REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 215 & 216 of 2004

JARED OGETO GICHANA ….………………………..……… APPELLANT

VERSUS

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

(CORAM: LESIIT, MAKHANDIA, JJ)

(Appeal from original Conviction and Sentence of the Chief Magistrate's Court at Nairobi in Criminal Case No. 3079 of 2002 by W. A. Juma – S.P.M. – Nairobi)

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 216 OF 2004

JUSTUS THOMAS ISOE …………………………………… APPELLANT

VERSUS

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

(Appeal from original Conviction and Sentence of the Chief Magistrate's Court at Nairobi in Criminal Case No. 3079 of 2002 by W. A. Juma – S.P.M. – Nairobi)

J U D G M E N T

JARED OGETO GICHANA hereinafter referred to as the 1st Appellant and JUSTUS **THOMAS ISOE** hereinafter referred to as the 2nd Appellant were the 2nd and 1st accused persons respectively in the trial before the subordinate court. They were jointly charged with one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. Each Appellant further faced a separate count of attempted rape contrary to **Section 141** of the **Penal Code**. The Appellants were duly tried and at the conclusion thereof, were both found guilty on the robbery with violence charge and were accordingly convicted and sentenced to death being the only permissible sentence under our statute books. They were however acquitted of the other offences.

The Appellants were aggrieved by their conviction and sentence. They therefore separately and independently lodged the instant appeals which we ordered to be consolidated when they

came up for hearing; the reason being that they arose from the same criminal case in the subordinate court as well as for ease of hearing.

When the appeals came up for hearing the 1st Appellant was represented by **Mr. Mogikoyo**, learned counsel whereas the 2nd appellant appeared in person. The state was represented by **Mrs. Kagiri** learned State Counsel. **Mr. Mogikoyo** hinged the 1st Appellant's appeal on two grounds; identification of the 1st Appellant and secondly, failure by the prosecution to prove the case against the 1st appellant beyond reasonable doubt. As for the 2nd appellant his grounds of appeal were similar to those of 1st appellant save for the further ground that the trial magistrate erred in law and fact in rejecting the alibi defence put forth by the appellants.

The prosecution case put briefly was that on 17th August, 2002 P.W.1 (complainant) boarded a matatu at about 10.30 p.m. at Tusker stage in the city centre. She was destined for Kayole where she resided. She never got to know the registration number of the said matatu. She was however the last passenger to disembark. When the matatu reached the bus stage where she was to alight, the matatu zoomed off instead of stopping. The conductor who had hitherto been sitting opposite the driver suddenly moved to the passenger door next to where P.W.1 was seated and closed it. He thereafter switched off the lights inside the motor vehicle. P.W.1 asked the two why they were not stopping at her bus stage but received no favourable response. Soon thereafter, the conductor attacked her, tore her blouse and removed her cell phone from one side of the bra and handed it over to the driver. He also took her purse from the other side of the bra which had her identity card, medicinal tablets and Kshs.974/=. The conductor then floored her and attempted to have carnal knowledge of her from the rear albeit unsuccessfully as she put up a spirited fight. It was then that the driver stopped the matatu by the roadside, came over to where the two were struggling and forcefully thrust his fingers in the private parts of P.W.1, held her cervical bone with his palm and tried to pull her up. The duo struggled to loosen her grip on the metal rails in the matatu that she was supporting herself with to no avail. Suddenly there appeared an oncoming vehicle which illuminated the scene and inside the matatu. The driver then left her and drove off the matatu. In the process, P.W.1 attempted to shove off the conductor. However the conductor still managed to hold her tightly and to cover her nose as well as the mouth. He twisted her left finger and attempted to push his penis into her mouth. As all these was happening, a police vehicle suddenly appeared and passed by. The duo panicked and then dropped P.W.1 along Kangundo road near super loaf bakery and drove off. She thereafter flagged down a passing by motor vehicle which was a matatu which dropped her at a nearby Caltex Petrol station from where she made her way to Buru Buru police station where she reported the incident.

In the course of the episode, she managed to note some writings on the matatu such as "No gain" and "Swiss beats". She had also been able to notice the driver's facial appearance which was familiar to her. She also saw and noted the facial appearance of the conductor. In doing so, she was assisted by the lights inside the matatu. According to P.W.1, the driver was the 2nd appellant whereas the conductor was the 1st appellant.

Upon reporting the incident, P.W.1 was advised to seek medical treatment. She was however issued with a P3 form. Subsequent thereto the P3 form was duly completed by P.W.2 who classified the injuries sustained by P.W.1 as harm. Using the information given by P.W.1, the police managed to impound the suspect matatu together with the driver and conductor. P.W.1 was then summoned to the police station for identification parades. Three identification parades were conducted. In the 1st parade P.W.1 did not identify any of the suspects. Instead, she picked on another person quite unconnected with the case. In the subsequent 2 parades conducted by P.W.4 and P.W.5 she was able to pick out the two appellants. The appellants were then charged.

Put on their defence, the appellants in their sworn statements all put forth alibi defence. They all claimed that on the night of the alleged crime, they were away in Murang'a having been hired

to ferry some people for a function. The function was held overnight. They left for Murang'a at 2.30 p.m. on the material day and came back the following day at about 8.00 a.m. when they handed over the motor vehicle to the owner and proceeded to their respective homes. It was a Sunday and they do not work on that day as it is a rest day. On Monday they resumed duty and worked as usual until 27th August, 2002 when they were arrested. As proof that they had been away in Murang'a, the appellant sought to introduce in evidence a Notice to attend court served on them by the traffic police for carrying excess passengers along Ruiru-Thika road. Subsequent to their arrest, they were subjected to an identification parade and although they were picked by P.W.1 the 1st appellant claimed that P.W.1 had seen him in the interrogation office prior to the parade. As for the 2nd appellant he faulted the identification parade because P.W.1 knew him as they were neighbours and therefore the identification parade was unnecessary. To the appellants the case was but a frame up.

In support of the appeal by the 1st appellant, Mr. Mogikoyo submitted that it was not possible for P.W.1 to see the appellants and master their faces in the circumstances of this case. Counsel submitted that although it was claimed that there was light inside the motor vehicle, there was no evidence to show how bright the lights were or how long P.W.1 kept the appellants under observation. Further, P.W.1 did not say how close she was to the appellants. According to her evidence P.W.1 was seated on the 3rd seat after the door. She was therefore not seated next to the appellants and according to learned counsel, there was no evidence that the appellants ever came face to face with her. Counsel concluded his submissions on this issue by stating that the evidence of identification was doubtful and if it had been ignored there would have been no other evidence to convict the appellants.

On the 2nd ground of appeal, counsel submitted that P.W.1 did not give the Registration number of the matatu apart from giving fancy names. That those who gave a lift to P.W.1 after the ordeal never testified and that the OB report did not show that the matatu had the fancy names. "No gain" and "Swiss beats." Counsel further pointed out that P.W.1 admitted under cross-examination that she had lied when she said that she was not dropped at the stage. Counsel posed the rhetorical question – If she can lie on a matter like this, what else did she lie about?

On the defence of alibi, counsel submitted that the same was raised at the earliest opportunity but was never investigated. To counsel therefore the defence remained valid as it was never shaken. If the appellants were not at the scene of crime in line with the Alibi defence, then the alleged identification was doubtful. The prosecution should have called evidence in terms of section 212 of the Criminal Procedure Code to rebut the Alibi. They did not. To counsel it was not up to the appellants to prove their Alibi. For this submission, Counsel relied on the case of **WANG'OMBE VS. REPUBLIC (1980) KLR 149.** Counsel also referred us to the case of **ANTIPHACE HERMAN VS. REPUBLIC C.A. NO. 40 OF 1997 (unreported)** for the proposition that the magistrate should have considered whether the appellant's defence was probably true and consistent.

To crown his submissions, counsel maintained that P.W.1 was not a credible witness in the light of her clear admission that she had lied about not being dropped at her bus stage. Counsel also mentioned the fact that P.W.1 had claimed that she was bleeding from her private as a result of the 2nd appellant inserting his fingers in her private parts, yet there were no bloodstains at all on her pants which were exhibited in court. Her evidence being of a single identifying witness ought to have been handled with a lot of circumspection which was not the case. For this submission counsel referred us to the case of **RORIA VS. REPUBLIC (1967) E.A. 583.**

On his part the 2nd appellant tendered written submission in support of his appeal which we have duly considered.

The appeal was opposed. **Mrs. Kagiri**, learned state counsel in opposing the appeal submitted that the attack on P.W.1 was committed after all the passengers had disembarked. From the time P.W.1 boarded the matatu upto the time of the attack, the lights in the matatu were on. Accordingly, P.W.1 was able to see the appellants clearly. She was also able to see the appellants with the assistance of the headlights of another vehicle which passed by. Counsel further submitted that P.W.1 was in close proximity with the appellants which again accorded her an opportunity to see the appellants clearly. Counsel further referred to the identification parades conducted in respect of the appellants and submitted that P.W.1 easily picked out the appellants. This went further to buttress the evidence of identification by P.W.1. The circumstances obtaining during the attack were favourable for positive identification. Counsel submitted that though P.W.1 was a single identifying witness, her evidence was corroborated by the evidence of identification parades and that the court duly warned itself of the dangers of acting on such evidence before convicting the appellants.

On credibility, counsel submitted that P.W.1 was a credible witness. The trial magistrate was impressed by the demeanour of P.W.1. The magistrate saw the witness and was in a better position to comment on her demeanour.

Finally, on Alibi, Counsel submitted that though the Alibi was not tested, the learned magistrate weighed the same against the prosecution evidence before rejecting it.

In the case of **GABRIEL KAMAU NJOROGE VS. REPUBLIC (1982-88) KAR 1134,** it was held that:-

"…… ***It is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for it ……."***

In determining this appeal, we shall be guided by the said enunciation. The conviction of the appellants turned on their purported identification by P.W.1 and the credibility of P.W.1 as a witness. It is important to bear in mind that P.W.1 was the only witness who identified the appellants as the culprits. In the case of **GIKONYO KIRUMA VS. REPUBLIC (1980) KLR 23,** the court of appeal held:

"…… ***where conviction depends upon the identification of the defendant by a single witness the evidence of that witness must be always tested with the greatest care. The court must satisfy that it is safe to act upon that evidence. Whether its safe is a question of mixed law and fact………"***

Did the learned magistrate test the evidence of P.W.1 with the greatest care? We are afraid that the answer to that question must of necessity be in the negative. P.W.1 boarded the matatu at about 10.30 p.m. This was at night. Although the learned state counsel submitted that the lights inside the matatu were on throughout, from the time P.W.1 boarded the motor vehicle to the point where she was attacked, that submission is not borne out by the record. The recorded proceedings do not disclose that fact. Even if we were to assume that indeed the lights were throughout, the learned magistrate did not inquire as to the intensity of the said light, its source in relation to the appellants and for how long P.W.1 kept the appellants under observation as to be able to identify them subsequently. The lights could have been dim or even coloured as is common with fancy matutus thereby making it impossible or difficult for P.W.1 to see and identify any person. It was also necessary for the learned magistrate to have inquired as to whether there were other passengers in the matatu. If there were and the record seems to suggest that there were, then the magistrate should have established whether the matatu was full with the passengers. If it was teaming with passengers then could P.W.1 have been in a position to see the appellants sufficiently as to be able to identify them. Further the

2nd Appellant was a driver, how possible was it for P.W.1 who was seating on the 3rd seat after the door of the matatu be able to see the 2nd appellant's face which was facing the same direction as hers. The closest that the 2nd appellant came face to face with P.W.1 was when he stopped the motor vehicle and attempted to overwhelm her by forcing his fingers into her private parts. However, this was all done in darkness as the conductor had already switched off the lights and closed the door of the matatu. Further, the conductor was already molesting P.W.1 with a view to having carnal knowledge of her and we doubt in those circumstances that P.W.1 could have had presence of mind to observe the 2nd appellant keenly as to register his facial appearance.

We would also add that if indeed there were passengers in the matatu P.W.1's observation of the appellants would have been impeded and or distracted by the constant movements of the passengers as they alighted and others boarded the matatu making it even harder for P.W.1 to identify any of her attackers.

It is also worthy noting that the learned magistrate did not bother to find the time taken between when P.W.1 boarded the matatu and when she was attacked. From her own account prior to her being attacked, the 1st appellant had been sitting next to driver. He left the co-driver's seat to come to where she was, closed the door and then switched off the light. At what stage if at all did the 1st appellant move to co-driver's seat. It is not clear from the evidence of P.W.1. Is it possible that perhaps throughout the journey, the 1st appellant was sitting with the 2nd appellant in the driver's cabin? That possibility exists. If that be the case, how could P.W.1 have been able to identify him with his back turned to her throughout the journey. It is not stated in evidence that the 1st appellant in the course of the journey came to P.W.1 to demand for the fare. This could have been the opportunity for P.W.1 to perhaps come face to face with the 1st appellant. The other opportunity could have been when the 1st appellant came to switch off the lights and close the door. However, the court was not told where the switch was. Is it possible that the switch could have been in a place where it was impossible for P.W.1 to see the 1st Appellant? That possibility too cannot be ruled out.

P.W.1 also claimed that as she was being brutally attacked she was able to identify the appellants courtesy of the headlights of another motor vehicle that passed by. That vehicle, it is important to note never stopped. The speed of the said oncoming vehicle was never gauged, implying that the said source of light was unreliable as it may only have afforded P.W.1 if at all, a fleeting glance of the appellants. It is possible that it did not adequately illuminate inside the matatu too. P.W.1 further claimed that with the assistance of the lights from the said motor vehicle she was able to note the fancy names on the matatu such as "No gain" and "Swiss beats". We highly doubt that P.W.1 would have been able to notice such things considering that she was under brutal attack and was trying to ward off forceful sexual advances from the appellants. Our observation is supported by the fact that having looked at the photographs of the matatu that were produced in evidence, we note that the words "Swiss beats" are written on the lower outside body of the matatu at the rear. There is no way therefore that P.W.1 who was inside the matatu would have been able to see those words with the assistance of the lights from the oncoming vehicle. As for the words "No gain" it would appear from the OB that when P.W.1 made the report, she indicated that the words were written at the rear. Subsequently the OB report was altered to read that those words were written on the front side of the matatu. It is not clear who made the alteration. We note that the OB went missing from the police station for a long time. No reasonable explanation was given. It took the court's intervention before it was produced. And when produced it had those alterations which nobody took responsibility. We would also add that those fancy names were not sufficient to identify the motor vehicle. Indeed both P.W.1 and P.W.6, the investigating officer, admitted under cross-examination that they were not sure whether that was the only motor vehicle with those fancy names.

P.W.1 was dropped from the ill-fated matatu on the night in question and was assisted by

good Samaritans in another matatu. She claimed that:-

"……*.. When I explained to the conductor in this matatu, he said that was the matatu ahead of us ..*"

Surprisingly none of these witnesses from this matatu were called to back up the appellants' story. Further P.W.1 never even asked them to pursue the said matatu so that she could at least obtain the Registration number. All these will have provided the necessary and material corroboration.

In relation to the evidence of the identification parades, we note that both appellants complained regarding the manner in which they were conducted. For the 1st appellant, he noted that he had been with the P.W.1 in the interrogation room and as for the 2nd appellant, that she was a neighbour well known to him. Accordingly, it was not necessary to have the identification parades. These complaints are not without merit considering the kind of weight that P.W.1 seem to have carried around the police station. She had been to the police station a couple of times and when she was told by the District Criminal Investigations Officer (D.C.I.O) that they would prefer charges against the appellants that were not to her liking, she went looking for the Provincial criminal investigations officer (P.C.I.O.) who compelled the D.C.I.O. to prefer the charges that P.W.1 wanted. A point also worthy noting is that P.W.1 attended an identification parade, prior to the arrest of the appellants and picked on a suspect whose arrest was not in connection with this case. This action dented further P.W.1's evidence of identification. In the case of **ABUBAKAR MUSA YAKUBA VS REPUBLIC, C.A. 85 OF 2000 (unreported),** the court held:-

"…… ***It is an error to sustain the conviction solely based on identification of one person in unfavourable circumstances and in the absence of corroborative evidence. In our judgment it is unsafe to say the least, to sustain a conviction based on such circumstances……."***

We are of the same persuasion in the circumstances of this case. There was absolutely no other evidence, direct or circumstantial that would have corroborated P.W.1's evidence of identification. We further note, contrary to the submissions by the learned State Counsel that the learned trial magistrate did not warn herself of the dangers of relying on the evidence of a single identifying witness to return a conviction. This was a fatal error. See **GENERALLY RORIA VS. REPUBLIC (1967) E.A. 583.**

The appellants raised at the earliest possible opportunity the defence of Alibi. They said that on the material day they had been hired to ferry passengers to Murang'a for a function whereat they stayed overnight. In support of the contention, the appellants produced a copy of a police bond served on them by the OCS, Thika Police Station for carrying excess passengers along Ruiru-Thika road. This Alibi defence was not at all investigated by the prosecution though raised that early. The prosecution never availed the OCS, Thika police station to counter the allegation. Indeed even in cross-examination by the Appellants P.W.6 was not sure whether the matatu had left Murang'a by the time the offence was committed. He stated: -

"……***. I am aware that the accused had been hired to Murang'a that day ……. I did not know the time the motor vehicle came back from Murang'a. I do not know if the motor vehicle was still in Murang'a the time this offence was committed …….."***

In our view the Alibi defence remained unchallenged to the end of the prosecution case. Indeed the doubts raised by P.W.6 regarding whether or not the matatu was in Nairobi at the time of the offence ought to have been resolved in favour of the Appellants. In purporting to discount the Alibi, the learned magistrate in her judgment stated: -

"…… ***It is the court's belief that the motor vehicle may have gone to Murang'a but was***

back in Nairobi at the time of the alleged offence……"

In our view there was no basis for that finding. There was no evidence led along the those lines. In doing so and with tremendous respect to the learned magistrate, she was engaging in speculation and assumption. Courts of law act on evidence and not on mere speculation and assumptions.

In the case of **<u>WANG'OMBE VS. THE REPUBLIC</u> supra** the court held and is worth repeating that:

"…***. When an accused raises an Alibi as an answer to a charge made against him, he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the Alibi is raised for the first time in unsworn statement at his trial, the prosecution ought to test the Alibi whenever possible but different consideration may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the Alibi against the evidence of the prosecution……"***

The State conceded that the prosecution did not test the Alibi defence. However, the available evidence is that the defence was given at the earliest opportunity. The investigating officer was under an obligation to resolve whether the matatu was still at Murang'a or had come back to Nairobi at the time of the crime. Failure to resolve the issue meant that the alibi was unchallenged. It is not lost on us that the appellants were consistent from the time they were arrested to the time they were brought to court and up to the time they gave their sworn statements of defence that they were not in Nairobi at the time of the attack on P.w.1. In the Tanzanian case of **<u>REPUBLIC VS. WILBALD TIBANYENDELA (1948) EACA III</u>,** quoted with approval in the case of **<u>ANTIPHACE HERMAN VS. REPUBLIC C.A. NO. 40 OF 1997</u> (unreported),** the court observed:-

"……***. The fact that an accused person has made a statement denying his guilt very soon after he has been charged with the offence may often be very relevant as showing the consistency of facts as given by him at his trial and may in some cases be the last ounce which turns the scales in his favour……"***

The statement fits so well in the circumstances of this case such that we need not say more.

The learned trial magistrate was of the opinion that P.W.1 was a credible witness having observed her demeanour. We are however unable to agree with that conclusion by the magistrate. P.W.1 clearly admitted under cross-examination that she had lied to court when she claimed that she was not dropped at her bus stage. She also lied that her bra was torn during the struggle yet at the police station it was observed that it was not torn at all. Further P.W.1 claimed that she was bleeding from her private parts as a result of 2nd appellant forcefully inserting her fingers in her private parts yet when she handed over her pants to the police, there was no single stain of blood on it. Because of these inconsistencies which are not explained at all, we are of the view that P.W.1 could not have been a credible witness. The same witness admitted to having gone to see the appellants at Kamiti remand prison. When told that she had gone there purposely to extort money from the appellants who put her claim at Kshs.40,000/= to drop the charges, she denied. The question that arises then is why she took the trouble to see the Appellants in custody.

We find that this appeal has merit. The sum total of what we have said is that we allow the appeal, quash the conviction and set aside the sentences as meted out on the appellants and order the appellants' immediate release unless otherwise lawfully held.

Dated at Nairobi this 8th day of March 2007

…………………………….

J. W. LESIIT

JUDGE

………………………….

M. S. A. MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants

Mr. Mogikoyo for the 1st Appellant

2nd Appellant in person

Mrs. Kagiri for the Respondent

CC: Tabitha/Erick

…………………………….

J. W. LESIIT

JUDGE

………………………….

M. S. A. MAKHANDIA

JUDGE