



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL NO. 359 OF 2000**

**JOSEPH NGURE MUTURI ..... APPELLANTS**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**The appellants**, Joseph Nguni Muturi (1st accused) and Josephat Muchira Muturi (2nd accused) were convicted by the Senior Resident Magistrate Kerugoya, Mr. W.N. Njage, on a charge of Robbery with silence, contrary to section 296 (2) of the Penal Code. At the hearing of the appeal all the appellants were unrepresented. We warned the appellants of the danger of proceeding with the appeal in that if we come to the conclusion that they were properly convicted then we are bound in law to substitute the sentence of 10 years

imprisonment plus 10 strokes of the cane on count 1, seven

(7) years imprisonment plus (2) strokes on count 2, 7 years

imprisonment plus 2 strokes of the cane on count 3, 7 years

imprisonment plus 2 strokes of the cane on count 4, 7 years

imprisonment plus 2 strokes of the cane on count 5, 7 years

2 strokes of the cane on count 6 and 7 years 2 strokes of the cane on count 7 with one of mandatory death sentence.

We equally advised them that they were free to withdraw their respective appeals if they so wished which they declined. *VERONICA WAMBUI KARIUKI (P.W.1)* Kariuki recalled events of 30th July 1999. She was asleep in company of her three children. People who claimed to be police officers forcibly made their way into her house. They were armed with knife and panga (the man in jungle jacket – accused 1). They ..... all items. They then raped Kariuki's daughters Alice, Nancy and Wanjiru. They then tied Kariuki, the three (3) daughters and Kariuki's father with a rope. A young kid Lawrence Kariuki untied them, the matter was reported to the Assistant Chief and Wanguru Police Station. The three raped girls were taken to Nairobi for treatment and issued with P3 forms which were eventually filled by a doctor. The ordeal took between 2-3 hours. Kariuki was positive she identified accused 1, he had been to Kariuki's on 15th June 1999 when they disagreed with Kariuki's father even some oxen. Kariuki also identified accused 2 on 15th June 2000 at her home. Kariuki told police he had recognized one of the robbers – 1st accused.

*“I saw his face. He is the one who had a jungle jacket on him. I recognized him as the man I had seen on 15 th June 1999 ----- I even talked to the accused and asked him why he was disturbing my old father. He asked me why I was talking on his own behalf ----- “*

NANCY WAMAITHA (P.W.2) Wamaitha a class 8 girl at Nyangati Primary School identified first accused in a jungle jacket with a cap with a metal crown on it. She had seen him before ... to see her grandfather (P.W. 1's father). He told Wamaitha to look and confirm that he is a policeman. She was threatened by a knife before being raped. She also confirmed that her sisters Rose and Alice were raped in turns. Both 1st and 2nd appellants raped her. She sustained injuries on her thighs and private parts. Wamaitha recognised the first and second accused when they lay on her. She recognized them by torches the two accused had. She identified the first accused at the parade.

Cross-examined by first accused Wamaitha testified thus:

*“----- I had seen accused 1 earlier at our home in company of accused 2. The first accused raped me. The first accused had a smoke jacket, police cap and cane -----  
----- I had seen the accused persons earlier on when they had come to see my grandfather”*

Cross-examined by second accused Wamaitha testified thus:

*“I saw accused and identified the accused person. I saw his face. He also had a torch. He raped me. Light from the torch enabled me to see the accused person ----- ----- I identified accused 2 at the parade. I had earlier seen them come to see my grandfather”.*

ROSE WANJIKU (P.W.3) Wanjiku like evidence to that of Kariuki (P.W.1) and Wamaitha (P.W.2). She was stripped naked and raped by the accused persons in turns. Second accused was the first to rape her followed by another man who was not in court. 2nd accused beat her in the process. She had seen first and second accused earlier when they came to see her grandfather . Cross-examined by second accused Wanjiku testified thus:

*“He is the one who removed me from my mother's bedroom. He had a knife on the left hand and a torch on the right hand, ----- I picked him at the identification parade”.*

ALICE WAMAITHA KARIUKI (P.W.4) Alice gave the radio permit on demand. The first accused who had a jungle jacket and police cap. She confirmed they were armed with knives. She was positive it was second accused who raped her. She was treated and issued with a P3 which she ..... to be filed by a doctor. She identified first accused at the parade. She saw the robbers by ..... of several torches in the room and identified second accused at the parade. JAMES MITHAMO (P.W.5) Mithamo a clinical officer at Kerugoya Hosital examined Rose Wanjiru Kariuki on 1st August 1999. Sperms were seen upon clinical examination. He filed P3 forms on 8th December 1999 which was received in evidence as exhibit 1. On the same day he examined Nancy .... Kariuki in respect of complaint of rape. He confirmed swellings on the back, thighs. Bruises on libia. Majora and blood oozing from clitoris and fresh wound on the hymen. Clinical results established spermatozoa and general infections.

He filed P3 forms and signed which was received in evidence as exhibit 2. On the same day he examined Alice Wamaitha Kariuki on a complaint of rape. Her underpants were torn. Spermatozoa were established on clinical examination. He filled and signed the P3 form which was received in evidence as exhibit 3. NO. 215494 INSPECTOR JOSEPH OMINJA (P.W.6), Ominja conducted an identification parade in respect of a suspect Joseph Ngure (1st accused). He was identified by Rose Wanjiku (P.W.3) and Alice Wamaitha Kariuki (P.W.4). Ominja also conducted identification parade in respect of Joseph Macharia Muturi (2nd accused). He was identified by Alice Wamaitha (P.W.4). NO. 65589 P.C. JULIUS NGUGI (P.W.7), Ngugi received complaint of robbery and rape on 1st August 1999 at 9.00 a.m. from Veronica Wambui (P.W.1). He booked the report and referred the rape victims to Kerugoya General Hospital for treatment. On 2nd August 1999 he visited the scene and proceeded to arrest the accused persons. He organized performance of identification parade. The doctors filled P3 forms. He charged the accused

persons after investigations.

At the close of the prosecution's case the learned trial magistrate found that there were sufficient evidence to put the accused on their defence. In his unsworn statement Joseph Ngure Muturi (accused 1) denied the offence. According to him father to complainant refused to pay him wages of Sh 500/= and promised to make him suffer. The case was a frame-up he concluded. In his unsworn statement Josphat Muchira Muturi (accused 2) denied the offence as charged. To him the whole thing was a frame up. The father of complainant employed him to run ox-carte for drawing and selling of water in Muruli. He also ploughed with oxen. He refused to pay Sh 500/=. ..... And threatened to make them suffer. He attributed the arrest to the bad blood between them.

At the close of the defence case the learned trial magistrate wrote a judgment and convicted both appellants as charged and thus provoked this appeal. Both accused tendered written submissions in support of their appeal which we have carefully read and considered fully. Mr. Obuo for the Republic supported the conviction. In his submission he argued that at the time the first accused (first appellant) was reading the radio permit with assistance of a torch reflection of light on the paper made the complainant see him. That in any event the complaint had seen the appellant fifteen (15) day before and had even talked. That Nancy Wamaitha (P.W.2) had also seen the second accused (2nd appellant) before the incident. Wamaitha also saw the second accused as he raped her and identified the appellant at the identification parade.

Alice Wamaitha Kariuki (P.W.4) also identified the first accused (first appellant) as he had seen him previously. She further identified him through the light from torches in the premises and also at the identification parade. Mr. Obuo urged us to substitute the sentences imposed on the appellants with one of death sentence. The learned senior Resident Magistrate analysed the evidence of identification carefully and share the view that the witnesses knew the appellants before the incident having had some dealings with father of complainant. That fact is also accepted by the appellants in their statement of defence. In the premises the flashing of torches at the time of the incident made it easier to recognize the appellants. It was mere case of recognition than identification. However, in the present case there is evidence that the appellants were identified by the complaint (P.W.1), Wamaitha (P.W.2), Wanjiku (P.W.3) and Alice Wamaitha (P.W.4) at the time they were being raped in turns. The learned magistrate, who had the opportunity of assessing the demeanor of the witnesses was satisfied that the eye-witnesses aforesaid could not concord the story of the appellant having been the robbers-cum-rapists. The appellants were known to the eye-witnesses and the ordeal took about 2- 3 hours.

Whilst the issue of identification and/or recognition is an issue of mixed law and fact, we cannot discern any error or errors on the part of the trial magistrate. The evidence against the appellants was overwhelming in that they were part of the gang of people that robbed the family of Veronica Wambui Kariuki and stole substantial property and in the course of doing so raped her daughters one of whom was 14 years, we are satisfied that the appellants conviction was proper, with the result that the appeal has no merit and is dismissed. In respect of appellant one (1) Joseph Ngure Mutiri, we

set aside the sentence of 10 years imprisonment and 10 strokes of the cane on count 1, 7 years imprisonment plus 2 strokes of the cane on count 2, 7 years imprisonment plus 2 strokes of the cane on count 4, 7 years imprisonment plus two strokes on count 6 and 7 years imprisonment plus 2 strokes of the cane on count 7 with a death sentence.

In respect of the appellant two (2) Josephat Muchira Muturi, we set aside the sentence of 10 years imprisonment on count 1, 7 years 2 strokes on count 3, 7 years and 2 strokes of the cane on account 5 with a death sentence.

DATED and DELIVERED at NYERI this 13th day of December 2002.

J.V.O. JUMA

JUDGE

N.R.O. OMBIJA

JUDGE