REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 178 of 2004

JEREMIAH MATHENGI MATHINYO …..... APPELLANT

VERSUS

REPUBLIC ……...…… RESPONDENT

(Appeal from original Judgment and Conviction in Criminal Case No. 1361 of 2003 of the Senior Principal Magistrate's Court at Kerugoya dated 6th May 2004 by Ms Lucy W. Gitari – SPM)

J U D G M E N T

Jeremiah Mathengi Mathinyo, hereinafter referred to as the appellant was charged with robbery with violence contrary to section 296(2) of the penal code. He was also charged with rape contrary to section 140 of the penal code. Following a full trial before **Lucy W. Gitari**, Senior Principal Magistrate at Kerugoya, the appellant was found guilty on both counts and sentenced to death in respect of the 1st count and life imprisonment in respect of the 2nd count. The appellant was aggrieved by the conviction and sentence imposed as aforesaid. Naturally he lodged the instant appeal to this court. In his petition of appeal drawn in person the appellant impugns his conviction on four broad grounds; identification, nay recognition, period taken to have him arrested, failure to call certain witnesses, failure to subject the appellant to medical examination and failure by the magistrate to adequately consider his defence.

The prosecution case briefly stated was that on 1st January 2003 at 2 a.m. the complainant in the 1st count (P.W.1) was in her house with her two daughters who included E M, the complainant in 2nd count (P.W.2). Whilst asleep the door to the house was suddenly hit and it caved in. P.W.1 lit a lamp only to find four men had entered the house. Whereas two of the men went to the children's room, two others approached her room. The men were all armed with pangas and axes. The two men who went to where P.W.1 was ordered her to give them money. They took her purse containing Kshs.3,500/= and a mobile phone make Siemens. She was then forced to remove her night gown and having looked at her body the two ordered her to dress up and sleep. In the meantime those two men who had entered the children's bedroom found P.W.2 and her sister D N. They asked P.W.2 whether she was married and when she responded in the negative ordered her to get out of the house. They had also asked her whether she goes to school. The men had pangas. Once out she found three other men, one of whom pulled her and ordered her to follow him. When she resisted she was hit with a panga. She was pulled upto Karira Primary School where she was raped in turns by the said men who had put a dirty cloth in her mouth. When done they left her there and went away but later came for her and took her home. As P.W.2 was bleeding profusely as a result of the sexual assault, she was rushed to Mwea Mission hospital in the morning. By then the thugs had left. During the robbery and rape ordeal, P.W.1 and P.W.2 had managed however to identify the appellant among the robbers. Although the appellant had disguised himself by wearing a

green mask on the face the 2 witnesses were nonetheless able to recognise him by his voice. The two witnesses testified that they had known him prior to the incident as he used to conduct boda boda business in the neighbourhood, that is to say he used to ferry passengers on his bicycle at a fee and the two witnesses had talked to him severally as he ferried them. They also were able to recognise the appellant by his walking gait. Finally P.W.1 recognised the appellant in the manner he spoke kikuyu. He was not fluent in kikuyu because he mixed it with Meru language. The matter was reported to Wang'uru police station and subsequent thereto the appellant was arrested and confronted with the instant charges.

The appellant gave unsworn statement of defence. He informed the court that on 2nd January, 2003 he carried the complainant, meaning P.W.1 on his bicycle taxi and took her to the police station. She never mentioned to him about robbery. Later on 5th April, 2003 he was arrested and taken to the police station by members of public on allegation that he had broken into a house. Later he saw the complainant. It was the appellant's contention that P.W.1 framed him with these offences which he knew nothing about.

In support of the appeal, the appellant tendered written submissions with the permission of the court. We have carefully read and considered the said submissions.

The appeal was opposed. Mr. Orinda, learned principal state counsel in opposing the appeal submitted that the appellant was well known to P.W.1 and P.w.2. He had on several occasions carried P.W.1 on his boda boda bicycle. Counsel further submitted that the transaction took a long time and though the appellant was masked he was identified by the voice and his distinct walking style. To counsel, this was not identification by a single witness in difficult circumstances. The appellant's names were given to the police immediately although his arrest was much later. Counsel rounded up his submissions by stating that the conviction was safe and should not be disturbed therefore.

In the well known case of **Okeno v/s Republic (1972) E.A. 32** the court of appeal stated that the duty of the first appellate court was:

"…… **to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of the trial court should be upheld ……..**"

We have already set out in summary form the evidence tendered before the subordinate court and on which that court after full consideration returned a conviction. It is clear that the conviction of the appellant was dependent on the evidence of identification (recognition) by two witnesses at night. It is recognised that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. In the case of **Kiarie v/s Republic (1984) KLR 739**, the court of appeal said that where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction. In the same case, the court stated that it is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken.

Lastly, although recognition is more reliable than identification of a stranger, such evidence of recognition should be tested carefully seeing that mistaken recognition of close relatives and friends are sometimes made. (See **Anjononi and others v/s The Republic (1984) KLR 59** and **Wamungi v/s Republic (1989) KLR 424**. The need for careful testing of evidence of identification is not less in cases of recognition as opposed to identification of a stranger in difficult circumstances therefor.

In this case, the appellant was positively recognised by P.W.1 and P.W.2. The court found these witnesses to be credible witnesses. This court can only disturb that finding on the credibility of the witnesses if it is satisfied that no reasonable tribunal would make such a finding. See **Ogol v/s Muriithi (1985) KLR 359**. We have not come across any basis to impugn that finding by the trial court. Both witnesses testified that they identified the appellant by his walking gait. They were able to see the appellant with the light from the lamp in the house and light from the torches the robbers had. He was a person well known to the witnesses. They recognised his walking gait as he moved from room to room. The witnesses further testified that the appellant would occasionally be very close to them as he demanded money from P.W.1 and as he dragged P.W.2 to and from the scene of rape. P.W.1 even knew the stepmother of the appellant whom she worked with. Going by the record, there is no doubt at all that

the two witnesses knew the appellant very well. P.W.1 even knew that the appellant could not speak fluent kikuyu because he would mix it with Meru language. The appellant had carried her severally on the bicycle. Indeed the appellant himself in his statement of defence even referred to P.W.1 as his customer. Even on the day of the robbery, the appellant according to the witness had carried her to the bank.

There is evidence that this witness (P.W.1) also recognised the appellant by his voice. He talked to the witness several times. He is the one who ordered her to produce money. When P.W.1 said she did not have any money he retorted that she was very poor. The offence lasted for a considerable period of time. The robbers including the appellant were not in hurry to leave. Indeed before they could leave they took out P.W.2 whom they raped in turns for sometime. When done they brought her back and found P.W.1's grand child crying in her bedroom. They then gave tea to P.W.1 to give to the child so that she could stop crying. These indeed were close encounters and we have no doubt at all that much as the appellant had masked himself, persons used to him as P.W.1 and P.W.2 could not have failed to recognise him by his limping or bow legged walking gait. Further it is not far fetched to conclude that considering the period the encounter lasted, and the exchanges between the two in the process P.W.1 would have failed to recognise his voice. There is abundant evidence that the appellant talked to P.W.1 severally during the episode. Yes of all the robbers, the appellant was the only one hooded. Why? From the evidence it is possible to assume that he knew that he would easily be recognised by P.W.1 and P.W.2 at the scene of crime and that is why he opted to disguise himself out of all the other robbers. That possibility cannot be ruled out. We also note that the appellant had according to the evidence of P.W.1earlier on in the day ferried her to the bank. He must have known that P.W.1 had gone to get some money and that is why when he entered the house, he immediately demanded money from P.W.1. All these issues help to place the appellant at the scene of crime.

The appellant's recognition was further fortified by the fact that when P.W.1 reported the incident to the police, she immediately gave the appellant's name in her first report. Indeed during the trial, the appellant asked for the production of the OB report. The court acceded to the request and when the OB was brought and read out in court, it confirmed that P.W.1 had reported that she had been robbed on the material night of Kshs.3000/= a mobile phone and her daughter raped. She had managed to identify one man called **Muthengi,** the appellant as one of the robbers. The appellant also does not dispute the fact that he used to operate a bicycle taxi through which P.W.1 came to know him as she would on numerous occasions hire him to ferry her to places. That being the case the appellant became familiar with the witness. Therefore her recognition of the appellant by his walking gait and voice cannot be faulted. After all she was familiar with him.

How about P.W.2 she states categorically that she was able to recognise the appellant as the person who raped her first. She recognised him by his style of walking as well. The witnesses conceded though that the appellant had concealed his face by a mask. However she was able to notice his peculiar style of walking as there were lights in the house. There was the lamp light as well as the light from the torches of the robbers. P.W.2 saw him as he moved within the house. She had previously seen him walking at Karira hospital. She also knew him as a boda boda operator. She had known him for over 2 years. She recognised the appellant's walking gait when the appellant and his accomplices removed her from the house and dragged her to the scene of rape and when again they walked her back to the house following the rape. According to P.W.2 "…**. As we went back to the house we walked together with accused. He was abusing me. We were struggling ….."** If all these circumstances are taken into account, we are convinced just as was the learned magistrate that there was sufficient opportunity accorded to P.W.2 by the appellant to enable her recognise him by his walking gait. This witness spent considerable time with the appellant. There is no doubt that yes it may have been night and conditions obtaining for positive identification of the appellant difficult, however taking into account, all that we have set out herein above, we believe it was possible for the P.W.2 to have recognised the appellant. The appellant also talked to the witness and since the witness had known the appellant for well over 2 years as he was a common feature in the neighbourhood her recognition was thereby made easier.

As already stated P.W.1 categorically stated that he recognised the appellant by his voice. There is no doubt at all that during the episode the appellant spoke severally both to P.W.1 and P.W.2. Evidence of

voice recognition is admissible. In the case of **Mbelle v/s Republic (1984) KLR 624**, the court of appeal laid down guidelines as regards admissibility of evidence of identification by voice as follows:-

"…… **In dealing with evidence of identification by voice the court should ensure that:**

(a) The voice was that of the accused

(b) The witness was familiar with the voice and recognised it.

(c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who said it …"

There is clear evidence that these witnesses knew the appellant very well. They had previously spoken with him. They even knew that he did not speak fluent kikuyu but a mixture of kikuyu and Meru. Indeed even in her judgment, the learned magistrate "…… ***noted that it is true that the accused does not talk fluent kikuyu ……."*** The appellant having spoken to P.W.1 as he demanded for money, P.W.1 could not have failed to recognise his voice… There is no doubt at all therefore that P.W.1 recognised the voice of the appellant and that she was familiar with it. Though conditions obtaining during the incident and particularly light and the fact that the appellant was hooded could have perhaps interfered with the recognition of the appellant, we are nonetheless satisfied that the totality of the evidence adduced by the prosecution places the appellant at the scene of crime. It is worthy repeating that the offences were committed over a long period of time when the appellant was in close proximity with the two witnesses. That being the case and despite the hardship we alluded to above we still believe that the witnesses could have positively recognised the appellant. The learned magistrate was therefore right in believing the testimony of P.W.1 and P.W.2 and as we have already stated we have no reason for departing from that conclusion.

The appellant claims that he was framed in the case. However, the evidence on record does not disclose any previous hostility between the appellant with either P.W.1 or P.W.2 that would have spurred them to falsely testify against him. Indeed by his own admission P.W.1 was in fact his customer. There is no history of any grudge or disagreement between them. Further there is cogent evidence that P.W.2 was injured during the rape ordeal. We doubt very much that P.W.1 and P.W.2 would have conspired to have P.W.2 injure her private parts so as to frame the appellant. P.W.4 testified that upon examining P.W.2, she found that she had bruises at the vaginal opening which was bleeding. On the basis of the foregoing we discount the frame up story. The appellant has faulted his conviction on the basis that the police did not subject him to medical examination so as to connect him with the rape offence. However our short answer to that submission is that it would have been an exercise in futility as the appellant was not arrested immediately after the incident but on 26th May 2002, over five months after the incident.

Further if even he had been subjected to medical examination immediately after the commission of the offence we doubt whether such evidence would have irresistably pointed to the appellant as the villain considering that the appellant and his cohorts raped P.W.2 in turns. Whose spermatozoa would have popped up in the medical examination. The appellant then raises the issue of delay in having him arrested. The uncontroverted evidence on record suggests that upon committing the offences, the appellant went underground. We doubt whether this conduct is consistent with the appellant's alleged innocence. As for failure by the prosecution to call as witnesses members of public who arrested the appellant, we do not think that such evidence was absolutely necessary. After all they had arrested him on an entirely different offence. Such evidence would not have added any weight to the prosecution evidence already tendered in respect of these offences.

The totality of the foregoing is that we are satisfied that the appellant's conviction was based on sound consideration. The evidence of recognition of the appellant by the two witnesses was free from possibility of error and that the appellant was properly convicted. In the result we dismiss the appeal.

Finally we wish to comment on sentence. The appellant upon conviction on both counts as already stated was sentenced to death in count 1 and life imprisonment on count 2. It has been repeatedly said

and we repeat it here that where a person is sentenced to death, there is no reason for imposing other sentences like imprisonment on the same person. Once a person is sentenced to death on one count, the sentences on the other counts should be held in abeyance. See court of appeal decisions in **Samuel Waithaka Gachuru v/s Republic, Cr. Appeal No. 261 of 2003 (unreported)** and **Abdul Debano Boye & another v/s Republic, Criminal Appeal No. 19 of 2001 (unreported).**

The Principle underlying this is that if an appeal court should acquit the accused on the count on which he was sentenced; the court so acquitting would be entitled to impose a sentence on any of the counts on which the accused was convicted but not sentenced. We recommend that the subordinate courts do adhere to rudimentary sentencing principle. Accordingly, we set aside the sentence of life imprisonment (although it should have been with hard labour) imposed on the appellant on the charge of rape. We nonetheless confirm the sentence of death imposed in respect of count 1. Those then shall be our orders in this appeal.

Dated and delivered at Nyeri this 4th day of October 2007

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE