appellants' were well identified. We also disagree with the lower court that the parades described hereinabove were well conducted. It appears to us that the only right thing the learned trial magistrate did as she arrived at her findings was to draw guidance from the Honourable Mr. Justice Bosire's (now J.A.) findings in **MWEREO VS. REP. [1990] KLR 267** that to have charged the appellant's with separate counts of assault under section 251 of the Penal Code when the alleged assaults were said to have been committed in the course of the same robbery incident was tantamount to subjecting the appellants to double jeopardy. The learned trial magistrate therefore did the right thing to acquit the two on those counts.

For the reasons given above we find that the appeals herein must succeed. We also note that the above reasons notwithstanding, the evidence adduced did not support the particulars of the charge in that no single witness testified as having seen any of the attackers armed with a panga. The learned trail magistrate ought also to have taken note of the reference by P.W.8 (an investigating officer) to the 1st accused (2nd appellant) as "***Erick Kipkoech Alias Rabuyo"*** when in all the charges his name appears as Elly Kipkoech Korir. Such a reference clearly creates a doubt as to whether the said officer arrested and charged the correct person.

The above said, we accept the appellants' grounds of appeal as valid. We consider the State's concession of the appeal to be the right thing to have done in the circumstances. We therefore allow both appeals with the result that the convictions are hereby quashed and the death sentence set aside.

Accordingly the two appellants are hereby set free and are to be released from jail forthwith unless they be otherwise lawfully held.

Dated, Signed and **Delivered** at **Nakuru** this 21st day of November, 2008.

D. M. MARAGA **M. G. MUGO**

JUDGE **JUDGE**