IN THE COURT OF APPEAL

AT NYERI

(CORAM: KWACH, BOSIRE & KEIWUA JJ A)

CRIMINAL APPEALS NOS. 117, 131, 133 OF 2000 (CONSOLIDATED)

BETWEEN

SAMUEL MWAURA MUIRURI ……..1ST APPELLANT

LAWRENCE MWANGI MUGO ……..……..2ND APPELLANT

STEPHEN NYAMU KIOI…….……3RD APPELLANT

AND

REPUBLIC ……...……..RESPONDENT

(Appeal from the judgment of the High Court at Nyeri, Juma & Mulwa JJ, dated June 6, 2000

in

H.C.CR.A Nos 135, 136 and 137 of 2000)

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JUDGMENT OF THE COURT

These are second appeals. There are three appellants. Samuel Mwaura Muiruri (1st appellant) was the 6th accused at his trial. Lawrence Mwangi Mugo (2nd appellant) and Stephen Nyamu Kioi (3rd appellant) were, together with three others whose appeals are not before us, his co-accused. They were 4th and 2nd accused respectively. The appellants were charged jointly with the offence of robbery with violence contrary to section 296(2) of the Penal Code a second count each of rape contrary to section 140 of the Penal Code, with an alternative count of indecent assault on a female contrary to section 144 of the Penal Code. The appellants were charged before the Principal Magistrate's Court at Murang'a, and upon trial each of them was convicted of the lesser charge of robbery contrary to section 296 (1) of the Penal Code pursuant to section 179 (2) of the Criminal Procedure Code (CPC), in the first count, and of the main charge of rape, and were thereafter sentenced to imprisonment terms with strokes of the cane.

On first appeal to the superior court, Juma and Mulwa JJ did not think the appellants' respective convictions in the first count were properly reduced to simple robbery. In their view the evidence which the trial magistrate accepted and acted upon proved the greater offence of robbery with violence contrary to section 296 (2) of the Penal Code, and held that the trial magistrate erred in principle when he held that because none of the complainants was injured in the course of the robbery, and that no offensive weapon was used, then the greater offence was not proved. The learned Judges therefore set aside the appellants'

respective convictions for simple robbery, substituted convictions under section 296 (2) and proceeded to sentence each appellant under that section. They upheld the appellants' respective convictions for the offence of rape and affirmed the sentences which were imposed on them. They thus provoked the appeals before us.

The crux of each of the three consolidated appeals is identification. The offences the appellants stand convicted of were committed at night time, on 27th November, 1995, at about 2 am at Kongoini village, in Murang'a District of Central Province. The appellants' respective convictions before the trial court were based on the testimony of four identification witnesses. It was urged on the appellants' behalf that the circumstances at the *locus in quo* were difficult and did not favour a correct identification. Additionally, it was urged that identification parade evidence of those witnesses was not reliable as the identification parades were flawed. Consequently, it was argued, if the identification parade evidence is ignored what is left is merely dock identification which, in absence of any other corroborative evidence, is worthless.

In *Gabriel Njoroge v Republic* (1982-88) 1KAR 1134, this Court held that dock identification of a suspect is generally worthless unless other evidence is adduced to corroborate it. And in *Amolo v Republic* (1991) 2 KAR 254 this Court explained the rationale for the Court's reluctance to accept a dock identification without other evidence. The Court there said that:

> "The reason for the Court's reluctance to accept a dock identification is part of the wider concept, or principle of law that it is not permissible for a party to suggest answers to his own witness, or, as it is sometimes put, to lead his witness".

It is believed that because an accused sits in the dock while witnesses give evidence in a criminal case against him undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of.

But the holding in *Gabriel Njoroge* case (*supra*) appears to us to be too broadly couched. We do not thin it can be said that all dock identification is worthless. If that were to be the case then decisions like *Abdulla bin Wendo v Rep* (1953) 20 EACA 166, *Roria v Republic* [1967] EA 583, and *Charles Maitanyi v Republic* (1986) 2 KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.

In his judgment the trial magistrate accepted and acted upon the evidence of eye witnesses and held that those witnesses, who numbered four, stayed with their attackers for long, were close to them long enough, and using torch light which because the inner side of the walls of their house were painted white, the light was reflected on the faces of the attackers as to facilitate a correct identification of them. He also acted on identification parade evidence of those witnesses in which each of them identified these appellants as having been among their attackers. He found the witnesses to be witnesses of truth.

The learned Judges of the superior court, on first appeal, agreed with the trial magistrate on the foregoing findings and added that because none of the appellants challenged the propriety of their respective identification parades then the parades were properly conducted, and that the evidence could therefore, be acted upon to support the visual identification of the eye witnesses. In the event they concluded that the evidence which the trial magistrate accepted and acted upon supported the greater offence of robbery with violence contrary to section 296 (2) of the Penal Code, and proceeded to hold that the appellants were improperly convicted of the offence of robbery under section 296 (1). They therefore quashed the

convictions on that charge and substituted convictions under section 296 (2), aforesaid and meted out the mandatory death penalty for that offence. They affirmed the appellants', respective convictions on the count of rape contrary to section 140 of the Penal Code and thus provoked this appeal.

As we stated earlier these are second appeals and only points of law fall for consideration. Identification is a point law, and as we stated earlier the offences complained of were committed at night time. The circumstances were as follows. A gang of robbers broke into the house of Mary Wanjiku Kuria (Mary) by smashing window panes of one window and cutting the window grills using metal scissors. Mary was in the house with her three daughters, namely, Rose Wambui Kuria (Rose), Winnie Wangari Kuria (Winnie) and Beatrice Njeri Kuria (Beatrice). The time was about 2 am on the night of 26th/27th November, 1995. The raiders were at least six in number and were armed. They had torches which Mary and her daughters said emitted bright light. On gaining entry one of the raiders whom the ladies identified as the 2nd appellant hit Mary with the flat side of a *panga* he had. The raiders then ordered all the four women to move to the kitchen which they did. There, they were ordered to sit down. As some of the raiders ransacked the house for valuables, some pulled Rose into Mary's bedroom, ordered her to remove her underpants, but when she refused they tore it, threw her on her mother's bed and raped her in turns. It was her evidence that as they did so their torches were on and she was therefore able to observe each man who raped her. She identified in court 2nd and 3rd appellants as some of the men who raped her. It was her evidence that the wall of her mother's bed-room reflected light onto the faces of the men and because their faces were quite close to her she had the opportunity and time to observe them as they lay on her. She stated that each man took between 3 and 5 minutes in the act.

Winnie was also raped. After the gangsters who raped Rose finished with her, they returned her to the kitchen where Mary, Winnie and Beatrice were under guard. They then picked Winnie. Like Rose, the gangsters led her to her mother's bed-room, demanded that she remove her underpants, but when she refused they violently tore it off, threw her on her mother's bed, one of them who she identified as Moses Mwangi Nyambura pulled her legs apart and thus enabled the 3rd appellant to rape her. It was her evidence that two other men stood by with torches on. The light was bright enough to facilitate identification of those present. After the 3rd appellant finished, the 2nd appellant took over. But he did not rape her on her mother's bed. Instead he led her into her bedroom where he raped her. She testified that the 1st appellant accompanied the 2nd appellant into her bed-room, and he too, raped her there. It was her evidence that she stayed with these appellants long enough and was therefore able to observe and identify them. She said that each of the men took about 5 minutes to rape her, and because they were lying over her and facing her, she was able to observe and register their respective appearances in her mind. Moreover, she said, while she was in the kitchen, she was able to observe and identify the robbers as they ransacked the house looking for money and other valuable items.

Mary and Beatrice were not raped. Both of them remained confined in the kitchen. While there they were able to observe the gangsters as they ransacked the house. The incident took over an hour. Mary specifically identified the 2nd and 3rd appellants. She testified that the 3rd appellant at some stage went very close to her when he picked some milk which was in the kitchen, to drink. She stated that she was able to closely observe him. Beatrice also testified to the same effect. Beatrice also identified the 1st, 2nd and 3rd appellant along with another whose appeal is not before us as also having been among the robbers. She testified that she did so as they moved to and fro in the house looking for items. She said that there were many torches in the house being flashed in all directions.

Those then are the circumstances under which the alleged offences were committed. The witnesses testified that although they screamed loudly for help no one came to their assistance. They later reported the incident at Murang'a Police Station. In their report, apart from the rape, they reported that several items were stolen from their house among them a National Panasonic Radio Cassette and a Singer Sewing Machine head, and that they would be able to identify their attackers if they saw them.

The evidence as to how the appellants came to be arrested is scanty. It would however appear to us that the appellants were named by one, Peter Irungu Mitambuki. He was the first accused at the trial. Although the record of appeal shows he, along with the appellants and two others were put on their defence at the close of the prosecution case, there is no record of his statement. Nor is there any indication

in the recorded proceedings as to what happened to him. In the trial Magistrate's judgment, however there is a note that he escaped from custody with another accused, James Mburu Mwangi.

The officer who arrested the first accused did not testify. So we do not know how that officer came to associate the 1st accused with the commission of the offences herein. The failure to call the officer who arrested the 1st accused was a serious omission. Such an omission in an appropriate case might lead to the quashing of an otherwise sound conviction. It has been stated before and we repeat here that a prosecutor is duty-bound to call all witnesses necessary to establish the truth in a case. (See *Bukenya v Uganda* (1972) EA. 549). We have however considered the facts and circumstances of this case and we do not consider that the omission to call the person who arrested the 1st accused, *per se*, is fatal to the appellants' respective convictions. They were before the court, were present when witnesses testified and were given an opportunity to cross examine witnesses and to testify on their own behalf. It is quite clear the appellants were arrested on the basis of information the 1st accused supplied to the police.

Peter Munene (PW5) arrested all the appellants at different times. From the house of 2nd appellant, the witness said he recovered a National Panasonic Radio Cassette which Mary positively identified as one of the items which were stolen from her house in the course of the robbery, there. Nothing was recovered from the other appellants. Although, at the trial the 2nd appellant denied he was arrested with the radio cassette, there are concurrent findings of fact by the trial and first appellate courts that he was found with it. Under section 111 of the Evidence Act, Cap 80 of the Laws of Kenya, the onus was on him to explain his possession of the radio. The 2nd appellant was arrested on 8th January, 1995, about a month and half after the radio was stolen. He did not explain his possession of the radio. His possession of the radio was recent.

As for the 3rd appellant, he was identified by Mary, Rose, Beatrice and Winnie, on 26th December, 1994, at an identification parade the police mounted. Although his counsel then on record complained at the trial that the said parade was improperly conducted, we are satisfied that his complaint that different members of the parade for each witness should have been used, has no merit. That is the more so because there was no allegation made at the trial that witnesses who had picked the appellant had met with those who had not. So the identification parade evidence against the 3rd appellant was properly accepted and acted upon. That evidence supported the visual identification evidence against the 3rd appellant. That evidence, we are satisfied, clearly placed the 3rd appellant at the scene of the robbery and rape. In our view therefore, the conviction of the 3rd appellant was based on acceptable and sufficient evidence.

The 2nd appellant was also identified by Mary, Rose and Beatrice in an identification parade which was held on 3rd January, 1995. In our judgment, even without that evidence, the conviction of the 2nd appellant cannot be faulted. Apart from the visual identification evidence, that appellant was, as we stated earlier, found with a radio cassette stolen in the course of the robbery. Both courts below accepted the identification evidence of Mary and her three daughters. We have no basis for faulting them in that regard. The witnesses mutually corroborated each other, and in any case the 2nd appellant's possession of the radio cassette corroborates their testimony. The 2nd appellant's conviction was in our judgment proper.

As regards, the 1st appellant, we find no error in principle in the way both the trial and first appellate courts dealt with the testimony of Mary and her daughters. We wish, however, to observe that the superior court should have subjected the evidence to greater scrutiny than it did. For instance the court did not note that the identification parades of the 1st and 2nd, appellants and two others whose appeals are not before us were held on the same day using the same witnesses and the same parade members. The first parade was held between 11.54 am and 12.05 pm on 3rd January, 1995. It concerned Nicholas Mwangi Nyambura. Mary, Rose and Beatrice were the identifying witnesses. The second parade had Samuel Mwaura Muturi, the 1st appellant, as the suspect. As that parade was held only 15 minutes after the first one, and had the same parade members and witnesses, there was the possibility of prejudice to the 1st appellant. Although the 1st appellant did not complain about that anomaly the possibility of prejudice cannot be ruled out. In the circumstances not much weight should have been attached to the identification parade evidence against the 1st appellant. However, the visual identification evidence was from four witnesses. They were all examined and cross-examined on their testimony on identification of the 1st

appellant and their evidence remained consistent. They gave graphic accounts on what happened on the material night, and their evidence mutually corroborated each other. We wish particularly to observe that the robbers remained at the scene for quite a long time. Although conditions favouring a correct identification appear to have been difficult, that problem was overcome by the length of stay, the fact that the robbers had torches which they flashed randomly, the fact that the robbers were observed at close range, and also the fact that due to the long stay in the house, the witnesses must have become used to the circumstances and cannot be said to have been under extreme fright as not to be able to observe their attackers well.

In the circumstances we are satisfied that all the appellants were correctly identified. We are also satisfied that the superior court properly quashed the appellants' respective convictions under section 296 (1) and properly substituted convictions under section 296 (2) aforesaid. There were more than one attacker, and even assuming that they were not armed with any dangerous weapons, and that no injury was caused, a conviction under section 296 (2) would still stand. But the evidence clearly shows that violence was employed against Rose, Winnie, and Mary. Mary was hit with a flat side of a *panga*. Rose and Winnie were sexually assaulted and injured according to medical evidence. They were threatened with violence if they did not obey the orders of the robbers. Clearly the evidence supported a charge under section 296(2).

As regards the counts of rape, an issue was raised that the appellants were not medically examined to find out whether they had a venereal disease. When Rose and Winnie were medically examined, each of them was found to have been sexually assaulted and traces of a venereal disease were detected. So the appellants implied that if that was so, then they should each have been examined medically to see if they would be connected with the sexual assault. Nothing turns on that complaint. The appellants were arrested about a month after the rape and there was the possibility of supervening circumstances. Besides, as evidence of identification is strong and considering that there is medical evidence to corroborate the respective testimony of Rose and Winnie, there was sufficient evidence to connect the appellants to both offences.

In the result, we come to the conclusion that the appellants' respective appeals have no merit and are accordingly dismissed.

Dated and delivered at Nyeri this 10th day of May, 2002

R.O KWACH

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

M. O.KEIWUA

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JUDGE OF APPEAL