



**IN THE COURT OF APPEAL
AT MOMBASA**

CORAM: TUNOI, AGANYANYA & VISRAM, J.J.A.

CRIMINAL APPEAL NO. 255 OF 2010

BETWEEN

PATRICK JUMA MUBWEKA APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at Mombasa (Ibrahim & Odero, JJ.) dated
26th March, 2010**

in

H.C.Cr.A. NO. 116 OF 2009)

JUDGMENT OF THE COURT

Patrick Juma Mubweka, alias Barasa, the appellant, was charged before the chief Magistrate's Court at Mombasa with one count of robbery with violence contrary to **section 296(2)** of the Penal Code; one count of rape contrary to **section 140** of the Penal Code and an alternative charge of indecent assault contrary to **section 141(1)** of the same Code. The facts of the robbery charge were that on the 4th day of January, 2006 at about 6.00 p.m. in Mombasa District within Coast Province while armed with a knife he robbed *E.N.S* of a mobile phone make Nokia 1110 and cash Kshs.2000/= all valued at Kshs7,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said *E.N.S*. As regards the rape charge the facts thereof were that on 4th day of January, 2006 in Mombasa District within Coast Province he had carnal knowledge of *E.N.S* without her consent. In respect to the alternative charge, the facts were that on the 4th day of January, 2006 at about 6.00 p.m. in Mombasa District within the Coast Province he unlawfully and indecently assaulted *E.N.S* by touching her private part, namely vagina.

The brief facts of the case were that the appellant had approached *E.N.S*, the complainant several times at her place of work, namely M Café offering her a job at S Beach Hotel which she declined. She however, suggested that she had a friend called D who would be interested in taking up the offer. On 4th January, 2006 the appellant came to pick the complainant from her place of work and they left to S Beach Hotel where they were to meet D. After they alighted from the matatu the appellant led the complainant through a short cut and through bushes claiming that he wanted to avoid another lady whom he had promised a job. But suddenly he turned on the complainant and ordered her to undress. He had a knife and he unzipped his trouser, removed his penis and lay on top of the complainant. He penetrated her briefly then withdrew claiming he had sympathized with her. But still at knife point, he robbed the

complainant of her mobile phone and Kshs.2,000/=. He then ordered her to continue lying down until the time he blew a whistle. She waited for some time but she did not hear any whistle and when she opened her eyes she discovered that the appellant had gone away. She ran to the road and boarded a matatu to Likoni Police Station where she made a report and gave the name of the appellant as Patrick. On 2nd March, 2006 she was called to Likoni Police Station where she took part in an identification parade and pointed out the appellant as the person who robbed and raped her.

No. 63299 PC. Tiberious Mureithi (PW2) was the police officer on duty on 4th January, 2006 at Likoni Police Station when PW1 went to make a report of this incident there. He recorded her report and issued her with a P3 form to go to hospital. He later recorded her statement. The witness stated further that on 7th February, 2006 while on duty he received a report of similar nature from another complainant who gave descriptions of the attacker as those given by PW1. And on the same day the appellant was arrested by Navy officers from Mtongwe and taken to the station. The witness called PW1 later to the station to take part in an identification parade conducted by C.I Wilfred Orange Mogera (PW3) on 2nd March, 2006. According to the witness the complainant identified the appellant without any difficulty.

When the appellant was put on his defence he denied the offence in sworn evidence and said he was arrested on 7th February, 2006, and beaten up at Mtongwe by a navy officer called Albert Kalonzo because of befriending D. He was thereafter taken to the Navy Camp and then to Likoni Police station where an identification parade was held and he was identified. Then he was charged. In a judgment written and delivered on 19th March, 2008 (*T. Mwangi, SRM*) the appellant was found guilty on the robbery and rape counts and sentenced to death for the robbery charge, the only sentence prescribed for it by law. The sentence on the rape charge was left in abeyance. His appeal to the superior court was dismissed, hence this appeal.

The appeal to this Court was heard on 24th January, 2011 when Mr. Sangero, learned counsel for the appellant complained about the delay in taking the appellant to Court and failing to offer adequate explanation for it. He also complained about the defect and inadequate ingredients of the robbery with violence in the charge sheet. According to his submission since the appellant was known, there was no need for holding the identification parade. Counsel submitted further that the case against the appellant was not proved beyond reasonable doubt as it was not shown there was any threat to use violence against PW1 or that she was struck on the head by the said appellant. That the people who arrested the appellant and took him to Likoni Police Station did not record any statements, nor were they called to testify in the case.

Mr. Muteti, learned Senior Litigation Counsel, while conceding the appeal on the rape charge, supported it on the robbery charge and submitted that there were no defects in the charge and that the charge of robbery with violence was established as the appellant was armed with a knife, a dangerous weapon with which he threatened to kill PW1. According to him, the evidence of PW1 was corroborated by that of PW2.

This is a second appeal and as such only points of law fall for consideration by this Court; see **section 361(1)** of the Criminal Procedure Code. PW1 alleged that the appellant had offered her a job at S Beach Hotel which she had declined. Then she said she accompanied the appellant to the hotel to meet D there and see if she could accept the offer. But in the appellant's evidence it emerged that D was indeed, his girlfriend. If really that be, was it necessary for PW1 to accompany the appellant to the said hotel to meet D in order to offer her the job? We think not.

In the evidence of PW2 he alleged that after the complainant made this report of robbery and gave the name of the culprit as "*Patrick*", yet the witness recorded that the robbery had been committed "by a man known to her." The name "*Patrick*" did not appear in the O.B. Then PW2 stated further that after PW1 had made her statement:

"On 7.2.06 while still on duty another complainant came to station with a similar incident as that of the complainant herein. She gave descriptions similar to those of this case. Luckily on that day

accused was arrested by Navy Officers from Mtongwe and brought to station. I later summoned complainant to attend identification parade. She identified the accused. I later charged the complainant (sic). Nothing was recovered.”

Several questions arise in this piece of evidence which need clear answers. The identity of the other complainant who reported a similar incident as that of the complainant “herein” was not given nor was she called to testify in the case to show the similarities. The descriptions of the attacker given by the other complainant said to be similar to those of the appellant were not given. In any case the evidence of PW2 did not show PW1 described the appellant at all. Moreover, the identity of navy officers who arrested the appellant at Mtongwe and took him to the station was not given, nor were they called to testify in the case to show what offence he had committed in that other incident, neither was the appellant’s home searched to try and recover the mobile phone stolen from the complainant. Given that in the circumstances of this case the complainant knew the appellant from previous meetings, we feel the identification parade held on 2nd March, 2006 was not necessary. If PW2 had investigated the case and taken action as indicated above, that would have assisted the trial court with the identification and/or implication of the appellant with the commission of the offence with which he was charged. In the circumstances of this case it is our view that the evidence adduced by PW1 and PW2 did not implicate the appellant sufficiently with the commission of the robbery and rape charges beyond any reasonable doubt. If the superior court had considered all these matters, it could have given the appellant the benefit of doubt and allowed the appeal, quashed the conviction and set aside the sentence.

In the result, we allow this appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered at Mombasa this 4th day of March, 2011.

P. K. TUNOI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR