IN THE COURT OF APPEAL

AT NAKURU

(Coram:Kneller JA, Chesoni & Nyarangi Ag JJA)

CRIMINAL APPEAL 100 OF 1984

BETWEEN

BENJAMIN MWANGI & ANOTHER.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nakuru, Masime J)

JUDGMENT

The two appellants were jointly charged before the Senior Resident Magistrate, Nakuru with:

1. Robbery with violence contrary to section 296(1) of the Penal Code.

2. Rape contrary to section 140 of the Penal Code.

They were subsequently tried and on conviction each was sentenced to 5 years' imprisonment on count one and to 5 years' imprisonment and 20 strokes on count two, the sentences of imprisonment to run consecutively. Their appeals to the High Court (Masime J) against conviction were dismissed but the sentences of imprisonment of each were reduced to 2 1/2 years on each count, the sentence to be served consecutively. The sentences of corporal punishment were upheld. Each has challenged the decision of the High Court. The grounds of appeal of the first appellant (hereinafter referred to as Benjamin) are that:

1) The learned trial magistrate erred in law in overlooking the cross examination of the defence counsel, was biased and in favour of the prosecution.

2) The learned trial magistrate erred in law as he deliberately overlooked the fact that PW 11 and 3 gave false evidence despite the fact that they were on oath to tell the truth.

3) The identification parade could not stand in court as the witness PW 11 was shown the suspects before the parade was held,

4) The prosecution failed in court and in fact by not giving any reason why his ID card was brought in court as an exhibit.

5) His defence witness was not allowed to give evidence and yet no reason was given.

6) The learned High Court judge erred in law in his ruling by not stating as to what extent and as to which point the prosecution had proved its case beyond any reasonable doubt.

7) Reasons therefore: He is pleading with the esteemed Court of Appeal as the principal custodian of justice for acquittal.

The second appellant, referred to as Julius in the rest of the judgment, based his appeal on the following grounds:-

1) The doctor contradicted himself in his evidence

2) The learned trial magistrate erred in law in dwelling on the uncorroborated evidence of all the prosecution witnesses.

3) Identification parade could not stand as the witness was shown the suspect before the parade was held.

4) The learned trial magistrate erred in law in not considering that there was a watchman on duty in the night of robbery and who was not called to court to give evidence.

5) The learned trial magistrate erred in law in passing his judgment on matters not proved before him.

6) The learned trial magistrate erred as he did not (say) give any reason why he refused his witness to give evidence in court.

7) PW 3's evidence could not be admitted in any court of law as it was full of contradictions, her sister also was not called in court to give evidence who accompanied PW 3 when they left PW 2.

8) PW 2 denied in court that she did not know him as her neighbour was disapproved by PW 3's evidence in court.

9) The learned High Court judge erred in law as he did not state which prosecution facts that the prosecution proved its case beyond any reasonable doubts as per his ruling. Reasons therefore he is pleading with the Honourable Court of Appeal for acquittal, he would like to represent his appeal as he is not represented in this case.

Addressing the court, Benjamin opened by saying he was a victim of a frame-up. He referred to the evidence and pointed out that in her evidence, C, the complainant, had said that two men entered her bedroom after the bedroom's door was broken and that she identified the two appellants. That piece of the complainant's evidence, said Benjamin, differed from that of PC Paul, PW 7, who told the trial court that C had told him that there were three robbers and that she could identify just one. Benjamin pointed out that C had said a night watchman was on duty during the material night and that she had directed him to guard the home and sit close to the front door. The watchman was not called as a witness in the trial to testify about the happenings of that night and the question has to be asked why the prosecution did nothing about the watchman. According to Benjamin, C's description of how the attack was started and carried out and of the clothes, etc of the robbers was too detailed to be true and that it is incredible that C would be standing near her bedroom door whose shutter had been smashed. Dealing with the identification parade, Benjamin complained that C had seen him before the parade. His identity card was produced as an exhibit in court by PC Paul. Benjamin urged the court to notice that the description of him which C had offered in her evidence-inchief fitted the appearance on the identity card.

Benjamin argued that the evidence of PW 3, Teresia Muthoni, is lacking in truth, that she was arrested by the police and kept at Molo Police Station from August 7, 1981 to August 20, 1981 when a statement was recorded from her, that she did not meet Julius as she said in her evidence, that her younger sister who accompanied her to Turi Trading Centre should have been called to confirm whether or not Teresia met

Julius in the evening of August 2, 1981 and that Teresia is an accomplice who shifted the blame and whose evidence is of no value.

On ground 5 of his appeal, Benjamin complained that one of his two witnesses did not give evidence although he had informed the court that he had two witnesses who would give evidence in support of his case.

As regards the second count of rape, Benjamin submitted that the charge was not proved and that the conviction for rape should not stand. The second appellant, Julius, described as incredible the evidence of the Doctor, James Henry Randal, who said, in his oral evidence, that the complainant had injuries on the external and internal genitalia but whose medical examination report stated that there were no injuries to external and internal genitalia. Julius asked the court not to overlook the contradiction. This appellant also referred to what he thought was a significant contradiction in the evidence of C. It was this: in the middle of her cross-examination, C said she was frightened when she heard the bang on the door and that before the robbers entered her bedroom, she was screaming in the hope that someone might come to her help. However, towards the end of the cross-examination, C told the court she was not in fear at the first bang nor at the second bang.

Julius attacked the manner in which the identification parade was organized and said C was placed at a place from where she could see him, Benjamin and the others and talk to them.

It was submitted that the trial magistrate took into account extraneous matter, the particular matter being that the robbers had torches, whereas the evidence was that none of the robbers had a torch and that the torch which C had was taken away by one of the robbers. Like Benjamin, Julius said his witnesses were not allowed to give evidence. A friend of his, in whose house he stayed that night, would have testified that Julius was with him. This appellant regretted that he was not reminded to crossexamine Peter Macharia, DW 1, and lamented that although the evidence showed that the appellants and the key witnesses were all neighbours, yet C had lied by saying she did not know him and Benjamin before the incident. On grounds 7 and 9, Julius adopted the arguments of Benjamin. Each appellant asked the court to quash the conviction, set aside the sentences and set him free.

Learned Principal State Counsel supported the conviction in each case, arguing that the complainant had a torch, was with the robbers for quite a while and was at close proximity with them and therefore that the identification was sufficient. Mr Etyang requested the court to exclude the identification parade. Mr Etyang's observation on the identity card was that it had not been shown to C and that the impressions on the card could not have been known to C.

On the second charge of rape, Mr Etyang conceded that there was no corroboration of the evidence of C, no warning by the trial magistrate of the danger of convicting in this sexual offence in the absence of any corroboration and no proof of penetration. Mr Etyang left his comments on the second charge at that.

This is a second appeal and so only issues of law fall to be decided. The basic issue is that of identification. The relevant part of C's evidence was that after the door of her bedroom had been broken, two men entered in her bedroom and that she identified the two men. She said she had a torch. Mary Muthoni, who was in the house did not get out of her bedroom. C screamed just before the two men forcibly entered her bedroom. Those were the conditions in which C asserted she identified the two men, to the extent of noticing their clothes. She was so brave that as they entered her bedroom, she was standing near the door. She had a stick and a torch.

Nothing more was said about the stick. C was all alone when the men attacked her in her bedroom. C was frightened by the bangs and by the forcible entry into her house. She must have been scared almost to death. When the two men entered the bedroom at night, she was alone and defenceless. The robbers would not have broken into the house as a joke. In those circumstances, reasonable people would have to hear and know much more than C told the trial court before they could accept that C kept calm and cool throughout the attack and was able to look at the face of Julius and to see Benjamin clearly. The trial magistrate held that the appellants were sufficiently identified by C

"because they were with her for hours".

That was a misdirection. C's evidence was that she was with the appellants for one hour, from 4.30 am to 5.30 am. The more serious misdirection is that the trial magistrate did not analyse the evidence of C, who was the single identifying witness, having regard to the circumstances of the case, including the fact that the incident took place at night.

In the case of *Roria v Republic* [1967] EA 583, the predecessor of this court had this to say on identification by a single witness at page 584, letter G:

"Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification was difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

See also *Abdalla Bin Wendo & Another v R* (1953) 20 EACA 166. It cannot be gainsaid that the appellants did not have the advantage of a careful and full consideration of the evidence of identification. Mbugua Waere, the watchman who was an employee of C, did not in the opinion of C

"….. rescue her from the robbers."

C did not see him during the material night. He however reported for work the next day and when his employer asked him why he did not offer any help, he kept quiet. The watchman was not called to give evidence and the appellants were astounded by this lapse. Whether a witness should be called by the prosecutor is a matter within the discretion of the prosecutor and a court will not interfere with that discretion unless, perhaps, it may be shown that, the prosecutor has been influenced by some oblique motive: See *Oloro & Others v R* (1956) 23 EACA 493. We think that in this case, the corroboration of Consolata's evidence was vital. It is, to say the least, surprising that the prosecution chose not to call the watchman or offer him for cross-examination.

The trial magistrate did not consider the evidence about the watchman. That was a further misdirection. The trial court would have been entitled to presume that the evidence which the watchman would have given, which was not produced, would, if produced, be unfavourable to the prosecution who withheld it: *R v Urberle* (1938) EACA 58.

The manifest lack of corroboration of C 's evidence of identification and the existence of conditions unfavourable to a correct identification, leads us to the conclusion that it would not be safe to allow the convictions to stand.

Teresia Muthoni, PW 3, was arrested by the police on August 7, 1981 and was charged with the offence of robbery in connection with the material incident. She told the trial magistrate that she left C's house at about 9.30 pm and that as she walked towards her home, she met Julius who enquired who else was with C in her house. She admitted under cross-examination that Julius requested her to return to C's house to see if the husband of C was present. She said Julius told her he had a plan and that that is why he wanted to know who was with C in the house. Now, on that evidence the trial magistrate should have treated Teresia as an accomplice which she clearly was. Not only was Teresia an accomplice, but one who sought by her evidence to shift the entire blame to the appellants. The trial magistrate seriously misdirected himself in treating Teresia's testimony as that of a reliable witness. Teresia's evidence should not have been given any weight whatsoever.

Teresia's uncorroborated evidence should have been held to be untrustworthy, for the reason that she was likely to swear falsely to shift blame from herself and being a participant in the crime she could easily disregard the sanctity of the oath she took to tell the truth: See *R v Asumani Logani s/o Muza* (1943) 10

EACA 92 and *Canisio s/o Walwa v R* (1956) 23 EACA 453.

In support of the charge of rape, C told the magistrate that the two appellants took her out of the house, forced her to escort them within the compound of the house, and near the fence they forced her to sit down and then Benjamin forced her to lie and she did so. Benjamin tore her inner pants and forced her to have sexual intercourse with him. After Benjamin, Julius had his turn and after he finished, Benjamin told her to report to the police that they had raped her.

Dr Randal, PW 1, examined C because she had alleged that she had been raped. He concluded that sexual intercourse had taken place. There were no injuries on external or internal genitalia.

The doctor's evidence did no more than support C's evidence that she had had sexual intercourse. His conclusion was based on the finding of spermatozoa on a specimen of C's vagina which was examined at a laboratory. The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has had sexual intercourse nor is the absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact to the offence of rape, which the doctor's evidence did not establish or corroborate. There was no corroboration of C's evidence that she had been raped. This was a sexual offence and so it was incumbent upon the trial magistrate to warn himself that it was not safe to convict the appellants on the uncorroborated evidence of C but that having warned himself, he could convict in the absence of corroboration. The trial magistrate was here faced with a case of an oath against an oath. The relevant law in Kenya is succinctly set out in *Chila v The Republic* [1967] EA 722 at page 723:

"The law of East Africa on corroboration in sexual cases is as follows. The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice."

The decision was applied in *Margaret v the Republic* [1967] Kenya LR 267.

In view of C's evidence, it was necessary for sexual intercourse to be proved by establishing penetration: *Halsbury's Statutes of England*, Third Edition, Volume 8 page 440 para 44. Be that as it may, the trial magistrate did not warn himself as we have already held. That was a grave misdirection. In the absence of such a warning, the convictions for rape are not for sustaining unless we are satisfied that C's evidence is true. We are not so satisfied and so the convictions cannot stand: *R v Cherop arap Kinei & Another* (1936) 3 EACA 124.

The complaint by Julius that his witnesses were not allowed to give evidence is not without substance. We would observe that a trial magistrate should make a full and accurate record whether an accused wishes to call defence witnesses and if the summons are applied for, the magistrate should issue summonses or record his reasons for refusing the application: *Musa v R* [1967] EA 573.

It is the duty of a trial magistrate to inform an accused person, where necessary, of his right to cross-examine a defence witness and to record whether the accused does so or not.

The upshot of all this is that we allow the appeals, set aside the decision of Masime J, quash the convictions, set aside the sentences and order that the appellants shall be set free forthwith unless they are held under some other lawful warrant.

Dated and Delivered at Nakuru this 19th day of October 1984.

A.A.KNELLER

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JUDGE OF APPEAL

AG. Z.R.CHESONI

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JUDGE OF APPEAL

AG. J.O.NYARANGI

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JUDGE OF APPEAL

I Certify that this is a true copy

of the original.

DEPUTY REGISTRAR