REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 542 of 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 1631 of 2002 of the Senior Resident Magistrate's Court at Kiambu (J. Ondieki (Mrs.) – SPM)

JOHN NJENGA MUKUHI……...…….……..……..APPELLANT

VERSUS

REPUBLIC……..……..…….....RESPONDENT

J U D G M E N T

JOHN NJENGA MUKUHI was charged with three counts of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code and one count of RAPE contrary to Section 140 of the Penal Code and in the alternative to the latter charge **INDECENT ASSAULT ON A FEMALE** contrary to **Section 144(1)** of the Penal Code. All the offences were committed on the same day 25th October 2001 in Kiambu District along Naivasha/Nairobi Highway for the robbery counts and K village for the rape charge. After a full trial the Appellant was convicted in all main counts. For the robbery with violence charges, the Appellant was sentenced to death while for the rape charge he was sentenced to 20 years imprisonment with 10 strokes of the cane and hard labour. The learned trial magistrate ordered the sentences in all four counts to run concurrently. However, that was an error. Three capital sentences cannot be executed simultaneously as humanly speaking, a person can die only but once. The proper order to have made after sentencing the Appellant should have been to suspend the sentences in counts 2, 3 and 4. Be that as it may, the Appellant was aggrieved by the conviction and the sentences and therefore lodged this appeal.

The Appellant had filed his appeal in person. However, he hired the services of **GACHOKA & CO. ADVOCATES** who put in supplementary grounds of appeal. In that supplementary, there are thirteen grounds of appeal.

We have perused these grounds and find that they were argumentative and repetitive. We think that they cover the following broad areas.

1. The evidence of identification.

2. The inconsistency and contradictory evidence of the prosecution witnesses.

3. The lack of medical evidence.

4. Failure by the learned trial magistrate to give due consideration to the Appellant's defence case.

5. Failure to consider the prolonged detention of the Appellant by the police for 21 days.

We have evaluated and analyzed the evidence adduced before the trial court as expected of a first appellate court, while giving due allowances for the fact that we neither saw nor heard any of the witnesses. See **OKENO vs. REPUBLIC 1972 EA 32** and **GABRIEL KAMAU NJOROGE vs. REPUBLIC [1982-88] 1 KAR 1134**. We summarize the evidence as follows: -

On the 28th October 2001, the main Complainant E, PW1, her husband M, PW2 and her sister N PW3 together with two children left K where they had gone to see E's sick mother. At 6.30 p.m., the five stopped their vehicle, which M was driving, to enable the older of the two children; K aged 5 years to relieve himself. They stopped at the bus stage just below the flyover. No sooner had K relieved himself and his father had returned him to the vehicle than two men both drawing guns approached them. M was ordered to the back seat where he sat with one of the gunmen. The other one sat next to E and took over the driving. They threatened them with death saying they would not be the first people they ever killed. The man who took over the driving of the car did not seem to know how to drive and E took the role of giving driving instructions on the man's command. They were driven to a village and on the way there, they were robbed of their mobile phones, each one phone and all the cash they had. The man driving kept threatening E saying she was too proud and that she had not given out all the money. He also kept asking E about the place they had visited, who was sick and the nature of illness. After driving near some village, the man driving stopped and the man who was sitting at the rear went away. The man at the rear had threatened to shoot the Complainants to death saying they were not the only people he would have killed. As they waited for the one who left, the driver man started fondling E all over saying he wanted to see if she had given out all the money. He then ordered her out and continued fondling her on the breasts. His accomplice returned with a short man who was armed with a gun. The short man took over the driving sitting next to E. His accomplices referred to this man as master. He was a good driver. He drove to a deserted place where the poor driver ordered E out, took her to the rear of the vehicle where he raped her as she held onto the rear door of the vehicle. The man who had gone to call master was not happy and he kept a gun on E's head threatening to kill her as the "poor driver" raped her. She pushed away the gun and the man put it on her stomach telling the "poor driver" to stop raping her so he could shoot her but he continued raping E. Eventually 'master' quarreled the two accomplices and ordered them back into the vehicle. At every point any of the vehicle doors were opened, the inner lights of the vehicle went on. Master drove back to the village where they had been initially and there E was pulled out of the vehicle, dragged into a thorny bush where two of the men at a time raped her as a third one kept guard over M and N. They raped E in turns for along time. Eventually the three took her back to the vehicle. E left her pant behind saying the men used it to wipe themselves. They argued between themselves whether to kill them or to release them and whether to take the vehicle or not. Eventually as they argued among themselves and as E fervently pleaded to have their lives spared for the sake of the children, the robbers thoroughly searched the vehicle taking all variables they could including clothing in bags, their jackets, watch, spare wheel, jerk and two more mobile phones. After thoroughly beating him, they ordered M to take over the vehicle and drive it away very fast. It was five hours or more since their first encounter with the gun man that they were finally released. M drove straight to Nairobi Hospital where E was admitted for one month. N was by then hysterical. M was also treated. M called police and the next morning he led police officers in three vehicles to the scene of the hijacking, then to the scene of where they were stopped first. At that scene M saw and recognized the man who had carjacked them and who had been driving erratically and he identified him to the police. It was the Appellant. The man, upon seeing the vehicles, started running away. One of the police Officers, PW4 **IP Chebare** immediately alighted chased and arrested him. The man is the Appellant. He led police to his house where a search yielded nothing.

PW6, **IP Kitheke** conducted an identification parade in which N, PW3, identified the Appellant as the 'poor driver' who had hijacked them and had driven the car erratically and who first raped her sister E. The parade was conducted on 2/11/01, one week after the incident. We have noted that the court jumped one number and instead of giving **IP Kitheke** PW number 5 the trial court gave him number six.

The Appellant gave a sworn defence and called 4 witnesses. In his sworn defence he told the court that after his arrest he took police to his home where they found his mother and sisters. The houses were

searched and nothing was taken. That after a few days, he was taken to an identification parade where he was the only slim person. That a lady who had been present during his arrest was called and she identified him in the parade. He said that his blood, saliva and urine samples were taken but the results were never disclosed.

Concerning 28th October, the Appellant gave alibi defence. He said it was a Sunday and that he had spent the whole day at home with a hired house help whom he called as DW1. The Appellant called four witnesses in total. The Appellant stated that he was arrested on his way back from his uncle's place where his mother had sent him to deliver milk.

DW1 confirmed the Appellant's alibi defence and stated that she spent the whole day Sunday with him and that he had even cooked supper for everyone. DW1 however gave the date she spent with the Appellant as 29th.

DW2 was the Appellant's first cousin. Her evidence was that on 28th October she went to Church in Nairobi with the Appellant's mother. That they returned home together at 4.00 p.m. and arrived at 6.30 p.m. They found the Appellant and DW1 at home. That the Appellant, herself and DW1 stayed up until late at night before retiring for the night.

DW3 was Appellant's cousin who confirmed that the Appellant went to their home with Police officers on 29th October and that the home was searched.

DW4 was Appellant's mother. She confirmed spending 28th October with her son between 6.30 p.m. and 11.00 p.m. when they retired for the night. DW4 also confirmed leaving the Appellant at home with DW1 on Sunday morning with instructions they do housework, and cook food. DW4 said that the Appellant cooked supper for them from 6.30 p.m. on 28th October. DW4 also confirmed the Appellant's visit to her home with Police Officers who searched it. DW4 said she had sent the Appellant to his uncle's place to deliver milk and that police arrested him on his way back home.

Mr. Kangahi in his submissions challenges the ability of PW2 M to identify the Appellant by the road side near the scene one day after the incident, stating that no basis were laid for this witness to do so. **Mr. Kangahi** challenges the fact that PW2 had not given any descriptions to the police to enable him positively identify the Appellant. He submitted that count 1, to which PW2 was the Complainant, was not proved since the identification by M was in the circumstances flawed. **Mr. Kangahi** then submitted that in regard to count 2, PW3 N who was the Complainant in that count was contradicted in her evidence by M to the extent that while N said she was with M when she identified the Appellant in an identification parade the day he was arrested, M denied being with her that day. Further that the parade forms indicated that the identification parades were conducted on 1st November not 29th October as she alleged. **Mr. Kangahi** submitted that N did not give descriptions of the Appellant before his arrest in her statement to the police. He urged us to find that in view of the conflict in N evidence which he said were material, that count 2 was not proved.

In regard to count 3 and 4, **Mr. Kangahi** submitted that the evidence of identification in court by the Complainant in those counts, PW1 Elishipa, was dock identification which was worthless and ought not to have been considered. He relied on the case of **GABRIEL KAMAU NJOROGE vs. REPUBLIC [1982-88] 1 KAR 1134**, holding 2 where court held as follows: -

"***2. A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."***

Mr. Kangahi submitted that in regard to the rape charge, that the charge was not proved since the evidence of identification of the Appellant cannot hold. He urged us to find that the Appellant's appeal was good and to quash the conviction and set aside the sentence.

Mrs. Kagiri opposed the appeal in all four counts. Learned State Counsel submitted that the evidence of identification was very strong since the conditions prevailing at the scene during the incident was positive for a clear identification of the Appellant by all three Complainants. Learned Counsel submitted that according to the evidence of the Complainants the attack begun at 6.30 p.m. which was in broad daylight and that they were with the assailants for 4 hours during which time the robbers interacted with the Complainant. In actual fact the evidence of the Complainants is clear that the robbery took five hours not four. Learned Counsel submitted that E in her evidence said she helped the Appellant to drive the vehicle and that at the same time M sat at the back seat and later in the rear cabin seat within the car and so had a clear view of the assailants at all times, whether they were in or out of the vehicle. Learned Counsel submitted that N sat on the rear seat throughout and was able to see what was happening throughout. Learned Counsel urged us to consider the Complainant's evidence that the vehicle's inner lights went on anytime the door was opened and also the fact the assailants went in and out of the vehicle several times and therefore hold that the Complainants saw their assailants clearly to be able to subsequently identify them.

In regard to Appellant's arrest, **Mrs. Kagiri** submitted that she relied on the evidence of M who said that he was able to recognize the Appellant near the scene of the attack next morning and that way caused his arrest. Learned Counsel submitted that the evidence of identification by M was fortified by that of N. As to the date of identification parade, **Mrs. Kagiri** submitted that it was on 2nd November and left it to us to resolve. Learned Counsel agreed that E never attended any identification parade but submitted that the basis of the conviction was the evidence given by all three witnesses. Learned Counsel urged us to find the cited case of **NJOROGE VS. REPUBLIC** Supra, was distinguishable. We do not think the case is distinguishable since the court convicted the Appellant on the basis he was found in possession of the Complainant's stolen gun. In the instant case there are three identifying witnesses not one and not all the evidence is dock identification. The *reci dendi* of the cited case is not in conflict with the facts of this case.

Mrs. Kagiri also submitted that the trial magistrate was correct to find the alibi defence of the Appellant was full of contradictions and to reject it. Counsel urged us to dismiss the appeal for lack of merit.

The conviction of the Appellant turns on the evidence of identification. We think that the evidence of identification by the three witnesses ought not to be treated separately as **Mr. Kangahi** for the Appellant urged us to do. It has to be considered together and analyzed vis-à-vis the arrest of the Appellant.

In our own evaluation of the evidence, each Complainant gave very clear description of the assailants and the descriptions given by each Complainant was consistent. It was the three Complainant's evidence that at the scene of car jacking, two men armed with guns approached them, one who had a bad leg therefore limping and had broader shoulders and slightly taller. The other man had a soft voice, was shorter and wore a woolen hat which covered his ears but which he removed when he started driving. The same man was smaller in size than his accomplice. He was identified as the Appellant. The man brought in later was described as shorter and more stout than the other two. The Complainants were clear concerning the descriptions of each of the assailants. When N identified the Appellant in the identification parade. She described him as the 'bad driver'. M identified him to the police at the scene where they were car jacked as the 'erratic driver'. Each of them described the role played by the Appellant during the robbery vividly and consistently. They all said that he took over the driving from M and that E had to assist him drive as he seemed incompetent. He was described as the one who first raped E a and who caressed her, assaulted her and quarreled her more than the other accomplices as if he had something personal against her. All those Complainants were also in agreement that while the one with the bad leg went and returned with the short stout one they kept referring to as "master", it was the Appellant who was left guarding them.

We do find that the Complainants' descriptions of the Appellant was vivid, clear and consistent and remained so throughout the trial. We are also fully satisfied and we find and hold that each of the Complainants had seen the Appellant in broad daylight at the point he carjacked them at 6.30 p.m. and then drove erratically around slum villages areas in daylight before "master" was called and took over the

driving. We noted that M's evidence was that the vehicle's inner lights went on every time the vehicle doors were opened. From the evidence of N and E the inner lights were on throughout the ordeal. Whether on throughout or on only when the doors were opened, we note that from the evidence of the three Complainants, the assailants opened the doors several times as they went in and out of the car. They forced E and N out of the car and searched them once. They forced E out of the vehicle twice before 'master' joined them. They took E out two times to rape her. They also stopped the vehicle twice to search it. The three assailants argued and stopped the vehicle twice to search it for valuables and three times to get out. They opened the boot door once to let out M. These occasions were so many. The assailants had not concealed their faces. We are satisfied that each Complainant had ample time and opportunity to see and identity the assailants. We find that the subsequent identification of the Appellant by M one day after the incident and N in the identification parade was proper, safe and reliable identification of the Appellant. The Complainants were so clear of who they were identifying, that even though E's identification of the Appellant was dock identification, it was not worthless taking into account that N and M had identified him prior to their evidence in court. The evidence of identification by N and M afforded corroboration to E's dock identification of the Appellant

The identification by the three witnesses must be considered together. We find that the conditions of identification at the stage where the car jacking took place were conducive for a correct and positive identification of the Appellant. We also find that the length of time the Complainants stayed with the assailants, a period of at least five hours, gave the Complainants a clear and positive opportunity to see and identify their assailants and to enable them subsequently to positively identify them.

The evidence of the three Complainants describing the role played by the Appellants was detailed, consistent and corroborative. We have no doubt from the evidence of identification and the described role the Appellant played that the Complainants have positively identified the Appellant and that the quality of the identification was good and free from any error or mistake.

The issue of the date of the identification parade conducted for N to identify the Appellant; PW6 **IP Kitheke** the parade officer said he conducted the parade on 2nd November 2001 as per the parade forms exhibit 1. N said she had been picked by her friend who drove her to the carjacking scene where she saw other vehicles before being taken to Tigoni Police Station where, she and her friend's vehicle was the last to arrive. N said that she could not tell whether she wrote her statement first and later went for an identification parade and vice versa.

It would appear to us that N did visit the Police Station on 29th at 4.00 p.m. and going by the parade forms which bear a date 2/11/01, time 11.00 a.m. the visit of 29th must have been for purposes of recording a statement. We do not find N's evidence inconsistent as to the date the identification parade took place since she mentioned that she was not clear whether the day she visited the Police Station on 29th it was to record a statement or attend an identification parade. We do not find that the inconsistency affects the credibility of N nor was it material or substantive. We find that it was inconsequential and does not affect the prosecution case against the Appellant.

We noted that there were other identification parades conducted. M was called to two identification parades where he did not identify anyone. Those in M's parade did not include the Appellant. N also talked of being called to 2 other identification parades where she did not identify anyone. We are not surprised that there were other identification parades conducted in respect of other suspects. From the evidence of PW4, **IP Chebare**, Deputy OCS, Tigoni, who initially conducted the investigations into this case, he had arrested four other suspects. **IP Chebare** said that he handed over those four suspects and the case to the C.I.D. who took over the investigations of the case from him.

We have noted from this case that the officer who took over investigations from **IP Chebare** was not called as a witness. Also not adduced in evidence was the medical evidence and medical records especially those pertaining to the treatment of the Complainant, E. The issue is whether that omission is material and affects the prosecution case.

The learned trial magistrate handled the issue of the omission of medical evidence quite clearly. It was

her view that medical evidence was not material as it could not have helped to resolve the issue of the identity of those who raped E. The learned trial magistrate found that the evidence of rape was overwhelmingly supported in evidence; that E's evidence that she was raped was corroborated by N and M and in the circumstances there was no need for other evidence to corroborate E's evidence.

We agree with the learned trial magistrate's evaluation of the evidence and the finding regarding the omission to call medical evidence. The medical evidence was not necessary to prove rape took place. Neither was it necessary to prove the Appellant raped the Complainant E. In **BUKENYA vs. REPUBLIC 1972 EA 549** it was held that the prosecution has a duty to make available all witness necessary to establish the truth even if their evidence may be inconsistent. Where the prosecution fails to do so the Court may in an appropriate case, infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. However, such inference may only be drawn if the evidence called is barely adequate. That inference cannot be drawn in the instant case as the prosecution called ample evidence to prove their case. We do however observe that the evidence of the investigating officer who took over from **IP Chebare** should have been called as an important witness to shed light to other issues for example, what happened to the four other suspects he took over from PW4. The failure to call him does not however create any gaps in the prosecution case nor does it affect the prosecution case.

As regards the Appellant, the evidence adduced by the prosecution cannot be described as threadbare. It was ample evidence to assist the court to establish the truth.

The learned trial magistrate considered at length the Appellant's alibi defence and made a finding that it was not truthful before rejecting it. We did carefully consider the alibi defence and have evaluated it afresh together with the rest of the prosecution evidence. The learned trial magistrate in her judgment found the alibi defence shaken on the following grounds: -

One, that the Appellant's evidence that he spent the whole day of 28th with an aunt, a neighbour and the sister whom he followed, DW3 was contradicted by his witnesses. DW3 the sister said she was not home on the 28th. DW1, the neighbour, contradicted the Appellant by saying she alone was the one with the Appellant at their home on 28th.

Two, that the Appellant's evidence that he cooked lunch and supper on 28th was contradicted by DW1 and his mother DW4 who said that the Appellant had cooked only the supper.

Three, that while the Appellant said the mother sent him on 29th to his grandmother, then changed to say his uncle, he did not give the uncle's name without hesitation. DW4 on other hand said she had sent the Appellant to his uncle's place.

Four, it was the learned trial magistrate's finding that the appellant and his witnesses could not stand the rigours of cross-examination.

We agree that the Appellant's defence evidence and that of his witnesses was full of contradictions. Issue is whether the alibi defence created doubt in the prosecution case against the Appellant. In our own evaluation of the prosecution case vis-à-vis the Appellant's alibi defence, we do not find that any doubt was created in the prosecution evidence. We find that the evidence of the prosecution witnesses who were the Complainants in this case was overwhelming. They had both the time and opportunity to see and identify the Appellant in conditions that were good for a positive and correct identification of the Appellant. The learned trial magistrate's finding that the alibi defence did not shake the prosecution case and further that the demeanour of the prosecution witnesses was good and that they were believable cannot be faulted.

We noted that the learned trial magistrate at page J16 of the judgment cautioned herself concerning important issues. The learned trial magistrate cautioned herself that a witness or witnesses may be honest but mistaken citing **RORIA vs. REPUBLIC 1967 EA 583** and **REPUBLIC vs. TURNBULL [1967] 3 ALL ER 549**. The learned trial magistrate carefully analyzed the prosecution evidence on identification

before entering a conviction. We find that the learned trial magistrate had a clear and correct view of the evidence adduced before her and correctly weighed it before arriving at the conviction. Having evaluated the evidence ourselves, we do agree with her finding and cannot fault the conclusion she made in her judgment.

We find the prosecution evidence against the Appellant proved beyond any doubt that the Appellant and two others not in court robbed the Complainants in this case and gang raped Elishipa on the material day. We find that the Appellant was one of the three men who committed this offence and that the evidence against him is overwhelming. The Appellant's appeal therefore lacks in merit and is dismissed.

The upshot of this appeal is that the same fails, the conviction is upheld and the sentence of death in count 1 confirmed. The sentence of death in counts 2 and 3 and of 20 years imprisonment in count 4 is suspended.

Dated at Nairobi this 4th day of May 2007.

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LESIIT, J.

JUDGE

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DULU

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Mr. Kangahi for the Appellant - absent

Mrs. Kagiri for State - absent

CC: Tabitha/Eric

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LESIIT, J.

JUDGE

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DULU

JUDGE