IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MARAGA, OUKO & M'INOTI, JJ.A.

CRIMINAL APPEAL NO. 505 OF 2007

BETWEEN

ALEX KIMATHI …….……..…...……..……. APPELLANT

AND

REPUBLIC …...……...……..…..…… RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ) dated 7th November, 2005

in

H.C.CRA. NO. 894 OF 2002)

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JUDGMENT OF THE COURT

The complainant, J N K (PW1), owned a boutique in the city. On 28th December, 2001, at about 9.00 pm, she walked from her place of work to a stage along Luthuli Avenue for her transport home to Kibichuku, Wangige. She was in the company of her cousin, A M (PW2), who was also on his way home. They parted company near Ramogi Studio, along Luthuli Avenue. A short distance further, PW1 was accosted by two men who she later identified as the appellant, Alex Kimathi and Thomas Ekiru (now deceased). She explained that the appellant, who was wearing a long dust coat, threatened her with a knife and ordered her to follow him. When she resisted, Ekiru armed with a sword, ordered her to comply. The two led PW1 into a dark alley off Luthuli Avenue where they robbed her of KShs.5,060/-, Nokia mobile phone, Casio wrist watch, house keys, Kenya National identity card, diary, Safaricom scratch-card, pair of ladies shoes, pair of jeans, biker, underpants and purse all valued at KShs.21,260. The appellant then held PW1 by the neck, knocked her down and removed her clothes, save for a shirt. He proceeded to rape her as Ekiru held a sword at her chest. Subsequently the appellant swapped places with Ekiru; he threatened PW1 with the sword as Ekiru raped her.

Mission accomplished, the two fled taking with them PW1's clothes, so that she was left semi naked, with only her shirt. Shortly a crowd of people gathered around her, among them PW2 who had seen PW1 being led into the dark alley. He went off to look for the police, but in the meantime, police on patrol passed by and PW1 reported the incident to them. Later the same night, a Good Samaritan taxi-driver helped PW1 to her home. The next day she went to Canaan Medical Clinic for treatment.

On 11th January, 2002, two weeks after the robbery, as PW1 walked along Luthuli Avenue near the scene of her ordeal, she spotted the appellant and Ekiru. They were dressed exactly the way they were on 28th December, 2001; the appellant in a long dust coat and Ekiru in a grey coat and a knitted hat. She alerted PW2 that she had spotted her assailants after which they made a report to the same patrol policemen who had been on duty on 28th December, 2001. The appellant and Ekiru were arrested, but none of PW1's stolen properties were recovered in their possession.

On 7th March, 2002 the appellant was charged jointly with Ekiru before the Chief Magistrate's Court at Nairobi with robbery with violence contrary to *section 296(2) of the Penal Code, Cap 63 Laws of Kenya*. In addition, each of them was charged separately with one count of rape contrary to *section 140 of the Penal Code* and an alternative count of indecent assault contrary to *section 141 of the Penal code*. The charges arose from the incident on 28th December, 2001 along Luthuli Avenue.

To prove its case, the prosecution called 6 witnesses while the appellant and Ekiru gave unsworn statements and called no witnesses. On 26th July, 2002, the learned trial magistrate found both of them guilty and convicted them of robbery with violence and indecent assault. She, however, acquitted them on the charge of rape because, in her opinion, they could not be convicted of rape in the absence of a medical report. On the count of robbery with violence they were sentenced to death while on the count of indecent assault each was sentenced to 4 years imprisonment with 3 strokes of the cane. The sentences were ordered to run consecutively.

Aggrieved by that decision, the appellant appealed to the High Court, challenging his conviction on the grounds that his identification was by a single witness under difficult circumstances; that the trial magistrate had shifted the burden of proof to him and that his alibi defence had been rejected off-hand. The appeal was heard by Makhandia, J *(as he then was)* and Lesiit, J who on 7th November, 2005 dismissed the same and upheld the conviction and confirmed the sentences. The decision of the High Court provoked this second appeal to this Court.

In this Court the appellant filed three documents raising between them 20 overlapping grounds of appeal. The first document was a *"petition of appeal"* filed by the appellant himself on 16th November, 2005 listing 6 grounds of appeal. When Mr R.O. Odhiambo, learned counsel was assigned to represent the appellant, he filed a supplementary memorandum of appeal on 4th July, 2013, listing 8 grounds of appeal and a further supplementary memorandum of appeal on 4th October, 2013, raising 6 grounds of appeal. At the hearing of this appeal, however, Mr Odhiambo addressed us on only 5 grounds of appeal, contending that:

1. The identification of the appellant was not safe;

2. The failure of the prosecution to call the investigating officer was prejudicial to the appellant;

3. The first appellate court had failed to discharge its duty to reconsider, re-evaluate and analyse the evidence adduced before the trial court and come to its own conclusion;

4. The trial was a nullity because the appellant was not charged with the substantive offence of robbery with violence under s. 295 of the Penal Code, but under s. 296(2) which is the punishment section.

5. The charge of robbery with violence under s. 296(2) of the Penal Code was in violation of the Criminal Procedure Code, the former Constitution of Kenya and the Constitution of Kenya 2010.

Elaborating on the above grounds of appeal, Mr Odhiambo submitted that the identification of the appellant at the *locus in quo* on 28th December, 2001 and at his arrest on 11th January, 2002 was questionable. On identification at the *locus in quo* he submitted that the robbery took place at about 9.00 at night under extremely difficult conditions with PW1 under threat to her life. Counsel further urged that there was no evidence led on the intensity of the light at the *locus in quo* and that in any event, the

actual robbery and the rape took place in an unlit dark alley. In counsel's view, the identification of the appellant was by a single witness (PW1) under difficult circumstances. He discounted the identification of the appellant by PW2 as no more than worthless dock identification which on the authority of *OUMA OBENJO & ANOTHER V REPUBLIC, CR.A. NO. 402 OF 2007* is unreliable and insufficient to convict an accused person. Counsel also cited *SIMON MATERU MUNIALU V REPUBLIC, CR.A. NO. 302 OF 2005* where this Court stated as follows on identification evidence:

> *"In law it is well settled that a conviction resting entirely on identity of an accused person which he disputes invariably causes uneasiness even when the case is that of recognition as opposed to that of identification of a stranger. The uneasiness is particularly real when identification is at night or under difficult conditions."*

Regarding identification at the time of arrest, learned counsel submitted that PW1 could not have properly identified the appellant since she was hiding behind a vehicle when she identified him to the police. Counsel further contended that there was no evidence that the robbery and rape were ever reported formally to the police. For good measure counsel urged us to find the coincidences in this appeal too curious and so unreal as to suggest fabrication of the prosecution case. In his view, it was unbelievable that that PW1 could have been raped and robbed at Luthuli Avenue by the appellant and Ekiru, then two weeks later spot them at the same area, wearing the same clothes, before reporting to the same patrol policemen to whom she had earlier reported the robbery. Learned counsel was aghast that PW1 was raped and robbed at 9.00 pm, yet she did not get home until 3 am the next morning.

Mr Kivihya, who appeared with Mr Chigiti for the respondent submitted that the identification of the appellant was safe and free from error. In his view, the appellant was identified by two witnesses (that is, PW1 and PW2) rather than by a single witness. PW1 had been with and had seen her assailants on Luthuli Avenue which was lit, before they took her to the dark alley. She had even communicated with them and had testified on the clothes they wore at the time of the attack. The evidence of PW2 was to the same effect. Two weeks later, counsel continued, PW1 was able to easily recognise her assailants. In his view, there was concurrent finding by the trial court and the first appellate court that the identification of the appellant was proper and safe to the extent that we should not interfere with that finding.

Due to the fact that evidence of visual identification in criminal cases can occasion a miscarriage of justice, this Court has always insisted that where reliance is placed on visual identification to convict an accused person, the evidence of identification must be weighed with the greatest care and the court is required to satisfy itself that in all circumstances it is safe to act on such evidence. See *REPUBLIC V ERIA SEBWATO*, (1960) EA 174, *RORIA V REPUBLIC, (1976) EA 583* and *MAJALIWA MOHAMED MANENO V REPUBLIC, CR.A. NO. 180 OF 2002 (Mombasa).*

In *JOSEPH NGUMBAO NZORO V REPUBLIC, (1991)2 KLR 212,* this Court emphasized the circumspection with which visual identification has to be treated as follows:

> "*Before accepting visual identification as a basis for a conviction, the court had the duty to warn itself of the inherent danger of such evidence. A careful direction regarding condition prevailing at the time of identification and the length of time the witness had the accused under observation together with the need to exclude the possibility of error was essential."*

And earlier in *WAMUNGA V REPUBLIC, (1989) KLR 424, 426,* the Court had observed:

"*…it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."*

PW1 had testified that at the time of the incident, Luthuli Avenue was well illuminated by electric light and that she had seen the appellant and Ekiru before they forced her to follow them into the

dark alley. She described their dress, the weapons they each had and the fact that Ekiru had some of his upper teeth missing. PW2'e evidence was that he had not gone far after they had parted with PW1 and that he saw her being led into the dark alley. The place where PW1 was accosted was well illuminated by street lights. He accosted the assailants who threatened him with a sword, and he had to run away screaming for help. By the time he came back, he found PW1 had been robbed and raped. In his evidence, Luthuli Avenue was well lit, he had noted the clothes the assailants wore and Ekiru's missing upper teeth.

In our view, the trial court and the first appellate court were acutely alive to their duty to carefully evaluate the evidence of identification of the appellant.

In this regard the trial court expressed itself as follows on page 4 of the judgment:

> *"The complainant (PW1) and Allan (PW2) testified that Luthuli Avenue is illuminated by street lights and one could see well around the area. They both say they saw the two accused [persons] very clearly. The description they both give [of] the two accused [persons] tally and has minor inconsistencies…The description they give is similar."*

On page 5 of the same judgment the trial court stated:

> *"The two witnesses say they had no difficulties in identifying them two weeks later after the complainant had spotted them…The complainant was firm when giving her evidence and the court [cannot] ignore her demeanor which left the court convinced that she was attacked on the material night. Her description of the accused persons and her reasons as to how she was able to see them clearly in the illuminated Luthuli [Avenue] … convinced [this court] that she saw well her attackers whom she said wore the same clothes they were wearing on the material day."*

For its part, the first appellate court went to great length to re- evaluate the evidence as regards the identification of the appellant and to satisfy itself that the conviction was safe. On page 6 of its judgment, the first appellate court stated:

> *"On these issues (identification) we agree that there were two identifying witnesses. The complainant herself and her cousin Allan who was PW2. The complainant's evidence was clear that the appellant and his co-accomplice approached her in a lighted street and with a knife and panga forced her into an alley where she was robbed and raped. Allan said that he witnessed the complainant being dragged by the two mean and screamed trying to get assistance from members of the public…*
>
> *It is quite clear that one, the issue of lighting was ably considered by the learned trial magistrate and found to be good enough for clear and correct identification. Secondly, it is also clear in this judgment that there were two identifying witnesses, the complainant herself and PW2, Allan.*

On page 8 of the same judgment the first appellate court concluded:

> *"It is trite law that evidence of identification made at night must be treated with great care particularly where it was made under difficult circumstances. We have treated the evidence by both the complainant and PW2 with extreme care. PW2 on his part, after seeing the two men drag his cousin towards a dark alley, he walked back towards them but was threatened with a panga causing him to withdraw and scream for help. PW2 said there were street lights at the place where the complainant was dragged from. He even described the appellant as having a jacket with a knitted hat which description tallied with the evidence of the complainant. In fact both complainant and PW2 described the deceased as having missing teeth in the upper jaw and wearing a long coat. That is sufficient proof that both witnesses were quite close to the attackers to be able to see the missing teeth and the clothing each wore."*

We are satisfied that the two courts below adequately and satisfactorily addressed the

identification of the appellant and were, on the evidence adduced, satisfied that the identification was positive and safe to convict the appellant. This Court has stated over time that it will only interfere with concurrent findings of the two courts below only when such findings are based on no evidence at all or on a perversion of the evidence, or when, on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. See *ADAN MURAGURI MUNGARA V REPUBLIC, CR.A. NO. 347 OF 2007 (NYERI)*. We do not see any basis in this case for interfering with the concurrent findings of the trial court and the first appellate court.

The issues raised by the appellant regarding what his counsel described as the curious coincides are really matters of fact which we should not be drawn into. It will suffice to note that there is nothing curious about this appeal if it is taken into account that PW1 was using the same route from her place of work to catch her usual transport home, and that the police officers on patrol along Luthuli Avenue on 28th December, 2001 were the same ones on patrol two weeks later, as testified by PW4, PC Elias Shikuku. As for the rather flippant query why PW1 did not get home much earlier, it totally ignores that having been stripped naked save for her shirt, and having been robbed of all her money, PW1 could not have freely walked round the city in search of transport home. The act of taking off with her clothes was probably calculated to totally immobilize her.

The second ground that Mr Odhiambo urged before us related to failure of the prosecution to call the investigating officer as a witness. Learned counsel submitted that the failure was prejudicial to the appellant because that witness could have shed more light on when PW1 reported to the police, what she reported and when the appellant was arrested. In the view of counsel, PW1 reported to the police on 14th January, 2002 after the arrest of the appellant on 11th January, 2002.

For the State it was submitted that the failure of the investigating officer to testify did not occasion the appellant any prejudice. In counsel's view there was uncontroverted evidence from PW1, PW2, PW4 and PW6, PC Tom Musau that PW1 had reported the rape and the robbery to the police on patrol on 28th December, 2001 and had recorded her statement at Central Police Station on 14th January, 2002.

In our view the real issue raised here is whether the failure by the prosecution to put the investigating officer on the stand was fatal to the prosecution case. There are consistent authorities that hold that it is good practice to always call the investigating officer, but whether or not failure to do so is fatal to the prosecution case must depend on the particular circumstances of each case. In *BWANEKA V UGANDA, (1967) EA 768*, Sir Udo Udoma decried the practice of not calling the investigating officer because it created the impression that the prosecution case was incomplete.

Also, in *HAWARD SHIKANGA ALIAS KADOGO & ANOTHER V REPUBLIC, CR.A. NO. 102 OF 2007* this Court reiterated the importance of calling an investigating officer as a witness, but added that whether or not the failure to do so was fatal would depend on the circumstances of each case. The Court delivered itself thus:

> *"We think that in all cases it would be good practice which prosecuting authorities ought to comply with, but the mere failure to comply with it, i.e. calling an investigating officer, cannot automatically result in an acquittal. Each case would have to be considered on its own circumstances in order to determine the effect of such a failure on the entire case for the prosecution."*

A similar approach was followed in *REUBEN GITONGA NDERITU V REPUBLIC, CR.A. NO. 349 OF 2007 (NYERI)* where this Court, in dismissing a ground of appeal premised on failure to call an investigating officer, held that it was not mandatory to call such officer as a witness, unless there is an allegation that he would have said something adverse to the prosecution case. On the facts of that case, the Court found that the failure to call the investigating officer was not fatal.

Lastly in *KIRIUNGI V REPUBLIC, (2009) KLR 638* this Court, in rejecting an argument similar to the one presented before us stated that:

"…the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged."

In this appeal we do not think that the failure to call the investigating officer was fatal to the prosecution case. The arresting officer (PW4) and the officer who recorded PW1's statement (PW6) testified. The two courts below were satisfied that even without calling the investigating officer, the prosecution had proved the guilt of the appellant beyond reasonable doubt. We do not see any merit in this ground of appeal.

The third ground of appeal urged by the appellant was that the first appellate court had failed in its duty to reconsider the evidence, evaluate it itself and draw its own conclusions before upholding the decision of the trial court, as required in *OKENO V R, (1972) EA 32*. Relying on *Majaliwa Mohamed Maneno V R, (supra),* Mr Odhiambo submitted that mere summary of the evidence given before the trial court by each side does not amount to analysis and evaluation of the evidence by the first appellate court.

From the outset we do not find any merit in this ground of appeal not the least because it was founded on issues that we have already addressed at length, namely identification of the appellant and the failure of the investigating officer to testify. Mr Odhiambo submitted that if the first appellate court had properly re-evaluated the evidence, it would have concluded that the failure of the investigating officer was prejudicial to the appellant and would have come to a different conclusion on the conviction of the appellant. Counsel further submitted that if the High Court had revaluated the evidence on record, it would have concluded that the appellant's identification was by a single witness, namely PW1 and that would have created reasonable doubt in its mind.

We have referred to the cogent and detailed manner in which the first appellate court addressed the issue of identification of the appellant after re- evaluation of the evidence on record and in particular, it's finding that there were two identifying witnesses. We have also addressed at length the issue of the failure by the investigating officer to testify and its effect taking into account the totality of the evidence adduced. We do not think that the charge that the High Court, on account of the two issues, did not discharge its duty to reconsider, re-evaluate and analyse the evidence on record and come to its own conclusion, is merited.

The last two grounds of appeal are literally an old hat that Mr Odhiambo will not let rest. The argument that a charge of robbery with violence must be laid under *s. 295 of the Penal Code* rather than *s. 296(2) of the Penal Code* and that a charge under *s. 296(2) is violative of the Criminal Procedure Code* and the former Constitution has been considered and rejected by this Court time and again, including by a bench of five judges constituted specifically to consider the issue barely two months ago.

In *Simon Materu Munialu V Republic, (supra)* this Court was invited to hold that a charge of robbery with violence under *s. 296(2) of the Penal Code* is fatally defective because *section 296(2)* does not create the offence of robbery with violence, but is merely a punishment section. In rejecting the argument, the Court stated:

"…section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence (robbery with violence) which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion."

Later in *JOSEPH ONYANGO OWOUR & ANOTHER V REPUBLIC, CR.A. NO. 353 OF 2008* the same argument namely, that *section 296(2) of the Penal Code* does not create an offence but merely

makes provision for punishment for the offence of robbery with violence, was advanced but rejected by this Court. On the same reasoning the Court also rejected the twin argument that a charge of robbery with violence under *section 296(2) of the Penal Code* was in violation of *section 77(8) of the former Constitution* which provided that no person shall be convicted of a criminal offence unless the offence was defined and the penalty therefor prescribed in a written law.

Barely a few months ago, in October 2013, the very same argument was presented and rejected by this Court in *GEORGE NJUGUNA WAMAE V REPUBLIC, CR.A. NO. 417 OF 2009,* when the Court held:

> *"It is noteworthy that section 296(2) of the Penal Code is not exclusively a punishment section as claimed by the appellant. It provides, in addition, the ingredients of the offence such as being armed with dangerous or offensive weapons, or being in company of one or more persons, or using or threatening to use personal violence immediately before or immediately after the robbery."*

In addition the Court held that the appellant in that case had not suffered any prejudice by being charged under *section 296(2) of the Penal Code* and that in any event the objection raised by the appellant was the kind of objection which under *section 382 of the Penal Code* should have been taken at the earliest opportunity before the trial court if he considered the charge to be defective or otherwise lacking in clarity.

Lastly, the issue was presented before a bench of five judges of this Court in *JOSEPH NJUGUNA MWAURA & OTHERS V REPUBLIC, CR.A. NO. 5 OF 2008* by none other than Mr Odhiambo, learned counsel who appeared before us in this appeal. In that appeal Mr Odhiambo contended, as he did before us, that the charge of robbery with violence against the appellants was defective because the appellants were charged under *section 296(2) of the Penal Code*. In his view, they ought to have been charged under *section 295 as read with section 296(1) and (2) of the Penal Code* because the offence of robbery is defined in *section 295*, while *section 296(1) and (2)* merely prescribe the punishment for robbery and robbery with violence. In the view of counsel, the manner in which the charge was framed was a violation of *section 137 of the Criminal Procedure Code* which requires, that where the offence charged is one created by enactment, then it shall contain a reference to *"the section of the enactment creating the offence."* In addition counsel submitted that as framed, the charge was a violation of *section 77(2)(b) of the former Constitution* which required a person charged with a criminal offence to be informed as soon as reasonably practicable in a language he understood and in detail *"the nature of the offence with which he is charged"* as well *section 77(8)* which prohibited conviction of a criminal offence unless it was defined and the penalty therefor prescribed in a written law.

In an opinion rendered on 18th October, 2013, the Court affirmed its earlier decisions in *Simon Materu Munialu V Republic, (Supra)* and *Joseph Onyango Owour & Another V Republic, (Supra)* in which it held that *section 296* is not a mere punishment section, but is one which also incorporates the ingredients of the offence of robbery with violence and that it would be wrong to charge an accused person facing a charge of robbery with violence under *section 295 as read with section 296(2) of the Penal Code* because such charge would not contain the ingredients set out in *section 296(2)* and may otherwise cause confusion.

The Court concluded:

> *"We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 of the Penal Code. This is the section that provided the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person."*

Barely one month after this decision, Mr Odhiambo is back inviting us to depart from the decision of the five judge bench, not on any new arguments or insights, but on the basis of the very arguments that he had unsuccessfully presented before five judges of this Court. Counsel cited the Uganda cases of

AMBAA JACOB & ANOTHER V UGANDA, (CRIMINAL APPEAL NO. 10 OF 2009, SUPREME COURT) and *UGANDA V KUKABAKO KAYONDO RICHARD & OTHERS, (CRIMINAL CASE NO. 0091 OF 2010, HIGH COURT)*, as well as the Tanzania case of *RICHARD ATHANAS V REPUBLIC (CRIMINAL APPEAL NO. 115 OF 2002, COURT OF APPEAL)* to show that the practice in those two jurisdictions is to charge robbery and armed robbery contrary to *sections 285 and 286 of the respective national Penal Codes*. With respect, these decisions did not consider the appropriateness or otherwise of framing robbery or capital robbery charges. True they do refer to the provisions under which the various parties therein were charged, (*sections 285 and 286*) but in our view that, without more, cannot be used as authority to void or negate the consistent decisions of this Court regarding the framing of robbery with violence charge under the Kenya Penal Code. We do not see anything in these decisions which can justify departure from the above decisions of this Court.

The only ground upon which we fault the trial court and the first appellate court is the failure to order the sentence of 4 years imprisonment and three strokes of the cane imposed in respect of the alternative count, to be held in abeyance upon the appellant being sentenced to death. The rationale for this approach was stated by this Court in *ROBERT NJEHIA VS. REPUBLIC (Crim App No. 720 of 2003)* as follows:

> *"We would again wish to reiterate to the trial Magistrates that where an accused person is convicted on more than one capital charge as in the instant case, it is desirable to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reason for this is not hard to find. In case of death if the sentence is to be carried out a convict cannot be hanged twice or thrice over. He can only be hanged once and hence necessity of leaving sentence on the other counts in abeyance. The other rationale is that if there was a successful appeal on the count on which the death penalty was imposed, the court dealing with the appeal would consider all other counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed." [Emphasis added].*

Ultimately, we order that the sentence of 4 years and 3 strokes of the cane imposed upon the appellant in respect of the alternative count be held in abeyance. Otherwise we do not see any merit in this appeal and the same is hereby dismissed.

Dated and delivered at Nairobi this 14th day of February, 2014.

D. K. MARAGA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

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