



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

**Criminal Appeal 126 of 2003
(FORMERLY NAIROBI'S CRIMINAL APPEAL NO.67 OF 2000)**

**(From original conviction and sentence of the Senior Principal
Magistrate's Court at Naivasha in**

PAUL MWANGI MURUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant, Paul Mwangi Murunga, was charged with four offences under the Penal Code but was convicted in three of the counts of robbery with violence contrary to **Section 296(2)**. The particulars of the said charges were that on the 2nd March 2000 at Karunga Farm, Gilgil the appellant, jointly with others not before the court robbed Paul Githaiga Mwangi and James Muraguri Karoge of various personal items and cash as stated in the charge sheet and at or immediately before or immediately after the time of such robbery used actual violence to the said Paul Githaiga Mwangi and James Muraguri Karoge. The appellant was further charged with the offence of rape contrary to Section 140 of the Penal Code. The particulars of the charge were that on the 2nd of March 2000 at Karunga Farm, Gilgil, the appellant unlawfully had carnal knowledge of FG without her consent. The appellant pleaded not guilty to all the charges. After a full trial, the appellant was convicted of the two counts of robbery with violence. He was sentenced to suffer the death penalty as mandatorily provided by the law. As regard the count of rape, the appellant was sentenced to serve ten (10) years imprisonment. The appellant was aggrieved by his conviction and sentence and duly appealed to this court.

In his petition of appeal, the appellant raised five grounds of appeal. He was aggrieved that the trial Magistrate had put reliance on the evidence of PW 1, PW 2 and PW 3 after finding that their evidence corroborated each other whereas the appellant was of the view that their evidence were contradictory. The appellant was aggrieved that the trial Magistrate had relied on the evidence of identification by the witnesses which identification according to him was not free from error. The appellant faulted the trial Magistrate for relying on the evidence of identification parade which was not conducted according to the law.

The appellant was aggrieved that he had been convicted by the trial Magistrate on evidence that did not establish his guilt beyond reasonable doubt. Finally, the appellant was aggrieved that the trial Magistrate had rejected his defence and shifted the burden of proof in finding him guilty as charged. At he hearing of the appeal, the appellant, with the leave of the court, presented to the court written submissions in support of his appeal. He also made oral submissions. He urged the court to allow his appeal as the prosecution had not established its case against him. Mr Koech, learned State Counsel, opposed the appeal. He urged

the court not to disturb the finding of the trial Magistrate both on conviction and sentence. According to him, the appellant was properly convicted based on strong evidence adduced by the prosecution witnesses. We shall revert back to the arguments made after briefly setting out the facts of the case.

On the 2nd of March 2000 at about 2.00 a.m, PW 1 Paul Githaiga Mwangi and his wife PW 3 Felista Wambui Githaiga were asleep in their house at Karunga Farm, Gilgil. PW 1 and PW 3 were woken up by screams of their son who was crying for help.

PW 1 went outside to investigate. He had a spotlight. When he was outside his house, he was able to identify the appellant who was in a gang of robbers who had broken into the house of their son. When PW 1 saw that there were many robbers outside his house, he retreated back to the house and locked the door. He lit the lamp to provide illumination. After a while, the robbers came to his house. They ordered him to open the door of the house or else, they would kill his son who was at the time being held hostage. PW 1 obliged and opened the door. The robbers entered the house and demanded to be given money. PW 1 gave the robbers Kshs.5,500/-. He testified that the robbers were armed with pistols, clubs and machetes. PW 1 was able to identify the appellant. He had known the appellant five years prior to the robbery incident. He knew the appellant by his nickname "house." He was also able to identify the appellant because his (*the appellant's*) upper teeth were missing. PW 1 was able to identify the appellant from the light of the lamp which had been lit. PW 1 further testified that the appellant, with another robber, took PW 3 outside the house and raped her. The robbers then robbed the PW 1 and PW 3 of their watches. PW 1 was also robbed of his trousers. The robbers then fled from the scene. PW1 made a report to the police and later attended a police identification parade. He testified that none of their properties which were robbed from them were recovered

PW 3 Felista Wambui essentially corroborated the evidence of PW 1. She testified that while she was asleep in her house, the robbers forced their way into the house, and demanded money. She testified that the lamp had been lit. She stated that the appellant stopped her from praying. She was then taken out by the appellant in the company of another robber, slapped with the flat side of the machete, undressed and then raped in turns.

PW3 testified that she clearly identified the appellant as she used to see him in the village prior to the robbery incident. She testified that she was able to identify the appellant by the light from the lamp. PW 3 was later taken to hospital where she was treated. She was issued with a P3 form which was duly filled and produced in evidence by PW 6, Hiram Njenga, a clinical officer based at Gilgil hospital. PW 6 established that PW 3 had been injured on the right hand and thighs. There was a swelling on the right hand and bruises on the left thigh. A vaginal swab revealed that PW 3 had been infected with gonorrhoea. PW 3 testified that when she was later called at the police station to attend an identification parade, she was able to unhesitatingly point out the appellant.

PW 2 Inspector Raphael Rono of Gilgil police station conducted the identification parade whereby PW 1 and PW 2 were able to identify the appellant. PW 4 James Muraguri testified that on the material night, while he was asleep in his house at about 1.00a.m, robbers broke into his house and demanded money from him. He gave them Kshs.2,700/-. He testified that he was able to identify the appellant by the light of the torches that the robbers had. PW4 testified that he had known the appellant prior to the robbery incident for a period of two years. PW4 knew the appellant by the name *house Karunge* and had known him (the appellant) as a fellow villager. PW 7 Corporal Erick Kanyua attached to Gilgil Police station was the arresting and the investigation officer in the case. He testified that he collected the appellant from Kipiripiri police station after he had been arrested by the said police. After being satisfied that there was sufficient evidence to charge the appellant, he charged him with the offences which he was later convicted of.

In his unsworn evidence in his defence, the appellant testified that he was arrested on the 13th of March 2000 in connection with a debt which he had failed to pay someone who had advanced him a friendly loan. He was arrested by the Administration Police who later took him to Gilgil police station where he was charged with the offence of robbery with violence. He testified that the complainants were his neighbours and knew him and therefore there was no need for an identification parade to be held. He

denied that he was involved in the robbery.

This being a first appeal, this court is mandated to re-consider afresh the evidence adduced before the trial Magistrate, re-evaluate it and reach its own independent determination whether or not to uphold the conviction of the appellant by the trial Magistrate. In reaching its decision, the court has to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore it cannot be expected to make any determination as to the demeanour of the witnesses (see Njoroge –versus- Republic [1987] K.L.R 19). In the instant appeal the issue for determination by this court is whether the prosecution proved its case against the appellant to the required standard of proof beyond reasonable doubt. The thrust of the appellant's appeal is that he was not identified by the complainants at the time of the robbery. He is also aggrieved that the trial Magistrate had not considered the contradictory nature of the evidence adduced against him and finally he faulted the trial Magistrate for not considering his defence before arriving at the said decision convicting him.

We have carefully re-evaluated the evidence adduced before the trial Magistrate. We have also considered the submissions made by the appellant and the State. PW 1 testified that her house was invaded by a gang of robbers on the 2nd of March 2000 at 2.00 a.m while she was asleep. She was woken up by the screams for help by her son. When PW 1 opened the door, she met with a man who was armed with a pistol. The man had a torch. PW 1 identified the appellant because at the time he had put on the lights. Out of the four robbers who entered the house, two of them raped his wife.

Among them was the appellant. PW 1 testified that the robbers, apart from being armed with pistols, were armed with machetes and clubs. From the evidence of PW 1 the robbery took place for some time. PW 3 also testified that he identified the appellant as being among the gang of robbers who robbed them and raped her. She testified that she was able to see the faces of the persons who raped her. In the process of being raped, PW 3 was slapped with the blunt side of a panga.

PW 3 testified she was able to identify the appellant by the light in the house when it was put on in the sitting room when the two robbers (among them the appellant) were raping her. PW 1 testified that he was able to identify the appellant as he knew him prior to the night of the attack. He knew the appellant by his nickname "house" and also by the gap on the upper gum of the mouth of the appellant. The appellant had several teeth missing. The trial Magistrate convicted the appellant based on the evidence of identification.

We have re-evaluated the said evidence of identification adduced by the prosecution. We have also warned ourselves of the danger of convicting the appellant based on the sole evidence of identification particularly when the said identification was made in circumstances that were not conducive for positive identification. PW 1 and PW 3 testified that they were able to positively identify the appellant. Although it was at night, the lights had been put on in the house. PW 3 endured the rape ordeal for sometime. PW 1 was able to recognize the appellant. He knew the appellant prior to the robbery incident. The appellant made no effort to disguise himself. The evidence of identification of the appellant by PW 1 was thus that of recognition. From the evidence adduced by the two witnesses (PW 1 and PW 3) it is clear that the robbery took sometime. The robbers did not appear to be in any hurry. There was sufficient time to enable the complainant positively identify them; and particularly the appellant. The lights were on. PW 3 had to endure the rape ordeal in the sitting room while the lights were on. She was raped by the appellant. After re-evaluating the evidence, we find that the evidence of identification by the two complainants was watertight. Of particular importance is the evidence of PW 1 who was able to recognize the appellant. His evidence was therefore that of recognition.

For the reasons stated, we find that the appellant was properly convicted on the evidence of identification. He was positively identified as being among the gang of robbers who attacked the complainants in the material night. The appellant was armed with a dangerous offensive weapon, namely a pistol. He stole several items from the residence of the complainants. In the course of the robbery he slapped PW 3 with the blunt side of the machete. He also raped PW 3. We find that the prosecution proved its case against the appellant to the required standard of proof beyond any reasonable doubt. The defence offered by the appellant is a sham. It is meant to exonerate the appellant from the crime which he committed. We reject it. We find no merit with the appeal filed by the appellant. We consequently

dismiss it and uphold his conviction by the trial Magistrate. The death sentence imposed is also upheld. We however suspend the sentence of the ten years imprisonment imposed on the charge of rape. Since the appellant was sentenced to death, it was not necessary for him to be sentenced to serve a custodial sentence also.

DATED at NAKURU this 3rd day of November 2005.

DANIEL MUSINGA

JUDGE

L. KIMARU

JUDGE