**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL CASE NO. 284 'A' OF 2013**

**P N K……..…….....APPELANT**

**VERSUS**

**REPUBLIC…….....RESPONDENT**

**(Being an appeal against conviction and sentence in the judgment delivered in the Thika Chief Magistrates' Court Criminal Case No. 3871 of 2006 (Hon. U.P. Kidula) on 2nd November, 2007)**

**JUDGMENT**

The appellant was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. According to the particulars of the offence, on 28th day of July, 2007 *[particulars witheld]* village in Thika district of the central province, the appellant jointly with another before court being armed with dangerous weapons, namely knives robbed L.N.W of cash Kshs 10, 450/= a mobile phone make nokia 3310, national identity card and an account book all valued at Kshs. 14,450/= and immediately before the time of the robbery, they used actual violence to the said L.N.W.

In the second count, the appellant was charged with the offence of rape contrary to **section 140** of the **Penal Code** and here it was stated in the particulars of the offence that on the 28th day of July, 2006, at *[particulars witheld]* village in Thika district of the central province, the appellant had carnal knowledge of L.N.W without her consent. In the alternative, the appellant was charged with the offence of indecent assault contrary to **section 144(1)** of the Penal Code the particulars being that on 28th July, 2006 at *[particulars witheld]* village in Thika district of the central province, the appellant unlawfully and indecently assaulted L.N.W by touching her private parts.

The case against the appellant at the trial court was that on the 28th July, 2006 at 8 am the **complainant (PW1)** was on her way to Kiharu when she was accosted by the appellant and his colleague; she said that she recognised them as P the appellant herein and Edward. She happened to have seen them on the opposite side of a stream soon before she crossed it as she walked towards Kiharu. She recognised the appellants as her cousins in the sense that they all shared a grandfather. As they approached her they appeared to be staggering; although the complainant moved aside, out of their way, the appellant is said to have deliberately butted her in the stomach with his head. She fell on her back and immediately the appellant climbed on her and held her by her throat.

According to the complainant, while the complainant was pinned to the ground, the appellant demanded money from her; he pulled out a knife and placed it at the complainant's neck threatening her with death if she did not oblige. He asked his colleague, to pull up her clothes and demanded to have sexual intercourse with the complainant. The appellant is said to have covered the complainant's face with her scarf with which she had covered her head as it is alleged to have been a rainy season.

Although the complainant pleaded with the appellant, he proceeded to rape her and once he was through he told her not to arise until after fifty minutes lest she would be killed. When she finally arose all her property which included a brief case containing the sum of Kshs. 10400/=, a cell phone, her identity card and books were all stolen. The books were part of her tools as a community development programmes officer for women projects. As a matter of fact she was on her way to making a presentation in this regard when she was attacked.

The complainant went to one her attacker's home where she was scheduled to address a group of women in her capacity as a programmes officer for women projects. Since her clothes had been soiled and was dirty she could not enter the house where they were gathering; she opted to call one of the women outside and tell her what the appellant with his colleague, who she also described as the appellant's cousin had done to her. She also told her that she knew the people who had attacked were her cousins.

The woman she called out was identified as **Lucy Kigio Kamau (PW2);** Lucy volunteered to escort the complainant, at least up to the stream where she had been attacked on her way to Kimunyu police post where she reported her complaint. She testified that soon after she made her report, the police accompanied her in the direction of where the crime had been committed trying to trace any document but none of the properties stolen from the complainant was ever recovered. They proceeded to one of the attacker's home where incidentally, was the same place the complainant was set to address women. The attacker, who was identified as Edward was found there and was immediately arrested.

The appellant, according to the complainant disappeared from the area and went to Makongeni in Thika where he was eventually arrested by officers from Makongeni Police station. The complainant testified that she is the one who took the warrants for the arrest of the appellant to the station. When the appellant was finally arrested, the police summoned the complainant to identify him; she said that she saw the appellant in the cell when the officer in charge of the station opened the cell for her, apparently to identify him.

Upon cross-examination, the complainant testified that she knew the appellant from childhood; it however emerged from her testimony that in her statement to the police she had said that she only knew one of the attackers who she named as Muhia Njoroge who apparently was also called Edward. She also stated in the same statement that the other attacker had a mask and did not know his name though he used to see him in the village.

Again in her statement she referred to a man who she described as a Good Samaritan who found her at the scene where she had been attacked. In her evidence in court she denied having seen such a person

**Lucy Kigio Kamau (PW2)** testified that indeed on 28th July, 2006 she was in a group of seventeen women when she was called outside the house in which they were gathering by the complainant. She found that the complainant had mud all over her; she informed this witness that she had been robbed and raped by some people. She said that the complainant told her she would not reveal the identities of her assailants until she had reported the matter to the police.

This witness testified that earlier on the same day at around 7 am one of their members, one Florence Wambui who was described as the mother to one of the appellants had enquired from her the custodian of the money for the women group. In her statement to the police, however, she said that these enquiries had been made the previous day.

The police officer who received the complainant's complaint at Kimunyu police post was **Wellington Musau (PW3)**; at the material time he was attached at Gatundu police station. This witness confirmed

that on 28th July, 2006 the complainant reported a case of robbery and rape. In his evidence, he said that when the complainant made a report to the police he gave the name of Muhia Njoroge who was one of her attackers. The complainant, according to him did not know who the other attacker was and apparently he is not the officer who arrested the appellant.

The investigating officer, police constable Benjamin Wambua (PW 5 testified of having seen the complainant at the Kimunyu police post on 28th July, 2006. She complained to the police that she had been raped and robbed by people she knew. This witness testified that the appellant was arrested after his supposed accomplice had been arrested; she did not know him.

The doctor who examined the complainant **Dr Marion Wanjiku Muhia (PW4)** testified that the complainant came to her with a history of having been raped by a person known to her. The complainant had torn underpants and soiled clothing. Her arterial part of the neck was tender, an indication that there had been a struggle. There was a foul smelling whitish discharge from her genitalia. The vaginal swab revealed mucal cells without spermatozoa. The complainant was managed on antibiotics and treated of HIV. This witness concluded that the complainant had been sexually assaulted within a few hours of the examination.

In his sworn defence the appellant testified that on 22nd August, 2006 he was hawking milk at Thika when he was arrested; it would appear from his testimony that the person who pointed him out to the police who arrested him was one Mwangi whom he complained that he was not in good terms. According to the appellant Mwangi was a competitor in business and there was a pre-existing land dispute between the appellant's family and Mwangi's cousins. The appellant raised this issue in cross-examination of the investigations who retorted that he was not out to investigate land disputes.

When the appellant was arrested, he was informed that he was being arrested for hawking milk without a licence and in fact four more people were arrested with him for the same offence; these people were released two days later after their families intervened leaving the appellant behind.

Five days after his arrest, the complainant was brought to station; the investigating officer asked the appellant whether he knew her to which he responded in the affirmative. When the complainant was asked whether the appellant is the person who robbed her she said that it could have been him but that the person she identified was one Muhia Njoroge. The investigating officer is said to have demanded a bribe and the appellant was only charged because he could not raise it. The charge sheet shows that the appellant was arraigned in court on 28th August, 2006 but, curiously, it does not show when he was arrested.

With the foregoing evidence, the learned magistrate was satisfied that the state had proved its case beyond reasonable doubt; she accordingly convicted the appellant of the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code and the offence of rape contrary to **section 140** of the same Code. The learned magistrate sentenced the appellant to death for the offence of robbery and life imprisonment for the offence of rape. She however suspended the life imprisonment sentence.

The appellant was dissatisfied with the learned magistrate's decision and therefore appealed to this court. In his grounds of appeal, the appellant faulted the learned magistrate for, *inter alia,* failing to consider that article **49(1) (a) (i)** of the Constitution was violated; that the conditions for identification of the appellant were not favourable; that the appellant was arrested in questionable circumstances; that the entire evidence was not properly analysed and, finally; that the learned magistrate did not consider the appellant's defence.

When the appeal came up for hearing, the appellant adopted his written submissions in which he expounded his grounds of appeal. In the submissions the appellant argued, quite correctly in my view, that the main issue on which his appeal turned is whether the appellant, as the alleged complainant's assailant, was properly identified. Except for the ground that his constitutional rights were violated under **article 49(1)(a)(i)** of the **Constitution** the rest of the grounds were either directly or indirectly connected with the evidence on identification of the appellant as the perpetrator of the crimes with which he was

charged and convicted.

In the appellant's view, there were material discrepancies and contradictions in the prosecution case particularly as far as the evidence on identification was concerned; for instance while the complainant testified that she recognised her attackers as people she knew, even before they accosted her, she told the police that she only recognised one person whom she named as Muhia Njoroge and she did not know the other person's name. In any event the other person is said to have been wearing a mask and it is for this reason or at least one of the reasons that the complainant, in her own words, could not identify him.

Counsel for the state Ms Kathambi asked the court to uphold the convictions and the sentences. Counsel argued that the attack on the complainant was executed in broad daylight and the appellant together with his colleague spent some time with the complainant; she not only saw her attackers but also they were people she knew before and therefore was able to recognise them. Moreso, she conversed with the appellant as he assaulted and robbed her. In the counsel's view the circumstances for identification of the complainant's attackers were favourable and they were properly identified by recognition.

Counsel relied on the **High Court in Criminal Appeal No. 161 of 2010, Wesley Osebe Ogasa versus Republic** (Emukule, Omondi JJ) to support her contention that the elements of the offence of robbery with violence were proved. As for the rape, the learned counsel's position was that the medical evidence in proof of the sexual assault was not displaced. She urged the court not to disturb the convictions and the sentences because there was sufficient evidence on record to cast away any doubt that the appellant was properly convicted and sentenced.

From the evidence on record, there is no doubt that the complainant was robbed and sexually assaulted; the only question whose answer can be discerned from a fresh analysis of the evidence presented at the trial is the identification of the person who robbed and raped the complainant. As the first appellate court, looking at the evidence anew and coming to our own conclusions is a mandatory exercise which we must undertake but with the caveat that we are not advantaged, as the trial court was, in appreciating certain aspects of evidence such as gauging the demeanour and disposition of witnesses. There is no better place to begin this task than with the evidence of the complainant herself.

The complainant testified that she saw the appellant with his colleague and immediately recognised them as P, the appellant herein and Edward; the two, according to her evidence, were her cousins. It follows that as they attacked her, she was under no illusions of who they were. Soon after the attack, she proceeded to one of her attacker's home where, incidentally, she was scheduled to address a group of women in her capacity as a programmes officer for women projects. At this home, according to her testimony, she talked to Lucy Kigio Kamau (PW2) and told her that she had been attacked by her cousins. This witness, however, denied having been told by the complainant who her attackers were; instead, according to her evidence, the complainant told her that she would not reveal the identities of her assailants until she had reported the matter to the police.

But even when the complainant reported her complaint to the police there is nothing on record to suggest that she gave the names of the two assailants; she only gave the name of one of them who she identified as Muhia Njoroge. She told the police that she could not tell who the other attacker was apparently because he was wearing a mask. This statement was obviously inconsistent with her testimony to court that she knew and recognised her attackers.

It is noted that the appellant took up this issue in his defence, as he was rightfully entitled to, and asked for the occurrence book of the date when the complainant's complaint was recorded at the police station. Despite his persistent pleas, this book was never produced and the only inference that one can draw from the prosecution's deliberate failure to produce this piece of evidence is that it would have been adverse to their case against the appellant. This aspect of the appellant's defence was not addressed by the learned magistrate and this omission gives credence to the appellant's argument that the learned magistrate did not have any regard to the appellant's defence at the trial.

The identification of the appellant as one of the complainant's attackers was further cast in doubt by the

police conduct. In the first instance she claimed to have been given the warrants of arrest to the police at Gatundu to take them to Makongeni police station to effect the appellant's arrest; we find it unusual that a civilian could be entrusted with police instruments such as warrants of arrest.

More intriguing was the police behaviour after the appellant was arrested. The complainant told the court that after the appellant was arrested she was summoned to the police station ostensibly to confirm whether the person arrested was the same person who had attacked her. The police officer opened the cell for her so that she could see him. Again this appears to be out of order because if the police thought that the complainant did not know her attacker but could identify her attacker if she saw him, then the proper procedure would have been for the police to conduct an identification parade from which she would have picked him out.

The need for an identification parade in circumstances similar to those that the complainant was faced with was emphasised in the court of appeal, sitting at Nyeri, in **criminal appeal no. 389 of 2009, Peter Maina Mwangi versus Republic.** In that case, the appellants had been convicted on two counts of robbery with violence and indecent assault based on the evidence of identification and recognition. This conviction was upheld by the superior court. The court of appeal considered the question whether the conviction based on identification was proper and safe and in this regard they considered the evidence of the complainant who had stated at the trial that she did not know one of her assailants but she saw him at close range while he was indecently assaulting her.

The court allowed the appeal and rejected the finding that the appellant had been properly identified because, amongst other things, the complainant did not point out any special marks or features of the appellant to the police. The learned judges referred to the decision in **Maitanyi versus Republic (1986) KLR 198** where the court of appeal held;

***"…There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made…if a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description."***

The court continued that;

"***In this case J admitted that she did not give the description of the first appellant to the police before he was arrested and before she identified him when he was brought into the police station. We are of the considered view that J's evidence on identification ought to have been tested by her first recording her initial statement indicating whether she could identify her attackers and giving their descriptions. Her ability to identify the attackers should have been tested by an identification parade. This is because it is quite possible for an identifying witness to be truthful but mistaken."***

In the light of the complainant's testimony, it would be logical and reasonable to conclude that apart from Muhia Njoroge the complainant did not know who the other attacker was; this implies that recognition as a means of telling who this attacker was, was out of question and the trial court misdirected itself to hold that the appellant was properly recognised.

In the case of **Wamunga versus Republic (1989) KLR 424** the court of appeal held at page 426 that;

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

It is apparent from the record that the trial court's approach to the question of identification of the appellant as one of the perpetrators of the complainant's misfortune was rather lackadaisical. In our humble view, the prosecution evidence on this issue was not carefully examined and it cannot be

concluded with any conviction that the identification of the appellant was not free from error. A conviction based on such questionable evidence cannot be said to be safe.

It would have been appropriate to allow the appeal at this stage but one further issue merits mention in this judgement.

The appellant raised the question of his rights having been violated contrary to the provisions of article 49 of the constitution. The appellant testified that he was arrested on 22nd August, 2006 but it was not until 28th August, 2006 that he was charged. It is clear that the appellant was charged long after he was arrested and in any event way beyond the constitutional limitation period. The prosecution never proffered any explanation for this delay. While this violation of the appellant's constitutional rights may not be a basis for an acquittal( see the case of **Kamau Mbugua versus Republic 2010 eKLR**), it goes to augment the appellant's case of the suspicious circumstances under which he was arrested and eventually arraigned in court. It is noted that the arresting officer never testified as was the person is alleged to have pointed the appellant out to this officer.

For reasons we have stated we do find and hold that the appellant's appeal is merited and it is hereby allowed. The convictions are quashed and sentences set aside. The appellant shall forthwith be set at liberty unless he is lawfully held under a separate warrant.

**Signed, dated and delivered in open court at Embu this 16th day of May, 2014.**

…… …….

**H.I. Ong'udi** **Ngaah Jairus**

**JUDGE** **JUDGE**