



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 114 OF 1982

BERNARD IRUNGU WAWERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO 115 OF 1982

KABOCHI GATIMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO 116 OF 1982

KIBUNJA MUCHIRI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The three appellants and two others were jointly charged with four counts of robbery contrary to Section 296(1) of the Penal Code (Cap 63) and three counts of indecent assault contrary to Section 144(1) of the Penal Code. Appellant No 1, Bernard Irungu Waweru and appellant No 2, Kabochi Gatimu, were convicted on count No 6 for indecently assaulting **F N K** (PW 3) and each of them was sentenced to eighteen months' imprisonment with three strokes of corporal punishment.

Appellant No 3, Kibunja Muchiri, was convicted on counts 1 and 2 for robbing David Wanjohi (PW 2) and Catherine Waithira Njuru (PW 3) respectively and he was sentenced to three years' imprisonment and three strokes of corporal punishment on each of the two counts. The custodial sentence on the two counts were ordered to run concurrently. The appellant was further ordered to be under police supervision for a period of five years from the date of his release from prison. Each of the three appellants has appealed

against the conviction and the sentence on the count/counts on which he was convicted and sentenced.

Briefly the facts were that sometime between 9.00 pm and 10.00 pm on the night of October 1, 1981, a gang of about six men raided the premises of a girls school known as Kiru Secondary School in location 14 of Muranga District. The raiders were armed with swords, spears and pangas. They first met Mr David Wanjohi (PW 2) who worked as a watchman at the school and after inquiring from him if he had any money they asked him if the teachers in the school had been paid their salaries. He replied that neither he nor the teachers had received their salaries. After further questioning PW 2, they made him to call Catherine Waithira Njuru (PW 3) who was a lady teacher at the school and who at the time was in her house on the school premises with two girls, one of whom was Perpeture Wahiga Ngure (PW 7) and the other FN K (PW 3). On recognizing PW 2's voice, PW 3 opened the door and the gangsters then entered the house where they robbed PW 7 of their property as listed in counts 2 and 3 and also sexually assaulted PW 2 & PW 8. They also robbed PW 2 of Kshs 100 before going away.

About a couple of hours later, at about midnight, PW 5 who lived in the same location saw two men carrying some goods. One of them was accused No 4 and the second who could not be identified was armed with a spear. On being challenged by PW 5 the two men left behind the goods they were carrying, jumped over a fence and disappeared. PW 5 collected the goods which comprised of Exhibits 2 to 31 and handed them over to PW 6 at Kiriani Patrol Base in the same location. Later PW 3 and PW 7 identified these exhibits as the property of which they had been robbed on the night in question.

The following morning ie on the morning of October 2, 1981 at about 8.00 am, five suspects were arrested in the compound of another school in the same area. Three days later identification parades in respect of them were held at which all three appellants were identified by PW 8 and appellant No 3 by PW 2 and PW 3 as being members of the gang which raided their premises on the night in question. PW 8 testified that she saw the faces of the gangsters when they entered PW 3's house where there was light from a lamp and that she also saw them outside the house where there was moonlight. She said that both appellant No 1 and appellant No 2 had sexual intercourse with her without her consent. She saw the gangsters taking away PW 7's suit case (Ex 23). According to her when they entered the house they ordered PW 3 to take off her watch and later took away her clothes and money as well. Her evidence as to the alleged rape was not supported by the Doctor (PW 1) who examined her but it is to be observed that the examination did not take place until October 3, ie nearly two days after the alleged sexual assault on her. However, her evidence is corroborated by PW 7 who stated that she saw PW 8 being raped by the gangsters. Appellants No 1 & 2 both denied being at the scene of the crime and each stated that on the night in question he was at his own home. The learned Resident Magistrate who had the opportunity of studying the demeanour of all the witnesses, rejected the alibi of these two appellants and described the story of either of them as pack of lies. He believed PW 8 as he was entitled to do and accepted her story that she was sexually assaulted by appellants No 1 & 2. We, on our own evaluation of the evidence before the lower court, see no reason to differ from the learned Resident Magistrate. We are satisfied that he came to the correct conclusion when he convicted appellants 1 & 2 on count No 6. As to the sentence of eighteen months' imprisonment and three strokes imposed upon each of these two appellants we are satisfied that having regard to all the circumstances of the case it is not manifestly excessive and we find no reason to interfere with it. Appellant No 3 was identified by PW 2, PW 3 and PW 8 as being a member of the gang that raided the school on the night in question.

PW 2 stated that the gangsters robbed him of Kshs 100. He corroborated the evidence of PW 3 who testified that she was robbed of her wrist watch and exhibits 3 to 22. On the question of robbery, PW 3's evidence also finds corroboration in the evidence of PW 7 and PW 8. Appellant No 3's denial of the offences in counts 1 & 2 was rejected by the learned magistrate who accepted the evidence of PW 2, PW 3 and PW 8 and convicted this appellant on counts 1 & 2 on the basis that he had been identified as one of the robbers who took part in the robberies. By the same token of logic this appellant could well have been convicted on count 3 and appellants 1 and 2 could have been convicted on counts 1, 2 and 3 in addition to count 6. All three robberies in counts 1, 2 and 3 were committed by the same gang of robbers at the same time. However, since no cross appeals were filed by the Republic, we need not go further into the question of acquittals of appellant No 3 on count 3 and appellants 1 and 2 on counts 1, 2 and 3.

Now coming back to appellant No 3 we are satisfied that there was overwhelming evidence before the magistrate to justify conviction of this appellant on counts 1 and 2. We find no merit in his appeal. As to the sentence of three years imprisonment with three strokes on each count, the appellant had two previous convictions both of which were for serious offences. We are satisfied that having regard to the nature of the offences, the sentences are not manifestly excessive. In the result all these three consolidated appeals against the convictions and sentences are dismissed.

Dated and delivered at Nairobi this 30th day of November 1982.

P.S BRAR

M.G MULI

JUDGE

JUDGE