MASILA WAMBUA alias PETER MUSYOKI WAMBUA ……................. 1ST APPELLANT

MWANZIA MWAMULI ………………..……………….........………. 2ND APPELLANT

VERSUS

REPUBLIC ………………………….………………………………………… RESPONDENT

(Appeal from a conviction and sentence in Criminal Case No. 741 of 2006 of the Principal Magistrates Court at Kitui (Hon. E. Juma Osoro SRM) dated 19th May 2010)

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J U D G M E N T

These two appeals Nos. 335/2010 and 336/2010 were consolidated and heard together as they arose from the same transactions and the same criminal trial. The 1st appellant **Masila Wambua** alias **Peter Musyoki Wambua** was the 1st accused in trial court, while the 2nd appellant **Mwanzia Mwamuli** was the 2nd accused.

The appellants were jointly charged with three counts of robbery with violence contrary to section 296(2) of the Penal Code. Each of them was separately charged with rape contrary to section 140 of the Penal Code, and defilement of a girl under the age of 16 contrary to section 145(1) of the Penal Code. Each of the sexual offences charges had an alternative charge of indecent assault contrary to section 144(1) of the Penal Code.

The 1st count was that on the night of 9th June 2009, at about 11 p.m. at […] Village, […] Location in Kitui District the appellants jointly with others not before court while armed with dangerous weapons namely axes, pangas and iron bars robbed Kavutha Mwanzia of cash Kshs.100/=, a jacket, panga, a sufuria and bow and arrows all valued at Kshs.500/= and at or immediately before or immediately after the time of such robbery threatened to use violence to the said Kavutha Mwanzia.

Count 2 was that on the same night at 1.30 a.m., at Nguuni Village, Mbusyani Location in Kitui District in similar circumstances robbed Harrison Nzuki Musyimi of cash Kshs.3,500/=, two mobile phones make Nokia and Philips all valued at Kshs.14,960/= and at or immediately before or immediately after the time of such robbery used personal violence on the said Harrison Nzuki Musyimi.

Count 3 was that on the same night at […] Village, […] Location, Kitui District in similar circumstances robbed M.K. of one bicycle and a jacket all valued at Kshs.4,800/= and used personal violence on her.

Count 4 was with respect to the 1st appellant. It was rape contrary to section 140 of the Penal Code in that on the night of 9th June 2006, at 3.00 a.m. at […] Village, […] Location in Kitui District had carnal knowledge of M.K., without her consent. In the alternative, he was charged with indecent assault of a female contrary to section 144 (1) of the Penal Code in that on the same night at about 3.05 a.m. at the same place unlawfully and indecently assaulted M.K., by touching her private parts.

In count 5, the 2nd appellant was charged with rape contrary to section 140 of the Penal Code in that on the same date and place as in count 4 at 3.10 a.m., had carnal knowledge of M.K., without her consent. In

the alternative, he was charged with indecent assault of a female contrary to section 144 (1) of the Penal Code in that he unlawfully and indecently assaulted M.K., by touching her private parts.

Count 6 was against the 1st appellant for defilement of a girl under the age of 16 years contrary to section 145 (1) of the Penal Code in that on the same night and place at 3.15 a.m. had carnal knowledge of L.K. a girl of the age of fourteen years. In the alternative, he was charged with indecent assault on a female contrary to section 144 (1) of the Penal Code in that on the same night, time and place unlawfully and indecently assaulted L.K. by touching her private parts.

Count 7 was against the 2nd appellant for defilement of a girl under the age of 16 years contrary to section 145 (1) of the Penal Code in that on the 9th June 2006 at 3.20 a.m. at […] Village, […] Location, Kitui District had carnal knowledge of L.K., a girl of the age of fourteen years. In the alternative, he was charged with indecent assault on a female contrary to section 144 (1) of the Penal Code in that on the same date, time and place unlawfully and indecently assaulted L.K., by touching her private parts.

After a full trial, both appellants were found not guilty in respect of count 1, and acquitted on the same. They were however, found guilty and convicted respectively with regard to the other main counts. On count 2 and 3, both were sentenced to suffer death as by law provided. On count 4, the 1st appellant was sentenced to serve 10 years imprisonment with hard labour. On count 5, the 2nd appellant was sentenced to serve 10 years imprisonment with hard labour. On count 6, the 1st appellant was sentenced to serve 14 years imprisonment with hard labour. On count 7 the 2nd appellant was sentenced to serve 14 years imprisonment with hard labour. Because the appellants were sentenced to death on count 2, the trial magistrate ordered that the sentences in counts 3, 4, 5, 6 and 7 should remain in abeyance.

Being dissatisfied with the convictions and sentences, the appellants have appealed to this court. They filed their initial respective separate petitions of appeal in July 2010. At the hearing of the appeals which were consolidated, with the leave of the court, each filed amended grounds of appeal and written submissions.

Their grounds of appeal are similar, that they did not plead to the charge as required under section 207 (1) of the Criminal Procedure Code, that vital witnesses were not called, that the visual identification was not positive, that the charges were defective, that their defences were dismissed without credible reasons, and for the 2nd appellant that the trial magistrate relied on inconsistent and incredible evidence.

In brief the facts of the prosecution case are as follows. On the night of 9th June 2006, at around 11 p.m., PW1 L.T., was asleep at her house at […] Village, Kitui District. She heard people knocking at the door. They then hit the door which was made of iron sheets and got into the house. The intruders directed a torch beam to her eyes and she could not see anything. A blanket and her jacket were used by the intruders to cover her as she lay on the bed. A panga was taken from under the bed, as well as Kshs.100/= and a bow and arrows. Her jacket which was in a polythene bag was also taken. The intruders ate the food **"githeri"** which she had prepared and took with them the cooking pot. She discovered that the items were missing the next morning. She reported the incident to the assistant chief in the morning. She did not identify any of the intruders. This was the subject of count 1.

On the same night, at around 1 a.m., Harrison Nzuki Musyimi (PW2) a primary school teacher was asleep in his house at […] Village, Kitui District. He was with his wife Penina Nzisa (PW3) when he heard dogs barking. There was moonlight. When he peeped through the glass window of the bedroom, he saw a person standing 3 meters outside the window. He did not recognize this person, and when he asked him what the matter was, that person flashed a torch into the window. It was dark in the house. He heard some voices from outside ask for him. Those people hit the wooden door until it opened. He went to bed and pretended to be asleep but the bedroom door was hit and opened. The people entered the bedroom and demanded money. They had pangas. They shone torches and told him to give them money. One shone a torch and picked the money from the coat. PW2 produced Kshs.1,000/= and gave it to one whom he named as Masila Wambua, who was ahead of Mwanzia Wambua who was directing the torch at him. Mwanzia (Mwamuli) Wambua was directing the torch behind Masila Wambua. He knew both of

them before. He recognized Mwanzia because he was tall. Masila had nothing in his hands. There was a third person with a bright torch standing by the door. He did not know him. Mwanzia even took his news papers, read them and placed them on the bed.

Mwanzia hit PW2 on the head. PW2 produced his mobile phone make Nokia and handed it to Masila Wambua. The robbers then demanded the phone of his wife (PW3). It was in a purse, and the wife did not rise from the bed. He picked the phone from the purse and gave it to Masila. He also gave Masila the money therein which was Kshs.2,500/=. Then Mwanzia asked for more money with threats. Immediately thereafter, the robbers switched off the torches and the house was suddenly dark. The robbers went outside, then suddenly, they came back into the house and said they had been cornered. They escaped through the bedroom window.

Shortly thereafter, two people arrived at the scene. They were Eric Muli and John Mutua. They said that they had heard a commotion. They gave PW2 first aid. The robbers were not found that night. This was the subject of count 2.

On the same night (PW4) M.K., was asleep at her house in […] Village, with her children (PW6) L.K. aged 14 and W. aged 9 years. She was woken up by noise of the wooden door to the house being broken. Two people entered the house carrying pangas, rungus, an axe, and two torches. There was a hurricane lamp alight in the house as another child called Jennifer was sick. The lamp was at the corridor. She recognized two of the four by the names Masila Wambua and Kitere Muamuli. According to her these were the 1st appellant and the 2nd appellant. She knew them before. It was her evidence that Kitele Muamuli, was also known as Mwanzia.

Both Masila and Kitere beat her up, demanded money, and injured her left leg. Masila then removed her underpants and raped her. Kitere removed the underpants of L and raped her. Then the rapers exchanged the victims and raped them again. They took a grey jacket and a bicycle belonging to her husband. The robbers went away but left a panga which Musili had. She thereafter, went and reported the incident to her mother in law. This was the subject of counts 3, 4 and its alternative charge; count 5 and its alternative charge; count 6 and its alternative charge; as well as count 7 and its alternative charge. PW4 and PW6 were examined by PW5 a Clinical Officer on 7/7/2006 almost a month after the incident.

The appellants were later arrested and charged.

When the appellants were put on their defences, the 1st appellant gave an unsworn defence. He stated that he was arrested on 17th June 2006 from his house. He was taken to the Kitui Police Station and booked for stock theft, on which he was sentenced to serve 6 months imprisonment by SRM Mr Makori. He denied committing the offence, as he was then under arrest. He stated that the case was a frame up. If Nzuki (PW2) had known that he was one of the robbers, he would so have informed the chief. However the chief did not come to give evidence. In addition, none of the complainants had told their relatives that they had seen or identified him. It was his evidence that Mwinzi Kimanzi, husband of PW4 had a grudge against him because he took his father to take **"Ngata"** an oath to exorcise witchcraft. He stated that the allegations of rape were false, as there was no credible doctor's report. The doctor did not testify.

The 2nd appellant gave a sworn defence. He stated that he was a mitumba trader. The 22/6/2006, was a market day. He went to Kitui town to do his business. He found that his employee had opened the business. Nyiva Nzuki sent someone to call him to see her at Kite bar. When he went there, he was taken behind the bar by Nzuki Muli and others. Nzuki Muli demanded Kshs.16,000/= from him, claiming that it was money he owed his wife, wrestled him and took his Kshs.6,700/=. When he screamed, people came and put a tyre round him and wanted to lynch him with petrol. However, before the match was lit, the chief arrived and saved him. He was taken to Kitui Police Station soaked in petrol. He denied committing the offences. He stated that he was framed. He was not mentioned by the victims, who knew him very well. He stated that the evidence, especially that of M.K. and L. regarding the lantern, was contradictory. Harrison Nzuki and Penina Nzisi also gave contradictory evidence. He stated that there was no evidence that the doctor medically examined the victims for physical and sexual assault. He stated that no identification parade was conducted. He also stated that, the complainants took three days to report the

incident, and when they did, they stated that they had been attacked by unknown persons.

Faced with the above evidence, the learned magistrate acquitted the appellants on count 1. He convicted them of the other substantive counts. The court stated.:-

"Since the proceedings herein continued under the sections of the Penal Code when (sic) were repealed by the Act section 48(3) allows the case to proceed under the repealed sections I do find that there is overwhelming evidence against both accused who were positively recognized at the scene by PW2 and PW4 and identified positively at the same (sic) by PW6. As earlier observed both accused are found not guilty in count 1 they are both acquitted under section 215 PC. On counts II, III, IV, V, VI and VII I do find that prosecution has managed to proof the case against the two accused they are equally find (sic) guilty and accordingly convicted."

We start by reminding ourselves that this being a first appeal we are duty bound to re-evaluate the case afresh and come to our own conclusions and inferences while giving allowance for the fact that we were not able to see the witnesses testify and determine their demeanour – *see* **Okeno –vs- Republic (1972) EA 32.**

Both appellants have complained on appeal that they were not required to plead to the charge. Indeed, it is mandatory for an accused person to plead to the charge or charges before he or she is tried. The words used in section 207 (1) of the Criminal Procedure Code (Cap 75) are mandatory, that the substance of the charge should be stated to the accused and that he should be asked whether he admits or denies the truth of the charge. The typed court record does not show anywhere, that the appellants pleaded to any of the charges. However, this must have been an error on the typed record. We have perused the original record. It shows that on 10th July 2006, both appellants were in court. The respective charges were read to them and they pleaded not guilty to the charges preferred against them. As a result, a plea of not guilty was entered on all the counts, and the hearing fixed for 2nd October 2006. As such, the complaint by the appellants that they did not plead to the respective charges is not valid. It is dismissed.

The appellants also complain that the charges were defective. That sexual offences should have been tried under the Sexual Offences Act, which came into operation during the course of the criminal proceedings.

The contention of the appellants has no legal basis. The sexual offences against them were brought under the provisions of the Penal Code, which was the law that created the said offences at the time the offences were allegedly committed on 9th June 2006. The Sexual Offences Act No. 3 of 2006 which came into force on 21st July 2006 could not be used since it did not exist when the offences were allegedly committed. It did not create offences retrospectively. In addition, the first schedule to the Sexual Offences Act, made under section 48 therein, it is provided as follows:-

"3. Any proceedings commenced under any written law or part thereof repealed by this Act shall continue to their logical conclusion under those written laws."

The new law therefore provided specifically that charges brought under the previous laws would continue to be prosecuted and determined under those laws.

We therefore dismiss this ground of appeal.

We now turn to the main ground which is on sufficiency of evidence. This has two prongs. One is failure to call some witness, and sufficiency of the evidence of identification.

Before the prosecution closed its case, the prosecutor asked for adjournment a number of times to call a witness **Cpl. Mwololo Sumba**, a retired Police Officer, who was the investigating officer. Ultimately, on 19th March 2009, the court noted that the last witness had testified on 24th April 2008. The court declined to grant any further adjournment, though the prosecution had asked for the same. As a result, the prosecution closed its case without calling the evidence of the investigating officer Cpl. Mwololo Sumba.

The appellants also state that other important witnesses, who first came to the scenes, were not called to testify.

It is not the duty of the prosecution to call everybody who appears to the defence to be a relevant witness. However, failure to call important witness can weaken the prosecution to an extent that they will fail to prove their case beyond any reasonable doubt. This position was stated in the case of **Ng'ang'a –vs Republic 1981 KLR 483** in which the Court of Appeal held, *inter alia*:-

1. The prosecution may elect not to call a material witness, but they do so at the risk of their own case. The courts accept as a matter of practice that it is not possible for informers to be called to the stand.

Therefore, *perse,* the failure to call any witness to testify cannot be fatal to a conviction. It will all depend on the sufficiency of the totality of evidence tendered in court.

Was there sufficient evidence to sustain the convictions?

We will consider each incident creating an offence separately. We have to remind ourselves of the need for a court to be cautious before founding a conviction on the evidence of identification or recognition in unfavourable circumstances. Several cases have addressed this issue. Suffice to cite the case of **Republic –vs- Ndalamia & 2 Others (2003) KLR 639** cited the English case of **R–vs- Turnbull (1956) 3 ALLER 549**, in which Lord Widgery CJ stated:-

"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."

With regard to count 2 of robbery with violence, the identifying witness was Harrison Nzuki Musyimi (PW2) as his wife Penina Nzuki (PW3) clearly stated that she could not identify anybody. PW2 stated that he identified the two appellants through the light from torches brought by them. He peeped through the window after he heard dogs bark, but though there was bright moonlight, he was not able to identify anybody. When the robbers came into the house, he went into his 9ft x 8ft bedroom. Two torches were flashed into the room. He recognized the appellants because he knew them before. One of the robbers shone a torch, and he gave Masila Wambua (1st appellant) 1,000/= who was ahead as Mwanzia Mwamuli (2nd appellant) was directing the torch at him (Masila Wambua). There was another person behind who was also shinning a torch. He stated that he identified the two from the lights from the torches. He described Mwanzia (2nd appellant) as being tall and carrying a panga, while the 1st appellant was carrying nothing in his hands. He knew both the appellants, but did not know the third man. He gave the money to the 2nd appellant. He gave his mobile phone to Mwanzia (2nd appellant). As for the purse of his wife, 1st appellant took it and emptied the contents on the bed. He gave the mobile phone of his wife to the 1st appellant. The same 1st appellant also took his wife's money Kshs.2,000/=. The robbers left just before neighbours appeared.

Was this identification of the appellants positive and without possibility of error? The time was at night. The house was in darkness. The witness is a single identifying witness who identified or recognized the appellants through their own torches. Identification by a single witness may sustain a conviction, however, it has to be treated with great caution – *see* **Wafula –vs- Republic (1986) KLR 627.**

Indeed, the magistrate did not caution himself. The learned magistrate also, like ourselves, did not have the advantage of seeing any of the prosecution witnesses testify to assess their demeanour. He only conducted the defence case. PW2 gives an account of what each of the two appellants did in the robbery. On the face of it, it may be convincing evidence of recognition. However, there is no evidence that he told any of the people who came immediately after the incident. He does not say so himself. He did not even state that he gave the names to his wife. His wife (PW3) did not mention in examination in chief that she was given the names by her husband. It was merely in cross-examination by the 1st

appellant, that she stated that Mwanzia Mwalimu and Masila Wambua were some of the robbers. Worse still, the investigating officer, who could have tied the loose ends, and clarified whether the complainant (PW2) made any report to the police, mentioning these appellants, or the police officer who took over the investigations never came to court to testify.

It is trite that, where there is positive recognition of a criminal, the first report or reports should logically give the identity or description of the culprits. That was not so here. In our view, this leaves a doubt as to whether, indeed the appellants were positively recognized as the robbers. If indeed their names were known, the information should have been relayed. We find that the evidence of recognition of the two appellants with regard to count 2 was not sufficient to sustain a conviction. We will acquit the appellants with respect to count 2.

We now turn to counts 3, 4, 5, 6 and 7. The identifying witnesses are two, that is PW4 M.K. and PW6 L.K. PW4 stated that the time was 3 a.m. when she was woken up, when the door to her house was being broken by people who had pangas, rungus, an axe and two torches. There was light from a hurricane lamp which was on the corridor. There were four robbers, but she recognized Masila Wambua (1st appellant) and Kitere Mwamuli Mwanzia (2nd appellant).

It was her evidence that the 1st appellant beat her up and demanded money. The 2nd appellant also beat her. The 1st appellant then removed her underpants and raped her as the 2nd appellant did the same on Lina. Thereafter, the two exchanged the victims and raped them again. Then the robbers took a jacket and a bicycle and left behind a panga which was in the possession of the 1st appellant. She then went and informed her mother in law Mbithe Wambua. She knew both appellants before the incident. In cross examination, she stated that the appellants had torches, but she recognized them from the light of the lantern lamp. She also stated that, though the panga left behind by the robbers, was later taken to the house of one Lydia after 4 days, she did not tell Lydia about the identity of the robbers.

PW6 L.K., stated that she was raped in the room by two people whom she did not know before. She saw them in the light of the lantern and torches.

We observe that both these witnesses gave only brief statements about the conditions for identification. The brightness of the lantern was not given. Whether it was put at full light or deemed was not testified to. The actual position and distance of the lantern from where each of the two witnesses were was not given. In addition, PW6 was actually in a room. Her evidence does not indicate whether the lantern directly faced the door, and whether the said lantern’s light reached the bed in the room. Understandably, if the two witnesses were raped or defiled or indecently assaulted, the encounter would have been close. However, even closeness in circumstances of little or a distant source light might, might not help very much in identification.

In addition to the above, PW4 claims to have reported the incident to her mother in law, shortly thereafter. However, she does not state that she mentioned to her mother in law any name of the robbers or rapers. It was only PW7 Kimanzi Wambua, who was away until 11/6/2006, who stated that he was given the identity of the appellants by his wife (PW4). The police officers who would have come to state whether anybody’s name was mentioned as one of the people involved in the incident also did not testify.

These gaps, greatly diminish the reliability of the visual identification. Even where a person knows another well, he can be mistaken in a purported recognition. Neither us, nor the magistrate who delivered judgment, saw the prosecution witnesses testify to determine their demeanour. We come to the conclusion that the identification or recognition of the appellants herein is not free from the possibility of error. It is not safe to sustain a conviction on the same.

The appellants claim that their defences were not considered. The learned magistrate considered the defence of the 1st appellant. However, he merely dismissed the defence of the 2nd appellant and stated that he did not establish his alibi. Be that as it may, we are going to allow the appeals on the other considerations which we have already given in this judgment.

To conclude, we are not satisfied that the identification or recognition of the appellants is free from possibility of error. We therefore, have to allow the appeals of the appellants.

Consequently, we allow the appeals of both the appellants. We quash the convictions on all counts and set aside the sentences. We order that the appellants be set at liberty unless otherwise lawfully held.

Dated and delivered at Machakos this **17th** day of **July** 2012.

Asike - Makhandia **George Dulu**

Judge **Judge**

In presence of:
Nyalo – Court clerk
Appellant present in person