



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

**APPELLATE SIDE**

*(Coram: Ojwang, Sitati, JJ.)*

**CRIMINAL APPEAL NO. 56 OF 2005**

BETWEEN

**ROBERT MAKAU KASEVA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the Judgement of the Senior Resident Magistrate, N.N. Njagi, Esq at the Kangundo Law Courts, in Criminal Case No.1130 of 2004, dated 23<sup>rd</sup> June, 2005)*

**JUDGMENT OF THE COURT**

The appellant was charged, in the first count, with robbery contrary to s.296(2) of the Penal Code (Cap.63). The particulars were that, on 22<sup>nd</sup> September, 2004 at 8.00pm, at Ngararia Village, Koma Sub-Location, Komarock Location in Machakos District, jointly with others not before the Court, and while armed with dangerous weapons namely swords, he robbed **Juliana Nduku** of one National Star radio cassette, one solar panel, one pressure lamp, one bag, one chair, one camera, two electrical irons, one cellphone charger and Kshs.1,400/=, and at, or immediately before, or immediately after the time of such robbery, he used actual violence on the said **Juliana Nduku**.

In Count 2 the appellant was charged with defilement of a girl under the age of 16 years contrary to s.145(1) of the Penal Code (Cap.63). The particulars were that, on 22<sup>nd</sup> September, 2004 at Ngararia Village of Komarock Location, in Machakos District, jointly with others not before the Court, he had carnal knowledge of **Salome Mawia Mutiso**, a girl under the age of 16 years. To this count, there was an alternative charge of indecent assault on a female, contrary to s.144(1) of the Penal Code (Cap.63). The particulars were that the appellant, on 22<sup>nd</sup> September, 2004, at Ngararia Village, Komarock Location in Machakos District, jointly with others not before the Court, unlawfully and indecently assaulted **Salome Mawia Mutiso**, a girl under the age of 16 years, by touching her private parts.

In Count 3 the appellant was charged with the offence of rape contrary to s.140 of the Penal Code (Cap.63). The particulars were that on 22<sup>nd</sup> September, 2004 at Ngararia Village, Komarock Location in Machakos District, jointly with others not before the Court, he had carnal knowledge of **Juliana Nduku** without her consent. To this count of the charge, there was an alternative charge of indecent assault on a female contrary to s.144(1) of the Penal Code (Cap.63). And the particulars were that the appellant, on 22<sup>nd</sup> September, 2004 at Ngararia Village, Komarock Location in Machakos District, jointly with others

not before the Court, unlawfully and indecently assaulted **Juliana Nduku** by touching her private parts.

The trial Court heard the evidence of **Juliana Nduku** (PW1) and **Salome Mawia Mutiso** (PW3): both testified that they had been attacked by robbers at 8.00 p.m. on 22<sup>nd</sup> September, 2004, as they rested in their living room. When, at that time, PW3 went out of the house to relieve herself, she was accosted by the invading robbers. She was hit with the flat side of a sword and she fell; and when PW1 rushed outside to help, she herself was hit with the sword all over the body, her left-hand fingers being cut. The robbers frogmarched PW1 into her bedroom and demanded money with menaces. The sum of Kshs.1,400/= was seized from her. PW1 and PW3 testified that during this ordeal, they were able to see the attackers, as the lights in their house were on. Of all the robbers who entered the house, the two witnesses were able to identify the appellant herein.

PW1 testified that, when the attackers obtained no more money than Kshs.1,400/= from her, they abducted her and forced her to come with them up to Ituuma River, where they ordered her to lie down on her stomach, and to remove her underwear. The attackers then raped her, without the use of condoms. PW3, who had been left with other robbers at the residence, testified that she too had been beaten up and sexually assaulted. PW4, **Dr. Anne Wairagu** of Kangundo Hospital, who examined both PW1 and PW3, confirmed that they had been sexually assaulted, and that they had been physically assaulted. PW4 produced P3 forms as part of her medical evidence on PW1 and PW3.

PW2, **Inspector of Police Kiprop** had conducted an identification parade, in the course of which the appellant herein was identified by PW1 as the man who robbed and sexually assaulted her. PW1 had known the appellant before, as the appellant once worked for her.

When the trial Court put the accused to his defence, he elected to give an unsworn statement from the dock, and called no witnesses. He told the Court that he knew nothing about the offences with which he had been charged.

From all the evidence, the Court held, and correctly, in our view, that PW1 and PW3 had properly identified the appellant herein, as one of the robbers who robbed and raped the complainant, on the material night. The two had clearly seen the appellant, as the house in which they were attacked was electrically lit, by means of solar panels; and the robbers later switched off the lights only after they had been seen by the complainants. PW1 had identified the appellant as the robber who assaulted her in the course of the robbery, and the one who raped her; and the P3 form produced in the trial Court showed that both PW1 and PW3 had been sexually assaulted: so, just as charged in counts 2 and 3, rape and defilement had been committed by the gang of robbers which included the appellant herein. The learned Senior Resident Magistrate found that the identification parade had been properly conducted by PW2, and that on that occasion, reliable identification had taken place, of the appellant herein. The trial Court found that even the appellant herein did admit that the complainants did pick him out, at the identification parade.

We are in substantial agreement with the trial Court's finding thus expressed:

***“The Court has been convinced that the prosecution evidence is overwhelming and there are no doubts that the main charges have been proved beyond any reasonable doubt. The defence by the accused is just a mere denial of the offence, and it should be dismissed by the Court as it does not address itself to the evidence before the Court, and the charges that the accused is facing. The Court makes a finding that the main charges in Counts 1 and 2 and 3, have been proved beyond any reasonable doubt.”***

The learned magistrate found the accused guilty as charged, and convicted him and sentenced him to death as provided by law.

The learned Magistrate, however, though finding the appellant guilty on the main counts, pronounced sentence only in respect of count 1. This point has been raised before us by learned State Counsel **Mr. Omirera**; he seeks guidance on whether the trial Court was entitled to convict on counts 2 and 3, and if

so, whether it was proper for the Court to fail to pronounce sentence for those counts. He urged that the Court should have awarded punishment for those two counts: because the sexual offences carried in those counts are distinct from aggravated robbery contrary to s.296(2) of the Penal Code.

We have considered the challenge to the trial Court's judgement as made by the appellant in his memorandum of appeal, in his written submissions and otherwise; and we have found that he has no case in that regard which addresses issues in the well-focused analysis of evidence by the trial Court, which culminated in conviction. We therefore dismiss the appellant's appeal in respect of the 1<sup>st</sup> count. We uphold conviction and sentence as awarded by the learned Senior Resident Magistrate.

We have also considered the contention made for the respondent, that since the trial Court found the appellant guilty also as regards sexual assaults in the main counts numbers 2 and 3, sentence ought to have been awarded for the same. We find this argument to be of merit, and would state that whenever a charge is laid in a plurality of counts that bear differing penalties, the trial Court should in the first place, where it convicts, pronounce sentence in respect of each count. Thereafter, in a case in which the most serious count attracts the death penalty, then the lesser sentences should remain suspended, while the capital one takes effect.

We have considered the evidence relating to the 2<sup>nd</sup> and 3<sup>rd</sup> counts of the charge, and we find that it was not safe to convict the appellant on the 2<sup>nd</sup> count: defilement of a girl under the age of 16 years. There is evidence that other robbers had detained PW3, some distance away, even as PW1 was being subjected to the rape ordeal along the Ituuma River. There was no proof, therefore, that the appellant was one of those who sexually assaulted PW3.

At the time the offences herein took place, the governing law on sexual offences was the Penal Code (Cap.63), ss.139 – 169; but these were later repealed, and the entire law on sexual offences translocated to a new statute, the Sexual Offences Act (Act No. 3 of 2006), in respect of which the date of commencement is indicated as 22<sup>nd</sup> July, 2006. The penal provisions relating to rape have not changed much under the new law, and it makes little difference, in essence, whether sentence for rape is awarded on the basis of the Penal Code, s.140 (now repealed), or under s.3(3) of the Sexual Offences Act (Act No. 3 of 2006).

For the offence of rape, which the appellant was proved to have committed against PW1, and in respect of which the learned Senior Resident Magistrate duly entered a conviction, we sustain that conviction and, furthermore, impose a term of imprisonment of 25 years; but this sentence, in the light of the death penalty meted out on the 1<sup>st</sup> count, shall remain suspended. We acquit the appellant in respect of the 2<sup>nd</sup> count quash the conviction and set aside the sentence imposed upon the appellant in respect of that count. The trial Court had made no finding in respect of the alternative charges in counts 2 and 3 respectively. We think, in the light of the evidence and the convictions entered, that there was good cause for such a decision and we uphold it.

***Orders accordingly.***

**DATED and DELIVERED** at Machakos this 11<sup>th</sup> day of May, 2007.

**J. B. OJWANG**

**JUDGE**

**R.N. SITATI**

**JUDGE**