



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR, JJA.)

CRIMINAL APPEAL NO. 175 OF 2007

BETWEEN

JOHN NJENGA MUKUHIAPPELLANT

AND

REPUBLICRESPONDENT

*(Being an appeal for the Judgment of the High Court of Kenya at Nairobi (Lesiit and Dulu JJ.) dated
4th May 2007*

in

HC.CR.A.542 OF 2003)

JUDGMENT OF THE COURT

In the early evening of 28th October 2001, a typical Kenyan middle class family was traveling from Kinangop to Nairobi from a typical familial undertaking of visiting an ailing parent. Typically, the man **M (PW2)** was behind the wheel with his wife **E (PW1)** in the front passenger seat. At the rear seat was PW1's sister **N** with the couple's two young children. The elder child, five-year old **K** quite typically announced that he was pressed and his father, typically, stopped the vehicle at a bus stop to enable the child to relieve himself. It was 6.30 p.m and the beginning of a nightmare of harrowing proportions.

As father and son returned to the vehicle, two gun-toting gangsters accosted them. PW2 was ordered to sit at the back seat, roughly persuaded by one of the intruders whose partner now took the driver's seat. He was a pretender to the wheel. Various described in the record before us as a 'poor', 'erratic' or 'bad' driver, he was clumsy and ignorant or at best a novice in driving. He ordered PW1 to give him instructions on how to drive the vehicle he and his accomplice had hijacked even as they kept threatening to kill the family, gloating that they had killed before. The robbers relieved the family of their mobile phones and money as the pretended driver got the vehicle to some village where his accomplice alighted. The novice of a driver meanwhile turned his attention to PW1, fondling her all over in a pretence of searching for money before ordering her out of the car where he continued to touch her breasts.

Shortly afterwards the gangster who had alighted returned with another referred to as 'Master' who took control of the vehicle with surer skill. 'Master' drove the vehicle to a deserted place and stopped. There the poor driver ordered PW1 out of the car and, bending her over, raped her while his first accomplice held a gun to her head preferring and threatening to shoot her. 'Master' eventually ordered the gangster duo back in the car with PW1. He drove back to the village and again pulled PW1 out of the car. The trio then embarked on a marathon of raping PW1 in turns in a thorny bush. The ordeal lasted a long time. Their lust assuaged, the three argued on whether or not to kill that family. PW1 begged and pleaded with them to spare their lives. In the end, the gangsters searched the vehicle and took bags of clothing, money, jackets, watch, spare wheel and more mobile phones – everything they could carry. Five hours after the bathroom stop, and after PW2 had received a thorough beating, the family was released with the order that PW2 should drive away very fast.

He did. To the Nairobi hospital where he was treated and discharged. PW3 was in shock and hysterical. As to PW1, her ordeal was so traumatic, her injuries so extensive, she was hospitalized for a month.

The morning after the robbery and rape, PW2 drove to Tigoni Police Station under which the locus of the crime fell, and recorded a statement. He was given some officer with whom he went to the place where they had stopped for his child to relieve himself. As they approached, he clearly saw the man who first commandeered their vehicle. That man on seeing the car took to his heels, in an attempt to flee. Inspector **CHEBARE (PW4)** gave chase and apprehended him. A search at his house yielded none of the items stolen from the family but in an identification parade conducted on 2nd November 2001, by Inspector **KITHEKE (PW5)**., the same man was positively identified by PW3 as the poor driver who drove erratically and was the first to rape PW1.

That man is **JOHN NJENGA MUKUHI**, the appellant herein and he was accordingly arraigned before the Principal Magistrate's Court at Kiambu facing three counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**; one charge of rape contrary to **Section 140** of the **Penal Code** and an alternative count of indecent assault contrary to **Section 144(1)** of the **Penal Code**. He denied the charges and after a trial in which the prosecution case was presented along the factual lines we have set out herein and he, in defence gave a sworn statement and called some four witnesses, the learned trial Magistrate found him guilty of the offences charged. He was accordingly sentenced by the learned Magistrate (Mrs J. Ondieki) thus;

“on the 1st, 2nd and 3rd counts, the accused is sentenced to death as is by law required. On the 4th count, the accused is sentenced to serve 20 years imprisonment with hard labour and to receive 10 strokes of the cane subject to medical fitness. Sentences to run concurrently”.

Aggrieved by the conviction and sentence, the appellant preferred an appeal to the High Court (Lesiit and Dulu JJ) which, by a judgment dated 4th May 2007 found that the **“evidence against the appellant had been proved beyond any doubt that the appellant and two others not before court had robbed the complainants and had also gang raped E on the material day”** and dismissed the appeal. On sentence, the learned Judges confirmed the sentence of death in count 1 but ordered those in counts 2 and 3 as well as the 20 years imprisonment in count 4 to be suspended. It is against the dismissal of that appeal that the appellant has now filed this appeal.

The appellant's grounds of grievance appear in his homegrown memorandum of appeal filed on 15th May 2007 and in the Supplementary Memorandum of appeal prepared on his behalf by his learned counsel Mr. Roch Oburu Odhiambo dated 7th June 2013. The complaints are to the following paraphrased effect:-

- a. He was held in pre-charge custody beyond the then constitutionally permitted period of 14 days.
- b. His conviction was based on identification evidence weak for lacking prior description and unsatisfactory identification parades.
- c. His conviction was improper, medical evidence not having been availed.

- d. His sworn defence was improperly rejected.
- e. There was variance between the charges and the evidence, which vitiated the entire trial.
- f. The charges were defective for being based on **S296(2)** of the **Penal Code**, which is a punishment section, without citing **Section 295** of the **Penal Code** which creates the office.

Arguing the appeal before us, Mr. Odhiambo made heavy weather of the seeming contradiction as to when the offences were committed. He pointed out that whereas all the other counts stated that the offences were committed on 28th October 2001, which is the date all the witness referred to, Count 2 referred to 25th October 2001 which is the date the learned Judges of the High Court mention in their Judgment. We think noting turns on it. A perusal of the entire record leaves neither doubt nor confusion as to the date the offences were committed. It was clearly 28th October 2001 which is mentioned in the charges save one and which all the witnesses, without exception, refer to. We are in agreement with Mr. Kivihya, the learned counsel for the respondent that there is no variance between the charges and the evidence and the mistake with regard to count 2 is minor and fully curable under **Section 382** of the **Criminal Procedure Code**. At any rate no prejudice whatsoever was occasioned to the appellant by that typographical error.

Mr. Odhiambo next addressed us on the issue of identification, which, without doubt, is the critical issue on which hinges the fate of this appeal. It was counsel's submission that PW1 did not identify any of the robbers on the material day and, not having attended any identification parade, her identification of the appellant in court was of little and no probative value. It is of course the case that mere dock identification without more is probatively worthless. That assertion of principle is however wholly inapplicable to the case before us because PW1's identification of the appellant at the scene is well recorded in her testimony on all its chilling and excruciating detail. She testified as follows:-

“I was able to identify the people who had robbed and raped me. The man I am very clear about is the one who raped me first. I am the one who showed him to drive properly. I was with him longest. He harassed me more than the other 2. I cannot forget his lips. He had big lips. When they 1st got into the car and as I helped him drive, it was not dark yet. I also recall his voice. It is not a deep voice. While in hospital, my husband told me that the following day he went with the police to the same village where they had been raping me. He told me that they arrested the man. After I was discharged, I never went back to the police to see if he was the one and was too traumatized. He is this man (at that point, the witness completely breaks down on looking at the accused. She has been avoiding looking at him all the while she has testified. She is given time to recollect herself). This is the man I showed how to drive. He is the same person who told me I was keeping money in my breast and started searching. He is the person who asked me out and started searching me while touching and fondling me all over. He is the one who ordered me to lie down, slapped me severally and raped me as I leaned on the car. He is the one who boxed me on the jaw. He slapped me the most of all the three. He is the one who said he has not finished with me and later asked his friends to throw me over the fence. It was a small fence i.e a small tiny thorny fence. He is the one who started raping me the 2nd time. He is the one who slapped me and I fell down. He is the one who pulled down my trousers when I was thrown over the fence.”

It seems quite plain to us that the appellant's visage was etched in indelibly in the appellant's mind and the horror he put her through was such as would not gain the cure of oblivion. We are satisfied as were the learned Judges of the High Court that the appellant was positively identified by PW1 as the man who assuaged his rapacious lust on her repeatedly. She was not mistaken. Her identification would have been fortified by attendance at an identification parade but we on our part find the explanation she gave under cross-examination for her failure to attend one to be wholly understandable. She was too traumatized. We fully accept it.

PW1's was not the only identification evidence before the trial court. PW2 and PW3 did also

positively identify the appellant thereby providing corroborative assurance to his identification by PW1 in court. We have considered the learned Judges' treatment of the evidence of identification and are persuaded that they were correct both in approach and in the conclusion they arrived at, which we think was inevitable from the evidence, said the Judges;

“The complainants were clear concerning the descriptions of each of the assailants. When N identified the Appellant in the identification parade, she described him as the ‘bad driver’. M identified him to the police at the scene where they were car jacked as the ‘erratic driver’. Each of them described the role played by the Appellant during the robbery vividly and consistently. They all said that he took over the driving from M and that E had to assist him drive as he seemed incompetent. He was described as the one who first raped E and who caressed her, assaulted her and quarreled her more than the other accomplices as if he had something personal against her. All those complainants were also in agreement that while the one with the bad leg went and returned with the short stout one they kept referring to as “Master”; it was the Appellant who was left guarding them.

We do find that the Complainants' descriptions of the Appellant was vivid, clear and consistent and remained so throughout the trial. We are also fully satisfied and we find and hold that each of the Complainants had seen the Appellant in broad daylight at the point he carjacked them at 6.30 p.m. and then drove erratically around slum villages areas in daylight before “Master” was called and took over the driving

The assailants had not concealed their faces. We are satisfied that each Complainant had ample time and opportunity to see and identify the assailants. We find that the subsequent identification of the Appellant by M one day after the incident and N in the identification parade was proper, sage and reliable identification of the Appellant. The complainants were so clear of who they were identifying, that even though E's identification of the Appellant was dock identification, it was not worthless taking into account that N and M had identified him prior to their evidence in court. The evidence of identification by N and M afforded corroboration to E's dock identification of the Appellant.

The identification by the three witnesses must be considered together. We find that the conditions of identification at the stage where the carjacking took place were conducive for a correct and positive identification of the Appellant. We also find that the length of time the Complainants stayed with the assailants, a period of at least five hours, gave the Complainants a clear and positive opportunity to see and identify their assailants and to enable them subsequently to positively identify them”

The evidence against the appellant as the zealous robber-rapist of PW1 was in every respect cogent, consistent and iron –clad. His identity was established quite beyond question as the rapist-in-chief, his brutality as memorable and matched only by his ineptitude as a driver. There was no case of mistaken identity. We are satisfied that the learned Judges properly had in mind and applied the principles on dealing with identification evidence laid down in a long line of authorities including RORIA –VS REPUBLIC [1967] EA. 583 where the predecessor of this Court affirmed the position that a court may convict on the evidence of a single identifying witness if satisfied in all the circumstances of the case that it is safe to act on such evidence. That case did itself make reference to the much earlier decision of ABDALLA BIN WENDO & ANOTHER –VS- R 20 EACA 168 which expressed the need for a Court to warn itself of the dangers attendant to acting on such evidence solely and on the need for great circumspection when dealing with cases based wholly or mainly on identification evidence and in particular seeking other corroborative evidence as follows:-

“Subject to certain well-known exemptions, 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 were difficult. In such circumstances what is needed is the evidence, whether it was 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 error”

The evidence that led to the conviction of the appellant was that of multiple eye witnesses who had ample opportunity to witness his acts of depravity under circumstances favourable for positive and accurate observation and identification over an extended period of time. It is of course possible for even multiple witnesses to be all mistaken (see **REPUBLIC –VS- TURNBULL [1967] 3 All ER 549**) but there is nothing about this case that dilutes the solid certainty of the appellant's identification by all the witnesses who testified as to his presence and rampage on the day.

Given the overwhelming evidence by the said witnesses as to what the appellant and his cohorts did, we do not think it was at all necessary for medical evidence to have been availed as proof of the allegations that they did beat and rape the main complainant (PW1). They robbed PW1, 2 and 3 while armed and in a gang so that the elements of the main offences of robbery were fully met. The complaint about medical records does not therefore advance the appellant's cause in the least.

As to the appellant's defence which he complains was not considered by the court's below, we are satisfied that it was fully considered and properly rejected at both court levels. The defence offered was in the nature of an alibi and whereas it is trite law that an accused person who prefers such a defence does not thereby assume any obligation or burden to prove it (see **LEONARD ANISETH –VS- REPUBLIC [1963] ER 206; SENTALLE –VS- UGANDA [1968] EA 365; OSIWA –VS- REPUBLIC [1989] KLR 469.**) the solid and unshakeable evidence that the appellant was all the while at the shifting *locus in quo* wholly dispels, or displaces and explodes that defence. What is more, the witnesses called by the appellant in an effort to lend credence to the alibi defence were found by the two courts below to have done little to assist his cause. If anything, the testimonies ended up casting great doubt on the said defence thereby showing it to have been contrived. The learned Judges noted and agreed with the four fold contradictions in the testimonies of the appellant and his witnesses as follows:-

“The learned trial magistrate in her judgment found the alibi defence shaken on the following grounds:-

One, that the Appellant's evidence that he spent the whole day of 28th with an aunt, a neighbour and the sister whom he followed, DW3 was contradicted by his witnesses. DW3 the sister said she was not home on the 28th. DW1, the neighbour, contradicted the Appellant by saying she alone was the one with the Appellant at their home on 28th.

Two, that the Appellant's evidence that he cooked lunch and supper on 28th was contradicted by DW1 and his mother DW4 who said that the Appellant had cooked only the supper.

Three, that while the Appellant said the mother sent him on 29th to his grandmother, then changed to say his uncle, he did not give the uncle's name without hesitation. DW4 on the other hand said she had sent the Appellant to his uncle's place.

Four, it was the learned trial magistrate's finding that the appellant and his witnesses could not stand the rigours of cross-examination. We agree that the Appellant' defence evidence and that of his witnesses was full of contradictions.”

We accept the concurrent findings of fact by the two prior courts on the implausibility of the appellant's alibi defence which was properly rejected after due consideration. The contention that it was improperly rejected therefore fails.

In the contention that the robbery with violence charges were incurably defective for being charged against **Section 296(2)** of the Penal Code being a punishment provision without citing **Section 295** of the same statute, we see no substance. The same claim had been made before this Court in the recent past and emphatically rejected. In **DIMA DENGÉ DIMA & OTHERS VS R CRIMINAL APPEAL NO.300 OF 2007** (unreported) for instance, we refused to be persuaded that the case of **HENRY KIMATHI –VS- REPUBLIC Criminal Appeal No.10 of 2002 (unreported)** which had been cited before us stood for the proposition that a robbery with violence charge sheet needed to also cite **Section**

295 of the **Penal Code**. We said then, and would say now, as follows:-

“We do not see how the case stands as authority for the proposition that a charge of robbery with violence must also include mention of Section 295 of the Penal Code to be good and effective. Indeed, when we pressed him on the point, Mr. Oyalo was candid enough to concede that this Court did not in that case hold that a charge under Section 296 (2) that did not also cite Section 295 of the Penal Code was defective. The law of drafting of charges as we understand it is that it is the punishment or penal section that creates the offence and as such it is the one that is cited in a charge sheet.”

The upshot of our consideration of the appeal in totality is that it lacks merit. We accordingly dismiss it in its entirety.

Dated and delivered at Nairobi this 20th day of June 2014

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR