IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), MARAGA & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 280 OF 2011

BETWEEN

SIMON MWANGI WAMBUI …… APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Appeal from a Ruling of the High Court of Kenya at Nairobi (Ochieng, & Warsame, JJ) dated 18th day of May, 2011

in

HC.CR.A No. 477 OF 2007*)*

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JUDGMENT OF THE COURT

1. The Magistrate's Court at Kibera Nairobi convicted the appellant on three counts of robbery with violence contrary to section 296(2) of the Penal Code and for indecent assault on female contrary to section 144 of the Penal Code. He was sentenced to death. His appeal to the High Court was dismissed in a judgment delivered on 18th May 2011. This is a second appeal.

Background

2. M N (PW1) was a patient attendant at ***[particulars withheld]*** clinic in Kangemi, Nairobi. Her work entailed writing patient cards and escorting patients to the doctor. On 27th March 2006 she was on night duty at the clinic where she reported to work at 6.30 pm. Dr. J A was also on duty. The clinic is well lit. Lights are not switched off at the clinic at night and visibility is good. At about 11 p.m. she heard a knock at the gate. As she went to check, she encountered the watchman Godfrey accompanied by three men. One of the men was holding his stomach "as if in deep pain." M rushed inside the clinic to the reception to write a card. Once inside she welcomed them to sit down so that she could take their names. The 'sick man' sat down and pulled down his hat and covered his whole face up to the neck. The person who was assisting the sick man ordered Mercy not to talk. The third person pushed Godfrey the watchman into the consulting room and ordered him to lie down. Two of the men drew guns and asked Mercy to give them money. She gave out Kshs.500.00 she had earlier collected from a patient. They also took a sagem phone. They then escorted Mercy to the laboratory where Dr. A was resting, knocked on the door and on opening

the door, Dr. A was ordered to keep quiet. They demanded money from him and when he said he did not have he was struck on the side of his face with a gun after which he gave out his wallet. They cleaned out his wallet, took a mobile phone from him and also took a microscope before escorting Dr. A and M to the consulting room where they ordered them to lie down. After lying down, one of the assailants ordered M to climb on to the couch. She complied. She was then ordered to remove her clothes. She resisted. One of the assailants, "the huge one" removed her biker and pants. The appellant then asked M to lift her legs. He tried to penetrate her vagina and anus unsuccessfully. The huge one asked the appellant to stop. He ordered M to lie on the floor. She complied. He tried to penetrate her. M started bleeding. Thereafter the appellant and the huge assailant took the microscope and left with the watchman. As she attempted to take cotton wool to control the bleeding M fainted. She was taken to Nairobi Women Hospital where she was hospitalized for two days. While at the hospital the doctor enquired from her whether she could be able to identify her attackers. She said she could. After being discharged she proceeded to Kabete Police Station where she identified the appellant at an identification parade as the one who had attempted to rape her.

3. On 28th March 2006 at about 8.00 p.m. PW2 Charles Munyoki Lena (Lena) and his cousin John Munyoki Makeiti (Makeiti) were listening to music inside a Nissan Matatu motor vehicle registration number KAS 277A that was parked outside their residence. Two men approached the vehicle and asked for the conductor of the matatu. One of the men, turned assailant, was the appellant who was well known to Lena. He drew a pistol and pointed it at Makeiti who was on the driver's seat and demanded the CD changer. Makeiti complied and gave him. The appellant then demanded the radio cassette. The driver informed him that it was not removable as it was fastened with screws. He demanded money. He took Kshs. 3,000.00 from Lena and thereafter disappeared. Lena and Makeiti thereafter reported the robbery to the chief. Lena mentioned the name of Mwangi as one of the assailants. Two administration police officers accompanied Lena and Makeiti in the vehicle and along the way they met the appellant and another person whom they arrested and escorted them to the chief's camp.

4. AP Sargent Morris Ndiema (PW3) stated that he was at Kangemi Chief's camp on 28th March 2006; that at about 8.30 pm two people arrived in a Nissan Matatu KAS 277 and reported that they had been robbed of a CD changer and cash amounting to Kshs.3, 000.00 and that they knew and had identified one of the attackers; that accompanied by APC Sammy Kuria, they armed themselves and boarded the Nissan Matatu and were on their way to the scene of crime when one of the complainants who was sitting in the front seat spotted one of the attackers, (the appellant) along the road; that they stopped him and took him to the office for interrogation; and that he was thereafter arrested.

5. David Mutoro Wasilwa (PW4) was on 27th March 2006 residing with his brother's house situate within the compound of St. Florence Hospital Kangemi. At about 11p.m, he went out of the house to go to the latrine. He met his neighbour and another person. That other person turned assailant (the appellant) was holding a pistol in a raised position. The appellant directed him to lead him to his house and asked for his mobile phone. Mistakenly believing the assailant to be a police officer, he compliedand retreated to the house. At the house the assailant seized PW4 by his shoulder and pointed the pistol at him. PW4 gave him his mobile telephone and cash in the amount of Kshs. 9,000.00. The assailant then left. PW4's brother Shisia Wasilwa who was asleep came out after the assailant had left. Together with PW4 they went to report the incident to the plot watchman who informed them that he had earlier seen robbers and that he hid himself on spotting them; that they heard screams emanating from the hospital and rushed there and found a nurse who said she had been raped; that they sought the assistance of a neighbour who took the nurse to Nairobi Women Hospital. The following morning he (PW4) went to Kabete Police Station and made a report. Later on 29th March 2006 he attended an identification parade where he identified the appellant as his attacker. He stated that he was able to see his assailant aided by the TV light in the house as well as by the security light.

6. On 5th April 2006 Dr. Zephania Kamau (PW5) a police surgeon examined Mercy Ngai (PW1) who complained of having been raped and who had been seen at Nairobi Women's Hospital with vaginal tear. Based on his examination he noted that she had no hymen. PW5 also examined the appellant who was suspected of rape. His organs were normal. PW5 filled out P3 forms which he produced during the

hearing.

7. Dr. Ketra Muhombe (PW6) examined M N PW 1 at about 1 am on 28th March 2006 at Nairobi Women's Hospital after an incident of sexual assault and robbery at her place of work in Kangemi. On examining PW1 he noted that she was bleeding profusely from her vagina and had multiple lacerations at the introitus and the perineum. Her hymen was freshly torn into several pieces. She was treated at the hospital.

8. Peter Ndubi (PW7) was the officer in charge of investigation based in Kabete at the material time. He conducted the identification parade made up of 8 members on 30th March 2006 at which M N PW1 identified the appellant by touching him.

9. The last prosecution witness was Sargent Nicholas Mukenye (PW8) who charged the appellant with the offences. In evidence denied that he had a grudge against the appellant.

10.In his defence, the appellant gave sworn testimony in which he denied having committed any of the offences. He stated that on 28th March 2006 at about 7.30 pm he was at his place of work, a club owned by his mother in Kangemi which he used to manage, when his mother sent a boy to call him; that he was on his way to his mother's house when he encountered a Nissan Matatu; that the matatu stopped and two police officers disembarked and ordered them to stop; that another person, Lena (PW2) also emerged from the matatu and claimed that he was one of the people who had robbed him; that after being searched by the police officers he was placed in the vehicle and taken to Kangemi Chief's camp; that nothing was recovered from him; that the officers were familiar to him as they used to patronize the club where he worked and that there was a grudge between one of the officers and himself over an outstanding debt; that he was not charged until 11th April 2006 having been in custody at Kabete Police Station for 13 days; that he was picked out in identification parades by persons he had never seen.

11.Esther Wambui Wangohi (DW 2) the appellant's mother testified on his behalf and stated that when his son was arrested on 28th March 2006, she had sent for him as she needed his assistance; that on learning of his arrest she went to Kabete police station where he was held and was informed that he was arrested for hijacking a motor vehicle and for raping nurses; that the officer who was handling the matter sergeant Mukenye demanded Kshs.50,000.00 from her in order to secure his release.

12.The last defence witness was Joseph Muiruri. He supported the testimony of the appellant that he was sent by DW 2 to call the appellant from the bar; that they were on the way when they met with a Nissan Matatu; that the matatu stopped and two police officers emerged; that they were ordered to stop and then taken to the chief's camp where the appellant was placed in the cells.

13.After reviewing the evidence the trial court was satisfied that the charges against the appellant were proved beyond any reasonable doubt. The trial court summed up as follows:

"From the evidence adduced by PW1, PW2 and PW4 who are the complainants in this case I am satisfied beyond any reasonable doubt that they positively identified the accused person. The accused person claim that there was a grudge between him and the sergeant Mukenya. Even if I was to assume that the said grudge existed the same does not affect the strong evidence which was adduced by the three complainants herein.

The accused person's defence does not have any doubt in my mind. I am fully convinced by the evidence adduced by all the prosecution witnesses that the accused person participated in the commission of these offences."

14.The appellant was accordingly convicted on count 1, 2 (alternative charge of indecent assault), count 5 and 6. He was sentenced to death in respect of count 1. The sentences on counts 2, 5 and 6 were suspended.

15.The appellant appealed against the conviction and sentence to the High Court complaining that his identification was doubtful; that he was framed by the investigating officer; that the prosecution evidence was not credible; and that the trial court did not consider his defence. After reviewing and analyzing the evidence the High Court (F. Ochieng J and M. Warsame J, as he then was) was satisfied that the convictions were "founded on solid evidence" and upheld the same.

16.It is against that background that the present appeal has been brought.

The appeal and submissions by counsel

17.In the present appeal, the appellant's complaints as set out in a supplementary memorandum of appeal filed on 1st November 2013 are that the High Court erred in affirming the conviction when the prosecution evidence was replete with contradictions; that the appellant was not positively identified and that the identification parade was not properly conducted; that essential witnesses were not called; that the charge sheet was defective and that the burden of proof was shifted.

18.Mr. A. O. Oyalo, learned counsel for the appellant submitted that the identification of the appellant as the one who committed the offences complained of must have been mistaken; that according to the evidence of PW1, the offence at the clinic in Kangemi was committed by the appellant on 27th March 2006 at 11.00 p.m.; that according to the evidence of PW4, he was also attacked by the appellant at a different location on the same date at the same time; that as the appellant could not have been in two places at the same time, there has to be a mistake as to the identity of the attacker; that PW1 did not give a description of her attacker and if, as she said, she was with the attacker for 30-40 minutes in a well lit clinic, it would not have escaped her that the appellant looks like a Somali and would have described him in those terms; that in relation to identification the lower courts failed to test the evidence respecting identification of the appellant with great care especially because the conditions favouring correct identification were difficult. Counsel cited **Charles Maitanyi vs. R (1986)2 KAR 75**,

19.Regarding the identification parade, counsel submitted that according to the testimony of PW1, she had seen the appellant prior to the parade contrary to the standing orders relating to identification parades that stipulate that the witness "will not see the accused before the parade"; that it is also evident from the names of the members of the parade appearing in the identification report that the parade was made up of Africans and the appellant would therefore have stuck out given his Somali features; that the integrity of the parade was therefore compromised; that the parade was conducted on 30th March 2006 in the afternoon and there is a possibility that PW 4 was given a description of appellant by the police; that PW 4 described the appellant to PW 1 as they were seated together before the parade and that it is important to note that PW 4 stated that he clearly saw the appellant before the parade; that in the words of this Court in **Paul Thuo Mburu and another vs. R Criminal Appeal No. 329 of 2006** the value of the parade was irreparably compromised.

20.With regard to evidence of PW 2 and PW 3 relating to count 6, counsel for the appellant submitted that the evidence of PW 2 and that of PW 3 contradicted each other and further that PW 2 contradicted himself and PW 3 with regard to where the vehicle was parked and where the offence occurred; that PW 3 suggested that the robbery occurred on the way home; that according to PW 2 the vehicle was parked outside the drivers plot and later said the vehicle was parked "where we live" ; that in one breath the witness stated that the vehicle had no seats at the back and in another breath stated that the "police officers were sitting at the back seat."; that it is not clear from the evidence whether PW 2 was accompanied in the vehicle by the owner or the conductor or the driver of the matatu; that had the High Court reviewed and subjected it to "fresh and exhaustive scrutiny" it would have come to a different conclusion. To support his argument counsel referred us to the case of **Dinkerrai Ramkrishan Pandya v R[1957] EA 336.**

21.Mr. Oyalo went on to say that the High Court misdirected itself on the burden of proof when it observed that the defence witnesses called by the appellant demolished the defence that he put forward; that evidence should have been considered as a whole taking into account the principle in **Woolmington v DPP [1935] All E.R. 1** ; that it is not for the accused to prove or establish his innocence but for the

prosecution to prove guilt of the accused and that the fact that defence witnesses contradicted themselves did not reduce the burden from the prosecution.

22. **Citing R v Newland [1988] 2 All E R 891** Mr. Oyalo's other complaint was that counts 6 and 7 should not have been joined together with the other counts in the same charge sheet with which there was no nexus and that the charge sheet therefore violated section 135 of the Criminal Procedure Code.

23.Mr. Oyalo concluded his submissions by urging that essential witnesses namely the conductor and driver of the matatu were not called to testify and adverse inference should therefore be drawn that their evidence would have been favorable **(see Bukenya v Uganda)** to the appellant or adverse to the prosecution.

24.Opposing the appeal Mr. B. L. Kivihya for the respondent submitted that there are concurrent findings on identification by the trial court and the 1st appellate court; that the evidence of PW 1 demonstrates that the circumstances obtaining at the clinic where the robbery and indecent assault occurred were conducive to positive identification as the clinic was well lit; that the appellant moved from room to room with PW1 when the lights were on and there was therefore no difficulty in identifying him.

25.Regarding the contention that the identification of the appellant was mistaken as he could not have been in different locations at the same time, counsel submitted that based on the evidence of PW 1 and 4 the clinic where PW1 was assaulted and the house where PW 4 was robbed are in the same location within the hospital compound.

26.According to Mr. Kivihya, the identification parade was conducted in accordance with the standing orders and the appellant confirmed that he was satisfied with the conduct of the parade and remarked that "it was well done" and that it is speculation that the appellant was picked out from the parade due to his 'unique' Somali features.

27.Mr. Kivihya submitted that any contradictions in the evidence were minor and do not go to the root of the offences; that the prosecution discharged its burden of prove; and that the burden of proof was not shifted to the appellant and that reasons were given by the investigating officer why some witnesses did not testify.

28.Regarding the claim that the charge sheet was defective, Mr. Kivihya agreed that counts 5 and 6 were not related to the other charges but that that does not affect the other charges.

Determination

29.We have considered the appeal and the submissions by learned counsel. The issues that call for our determination are: firstly, whether the appellant was positively identified and whether there was a mistake in his identification; secondly whether essential witnesses were not called to testify; thirdly whether the burden of proof was shifted to the appellant; and fourthly, whether the charge sheet was defective.

30.We will first address the issue of the quality of identification evidence and the claim that the appellant is a victim of mistaken identification. Where, as is the case here, the case against the accused person is dependent on the correctness of identification, this Court has applied the guidelines as the laid down by the Court of Appeal in England in **R vs. Turnbull [1977] Q.B. 224**. Those guidelines include the stipulation that before convicting an accused person in reliance on the correctness of identification, the court should warn itself of the need for caution. Secondly, the court should examine closely the circumstances in which the identification came to be made. The holding by this Court in the case of **Charles O Maitanyi v Republic** (supra) to which we were referred by counsel for the appellant to the effect that it is necessary to test the evidence of a single witness respecting identification with the greatest care, especially when the conditions favouring correct identification were difficult accords with the Turnbull principles. How then did the lower courts approach the matter of identification?

31.In relation to the first count, this is what the trial magistrate said after reviewing the evidence:

"PW 1 Mercy Ngai said that although she did not know the accused person before she was able to identify him since there was electricity light in and outside the hospital where the offence took place. She said that she took between 30-45 minutes with the accused person and therefore she was able to observe him well. Every room she was taken to by the accused person there was light.

The accused person had not covered his face for this reason I find that the circumstances prevailing at the time of the robbery; were conducive for a positive identification. She was also able to pick the accused person in an identification parade. She narrated clearly what the accused person did during the robbery. I am therefore satisfied beyond reasonable doubt that the accused person was properly identified by PW1. There is no possibility of an error in his identification."

32.The trial magistrate may not have warned himself in express terms of the need for caution. It is however clear from the passage of the judgment we have cited that he did in fact proceed with caution and examined the circumstances in which PW 1 identified the appellant. He took into account the length of time PW1 had the appellant under her observation, the lighting in each of the rooms at the clinic to which they entered, the fact that observation of the appellant was not in any way impeded. PW 1 spent a considerable length of time with the appellant on the night in question in well lit premises and there is therefore no question of mistake in the identification of the appellant.

33.As regards the evidence of identification in relation to count 6 the learned trial magistrates exhibited similar caution. He was here not dealing with identification of a stranger. PW 2 recognized the appellant. The learned magistrate summed it up thus:

"PW 2 Charles Munyoki knew the accused person before. He had known him since 1986 when they used to live in the same plot. When they went to report at Kangemi Chief's Camp he mentioned that he identified one of the attackers as Mwangi. It is PW 2 who led to the arrest of the accused person.

They met with him on the way and he identified him to the officers who arrested him. He also said that there was light inside the Nissan Matatu which they were in which enabled him to identify the accused person. During cross-examination also came out that the same was illuminated by security light from a nearby building where he used to live the accused person was very close to him. He was getting things from the driver of the matatu so he must have been very close to PW 2 who was sitted on the left side where he was. Therefore PW 2 was able to positively identify him."

34.As relates to count 5, the learned trial magistrate examined the evidence and found that PW4 David Mutoro Wasilwa was aided by security lights from the house and from the latrine to identify the appellant and that he had the opportunity to observe him as he was walking out of the house.

35.The High Court on its part when dealing with the first appeal carefully reviewed and analyzed the evidence and concluded, correctly in our view, that the convictions were "founded on solid evidence."

36.On our part, we are satisfied, as we have demonstrated, that the lower courts proceeded on the correct legal basis and that the evidence of identification of the appellant was watertight. The evidence also demonstrates that the location where PW1 was assaulted and the location where PW4 was robbed are within the same premises and the contention that identification of the appellant was mistaken is not well founded.

37.We turn now to consider the complaint that essential witnesses were not called to testify. We understood the complaint in this regard to relate to count 6 of the charge. We do not think there is merit in this complaint. Counsel for the appellant cited the decision of this Court in **Bukenya and others v Uganda [1972] E. A. 549.** That decision stands for the proposition that though the prosecution has a discretion to decide who are the material witnesses and whom to call, there is a duty on the prosecution to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent; the court itself has a duty to call any person whose evidence appears essential to the just decision of the case and if the prosecution calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled to draw an inference that

the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution.

38.We do not think that the evidence called by the prosecution in the present case can be described as "barely adequate" within the context of the pronouncement in **Bukenya and others v Uganda**. On the contrary we think the evidence was more than adequate and that the charge in relation to count 6 was proved. The evidence of the conductor or the driver of the Nissan Matatu, who the appellant says should have been called, was not necessary, in our view, to sustain the charge. Having found that Charles Munyoki Lena was a witness of truth, the learned trial magistrate was entitled to convict the appellant. He cannot be faulted for doing so.

39.The next matter is whether the burden of proof was shifted from the prosecution to the appellant. The appellant's complaint in this regard is on account of remarks by the High Court that:

"Possibly, if the appellant had not called his two witnesses, there might have arisen some questions. But because the witnesses called by the appellant completely demolished the defence he put forward, we have come to the conclusion that the evidence tendered by the prosecution was completely unchallenged."

40.We agree with counsel for the appellant that it is the duty of the prosecution to prove the guilt of an accused person and that if at the end of the whole case there is reasonable doubt created by the evidence given by either the prosecution or the defence as to the guilt of the accused then the prosecution has not made out the case and the accused is entitled to an acquittal. That is the principle that emerges from the House of Lords decision in **Woolmington v DPP [1935] All E R 1** to which we were referred.

41.The lower courts were under a duty, which in our view they discharged, to consider the evidence tendered by the prosecution and by the appellant in his defence as a whole and to determine whether at the end, any reasonable doubt was raised as to the guilt of the appellant.

42.We do not construe the remarks by the High Court to which we have referred as manifesting a shift in the burden of proof to the appellant. When making reference to the evidence adduced by the defence, we understand the High Court to say that the evidence adduced on behalf of the defence did not cause doubt as to his guilt. We are not therefore satisfied that in doing so the lower court thereby shifted the burden of proof to the appellant.

43.As to the question whether the charge sheet was defective due to misjoinder of counts and on the basis that the particulars are at variance with the evidence adduced in support, the contention by the appellant is that there is no nexus between the offences the subject of counts 6 and 7 of the charge sheet and the other counts.

44. Section 135 (1) of the Criminal Procedure Code provides that any offences may be charged together in the same charge sheet if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or similar character. Under section 135 (3) of the Criminal Procedure Code the trial court can either before trial or at any stage of the trial direct separate trials for any one or more offences charged if it is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or if for any other reason it is desirable to direct that the person be tried separately.

45. The English Court of Appeal decision in **R vs. Newland [1988] 2 All E R 891** cited to us by counsel for the appellant held that the power to sever an indictment and to order separate trials applies only to valid indictments and that in ordering separate trials where the indictment was defective because of misjoinder of disparate offences the judge had acted without jurisdiction. In that case the appellant was charged with possession and dealing in drugs on 28th November 1986 under the Misuse of Drugs Act 1971. He was also charged under the same charge sheet with the offence of assault of police officers on 18th December 1986 when police officers were called to a disturbance at an Indian Restaurant in which the appellant was not involved.

The appellant wrongly interfered with the police and assaulted the police officers. As the court in that case observed, "*the drug offences and the assault offences were entirely unconnected*."

46. The circumstances in the present case are different. In our view the offences with which the appellant was charged in the same charge sheet are "*offences of the same or a similar character*" within Section 135 (1) of the Criminal Procedure Code that occurred in the night of 27th and 28th March 2006. Besides that, there was no suggestion at any stage of the trial that the appellant was embarrassed or prejudiced in the conduct of his defence. We are therefore not persuaded that the proceedings in the lower courts were vitiated by a defective charge sheet.

47.For all the above reasons, we find that this appeal has no merits and it is dismissed.

Dated and delivered at Nairobi this 17th day of October, 2014.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR