



**REPUBLIC OF KENYA**

**Mwangi v Republic**

**High Court, at Nairobi July 29, 1985**

**Cockar J & Torgbor J**

**Criminal Appeal No 1702 & 1705 of 1984**

**(Appeal from the Senior Resident Magistrate's Court at Kiambu, J Ombonya Esq)**

**Advocates**

**Appellant absent, not wishing to be present and unrepresented**

**Miss W Ngugi for respondent**

**July 29, 1985, Cockar J & Torgbor J delivered the following Judgment.**

The two appellants have jointly been convicted on counts 1, 2 and 9 of robbery with violence contrary to section 296(1) of the Penal Code and sentenced to a term of 10 years imprisonment with 8 strokes on each count to run concurrently – that is a total of 10 years imprisonment plus 24 strokes for each appellant. Each was further convicted for the offence of rape (counts 5 and 6) contrary to section 140 of the Penal Code and sentenced to 10 years imprisonment with hard labour to run concurrently with the prison sentence, imposed in respect of counts 1, 2 and 9. Each was made subject to a police supervision order for 5 years.

The 3rd accused jointly charged with the appellant was acquitted on all the counts.

There is no room for doubt and it is not in dispute that on the nights of May 21, 1984 and May 25, 1984 the houses of Jiminah Kigundu Chege PW 1 complainant in count 1 and of John Hosea Kahara PW 5, the complainant in count 2 respectively were broken into by a gang of armed men and the said two complainants and Grace Njeri Kahara PW 7 complainant in counts 5, 6 and 9 were robbed of the property described in the particulars of charges in the said counts relating to robbery.

The prosecution evidence is that during the robbery at PW 5's house his grown up daughter Grace Njeri Kahara PW 7, 21 years old according to the medical report, was also raped by the two appellants. PW 1 (count 1) said that the robbery at his house in Muthiga, Kikuyu Division, took place at 11.30 pm at night on May 21, 1984. He said that after the robbery he found his television set missing. Although the property stolen from him according to the charge sheet was over Kshs 100,000 he did not name a single other item that was stolen from his house that night. All that he said was:

***“I found they had taken my television and other things as outlined on the charge sheet.”***

That statement is not evidence of items stolen from the complainant. The charge sheet is read out only to

an accused person in court. The complainant an ordinary layman in the normal circumstances is not even aware of what a charge sheet is. It is the duty of the prosecutor as well as of the court to see to it that a complainant states in court all the items that he can remember having been stolen. If he had prepared a list of the items missing then he can refresh his memory from it. There is no short-cut in the recording of evidence in a criminal trial. PW 1 had not been able to identify any of the robbers. He said they were armed.

A week later PW 1 identified a typewriter of his which had been with him for 30 years. He did not say in his evidence as to whether or not this typewriter was stolen from his house during that robbery. In his judgment the senior resident magistrate said that PW 1 testified that the six armed men took away the typewriter. The record of PW 1's evidence shows that he never said that.

However this serious omission on the part of the prosecutor and the senior resident magistrate has not proved fatal in this case because the prosecution called a woman Eva Wanjiru Munya PW 8 to testify.

She said that on that night at about 9.00 pm she and her companion Tom were picked up from the gate of her house by four people of whom two were the two appellants both of whom she had known previously. In a forest they left her companion Tom tied up, and drove up to Kikuyu area. At about 2.00 am at night in Muthiga village they locked up the watchman of a house and broke into the house. She heard screams. They returned with goods which they loaded in the car. The goods stolen from the house included a typewriter. The house belonged to PW 1 whom she pointed out in court. From there they drove back to Nairobi, dropped her at her house and gave her the typewriter. The following day she took the typewriter to the police and gave a statement.

During cross-examination by appellant Peter Andai (1st accused) she said that she had gone with them to the sitting room of the house from which they had got the typewriter. She had talked to the watchman but he had not spoken. She was forced to arm herself with stones (to guard the gate examination in chief) to hit anyone who might come. It was after her father had asked her about the typewriter and had warned her to report to the police and also informed them of the whereabouts of the two appellants. PW 9 Inspector Mwenda Katami confirmed that on May 22, 1984, at 9.30 am at Kabete Police Station he received a telephone call from PW 8's father as a result of which he went to his place and met PW 8 who gave her the typewriter and her statement also.

PW 8 was very properly treated as an accomplice. But her evidence is corroborated by two facts. First the typewriter was identified by PW 1 as his which had been with him for 30 years. He also showed the mark which had helped him to identify it. There is no doubt that the typewriter was his. Secondly PW 1's watchman PW 2 confirmed that when the robbers' vehicle came at the gate a woman alighted and came to the gate and called him. When he asked her what her problem was – thinking that she was a visitor, people got out of the car, jumped over the gate and threatened to cut his throat.

We are satisfied that PW 8, though an accomplice, was a truthful witness. She further does not appear to have hidden anything from her father and had readily agreed with his advice and handed over the typewriter to the police. Of the three accused charged with the offence she identified the two appellants only. She also identified PW 1 as the owner of the house from which the typewriter was stolen.

In his unsworn statement appellant Peter Andai (1st accused) after saying that on May 25, 1984, he was having a birthday party in his house (the offence in count 1 took place on May 21, 1984) then described how he was arrested on June 14, 1984. He then described how he was questioned and taken from police station to police station. At the end he said that PW 8 was a prostitute who sold second hand clothes. She bore him a grudge as he owed her a six months old debt. She reported him to the police to hide those with whom she had stolen. The evidence of 1st accused's witness DW 2 was not relevant to this count.

This appellant's defence does not impress. Although he had cross-examined PW 8 at length he never put the allegation of grudge to her. We reject the allegation. Appellant Peter Mwangi (2nd accused) in his unsworn statement in court merely described what happened to him after his arrest.

On our own evaluation we have no hesitation in accepting the evidence of PW 8 as the truth. Her evidence is corroborated, on material issues. We are satisfied that the two appellants were among the four who picked her up from the gate of her house (presumably for the purpose of distracting the attention of any watchman) and then robbed PW 1. We reject the defences put forward by the two appellants. We are satisfied that both the appellants have been properly convicted on count one.

The offence in respect of counts 2 (robbery), 5 (rape), 6 (rape) and 9 (robbery) took place in the house of the complainant in count 2 PW 5 on the night of May 25, 1984 four days after the robbery in count 2 PW 5 on the night of May 25, 1984 four days after the robbery in count 1. It is not disputed and there is ample evidence to prove that the two robberies in the house of PW 5 and took place that night and that during the robbery the two complainants PW 5 and PW 8 were robbed of the properties detailed in counts 2 and 9. PW 5 could not identify any of the robbers nor was any property recovered from either of the appellants. He said that the robbers were armed with pangas and they had torches.

PW 5's wife Mary Kahara PW 6 said that at 4.00 am at night she heard a bang on the door. She went to the door and on seeing two people she backed away. The door was opened and the person who entered demanded money. Her wrist watch and wedding ring were taken. She was beaten. One of the intruders took her daughter and asked her, PW 6, if she wanted him to rape her or the daughter. PW 6 went back to her room. Later her daughters claimed to have been raped and she took them to the hospital. She was able to recognise appellant Peter Mwangi (2nd accused) whom she had been able to see by the light from the torch. On June 11, 1984, she picked him up during an identification parade at Karuri police station.

During cross-examination by 2nd accused she said that he was the one who had asked her for the video and had beaten her with a simi.

The daughter Grace Njeri Kahara PW 7 was awakened by a torch light held by a person armed with a simi. He demanded money and searched the wardrobe. Her Kshs 1,000.00 and wrist watch were taken. One threatened to rape her mother but she told the robbers to rape her instead. Three of the robbers took her and raped her in turn. She identified both the appellants as the ones who raped her. She could see their faces by torchlight. During cross-examination she said that each one of the robbers had a torch and all of them had their torches on. She had seen those who had raped her before the actual act. The light from the torches was very bright. She could identify all the three who raped her as they used torches when raping her. The torch had been placed on the bed at side. On June 19, 1984, she attended identification parades at Karuri police station and identified both the appellants.

From the evidence of PW 7 we are satisfied that there was plenty of light for her to identify her assailants.. She had ample time and opportunity also to do so from close quarters.

The medical evidence was worthless because the police surgeon, Dr Patel PW 11 saw PW 7 about 4 months after the robbery. It appeared from his evidence that the girl had been first examined and treated at Aga Khan Hospital. The medical report from that hospital was not produced in evidence.

Inspector Stanley Kikumu PW 10 who conducted the identification parades appears to have committed a very serious blunder as far as appellant Peter Mwangi (2nd accused) is concerned. What happened was that he arranged a line of 12 men whose names are listed in the identification parade report prepared in respect of appellant Peter Andai (1st accused) which was held first. This appellant (1st accused) was picked by both the mother (PW 6) and the daughter (PW 7). We have carefully perused the evidence and studied the identification parade report. We do not see anything wrong in respect of this identification parade and we are satisfied that it was conducted that it was conducted in a fair and proper manner.

A few minutes later the inspector held the second identification parade in which the suspect was the appellant Peter Mwangi (2nd accused). The identifying witnesses were the same PW 6, PW 7, and Ester Njoki Kahara who was not called to give evidence. The blunder that was committed was that the same members of the parade who took part in the previous parade were again used as members of parade in the second parade. It must be presumed that the identifying witness must have observed carefully the features of each one of the members of the previous parade and then picked up the 1st accused. A few minutes

later the same identifying witness once again observes the new familiar faces of the same members of the parade but notices that the person she had picked is absent and in his place a new face has now appeared – the new face being that of the 2nd accused. The identifying witness will naturally suspect that this new person is the one held by the police on suspicion. That is an extremely serious prejudice which in our view was caused to the detriment of appellant Peter Mwangi (2nd accused). In fact this is a fatal error because there is no other evidence produced to prove his involvement in any of the counts 2, 6 and 9 except identification by PW 6 and PW 7.

We have already considered the defence raised by the appellant Peter Andai (1st accused) in his unsworn statement which was that on May 25, 1984 he was in his house and was having a birthday party. Thereafter he described his arrest on June 14, 1984 and what happened to him after his arrest. The evidence of his witness DW 2 as regards the birthday party was that by 10.00 pm the party was over and then they went to bed. The mother PW 6 had not identified appellant Peter Andai (1st accused). The prosecution case against this appellant rests on the sole evidence of the daughter PW 7, Grace Njeri Kahara. We have very carefully considered her evidence keeping in mind the state of light, the opportunity and the amount of time she had to see this appellant during the whole incident. We warn ourselves of the dangers of convicting on the evidence of a single identifying witness. A witness may be truthful but honestly mistaken. We are satisfied that not only was there sufficient light from the torches which her three assailants had kept constantly shining during the course of raping her but also during that period she had ample opportunity and time to observe each one of the assailants from very close quarters. Any possibility of a mistake in our view is completely ruled out.

There is also corroboration of her evidence as to the rape. The mother PW 6 said that one of the intruders had held her daughter (she did not say which one) and had asked her if she wanted him to rape her or the daughter. PW 7, the daughter, said that when the robber had threatened to rape her mother she had told him to rape her instead. That evidence of the mother is corroboration of PW 7's evidence of having been raped. No consent can be imputed to PW 7. that was a submission under a threat.

We accept the evidence of PW 7 as being truthful and accurate. There is corroboration as regards rape from the evidence of PW 6, the mother. We are satisfied that the appellant Peter Andai (the 1st accused) has been properly convicted on counts 2 and 9 for robbery and on count 5 for the offence of rape. These convictions are sound.

As regards the case of the 1st appellant Peter Mwangi (2nd accused) on counts 2, 6 and 9 although we accept the evidence of PW 6 and PW 7 as truthful and accurate, in view of the extremely grave prejudice caused to the detriment of this appellant during the identification parade we feel that we are unable to support his conviction on any of these three counts.

The sum result is that the appeal of appellant Peter Mwangi (2nd accused) succeeds against convictions on counts 2, 6 and 9 which convictions are quashed and sentences thereon are set aside. His appeal against conviction on count 1 is dismissed and the conviction is confirmed.

Appeal of appeal Peter Andai against convictions on counts 1, 2, 5 and 9 are dismissed and the same are confirmed.

As to sentences we feel that a sentence of 10 years imprisonment with total of 24 strokes is manifestly excessive. Appellant Peter Andai (1st accused) was a 1st offender. No records of the other appellant were available. The sentence of appellant Peter Mwangi (2nd) accused is reduced to 7 years imprisonment and 6 strokes on count one. The sentences of appellant Peter Andai are reduced to 7 years imprisonment and 6 strokes on counts 1, 2 and 9, and to 7 years imprisonment with hard labour on count 5 – all prison sentences to run concurrently.

The police supervision order imposed by the lower court is confirmed in respect of both the appellants.