IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KWACH, SHAH & BOSIRE JJ A)

CRIMINAL APPEAL NO 86 OF 2001

BETWEEN

MWINYI JUMA KUSHINDA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment and Conviction of the High Court of Kenya at Mombasa (Waki J & Khaminwa CA) dated 21st November 2000

in

HCCCrA No 182 of 1998))

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JUDGMENT OF THE COURT

Mwinyi Juma Kushinda, the appellant, was charged, tried and convicted of two counts, namely, robbery with violence contrary to section 296 (2) of the Penal Code, and indecent assault on a female, contrary to section 144 (1) of the same code. He was thereafter sentenced to the mandatory death penalty on the first count, and 10 years imprisonment with 3 strokes of the cane in the second count "to run consecutively".

His first appeal to the Superior Court was dismissed and hence the present appeal. We pause here, to consider the propriety of the manner in which the sentences were ordered to run. Section 14 (1) of the Criminal Procedure Code, in pertinent part, provides as follows:

> " 14 (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offenses, the court may sentence him for those offenses, to the several punishments prescribed therefor.....; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently."

In view of the aforequoted provision the trial court could not properly order a sentence of imprisonment to run consecutively with a death sentence as such death sentence is not an imprisonment term. The proper order in our view should have been that the imprisonment term would stay in abeyance and to be executed only if for any lawful reason the sentence of death was set aside. But we do not think that the error caused any prejudice to the appellant and is curable under section 382 of the Criminal Procedure

Code.

The case against the appellant before the trial court was that he, in the company of several other persons while armed with *pangas*, bows and arrows descended on the home of Rennie Njeri Ndirangu (Njeri) at Tiwi on the night of 11th September, 1997, at 10.00 pm. Njeri was inside her house with her niece, Beatrice Wairimu (Wairimu), the latter's brother, Antony Njenga (Njenga), a house maid and one other person. The riders demanded that a radio and other valuables be handled over to them through the window. But when Njeri and those with her hesitated the raiders broke the door into the house and gained entry. While inside they raped the women before they escaped with several items belonging to Njeri. Njeri testified at the appellant's trial that at the time the robbers broke into her house there was a lamp on and using the light from it and other light from a poultry house next to her house she was able to recognize the appellant as one of the people who broke into her house. It was further her evidence that she saw the appellant raping "her daughter". It was her evidence that the appellant is a person she knew well before.

Wairimu and Njenga, like Njeri testified that with the aid of the light from the lamp in the house and some light from the poultry house they were able to recognize the appellant as one of the attackers.

The trial magistrate believed all the three witnesses and found as a fact that the appellant jointly with other persons, not before the court, violently robbed Njeri and indecently assaulted Wairimu. He then convicted him and proceeded to sentence him. The Superior Court on first appeal upheld the appellant's conviction and sentences, and itself said that the conditions at Njeri's house at the time of the alleged offenses favoured a correct identification of the appellant. That court rejected, quite properly so, the appellant's complaint that in absence of medical evidence to support the eye witness account in both the counts his conviction was not sound. The absence of medical evidence did not nor does it vitiate the appellant's conviction in the two counts.

Before us, Mr Bryant for the appellant submitted that the evidence in support of both counts was deficient in material particulars as, in his view, there was no evidence on record to show that Njeri had given the name of the appellant to the police. In his view, apart from the evidence of Njeri that she gave the name of the appellant to the police, a police witness should have been but was not called to confirm that fact.

There are concurrent findings of fact by the trial and first appellate courts that Njeri, Wairimu and Njenga knew the appellant before; that there was sufficient light at the scene of the offences charged which enabled the said witnesses to recognize the appellant; and that because the raiders remained in Njeri's house for at least 4 hours it was possible for them to observe the appellant well. There is ample evidence on record to support those findings. Wairimu testified and Njeri corroborated her evidence that she was raped. It cannot therefore be said that both the courts below erred in principle or that their respective findings are plainly wrong. Both Njeri and Wairimu testified that the appellant demanded money from the former and that made him to stand face to face with the witnesses, with the result that they were able to observe and identify him. True, at some point the appellant is said to have hit and broken the only lamp which was on in Njeri's house. However, Njeri, Wairimu and Njenga testified, and their testimony in that regard, was not controverted, that the light from the poultry house sufficiently lit the area where they were for them to identify the appellant.

This appeal has no merit. It is accordingly dismissed in its entirety. Order accordingly.

Dated and delivered at Mombasa this 18th day of January, 2002

R.O KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR