



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CRIMINAL APPEAL NO 623 OF 1992**

**JACKSON MACHARIA MAGIRI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(From Original Conviction(s) and Sentences(s) in Criminal

Case No 5325 of 1991 of the Principal Magistrate's Court

at Thika S N Mutuku Ag R M (Mrs) )

**JUDGMENT**

The appellant, Jackson Macharia Magiri, was convicted after trial by the learned Ag. Resident Magistrate, Thika on two counts concerning a charge of robbery contrary to sec 296 (1) of the Penal Code (count 1), and indecent assault on a female contrary to sec 144 of the Penal Code (count 2). Upon conviction, he was sentenced in count 1 to serve 4 years imprisonment with 10 strokes corporal punishment and in count 2 to serve 2 years with hard labour. The sentences to run concurrently. The appellant now appeals to this Court against his conviction and sentence.

Briefly, the prosecution case was that on that night of 12th of Dec 1991, the complainant Joyce Muthoni Njuguna (PW1) arrived late at Kandara from Nairobi where she was working as a maid. It was then 8 pm and as she was walking home, a man came from behind caught up with her and tried to engage her in a conversation but she declined to participate or to agree to be escorted by the said man who is Bernard Murithi (PW2). As she walked with PW2, another man emerged near a stream and told PW2 that he wanted the complainant PW2 and the said man who is said to be appellant then is exchanged some words and a fight broke between them. As the fight went on complainant stated that she stood watching. After PW2 had been hit with a stone and fell down, the said man grabbed the complainant and lead her in the maize plantation some 30 meters from the foot path where she had been walking. There he forcefully had canal knowledge with her by force for about 2 hours and thereafter he took away with him the things which the complainant had including her money cash Shs 750/- which forms the basis of the charge in count 1. The complainant then continued with her way home after the incident and time past midnight. She reported the matter to her father and they proceeded to Kandara police where she reported the matter. She then lead the police to the house where she alleges she had seen her attacker going into. That was the house in which the appellant was later arrested.

It is plain from the evidence of the complainant that she was unable to recognize the man who had indecently assaulted her and whereafter robbed her of her properties. According to the learned trial magistrate she could not even tell in Court during the trial whether the appellant was the man.

The only evidence that link the appellant with the crime is that of PW2 who says that the appellant is the man who had fought with him on the way over the complainant and lead her away into the maize plantation. He says that the appellant is his neighbour and he had seen his well. He says that on that same evening, he had been in the same *matatu* upto Kandara but this mentioned by the complainant. The appellant denies any involvement in the said offence. He says that PW2 simply implicated him in the crime because of an existing grudgebetween them.

The conviction of the appellant was largely based on the testimony of PW2 alone. This is an incident which took place at night. Circumstances for proper and positive identification did not exist. It was therefore identified by a single witness at night in difficult circumstance learned trial magistrate did not warn himself as fully as he ought to have done before convicting on the sole evidence of PW2 to mind the evidence of PW2. To my mind the evidence of PW2 needed corroboration in view of the evidence of the appellant that he has always had a grudge against him. The corroboration was lacking. The evidence of the complainant was of little help to the prosecution. Indeed I find her conduct a bit odd in the sense that before the incident, the appellant had clearly told PW2 who was in the company that he wanted her and even engaged PW2 in a light and yet according to her testimony, she just stood watching the two man who were strangers to her fighting. She made no attempt to run away or even raise alarm. She took about 2 hours with the said man in the maize plantation. Whereas she totally says that she was unable to recognize or identify the said man and that may be so in view of the fact that it was then dark, she however, alleges that she was able to see the house where that man had entered into after the incident. If the man had raped her in a maize plantation and not in a house, how was she able to see that house and be able to lead the police to that house and yet she was unable to recognize the man even in the dark.

I find her evidence to be suspect.

In view of the weakness in evidence of PW2 to which I have referred I do not find upon evaluation of the recorded evidence that the conviction of the appellant was safe. I consider that the guilt of the appellant was not proved beyond all reasonable doubts as the possibility of mistake or error on the part of PW2 was not properly excluded.

For reasons given, I allow this appeal, I quash the conviction of the appellant and set aside the sentence that was imposed. I order that he shall be set free and be released forthwith unless otherwise lawfully held.

Dated at Nairobi this 26<sup>th</sup> Day of January, 1993

**S. O. OGUK**

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**JUDGE**