REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 131 OF 2006

(From original conviction and sentence of the Principal Magistrate's Court at Nyahururu in Criminal Case No.5366 of 2003 – S. M. Mungai [P.M.])

PAUL KIMATHI WAMBUI…………....……………..APPELLANT

VERSUS

REPUBLIC……………………………………..RESPONDENT

JUDGMENT

The appellant, Paul Kimathi Wambui was charged with **Robbery with violence contrary to Section 296(1)** of the **Penal Code**. The particulars of the offence were that on the 8th November 2005 at Nyandarua District, the appellant jointly with others not before court robbed D W W of Ksh.300/=, and a video deck valued at Ksh.4000/= and at or immediately before or immediately after the time of such robbery, the appellant threatened to use actual violence to the said D W W. The appellant was further charged with **Rape contrary to Section 140** of the **Penal Code**. The particulars of the offence were that on the same and in the same place, the appellant had carnal knowledge of D W W without her consent. The appellant pleaded not guilty to both charges. After full trial, the appellant was convicted as charged on both counts. He was sentenced to serve seven years imprisonment on each count. The sentences were ordered to run concurrently. The appellant was aggrieved by his conviction and sentence and duly appealed to this court.

In his petition of appeal, the appellant raised several grounds of appeal basically touching on his alleged identification by the complainant. He was aggrieved that he had been convicted based on the sole evidence of identification and that of a police sniffer dog which did not establish that he had committed the offences for which he was convicted to the required standard of proof beyond any reasonable doubt. At the hearing of the appeal, the appellant reiterated the contents of his petition of appeal. He submitted that although the prosecution had claimed that the robbers had used a woman as a shield to secure entry into the complainant's house, the woman in question was not called by the prosecution to testify before court.

The appellant took issue with the manner in which the police identification parade was conducted. He submitted that he was conspicuous at the time the police identification parade was held since he had a bandage on his head due to the injury that he had sustained at his place of work. He maintained that the house where the police sniffer dog directed the police and the vigilante group was not his house but a house of another person. He explained that at the time of his arrest he was working at St. Bernard's Girls High School and was a faithful worker and had not committed any criminal offence. He urged this court to find that the trial magistrate had failed to properly evaluate the evidence that was adduced before him

and thereby reached the erroneous conclusion that it was the appellant who had robbed and sexually assaulted the complainant. He urged the court to allow the appeal.

Mr. Njogu for the State opposed the appeal. He submitted that the evidence which was adduced by the prosecution witnesses against the appellant was overwhelming. He submitted that the complainant had positively identified the appellant as being among the persons who robbed and raped her. He maintained that although the robbery incident occurred at night, the complainant was able to identify the appellant because she saw him clearly. He submitted that the robbers used a flash light during the robbery and the rape incident. He maintained that the complainant had confirmed her identification of the appellant when she pointed out the appellant at an identification parade which had been mounted by the police. He explained that the complainant identified the appellant by his voice. He urged the court to dismiss the appeal and confirm the conviction and sentence of the trial magistrate.

The duty of this court as the first appellate court was set out in **Okeno vs Republic [1972] E.A 32** at page 36 where it was held that;

"***An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*****Pandya vs Republic [1957] E.A 336*****) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*****Shantilal M. Ruala vs R.[1957] E.A 570*****). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses, see*** *Peters vs Sunday Post [1958] E.A 424****.***"

In the present case, the appellant was convicted based on the evidence of identification. The complainant claimed that she identified the appellant in the course of the robbery and the rape incident. The robbery and the rape incident occurred at night. The complainant testified that she was able to identify the appellant by the flash lights that were possessed by the robbers. The complainant did not know the appellant prior to the robbery and the rape incident. She testified that she was able to identify the appellant by his voice. She confirmed her identification of the appellant six days after the robbery and rape incident.

I have re-evaluated the evidence that was adduced by the complainant in support of her claim that she had identified the appellant. It was evident that the said identification was made in circumstances that were clearly difficult. The robbery incident occurred at night. The appellant was robbed in her house before she was taken to a nearby bush where she was raped by two of the robbers. There was evidence by PW3 F R that the said robbers used her to gain entry into the house of the complainant. PW3 could not however identify the robbers. This court is aware that before a court can convict based on the evidence of identification, it must be certain that the condition favouring positive identification were present so as to exclude the possibility of mistaken identity. In the present case, it was clear that the conditions favouring positive identification were absent. It was improbable that the complainant could have identified the appellant as being one of the robbers who raped her taking into consideration that the entire incident took place at night. The source of light *i.e.* the flashlight could not have enabled the complainant to be certain that she had positively identified the appellant. The complainant did not describe the robbers when she made the first report to the police. She did not state the clothes that the robbers wore during the robbery and the rape incident. She did not tell the court what physical features of the appellant that made her be certain that she could recognise the rapist if she saw him again.

Although she testified that she was able to point out the appellant in the identification parade held by the police six days after the incident, when she asked the men who were in the identification parade to utter the words "*toa pesa*," it was clear to this court that the said voice identification could be free from error because the complainant did not intimately know the voice of the appellant prior to the robbery incident. The appellant was not known to the complainant at the time of the robbery incident. In **Libambulah vs Republic [2003] KLR 683,** the Court of Appeal held that for the evidence of voice identification to be

received, the court must confirm that the person making the identification knew the voice of the person identified prior to the robbery incident and therefore could positively identify the said voice as being of the person being identified. In the present appeal, it is evident that the condition precedent for the receipt of the evidence of identification as laid down by the Court of Appeal in the case of **Maitanyi vs Republic [1986] KLR 198** at page 200 was not satisfied by the prosecution. The appellant raised reasonable doubt that he was identified as one of the robbers during the robbery incident.

The prosecution did adduce evidence that the appellant was arrested after the police sniffer dog directed the police to a house where the appellant used to reside. From the scene of the robbery to the place where the appellant was allegedly residing is over ten kilometres. It was clear from the evidence of the prosecution witnesses that the appellant was not found in the house where the sniffer dog directed the police and the members of the vigilante group who were assisting the police. The appellant was arrested at a different place from where the sniffer dog directed the police. It was therefore evident that the police sniffer dog did not lead to the arrest of the appellant. It was the owner of the house where the sniffer dog led the police who directed the police to the arrest of the appellant. The said owner of the house was not called as a witness to testify and corroborate the testimony of the police as to the circumstances of the arrest of the appellant.

The upshot of the above reasons is that the prosecution failed to establish the charge against the appellant on the charge of robbery and that of rape to the required standard of proof beyond any reasonable doubt. The prosecution offered no other evidence which connected the appellant to the commission of the said offences. In the absence of any other incriminating evidence, the appellant cannot be deprived of his liberty. His appeal is allowed. His conviction is quashed. The sentence imposed by the trial magistrate is set aside. He is ordered released from prison forthwith and set at liberty unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 14th day of December 2007.

L. KIMARU

JUDGE