REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 64 OF 2016

PAUL MWANGI MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Nakuru Chief Magistrate's Criminal Case (No. 296 of 2013** by **Hon. J. N. Nthuku, S. R M** on **11/04/16).***

J U D G M E N T

1. **Paul Mwangi Macharia**, the Appellant was charged as follows:

Count 1: **Robbery with violence contrary to Section 296 (2) of the Penal Code.** Particulars of the offence were that on the 11th November, 2011 at [particulars withheld] village, Banita in Rongai District within Rift Valley Province, jointly with another not before court, being armed with dangerous weapon namely slasher robbed P K cash Kshs.1,440/=, a hen valued Kshs.500/= and at or immediately before or immediately after the time of such robbery used actual violence on the said **P K.**

Count 2: **Defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act**. Particulars of the offence were that on the 11th November 2011 at [particulars withheld] village in Rongai District within Rift Valley Province, unlawfully and intentionally committed an act causing penetration by inserting a male genital organ (penis) into the female genital organ (vagina) of **J C** a girl aged 15 years causing penetration.

Alternative: **Indecent act with the said child by touching her private parts**. Particulars of the offence were that on the 11th day of November 2011 at [particulars withheld] village Banita in Rongai district within Rift Valley province, unlawfully and intentionally did an indecent act on **J C** a girl aged 15 years by touching her private parts.

2. Facts of the case were that on the night of 11th November 2011, the Complainants were asleep inside their house when robbers broke into the house, robbed **P K** of cash Kshs.1,440/=, a hen, cellphone and in the process defiled the Complainant in the second count. They identified the Appellant as one of the attackers. Investigations were carried out that culminated into the arrest of the Appellant who was subsequently charged.

3. When put on his defence, the Appellant denied the charges. He alluded to the time of his arrest by stating that he disagreed with **K (K**) as both of them were drunk. The lad called the police who arrested and locked him up. He was subsequently moved to Solai Police Station where he saw the Complainants and their witnesses. He adduced in evidence an OB. Excerpt No.2/11/11/11 of a reportee who did not testify.

4. The learned trial magistrate considered evidence adduced, convicted and sentenced the Appellant to death on the 1st count and twenty (20) years imprisonment on the 2nd count which was to be held in abeyance.

5. Aggrieved by the conviction and sentence, the Appellant appealed on grounds as amended thus:

1. The trial magistrate failed to appreciate the express and outright contents of defence exhibit 1, O.B. No. 2 of 11th November 2011, which was a complaint of 9th November 2011 which has no relationship or connection with the particulars of the charge sheet and evidence in court in respect of the date of the offence.

2. The trial magistrate erred in law and fact as to the identity and/or recognition of the assailants who were not identified or recognized pursuant to the first information report O.B. No.2 of 11th November 2011.

3. The trial magistrate failed to consider the evidence of prosecution witness No.7 and prosecution exhibit 2. The arrest of the

Appellant, his arraignment in court of the charges were not explained or any relation given.

4. The trial magistrate finding that the Appellant was in hiding from November 2011 to 2013 was erroneous and prejudicial to the Appellant as there was no such evidence presented before him.

5. The Appellant is prejudiced by the conduct of the investigating officer as seen from exhibit 2 as the witness statements were recorded in February 2013 after the arrest of the Appellant while as the assailants were unknown per defence exhibit 1 O.B. 2 of 11th November 2011.

6. The trial magistrate failed to appreciate the fact that the witness statements were recorded on arrest of the Appellant in 2013 and before then the assailants were unknown per the O.B. No.2 of 11th November 2011 – defence exhibit 1) and the history captured on the P3 (prosecution exhibit 1 part II (2).

7. The trial magistrate failed to comment or consider the sworn evidence of the appellant in relation to the evidence and exhibits before court.

6. The Appellant canvassed the appeal by way of written submissions through the firm of Mburu and Co. Advocates. It was urged that the extract of O.B. 2 of 11th November 2011 showed that **S K** reported a robbery that occurred on the 9th November 2011 at about 1.00a.m. where his mother was robbed and sister raped. That the charge the Appellant faced was in respect of the 11th November 2011 and the reportee did not testify. The discrepancy was not appreciated or considered by the trial magistrate.

7. On the second ground, it is argued that at the point of the entry in the O.B being made, and the filling of the P3 Form, the assailant was unknown and witness statements were recorded after the arrest of the Appellant and no identification parade was conducted.

8. On ground three that the circumstances of the Appellant's arrest were explained by the Appellant and not contravened as the arresting officer did not testify. And it was after his arrest that witnesses alleged they knew him as a neighbour a fact that was not disclosed in O.B. 2 of 11/11/2011.

9. On grounds 4 – 7 of appeal, the argument was that the case was poorly investigated and a wrong conclusion reached and the Appellant was prejudiced.

10. In response, the State through the Senior Assistant Director of Prosecutions, **Mr. Okemo**, opposed the appeal. He urged that nothing precluded any other person from making a report and at page 10 of the proceedings PW1 had mentioned that he had a brother at M. That the error apparent on the document indicating that the break in was on 9/11/2011 must have been made by the person who recorded the report because the report was made on the 11/11/2011. As the report corresponds to what witnesses testified to as having happened. That there was no intention to falsify. That all witnesses testified to how they recognized the Appellant a person they had seen, who had a very bright torch that he kept flashing while looking for properties in the house. As a result there was no necessity of conducting an identification parade.

11. Regarding the P3, he argued that it did indicate that the assailants were unknown but urged the court to find that witnesses had persuaded the lower court that they had recognized the Appellant as their attacker. That the attackers were more than one, and armed with a panga therefore the charges were proved.

12. This being the first appellate court I am duty bound to re-evaluate and reconsider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusions with that in mind **(*see Okeno –vs- Republic [973] E.A. 32).***

13. Some facts in this case were not in doubt. In the case of robbery with violence as stated in the case of Oluoch Vs Republic (1985) KLR the prosecution was duty bound to prove; that:

"(a) the offender is armed with any dangerous and offensive weapon or instrument; or

((b) the offender is in company with one or more person or persons; or

(c) At or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses other personal violence to any person…"

14. **PW1, J C** saw two (2) men. **PW3, Simon Kosgei** saw two (2) people who had a slasher which they used to cut the dog. **PW4, P K** saw two (2) people. PW5 R C also saw more than one person. She witnessed as they cut the dog. The individuals took away cash Kshs.1,440/= from PW4. They also took a hen and a cellphone.

15. The slasher the individual had was adapted to be an offensive weapon. They were more than one person and actual violence was meted out on the person of PW1 as they took away what belonged to the 1st Complainant without her consent. This was robbery with violence.

With regard to the 2nd count the prosecutions had a duty of proving the:

i. Age of the Complainant

ii. The fact of the act of penetration.

iii. The identification of the assailant

(**See Charles Wamukoya Karani –Vs- Republic, Criminal Appeal No.72 of 2013).**

16. In the case of Mwalengo **Chichoro Mwajembe vs. Republic, Criminal Appeal No. 24 of 2015 (UR)** it was stated that:

> ***"….the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See*** *Denis Kinywa-Vs- Republic, Criminal Appeal No.19 of 2014* ***and*** *Omar Uche -Vs- Republic, Criminal Appeal No.11 of 2015****. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in*** *Francis Omuroni -Vs- Uganda, Criminal Appeal No. 2 of 2000****. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable…"***

17. The complainant, PW1, was not taken through voire dire examination which was a suggestion that she was not a child of tender age. In her testimony she gave her age as 15 years. PW4, her mother, did not allude to her age. The clinical officer who examined her indicated her age as 15 years. The defence did not dispute the age of the Complainant therefore it was proved as required. The act of penetration was proved by medical evidence, her hymen was freshly broken and spermatozoa were noted.

18. The Appellant denied having been one of the attackers/assailants. In his defence he stated that he resides in Lanet and at the time of his arrest he had gone to Banita to visit his parents. On cross examination he stated that the Complainant's home is one (1) kilometre away from his home.

19. PW1 stated that she recognized the two (2) individuals who entered their house (room) and identified the Appellant in particular as the person who defiled her.

20. PW3 **S K** said he identified the Appellant by voice. PW4 did not identify the people who attacked others on the fateful night. She denied having seen the Appellant that night. **PW5 R C** on the other hand said she identified the Appellant's voice and physical appearance. **PW6 JS** said he recognized the Appellant.

21. This was therefore a case of visual and voice identification. In the case of **Wamunga (1989) KLR 42** the court stated that:-

> ***"whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before conviction of the defendant in reliance on the correctness of the identification".***

22. In **Anjononi and others V Republic (1976 – 1980) KLR 1556 at 1568 the Court of Appeal** stated as follows:-

> ***"The recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other."***

23. The Appellant lived in the same neighbourhood with the Complainants. He was a person well known to them. It is stated that there was moonlight and the Appellant had a bright torch that he was flashing which enabled some of the witnesses to see. They also stated that he made utterances that made some of them confirm that he was one of the assailants/attackers.

24. PW1 stated that both their attackers were known as **Macharia, Paul Macharia Mwangi** and **"Mash".** She identified the Appellant as the one who perpetrated the violence of defilement upon her. She had known the Appellant, their neighbour for over eight (8) years. She described him as a brown man. She stated that the Appellant had a bright torch that enabled her to see him.

25. PW3 recognized the voice of the Appellant when he cut their dog and remarked that : *"Kesho mpeleke hiyo mbwa hospital."* Pw5 stated that she recognized the voice of the Appellant as he ordered her to go and undress but abandoned the quest to defile her when she alleged that she was HIV positive. She had known the Appellant for a duration of five (5) years. On cross-examination she said that she recognized the Appellant by voice and physical appearance as the torch was bright and when he entered the house he said:

> ***"silly nyamazeni achene kupiga nduru.***

26. PW4 on the other hand stated that there was bright full moonlight which enabled him to recognize the Appellant. He saw him as they tied him and later heard his voice as he demanded for money. He had known the Appellant for ten (10) years and even his accomplice that he referred to as "Macharia"

27. PW3 and PW4 testified that in the morning they followed feathers of the chicken that dropped along the way and footprints that led them to the house of the Appellant's accomplice. They found both of them inside the house but they managed to escape. They went into hiding until the time the Appellant was arrested.

28. PW7 No.xxxxxx Corporal Bernard Kipken did not investigate the case but adduced in evidence a statement recorded by the investigation who had passed on. Per the statement, the officer was assigned investigation duties after the Appellant was arrested and he went on to record statements of witnesses.

29. In his defence the Appellant produced in evidence a paper with some writing scribbled thus:-

> ***"O.B. 2/11/11/2011: Robbery with violence. To the base is one male adult namely S K C/o M – M – 0724xxxxxx and he reports that on 9th November, 2011 at about 1.00a.m. midnight two people broke into his house and found his mother while armed with pangas and demanded money from his mother which they robbed her Kshs.1,450, mobile phone make not known, one hen and they also raped his sister by the name C. Now seeks police assistance.***

30. The note bears no stamp impression from a police station and was not introduced in evidence early enough when the police officer testified for purposes of testing its authenticity. That notwithstanding the reason for its production was to demonstrate that the person who made the report to the police was not a witness. If the reportee was S K as written he was not a witness but the report alluded to two people who broke into the house and committed a robbery and also raped one of the victims. In his defence the Appellant alluded to having been arrested and locked up on the 3/2/2013 but no Occurrence Book entry was availed to establish that he was locked up for a different offence other than what he was alleged to have committed. It is urged that the P3 did not identify the assailants of the Complainant. Part 1 of the P3 was filled by the police. It indicated that the Complainant was defiled during a robbery at home. On part II the medical practitioner captured the relevant history thus:

> ***"……of having been sexually assaulted by one person who was in a group of two who broke into a house and stole some properties at around 1.00a.m."***

31. The defence did not seek to have an explanation by the officer who made the 1st entry. The clinical officer testified but she was not interrogated as to why the name of the assailant was not included. It was not established if it is a requirement to mention the name of the assailant.

32. It is urged that no identification parade was conducted to identify the robber. It is imperative to distinguish between recognition and identification. This was a case where the witnesses who testified stated that they recognized the Appellant having known him previously and for many years. They were not alluding to the fact of trying to remember the individual they saw on the fateful night therefore identification of the person on an identification parade would have served no purpose. Where the prosecution witness has the knowledge of the assailant who is alleged to have committed the offence an identification parade is not necessary.

33. This is a case where the arresting officer did no testify; a lacuna that the Appellant seeks to benefit from. In the case of Kiriungi V Republic (2009) KLR 638 the court stated:

> ***"……the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case that the Appellant was involved in the criminal with which he was charged."***

34. This is a matter that the original investigating officer died. The arresting officer did not testify but the evidence of the witnesses was cogent. It was also stated that the Appellant escaped in the morning and he disappeared until the time of his arrest. It has been held that the conduct of the appellant in such a case was indicative of the fact that he was conscious of what he was doing and what he had done was wrong. (**See Roba Galma Wario V. Republic (2015**) eKLR.

35. Witnesses who testified in this case were forthright. The Appellant was their neighbour but we had PW4 who did not lie. She did not recognise her assailants and she stated so. Therefore evidence adduced against the Appellant as one of the robbers and the individual who defiled the 2nd Complainant was overwhelming. Therefore I affirm the conviction.

36. On sentence, the Appellant was sentenced to death on the 1st count. In the case of **Francis Karioko Muruatetu & Another V. Republic (2017) eKLR** it was held that the mandatory nature of the death sentence in capital offences is unconstitutional. I do note that when given the opportunity to mitigate the Appellant stated that he had nothing to say in the premises I do set aside the death sentence imposed and substitute it with ten (10) years imprisonment.

On the second count, the sentence imposed is the minimum prescribed sentence for the offence. I do affirm it, save that I do set aside the order having the sentence held in abeyance.

37. Sentences will run concurrently with effect from the date of the conviction of the lower court.

38. It is so ordered.

Dated, Signed and **Delivered** at **Nakuru** this **13th** day of **December, 2018.**

L.N. MUTENDE

JUDGE