REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

[CORAM: KOOME AND AZANGALALA, JJ]

HC.CRA. NOS. 68 OF 2008, 69 OF 2008 & 70 OF 2008

{CONSOLIDATED}

BETWEEN

ALEX INDACHI CHASIA.....1ST APPELLANT

ALFRED MUHANDO ABASILWA .....2ND APPELLANT

LEONARD JUMA MUTALI .....3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

[Appeals from the Judgment of the Principal Magistrate {P.N. Gichohi} dated 27/11/2008 – in Kitale CMC.CRC. No. 897 of 2006]

JUDGMENT

The appellants, **Leonard Juma Mutali** (hereinafter **"the 3rd appellant"**), **Alex Indachi Chasia** (hereinafter **"the 1st appellant"**) and **Alfred Muhando Abasilwa** (hereinafter "**the 2nd appellant**") were jointly charged in that order in a first count with **Robbery with Violence Contrary to section 296 (2) of the Penal Code.** In a second count, the 3rd and 1st appellants were jointly charged with committing an **Unnatural Offence Contrary to section 162(a) of the Penal Code** and in count three, the same pair were jointly charged with **Indecent Assault on females Contrary to section 144 (1) of the Penal Code.**

It was alleged, in count one, that the appellants, while in the company of others not before the court and while armed with dangerous weapons, namely pangas, rungus and knives on 23rd February 2006 at [particulars withheld] in Trans-Nzoia District of the Rift Valley Province, robbed **REA** of a small metal box containing Kshs 12,000/= , one radio – make Sonitee, 10 kilograms of white sugar, a thermos flask and 2 Kgs of wheat flour all valued at Kshs 13,640/= the property of **REA** and at or immediately before

or immediately after the time of such robbery used actual violence to the said **REA** (hereinafter **"the 1st complainant").**

It was alleged in the second count, that the 3rd and 1st appellants in the same place, same date jointly had carnal knowledge of **JMA** (hereinafter **"the 2nd complainant"**) against the order of nature and in the third count, it was alleged that the same pair, in the same place and on the same date, jointly, unlawfully and indecently assaulted **JMA** aged 21 years old by touching her private parts.

The learned trial Magistrate did not find proof to the required standard in respect of count 2 and accorded the 3rd and 1st appellants the benefit of doubt and acquitted the duo on that count. With respect to the other counts, the learned trial magistrate found that the prosecution had discharged its burden as required and convicted the appellants of count 1 and the 3rd and 1st appellants of count 3.

After considering what the appellants had said when asked to mitigate, the learned trial magistrate pronounced the death sentence against all the appellants in respect of the 1st count and imposed a prison sentence of 20 years upon the 3rd and 1st appellants.
The appellants were not satisfied with their convictions and sentences and have appealed before us on a number of grounds which in the main raise the following issues:-

(1) Unsatisfactory identification;

(2) Conflict, insufficiency and inconsistency in the prosecution evidence;

(3) Failure to call essential witnesses;

(4) Failure to consider or adequately consider the defence statements ;

(5) Breach of fair- trial rights under the Constitution

During the hearing of the appeals, the appellants appeared in person and relied upon pre-written submissions. On the other hand, **Ms Bartoo** appeared for the Republic and orally submitted that the appellants were positively identified both at the scene and at subsequently identification parades properly conducted.

As the first appellate court, it is our duty to analyse, re-examine and re-evaluate the evidence upon which he appellants were convicted and arrive at our own independent conclusion bearing in mind that we had no advantage of seeing and hearing the witnesses testify and should give allowance for that (see **Okeno – vrs- Republic [1972] EA 32 and Ngui –vrs- Republic [1984] 729.**)

The prosecution case was that the complainants were asleep in the house of the 1st complainant on 23rd February, 2006, when at about 11.00 p.m., thugs broke into the house and physically attacked the 1st complainant and 2nd complainant. They also sodomized the second complainant and stole the items stated in the charge. They then escaped. The complainants allegedly identified the appellants during the robbery using light from the torches the robbers had.

The 1st complainant screamed after the thugs had escaped thereby alerting her workers and neighbours who went to the scene. Police were informed and they visited the *locus in quo* the same night. **P.C. Kennedy Magige (P.W.5),** of Kitale Police Station was one of the officers who visited the scene that night at about midnight. He received a report of the robbery and took the 2nd complainant to Kitale District Hospital for treatment.

I.P. David Kitur, P.W.7 is the officer who mounted the Identification Parade at which the 1st appellant was identified by the complainants and **CPL John Kimani (P.W.8)** of Centre Kwanza Patrol Base also

visited the scene on 24th February 2006. He followed footmarks of the robbers which ended at a forest 2 kilometres away. He also recovered a sack, a small box and a knife. An informer informed him that the appellants were involved in the robbery. He found them in a shamba and on carrying out a search at their houses, recovered a jacket from the 3rd appellant's house, a pair of shoes from the house of the 1st appellant and another pair of open shoes from the house of the 2nd appellant. He arrested the appellants and handed them over to the CID for further investigation.

Clisados Masinde (P.W.8) was then a Clinical Officer at Kitale District Hospital – where he had worked for ten years with **Peter Simiyu,** another Clinical Officer. P.W.8 produced P.3 forms in respect of the 1st and 2nd complainant on behalf of his colleague whose signature and handwriting he was familiar with.

P.C. Tasan Bindi, (P.W.10) is the officer who took over investigation from **Sgt Hamisi** who was disqualified from testifying after being found sitting in court when some witnesses were testifying. P.W.10 merely received the exhibits and produced them at the trial. In reality, he took over the case when investigations were complete.

From the above account, it is clear to us that the main issue for determination is whether the appellants were properly identified as some of the participants in the alleged robbery and indecent assault. In this regard, the evidence of the complainants is pertinent. The 1st complainant testified that the source of light comprised torches which the robbers had. In her own words:-

"I am not sure I saw the 3rd accused (2nd appellant). I saw the 3rd accused. Whenever I looked at the attackers, they would beat me. I did not see accused 3 properly that night. I identified accused 1 and 2 with the help of light from the torches."

And in cross-examination, she stated as follows:-

"It was dark in the house as we slept. The people who attacked us were armed with torches. I was frightened … The thugs did not want me to look at them even on the face. Any time I tried to look at them, they would slap me. To save my life, I tried not to look at their faces … The light was too bright for my eyes … The light was dazzling."

The 1st complainant on her own admission was not sure she saw the 2nd appellant during the robbery. She herself doubted whether she saw the appellant. We do not think her alleged identification of the 2nd appellant could be positive. The 2nd complainant specifically testified that she did not see the 2nd appellant. **JAO (P.W.6)** is the only one who testified that she identified the 2nd appellant during the robbery and at a subsequent identification parade. We have scrutinized her testimony and observed that apart from alleging that she identified the appellants, she did not describe the role each of them played in the robbery. In view of the evidence of the complainants regarding the identification of the 2nd appellant, we think P.W.6's purported identification of the 2nd appellant was not positive.

With respect to the 3rd and 1st appellants, the evidence of identification was given by the complainants and P.W.6. As already observed, the 1st complainant, **REA (P.W.1),** acknowledged that the surrounding circumstances were not conducive to any positive identification of the robbers. We have already set out her testimony in that regard. We have come to the conclusion that P.W.1's alleged identification of the 3rd and 1st appellants was not also positive. To compound the issue, she also did not give an account of what each appellant did at the time of the robbery.

JMA, P.W.2, the second complainant stated as follows regarding identification:-

"Other than touching my private parts, they broke my left arm. One of them also sodomised me. It

took about 3 minutes. It is then that I heard someone scream and then someone say they leave. They all left …. The spot lights (torches) and the whole room was lit brightly. I was able to see the people … The two who attacked me are the 1st and 2nd accused in the dock (3rd and 1st appellants respectively) … It is accused 1 who was pulling my leg. It is the 2nd accused who sodomised me as I lay on the bed with [on] my stomach ……. The 1st accused wore a purple jacket. I do not recall what the 2nd accused wore. I had not seen the two accused persons before."

If the entire incident, according to the 2nd complainant, took about 3 minutes, it is doubtful that she could positively identify her attackers. Our suspicion of her evidence is increased by the fact that during the robbery, she lay on her stomach and the only source of light comprised the torches the thugs had. The record further shows that **P.C. Kennedy Magige**, **(P.W.5)** was one of the first police officers to visit the scene the same night and infact took two of the victims to Kitale District Hospital. When cross-examined, P.W.5 stated as follows;-

"I did not say the complainant gave me names of attackers. She did not give me the description of attackers …"

I.P. David Kitur (P.W.7), the parade officer, did not testify that before he mounted the parade, he had received a description of the appellants from the complainants and lastly **CPL John Kimani (P.W.8)**, the police officer who visited the scene the next morning, did not also testify that any of the complainants gave him a description of the appellants. The record does not also indicate that **JAO,** gave a description of the attackers to P.W.7 before he mounted the parade. It is further significant that the officers who conducted parades for the 1st and 2nd appellants were not called to testify even though the parade forms were produced by **P.W.10, P.C. Hassan Dinda.**

In **Fredrick Ajode –vrs- Republic [Cr. Appeal NO. 87 of 2004] (UR),** the Court of Appeal had this to say about identification and specifically dock identification:-

"It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite that before such a parade is conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."

In this case, the investigating officer who carried out investigations, **Sgt Hamisi**, did not testify. We therefore do not know whether he received the physical description of the appellants from any of the complainants and or their witnesses.

In view of the decision in **Fredrick Ajode –vrs- Republic (Supra),** we have come to the conclusion that the identification purportedly made by the complainants and P.W.6 at various identification parades could not be safely relied upon given that the complainants and the said witness did not give a description of the appellants to the parade officers before the parades were mounted.
Without the identification parade evidence, the evidence of the complainants and P.W.6 remained dock identification which, on the above authority, we find worthless in the circumstances of this case. We have also noted certain shortcomings in the conclusions made by the learned trial Magistrate. We refer to some of them. He placed reliance on the jacket which was produced at the trial. In his own words:-

"According to P.W.1 and P.W.6, it is the 1st accused (3rd appellant) who wore the jacket (exh.6) during the robbery. P.W.6 saw them clearly and noted their appearances."

There was however conflict as to where the jacket was recovered. According to the 1st complainant, the jacket was dropped within her compound as the robbers escaped and according to **CPL John Kimani, (P.W.8),** it was recovered from the 3rd appellant's house. The learned trial Magistrate accepted the version given by P.W.8 without assigning reasons why. He also found as corroborative the finding of the jacket in the 3rd appellant's house. We are not sure whether he could have arrived at the same conclusion

if he had accepted the version given to the trial court by the 1st complainant.

The learned trial Magistrate further found that P.W.8 and his team followed foot prints from the scene of robbery upto where the appellants were found. In his own words:-

"The footsteps led to Abwela's farm where accused persons were arrested soon after the robbery."

That conclusion is however not borne from the record. The evidence of tracing foot prints was given by **P.W.8, CPL John Kimani**. He said the following regarding the foot prints:-

"We followed the foot marks as the ground was wet. It had rained. The foot marks led us to the forest about 2 kilometres away …… as we were leaving the forest, we got information from the informer that the accused persons now in the dock were involved in a robbery. The informer directed us to their shamba from far and identified them to us."

The foot prints were initially traced by **Stephen Indasi Akoto (P.W.4)** and his neighbours. He is the one who called police after following the foot prints upto the farm of **Mzee Ambwele**. We can only assume that the police officer who responded to the call of P.W.4 was P.W.8. It is insignificant that P.W.4 was not specific that the foot prints led to the arrest of the appellants. P.W.8 as observed above told the court the foot prints led to a forest.

The finding by the learned trial Magistrate that foot prints were traced upto where the appellants were found had therefore no sound basis.
Then the learned trial Magistrate came to the following conclusion:-

"Even though the prints were not matched (that) circumstantial evidence points to no other hypothesis than to the guilty of the accused persons."

Having held that the appellants had been positively identified by witnesses, we are puzzled that the learned trial Magistrate seemed to suggest that the conviction of the appellants would be based on circumstantial evidence. That may very well suggest that the learned trial Magistrate still entertained doubt with respect to the direct evidence he had received. We, on our part, would not share his view that circumstantial evidence pointed to no other hypothesis than to the guilt of the appellants. The prosecution's case was in any event not premised on circumstantial evidence. It was based on direct evidence which we have discredited for reasons we have given.

The upshot is that we agree with the appellants that their identification as having been members of the gang which attacked P.W.1 and P.W.2 as charged was not positive. This finding determines the appellants' other complaints which do not merit a detailed consideration. We however feel impelled to comment on the appellants' complaint that their fair-trial rights under section 72 (3) (b) of the repealed Constitution were infringed. The appellants allege to have been detained by the police beyond the 14 days the repealed Constitution permitted. The issue of breach of the appellants' fair-trial rights was however not raised before the learned trial Magistrate, yet the appellants then were represented by counsel. We also note, from the record of the trial court, that the appellants were arrested on 24th February, 2006 and arraigned on 10th March 2006. If that record is correct, we do not think the appellant's fair-trial rights were infringed at all. Even if there had been any delay in arraigning the appellants, our finding would be that they must have waived their right to complain. In the premises, if these appeals turned on breach of section 72 (3) (b) of the repealed Constitution, we would have had no difficulty in dismissing the same.

But as we have found for the appellants on the issue of identification, their conviction cannot safely stand. We allow these consolidated appeals, quash the conviction of the appellants for both robbery with violence and indecent assault on a female and set aside the sentences of death imposed on the appellants and that of imprisonment imposed upon the 3rd and 1st appellants. The appellants are accordingly set free unless they are otherwise lawfully held.

Before concluding this judgment, we observe that the learned trial Magistrate ordered the 3rd and 1st appellants to suffer death for robbery with violence and also serve the twenty (20) years imprisonment for indecent assault on a female. He did not say how both sentences were to be served. If we had upheld the conviction and the sentences, we would have ordered the sentence of imprisonment to be held in abeyance since it would not be served if the death sentence is executed. That is however academic as we have allowed the appeals.

DATED AND DELIVERED AT KITALE THIS 4TH DAY OF MARCH 2011.

M. KOOME

JUDGE

F. AZANGALALA

JUDGE

Read in the presence of:-

M. KOOME

JUDGE