



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 58 OF 2013**

**JOHN MWANGI WANJIKU ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... STATE**

*(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. J. Mwaniki –Principal Magistrate delivered on the 21<sup>st</sup> March, 2013 in CMCR Case No. 4389 of 2011)*

**JUDGMENT**

The appellant **JOHN MWANGI WANJIKU** has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at the Nakuru Law Courts.

The appellant had been arraigned before the trial court on 2/12/2011 facing two charges. The first charge was that of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars or the charge were that

*“On the 30<sup>th</sup> day of December 2011 within Central Province jointly while armed with a dangerous weapon namely panga robbed **J W K** of Ksh 2,000/- serial number CA [particulars withheld] and serial number [particulars withheld] and immediately before or immediately after such robbery used actual violence to the said **J W K**”.*

The appellant faced a second charge of **RAPE CONTRARY TO SECTION 7 OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of this charge were that

*“On the 30<sup>th</sup> day of December, 2011 at [Particulars withheld] Village in Mirangine District within Central Province intentionally and unlawfully caused his penis to penetrate the vagina of **J W K** without her consent”.*

The appellant pleaded ‘**Not Guilty**’ to both charges. His trial commenced on 13/4/2012. The prosecution led by **CHIEF INSPECTOR IKUNYWA** called a total of four (4) witnesses in support of their case.

**PW1 J W K** told the court that on 30/12/2012 at about midnight she and her husband **D K PW2** were asleep in their home in Gilgil. There was a knock on the door and a voice called out to her husband. **PW1** recognized the voice as that of the appellant. **PW2** opened the door. The appellant came in. He demanded to be given Ksh 5,000/=. **PW1** had only ksh 2,000/= which she gave to the appellant. Despite being given this money the appellant proceeded to rape **PW1** in the presence of her husband.

The matter was then reported to police. The appellant was then arrested and charged with the two offences.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He opted to make a sworn defence in which he denied the offences.

On 21/3/2013 The learned trial magistrate delivered his judgment in which he convicted the appellant on both counts and sentenced him to serve twenty five (25) years imprisonment on each count. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

The appellant who was not represented by counsel during the hearing of this appeal relied entirely upon his written submissions which had been duly filed in court. **MR. MOTENDE** learned State Counsel opposed the appeal.

Being a first appeal, this court is obliged to re-examine and re-evaluate the prosecution case and draw its own conclusions on the same. **(see AJODE Vs REPPUBLIC (2004) 2 KLR 82).**

In this case the appellant was sentenced by the trial court to two term of 25 years imprisonment – the sentences were to run concurrently. The respondent state filed on 18/4/2017 a notice seeking enhancement of sentence. This notice was brought to the attention of the appellant. He opted to proceed with his appeal notwithstanding that notice seeking enhancement of sentence.

In his written submissions the appellant claimed that the charge sheet was fatally defective. I have anxiously perused the said charge sheet. I find no defect in the same. The charges are properly and clearly framed. It must be remembered that a charge sheet is but a **‘snap shot’** of the evidence to be adduced at trial. It is not necessary that all aspects of the evidence be captured in the charge sheet. I therefore dismiss this limb of the appeal.

The next crucial issue is that of identification. The incident occurred at about midnight. Undoubtedly it was dark. **PW1** told the court that she and her husband were both asleep in their home. The witnesses both state that they heard a knock on their door. A voice which both recognized as the voice of the appellant called out. Since the couple knew the appellant they opened the door to let him in. The question is whether the witnesses were sufficiently able to identify the appellant by voice recognition.

**PW1** and **PW2** told the court that the appellant was their neighbor, a man whom they knew very well. On that very day they had hired the appellant to do some casual work on their farm of packing potatoes. Being a neighbor and a person with whom the witnesses interacted frequently, they were well placed to recognize his voice. In his defence the appellant admits that he knows both **PW1** and **PW2** as they are his neighbours. In her evidence **PW1** says

*“I recognized the voice as that of John Mwangi Wanjiku”*

On his part **PW2** says

*“I recognized the voice as that of Mwangi accused at the dock”*

Indeed I have no doubt that the only reason why **PW2** opened the door so late that night is because he recognized the voice as that of the appellant a man he knew well.

Aside from voice recognition, **PW1** and **PW2** both state that they saw the appellant on the night in question. Although it was night **PW1** states that her husband had a torch which he shone at the appellant. **PW1** states that the appellant also had a torch.

From the narration of the two witnesses the incident must have taken several minutes. As such they had ample time and opportunity to see the appellant. The appellant spoke to **PW1** and **PW2** making demands for cash. He had not covered or otherwise disguised his face. From the light available from the torch and the fact that the parties were in close proximity, I am satisfied that identification was possible. Both witnesses were able to describe the clothes which the appellant was wearing at the material time – a black/red jacket and a red cap. The witnesses would only have been able to see these clothes and the colors if the lighting was sufficient.

In respect of **PW1** she even spent more time in closer proximity with the appellant. When the appellant demanded Ksh 5,000/= **PW1** handed to him the only cash she had at hand which was ksh 2,000/= which he put inside his jacket pocket. **PW2** confirms this aspect of the testimony of **PW1** when he says

*“Accused demanded Ksh 5,000/= from me. My wife gave him ksh 2,000/=”.*

The appellant apparently dissatisfied with this amount threatened to abduct her. He then undressed her and lay her on the bed and proceeded to rape her. **PW2** confirms that the appellant raped his wife in his presence. In the act of raping **PW1** the appellant was in very close proximity with the witness allowing her a chance to see him well.

I am satisfied that both **PW1** and **PW2** have positively identified the appellant. Aside from evidence of identification, there exists clear evidence or recognition given that the appellant was a man well known to both witnesses prior to this incident. As they told the court only that very day the appellant had been working in their farm packing potatoes. I find there is little possibility of a mistaken identity.

The evidence on identification is further strengthened by the testimony of **PW3 CORPORAL PATRICK OOKO** who was the arresting officer. **PW2** told the court that he went to the scene immediately after the incident had occurred. He met **PW1** who named her attacker as **‘John Mwangi’** and described that he was wearing a black jacket and a red hat. **PW3** went to the appellant house and arrested him. Inside the house police recovered a black jacket and a red cap. These items were produced in court as exhibits **P. exb 1** and **P. exb 2** and were identified by **PW1** and **PW2** as the clothes which the appellant had been wearing. Upon checking the pockets of the jacket police recovered cash Ksh 2,000/= in denominations of 1,000/= notes. Whilst the serial numbers of the cash which **PW1** handed over to the appellant had not been recorded, it is too much of a coincidence that clothes identified as the ones the attacker was wearing were found inside the appellant’s house and Ksh 2,000 found in the jacket pocket. This is the exact amount which **PW1** said she gave their attacker and which she saw him place in the pocket of his jacket. This sequence of events buttresses the identification of the appellant as the man who robbed **PW1** and **PW2**.

The evidence available points squarely at the appellant as the man who robbed **PW1** on the night in question. There has been a clear a positive identification by both witnesses.

The next question to be determined is whether the appellant raped **PW1**. Rape is defined in law as sexual penetration of another person

without their consent. **PW1** told the court that in the course of the attack the appellant pulled off her clothes, forced her onto the bed and raped her. This is one of the very rare occasions where there was an eyewitness to the act of rape. **PW1** told the court that appellant raped her in the presence of her husband.

**PW2** who was the husband to **PW1** confirms that his wife was raped in his presence. **PW2** stated in his evidence at page 7 line 8

*“The accused person raped my wife. It was a horrifying experience for me”*

Following the incident **PW1** went and sought treatment at Ol kalou Hospital. **PW4 PETER NUMBO** a clinical officer attached to that hospital told the court that he examined both the appellant and **PW2**. Upon examination the appellant was found to have an infection. **PW4** filled and signed his P3 form which is produced as an exhibit. **P. exb 7(a)**.

**PW4** also examined **PW1**. He noted that she was wearing an under pant which was torn and which was stained with a mucus – like substance. **PW1** was found to have a perforated hymen and a lab examination revealed the presence of mobile spermatozoa as well as a gonorrhoea infection. She was 22 weeks pregnant at the time. He filed and signed her P3 form which was also produced as an exhibit **P. exb 7(b)**.

Given that **PW1** was an adult married woman the absence of a hymen was not unusual. The torn under pant was indicative of the use of force. The presence of mobile spermatozoa indicated recent sexual activity. It is significant that just like the appellant **PW1** was also found to have an infection.

The evidence of **PW4** makes it clear that **PW1** had in the recent past engaged in sexual intercourse. As stated earlier the torn under pant indicates that there was use of force. The presence of a sexual infection in both the appellant and **PW1** makes it more than likely that the sexual encounter was with the appellant. I find that the evidence of **PW4** corroborates the claim by **PW1** that she had been raped. The circumstantial evidence point at the appellant as the perpetrator of the rape. I am therefore satisfied that the charge of Rape has been proved.

This was an incident in which the appellant robbed **PW1** and during the course of that robbery used actual violence against **PW1** by raping her. The ingredients of the offence of Robbery with Violence have been shown to exist. I find that the appellant was properly convicted on both Counts 1 and 2 and I do uphold those convictions.

Following conviction on Count No. 1 of robbery with Violence the trial court sentenced the appellant to serve 25 years imprisonment arguing that the death sentence was not mandatory. I find that the trial magistrate misapprehended the law and erred in imposing such a sentence. Section 296(2) provides for a mandatory death sentence upon conviction. I therefore set aside the 25 years imposed by the trial court for Count No. 1 and instead enhance it to the lawful sentence of death. The sentence of 25 years imprisonment for Count No. 2 being lawful is confirmed.

The upshot is that this appeal fails in its entirety and is hereby dismissed.

**Dated in Nakuru this 2<sup>nd</sup> day of June, 2017.**

Appellant in person

Mr. Motende for State

**Maureen A. Odera**

**Judge**