



REPUBLIC OF KENYA

**Court of Appeal at Malindi**

**Criminal Appeal 340 of 2010**

**BETWEEN**

**JAFFERSON MWAKIO ..... 1<sup>ST</sup> APPELLANT**

**TOFIL MWADIME ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

***(An appeal from a Judgment of the High Court of Kenya at Mombasa (Azangalala & Odero, JJ.) dated 10<sup>th</sup> May, 2010***

**in**

**H. C. Cr. A. No. 189 ‘B’ of 2007)**

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**JUDGMENT OF THE COURT**

The appellants, ***Jafferson Mwakio*** and ***Tofil Mwadime***, were on 9<sup>th</sup> October, 2007 convicted by the Senior Resident Magistrate’s Court at Voi (J. M. Gandani) of the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code and sentenced to death. They were also convicted on a second count of rape contrary to ***section 140*** of the Penal Code and each sentenced to 10 years imprisonment; while the second appellant was also convicted of a third count of attempted defilement of a girl contrary to ***section 145 (2)*** of the Penal Code and sentenced to five years imprisonment.

The evidence at the trial court was that at about 3.00 am on the early morning of 24<sup>th</sup> June, 2006, G.S (PW 1) (the complainant) (G) was asleep in her house with her two young children, J.S (PW 2) (J), then aged 14, and C.M (PW 3) (C), then aged 16. There was a knock on the door. C was the first to wake up. Before he could even get out of his bed, he found the flash of a torch light on his face. One of the two intruders, who were already in his room, asked him what was inside the sacks that had been piled up. He said it was maize and beans. At this time G woke up, and asked C who he was talking with. C shouted that there were strangers in the house. Before she could do anything, her door was smashed in, and two strangers walked in, one carrying a panga, and the other a knife. She screamed. One of the intruders ordered her to keep quiet if she wanted to live. They had a powerful torch light which enabled her to see the two men, who she knew as “Mwakio” (the 1<sup>st</sup> appellant) and “Mwadime” (the 2<sup>nd</sup> appellant). She had known Mwakio from his childhood, including the school he had attended, and she had known Mwadime for about one year. The two intruders then pushed G and J to the back of the house where Mwakio raped

G, while Mwadime attempted to rape J, but could not penetrate. Mwadime then raped G once Mwakio was through with her. The two intruders then ordered G to remove the two sacks of beans from her house, and move them to a nearby thicket. As she did this, she pleaded with them to leave some beans for her family. They agreed. She was able to retain four tins of beans, and began carrying the rest into the thicket. Once there, the two intruders once again raped her in turns, and threatened to burn down her house if she complained to anyone.

Meanwhile, back at the house, the two children, C and J, raised alarm, and the neighbours gathered around. By this time, the two intruders had escaped. G informed the village elders who the attackers were, by name, and the following morning the two appellants were apprehended by the police, and charged with the offences stated earlier.

After a full trial, where the prosecution called nine witnesses, and the appellants offered unsworn testimony, the appellants were found guilty of the offences charged, and sentenced as stated earlier.

Their first appeal to the High Court (Azangalala and Odero, JJ) was unsuccessful, and they are now before this Court for their second, and possibly final, appeal.

This being a second appeal, by dint of the provisions of **section 361** of the Criminal Procedure Code, we are enjoined to consider only matters of law, not facts. On 2<sup>nd</sup> November, 2010, the appellants filed identical sets of home-made memoranda of appeal, and on 9<sup>th</sup> August, 2011, their learned counsel, Mr. A. N. Atancha, filed supplementary grounds of appeal, outlining the following four grounds:

**“1. THAT the first appellate court failed in law to take into consideration that the evidence of the prosecution of PW-2 and PW 3 was not taken as required under the law which requires the minor to be examined first by the trial magistrate.**

**2. THAT first appellate court failed to warn itself on the conviction of the offences relying on a single eye witness.**

**3. THAT the first appellate court failed to take into consideration that the identification was not proper.**

**4. THAT the first appellate court failed to take into consideration the contradiction evidence as adduced by the PW-6 (A.P INST. JOHN MWAKISHA) and other witnesses hence failing to find that there was no corroborating evidence.”**

At the hearing of this appeal, Mr. Atancha relied on both memoranda of appeal, but confined his arguments to three major issues: identification; inconsistencies in evidence; and that the charge of robbery with violence was not proved on account of the fact that no actual violence was inflicted on the complainants.

As “inconsistencies” and “contradictions of evidence” are not points of law, we will ignore that ground of appeal. With regard to identification, Mr. Atancha submitted that the alleged offences having taken place at night, where the only source of light was the torch; the appellants could not have been properly identified. He also argued that although the appellants carried a panga and knife, there was no evidence of actual violence inflicted, and hence the charge, as framed, had not been proven. Mr. A. O. Kemo, learned Senior Principal Prosecution Counsel, defended the conviction, arguing that the evidence against the appellants was water-tight, and that the charge, as framed, was not defective.

The issue relating to the defective charge has absolutely no substance and may be quickly disposed of. If raping and defiling is not inflicting actual violence upon the victims, we must wonder what kind of “violence” Mr. Atancha had in mind.

Finally, with regard to the issue of identification, the High Court noted as follows in its Judgment:

***“The identification of the Appellants at the scene was not only that of a single witness. PW 2 ‘J.S’ the complainant’s 14 year old daughter also told the court in her evidence that she identified the two Appellants as the men who robbed her family. At page 8 line 15 PW 2 states –***

***‘The two of them pulled mum outside. I followed but they ordered me to go back into the house. I refused. Mwadime A2 pulled me. I knew his face. I saw his face through light from the torch which was bright. I did not know his name by then but I used to see him pass outside our farm. Accused 1 pulled mum outside. I used to see him pass outside our school. I saw his face through the light from the torch. I also know him well.’***

***PW 2 has described the torch light as “bright”, such that enabled her to see and identify both Appellants. As in the case of PW 1, PW 2 also relies on recognition. She states that the two Appellants were men whom she knew by appearance as she had seen both before this incident. Again we note that like PW 1, PW 2 got far much more than a fleeting glance at the two men. She was also taken out behind the house. She certainly spent a fair amount of time in their presence. At page 10 line 26 PW 2 under cross examination by the 2<sup>nd</sup> Appellant says –***

***‘You did not point the torch light on my face. You had pointed to the wall but there was enough light to enable me see you. I did not have a torch. I was able to see you’.***

***Here again the fear that the torch light may have been pointed directly into face of PW 2 thereby blinding her vision is disabused. The torch was directed to the wall thus giving a clear an uninterrupted beam of light in the room.”***

We concur with those findings, and reject the argument that the case against the appellants was not proved beyond reasonable doubt in that it depended only on one witness, without corroboration, and in circumstances where positive identification was not possible.

This is a case of identification by recognition. The two appellants were well known to all the three victims, one from his childhood, and the other for about one year. Their names were given to the village elders immediately after the attack and to the Police the following morning. Both C and J saw and recognized the two appellants by the bright torch light, and G, who was raped twice by the two, and who spent at least two hours with them, in bright moonlight outside the house, and for some time within the house, where there was bright torch light, was able to recognize the appellants, leaving no doubt in our minds that the appellants were proved guilty beyond any reasonable doubt.

Accordingly, and for reasons outlined, we find that there is no merit in this appeal and the same is dismissed.

**Dated and delivered at Mombasa this 15<sup>th</sup> day of March, 2012.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**