REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ibrahim & Ojwang, JJ.)

CRIMINAL APPEAL NO. 166 OF 2008

- BETWEEN -

DZOMBO MATAZA.....APPELLANT

- AND -

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Senior Resident Magistrate K. Muneeni dated 29th December, 2005

in Criminal Case No. 200 of 2005 at Voi Law Court)

JUDGMENT

The appellant herein, **Dzombo Mataza**, was arraigned before the trial Court on two charges: robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63, Laws for Kenya); and rape, contrary to s. 140 of the Penal Code.

The allegation in respect of the first charge was that the appellant, acting jointly with others not before the Court, and while armed with dangerous weapons, namely machetes, on the night of **25th/26th February, 2004** at Mavirivirini Village in Mwatate Location, Kwale District within Coast Province, robbed **Lennox Zuma Majele** of one radio cassette, Sony by make, one solar panel, one wrist watch, Rado quartz by make, and cash, in the sum of Kshs. 900/= — all coming to a total value of Kshs. 66,000/= — and, immediately before or immediately after the time of such robbery, threatened to cut the said **Lennox Zuma Majele** with machetes.

It was alleged, in the second count, that on the night and at the place aforesaid, the appellant herein had carnal knowledge of **Fatuma Ibrahim**,without her consent.

The learned Magistrate, after hearing the evidence, stated as the questions for determination, the

following:

(i) whether a robbery-with-violence had been inflicted upon PW 1, ***Lennox Zuma Majele****;*

(ii) whether the accused was the one, or one of those, who robbed PW 1;

(iii) who raped PW 2, ***Fatuma Ibrahim****; was the accused one of the rapists?*

The trial Court found that the offender, in relation to the robbery-with-violence, was accompanied by one other person; the intruders were armed with dangerous and offensive weapons, namely, machetes and knives; during the robbery, the attackers threatened to harm PW 1 — he was ordered to lie down and face the wall; therefore, robbery with violence was visited upon PW 1.

As regards count 2, PW 2 testified that she did not consent to sexual intercourse to which she was subjected by her assailants; she and her uncle (PW 1) gave evidence that the assailants forcibly removed her from the house; examination by a doctor confirmed that she had been forcibly penetrated, and the indication was in the bruises and injuries; she was able to identify the appellant herein, as one of her attackers.

The learned Magistrate recorded the caution that the evidence of a single identifying witness, in relation to the rape incident, was to be treated with caution; and he then went on to find, on the basis of the evidence, that the complainant had had two separate moments to view the face of the appellant herein, on the material occasion. The complainant testified that while the intruders frog-marched her into the bush, his cap fell off, and his accomplice aided him to retrieve it by illuminating the place, illumination which also fell on the appellant's face. And then during the rape attack the appellant's accomplice illuminated the *locus in quo* with the torch, and she was able to see the face of the appellant. The learned Magistrate found as a fact, moreover, that the complainant had known the appellant, who was a neighbour at Mavirivirini Village. There were, besides, *"first reports"* giving the identity of the rape-attacker, which the complainant had made both to the Police and to her uncle.
The foregoing factual inferences led the trial Court to the conclusion that the complainant, in the rape incident, had *"positively identified the accused as her assailant"*.

The Court observed from the facts that *"the robbers were also the rapists"*; *"this implies that [the] accused was one of the robbers"*. The Court came to its conclusion as follows:

"I find that [the] accused committed both offences as alleged. I find him guilty as charged. I convict him under section 215 of the Criminal Procedure Code".

The learned Magistrate treated the appellant herein as a first offender, and gave him an opportunity to make a statement in mitigation, before sentencing him to death in count 1, and to a fourteen-year jail term in count 2.

In his amended grounds of appeal, the appellant contended as follows:

(i) the charge of robbery with violence as laid against him, was defective;

(ii) the evidence of visual identification and of recognition, at the material time, lacked probative force;

(iii) the first reports made on the material incidents had doubts;

(iv) no connection had been established between the incidents herein, and the actions of arrest taken upon the appellant;

(v) the conviction was based on contradictory evidence;

(vi) essential witnesses were not called by the prosecution;

(vii) the rape offence had not been proved;

(viii) the defence statement was not adequately considered by the trial Court.

The appellants filed written submissions, elaborating the several points set out in the memorandum.

On the occasion of hearing, on **21st September, 2010** the appellants appeared in person, while the respondent was represented by learned counsel, **Mr. Muteti.**

Mr. Muteti submitted that the identification of the appellant, at the *locus in quo,* could not be faulted: the robbery with violence took place in the house in which both PW 1 and PW 2 were present. Although no evidence had been given showing the presence of lighting in the house where the robbery took place, the ensuing activity created the link between the two incidents in the allegations in the charge. After the act of robbery, the attackers removed PW 2 from the house, took her into the bush and sexually assaulted her; and it is this process leading to the rape-attack, that gave occasion for the identification of the appellant herein. When the appellant's accomplice flashed a torch, to enable the appellant to recover a cap which had dropped down, PW 2 was able to see a face she readily recognized – that of the appellant herein. Thereafter, the two attackers took PW 2 into the bush, and raped her in turns: and here, a further opportunity for recognition of the appellant came when the appellant's accomplice flashed the torch, as the appellant was in the course of action. As soon as PW 2 returned home, she told her uncle (PW 1) that the appellant herein had raped her. Counsel urged that PW 2's evidence stood firm and unshaken.

Counsel urged that the totality of the evidence establishes the two charges, and submitted that both conviction and sentence were properly arrived at.
The appellant, for his part, in his written submissions, contended that the charge brought against him was defective because the exact time when the offences took place had not been specified. The appellant also contended that he had not been properly identified at the *locus in quo,* on the material night; he urged that the evidence of a single identifying witness (PW 2) was insufficient as a basis for a conviction.

PW 1's evidence was that he had gone to sleep at 9.30 p.m. on the material night; and those who slept in that same house included PW 2. Two men forced their way into the said house at 2.00 a.m., flashing torches as they rummaged in the house, one of them wielding a machete. These intruders forced PW 1 to lie down as they stole household goods. One of the attackers directed the other: *"Get that girl from there"* — and the one so directed, got into the girls' room and took out PW 2. The attackers stole and left with PW 2, locking the door from the outside.

After an opening was created by neighbours, PW 1 got the process of searching for PW 2 in progress. At about 4.00 a.m. (some two hours later), PW 2 returned, in the company of a village elder; and PW 2 informed the said search party (including PW 1) that the two attackers had forced her into the bushes and

raped her. The matter was reported to Mackinnon Police Station, where the medical-reporting P3 form was provided in respect of the assault on PW 2. When PW 2 reported the attack upon her, she specified that one of her attackers was **Dzombo Mataza** (the appellant herein), whom she had known before the material incident. PW 1 testified that, for some time, the appellant had fled and could not be found; the witness said:

"I looked for the accused all that time, till this year [2005]. He had disappeared from Mackinnon and [from] his home".

The appellant was arrested at a funeral gathering.

PW 2 had been sleeping as from 9.00 p.m.; and she later heard the attackers demanding money and effects from her uncle who was sleeping in a different room in the house. Two men, thereafter, forced their way into PW 2's room, armed with machetes, knives and torches; and they demanded she goes out with them. These men were already carrying goods stolen from the house: a solar panel and a radio. As PW 2 was led away, she perceived something, of relevance to the question of identification:

*"On the way, a cap fell from one of them. It was **Dzombo Mataza.** He asked whether I knew him. I told him I did not know [him]. The accused led the way. I was in the middle. A tree branch held the cap [and it] fell down. The other [flashed] the torch there, for them to [retrieve] the cap. It showed … [the] accused. I saw his face. I feared he would kill me if I told him the truth. I knew the accused before. He used to stay with **Rema** in Mavirivirini, near our home. I had seen him for three or so months"*.

Apart from shedding light on the question of identification, PW 2 gave testimony with a bearing on the second charge. She said:

*"They took me [into] the forest – 3 km away. They removed my **lesso,** biker and underpants. They raped me in turns. [The] accused started. He raped me twice, the other once. He took a second turn after the other man was through. They left me at the scene. I went home alone. I put on my clothes at home. I found the house locked from outside. The accused had told me not to look at them. At the scene, I saw the faces of both men [while they were] raping me. The other man [flashed a torch] as the accused raped me"*.

PW 2 testified that she gave information about the rape incident to her uncle (PW 1). She gave the name of the appellant herein, both to her uncle and to the police.

PW 3, **P.C. Daniel Imbugua**, is the one who arrested the appellant herein, on **6th March, 2005**, at a funeral gathering. While the appellant was held at the Police station, both PW 1 and PW 2 arrived to confirm his identity as the robber and rapist of the material night.

Dr. H. A. Musolo had examined PW 2, and had signed the P3 form on **22nd March, 2004**. This report was produced in Court by PW 5, **Joan Warungu**, a clinical officer who had worked with the doctor and was familiar with his hand-writing and signature. The report showed that **Fatuma Ibrahim** (PW 2), aged 17, had been sexually assaulted by two men and was complaining, one day following the incident, of pain in the genitals; she had lower abdominal tenderness, and her labia majora was reddish and swollen; with vaginal bruises and tenderness, and vaginal discharge with pus cells; she had bacterial protozoa infection. The doctor concluded that it was possible PW 2 had been subjected to forcible penetration.

The appellant gave very brief evidence in which he said his arrest had nothing to do with the charges which were laid against him.
The learned Magistrate was convinced the prosecution had proved their case against the appellant herein, beyond any reasonable doubt: and he considered specific aspects of the evidence, to come to that

conclusion.

Upon reviewing the merits of the contentions of both sides, we, too, have come to the conclusion that the prosecution had established a water-tight case against the appellant herein. We have considered the appellant's own evidence at the trial, as well as the points of law and fact which he has urged in his written submissions — and we do not find these to cast any doubts at all on the firmness of the prosecution case.

It is clear to us that the evidence shows the occurrence of the events leading to the two charges, to have been **integrally connected and forming one set of contemporaneous transactions.** Once we come to that conclusion, it follows, logically, that the same evidence which proves one charge, also goes into the proof of the other.

Evidence shows that, those who broke into PW 1's house on the material night were not total strangers; they knew the particular girl they wanted to take out for sexual gratification; they stole, and they were armed; they used threats as they stole; they forced PW 2 into the bush, and they raped her. At two crucial, fortuitous moments, PW 2 saw the faces of her tormentors, and one of them was from the neighbourhood, and was a familiar face — the appellant herein.

We find and hold that the appellant herein, on the material date, committed the acts specified in the first and the second charge.

We dismiss the appeal; uphold the conviction; and affirm the sentences as imposed: save that the term of imprisonment imposed shall rest in abeyance, pending the execution of sentence in respect of the first count of the charge.

Orders accordingly.

DATED and **DELIVERED** at **MOMBASA** this **1st** day of **March, 2011.**

M. IBRAHIM **J. B. OJWANG**

JUDGE **JUDGE**