REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 140 OF 2013

BETWEEN

DANIEL MWANGI THUO..APPELLANT.

AND

REPUBLIC... RESPONDENT.

JUDGEMENT

(An appeal from the original conviction an sentence in the Chief Magistrate's Court at Murang'a Cr. Case No. 113 of 2008 delivered by Hon. Mutuku M.W, SRM on 5th October 2010).

JUDGMENT

Background

1. The Appellant was charged with two counts. In Count 1 he was charged with robbery with violence contrary to Section 296 (2) of the Penal Code. Particulars of the charge were that on 24th day of August, 2007 at [Particularsn Withheld] in Murang'a South District within Central Province jointly with others not before Court while armed with Pangas and Rungus robbed JWM cash 4600/= and at the time of such robbery used actual violence to the said JWM.

2. In count II he was charged with Rape contrary to Section 3(1) of Sexual Offences Act No. 3 of 2006. Particulars of the charge were that; on 24th August 2007 in Murang'a South District within Central Province committed an act which caused penetration with a genital organ with JWM.

In the alternative he was charged with indecent act contrary to Section 2(1) of the Sexual Offences Act No. 3 of 2006 in that he indecently assaulted on JWM by touching her private parts.

3. The Appellant was convicted of Count 1 but acquitted in Count II for want of sufficient evidence. He was sentenced to suffer death as by law required. Dissatisfied with both the conviction and sentence he preferred the instant appeal. He filed Amended Grounds of Appeal in which he raised three grounds of appeal namely; that the evidence of the key prosecution witnesses PW1 and 2 was inconsistent and contradictory, that the persons who alerted the police about the robbery were not called as prosecution witnesses and that the case was not proved beyond a reasonable doubt.

Summary of evidence

4. This being the first appeal, it is the duty of the Court to re-evaluate the evidence in record and come up with its own independence conclusions. **See Pandya –vs- Republic (1975) EA, 336 and Okeno vs Republic (1972) EA 32.** The background to the prosecution case was set out by the evidence of PW1 JW. Her testimony was that on the material night of 24th August, 2007 at about 2.00 am she was asleep with her family in their house. She named the family members as her husband**, JM(PW2)** and their children PW and CN. She described her house as comprising three rooms. The first room was the living room, followed by the children's bedroom and lastly the master bedroom.

5. Her testimony was that she heard a knock on the door and a person outside stated that they had come back. She sat on the bed while her husband picked up a torch and headed towards the living room. Immediately two men entered her bedroom, one holding a Panga and another something looking like a pistol. One person wore a blue trouser while another one was holding a torch which was lit. She was ordered to look down and hand in all the money she had. She handed over a total of 4,600/= to the person who was holding a "gun". The person who had a Panga then ordered her to lie on the bed and raped her. Meanwhile, the other robber was ransacking the house. She recognized the person who raped her as a person known to her as he lived around the place she worked. She was familiar with him for a period of 10 years. After she had been raped the robbers continued to ransack the house demanding for more money from her husband. The ordeal took about

two hours during which time neighbours heard the movements and they responded. The neighbours who responded were one Stanley Ngugi and another Mr Muguro. A watchman also heard the commotion and informed a Dr. John who in turn called the police. Robbers fled when they heard police approaching the house.

6. PW1 was categorical that the person who raped her was the Appellant, Daniel Mwangi Thuo. She was escorted by the police to the hospital for treatment to Maragua District Hospital where a P3 Form was prepared. **PW7, Antony Mwangi** a Clinical Officer produced the P3 form on behalf of Dr Mugo who had since left the hospital. According to PW7, PW 1 gave a history of having been raped by a person known to her. She had a cut on her ring left finger and left hand which were bleeding. No positive findings were found on her genitalia. Necessary laboratory tests were done and medication administered.

7. PW6 was a Government Analysis who analyzed the saliva and the blood of Appellants and the underpant of PW1. The blood group of Appellant was established as of group A. No spermatozoa or semen were found on the pant of PW1.

8. **PW2, JMK** was the husband to PW1. He entirely corroborated the evidence of PW1. In addition, he stated that the Appellant was one of the persons who attacked them and that he was well known to them. He too stated that they knew the Appellant by the name Maina which he was commonly referred by. He added that he was hit with a stick as he jumped back into bed. He added that before the Appellant raped his wife he enquired from him whether she has been tested for HIV.

9. Based on the information PW1 & 2 gave to the police at Maragua Police Station, the police embarked on looking for the Appellant. On 3rd September, 2007, **PW3, PC Maarine Abdi Ali** of Muthithi Police Post while in the company of PC Kiarie received information of the whereabouts of the Appellant. They effected the arrest and escorted him to Maragua Police Station.

10. **PW4,** Acting **Inspector Jane Langat** conducted an identification parade on the Appellant on 4th September 2007.The Appellant was positively identified by PW1 & 2. The witness adduced identification parade forms as Exhibit 3A & B respectively.

11. The case was investigated by **PW5, PC Charles Ndiritu** of Maragua Police Station. He summoned up the evidence of the prosecution witnesses and preferred the charges against him. He added that he was one of the police officer who visited the scene of crime in the company of PC Mwangi and Sargent Mbao. He added that PW 1 informed her that he was able to recognize the Appellant who used to sell firewood at *[particulars withheld]* where she also worked. In addition, he requested that an identification parade be conducted in which PW 1 & 2 positively identified the Appellant.

12. After the close of the Prosecution case, the Court ruled that the Appellant had a case to answer and accordingly put him on his defence. He gave a sworn statement of defence in which he stated that he sold bananas and operated a pool table in Githurai estate in Nairobi. He also said he sold firewood at Karuri. His defence was that between the 22nd and 26th of August, 2007, he was in his business of selling bananas in the company of one Mwangi. He thereafter returned upcountry to pick up more bananas at which point although he come across police officers at Karuri he was not arrested. He returned to Nairobi but on coming back upcountry on 3rd September, 2007 he was arrested. He was thereafter charged with the offences in question. He stated that the complainant (PW1) was well known to him for many years. But that on the date of the offence he was in Nairobi. He denied that he ever robbed her.

13. **DW2, Elias Mwangi Gathungu** in supporting the evidence of the Appellant stated that he had conducted business with him for three years. Further that he was with him on 22nd of August, 2007 when they went to Gikomba to buy Miraa. He further stated that the Appellant asked him for money to buy bananas. It was his evidence that he learned of his arrest on 25/8/2008.

Analysis and Determination

14. The Appeal was canvassed before on 9/9/2019. The Appellant was in person and he relied on written submissions dated 9th September, 2019. His main contestation was that he was not properly identified. He laid emphasis on the fact that the robbery took place at night when conditions for a positive identification were difficult. He added that at the time, there was no electric light in the house of the complainants that would have enabled the complainant to identify their attackers. He also took issue with the fact that when the PW1 & 2 were attacked they were forced to look down, reasons wherefore whey would not have known who attacked them. Furthermore, it was not stated how the torches were directed at the attackers so as to enable them to be recognized by the victims.

15. Further on identification, the Appellant took issue with the assumption by PW1 that he recognized him, not only as one of the attackers but the person who raped her. According to him PW 1 failed to inform the police when she recorded his statement that he had recognized him during the attack. That she had also failed to state how he was dressed, which mode of dressing would have enabled her to recognize him.

16. The Appellant further argued that PW2 did not corroborate the evidence of PW1 with respect to his identify. He asserted that PW1 indicated that he had been attacked by a person called Maina and not Daniel Mwangi Thuo, the latter being his name. Furthermore, according to PW2 the said Maina did not enter the bedroom where the actual robbery took place.

17. Learned State Counsel, Mr. Mutinda for the Respondent submitted that the Appellant was positively identified by both PW1 & 2. He asserted that the robbers were identified with the help of torches which the robbers and PW 2 had. In addition, an identification parade was conducted in which the Appellant was identified by both witnesses.

18. This is a case in which the learned trial magistrate ruled that the Appellant was identified by way of recognition having noted that he was well known to the PW1 & 2. The law on identification by recognition is well settled in that identification by recognition is more assuring and reliable as the person so stating would only be confirming that he knew the assailant prior to the commission of an offence. See the case of **Republic –vs- Turnbull & Others (1976) 2 ALL ER, 549** which has been adopted with approval by our Courts in which the Court of

Appeal, Criminal Division in England, Lord Widgery CJ pointed out that;

> "***Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made ..all these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger."***

19. From the above decision it is clear that even if the Court is to rely on the evidence of recognition in holding that an accused was positively identified, such evidence must be evaluated with a lot of care because a person may be mistaken of having identified a person he did not know very well. That is to say that even if a person believes that he knew the person at the time of the offence it does not lessen the burden of examining the evidence of identification with the greatest care possible due to the danger of mistaken identity. See **Wamunga –vs Republic (1989)KLR ,424** in which the Court of Appeal held that;

> ***"it is trite law that where the only evidence against a defendant is of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that circumstances of the identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.."***

20. In the present case, the robbery took place at night when conditions for a positive identification were difficult. According to PW1 & 2 they were able to identity the assailant with the help of torch lights. They testified that one of the robbers had a torch as well as PW2 who went to open the door. Throughout the robbery the assailants did not switch off their torch. The robbery took more than two hours and what drove the robbers out was the arrival of the police officers. During the period of the two hours the robbers turned the house upside down looking for money. Additionally, one of them identified as the Appellant raped PW1.

21. What is most intriguing is that PW1 at the first instance when the police visited the scene was quick to mention that one of the robbers was known to her for a period of more than 10 years. In the morning when she was at Maragua Police Station she reiterated the same giving the name of the known robber as Maina. The same name was given by PW2 as a person they well knew for a long period. In fact, PW1 in her statement indicated that Maina was the robber who raped her and was carrying a Panga. He is the robber who cut her hand.

22. In addition, when the police embarked on looking for the assailants one of the person who was being sought was the Appellant. Immediately after his arrest PW1 reiterated that he was involved in the robbery and raped her. All these events add up to one thing, that both PW1 & 2 were clear in their mind that the Appellant was one of the attackers. They were also clear that he was also known by the name Maina and upon his arrest he was identified as such. This drives me to one conclusion that an identification parade was not necessary. A Parade is only conducted when conditions for an identification parade are difficult and when the assailants are not known to the victims. A parade is intended to erase any doubt that the victim was able to identify his or her attacker in circumstances that were difficult for a positive identification.

23. It follows that the Appellant could not plead innocence and his alibi defence was a mere afterthought. Furthermore, his witness, DW2 gave contradictory evidence. He stated that he lived in the same house with the Appellant whereas the Appellant only stated that they did business together. DW2 also stated that they also sold Miraa with the Appellant an issue that never arose in the Appellant's statement. The entire defence case was ousted by the strong prosecution case that the Appellant was culpable.

24. The Appellant took issue with the fact that the persons who called police to inform them that there was a robbery were not called to testify. It is trite law that there is no number of witnesses that the prosecution is required to call. See **Section 143 of the Evidence Act**. What is paramount is that they call such number of witness as is sufficient to prove their case. In the instant case the prosecution witness who testified established that the Appellant was positively identified.

25. Finally, the Appellant submitted that the prosecution failed to proof their case beyond a reasonable doubt. I understood him to be stating that the ingredients of the offence of robbery with violence were not established. The elements of the offence are provided under section 296(2) of the penal code in the following words;

> ***"(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

26. In the present case, PW1 was injured during the robbery and was treated and a P3 form produced. The injuries were occasioned by the violence meted against her by the robbers who were armed with crude weapons as a result of which he sustained cut wounds on her left hand. The robbers were also more than one in number. Under the provision, a proof of any of the three elements is sufficient to sustain a conviction of the offence. In this case the prosecution discharged its burden accordingly. I therefore hold and find that the conviction of the Appellant was safe. I uphold the same.

27. As regards the sentence it is now clear from the Supreme Court decision in the case of ***Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015*** that a mandatory death sentence is no longer constitutional. The justification for this is that providing a minimum mandatory sentence denies a trial Court the exercise of discretion in sentencing where circumstances of a case do not warrant such stringent penalties. This jurisprudence is accordingly being applied to other offences where minimum mandatory sentences other than a death penalty are provided. For instance, the Court of Appeal in the case of ***Evans Wanjara Wanyonyi –vs- Republic (2019) EKLR held as follows;***

> ***"On the enhanced 20 year term of imprisonment meted upon the Appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the Appellant raises a question of law. This Court***

in Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and inJared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the aforestated Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:

> *'In this case, the Appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court's decision in* ***Francis Karioko Muruatetu & another – v- Republic (supra****), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial Court.'*

28. The present case is one where the Appellant and his co-assailants brutalized PW 1 and her husband. PW1 was additionally raped and she lost some money. It is a case that is deserving a deterrent sentence so as to sound a warning to would be offenders. During the trial the Appellant declined to offer mitigation stating he did not care about the sentence. Equally before this Court he did not offer any mitigation. This implies that he has not as at date regretted the mistakes he made. The Court must therefore, impose a sentence that will serve as deterrence. I however, underscore the fact that the death sentence imposed was harsh and excessive in the circumstances of the case.

29. In the upshot, the appeal against conviction is dismissed. I however set aside death sentence and substitute it with ten (10) years imprisonment commencing from the date of the Appellant's arrest which is 3rd September, 2007. It follows that the Appellant has served in excess of his sentence. I therefore, order that he be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 12TH DAY OF SEPTEMBER, 2019.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of;-

1. Appellant in person.

2. Mutinda for the Respondent.