REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 111 OF 2015 [consolidated with Cr. App. nos.107& 112 of 2015]

1. CHARLES MWIRIGI MARETE

2. KELVIN KATHURIMA.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No.283 of 2015 of the Senior Resident Magistrate's Court at Githongo by Hon. C.A Mayamba – Senior Resident Magistrate)

JUDGMENT

CHARLES MWIRIGI MARETE and **KELVIN KATHURIMA** the appellants herein were convicted for the offence of robbery contrary to section 296 (2) of the Penal Code. **CHARLES MWIRIGI MARETE** was convicted for the offence of gang rape contrary to section 10 of the Sexual Offences Act.

The particulars of the offences were that on the night of 22nd January 2015 at [particulars withheld] Central district in Meru County, jointly with others not before court, while armed with pangas and sticks robbed **E K** of her cell phone and Kshs.750/= and national identity card and at or immediately before or immediately after the time of said robbery beat the said **E K**. Thereafter the first appellant raped her.

The appellants was convicted and sentenced to life imprisonment in count one whereas the sentence in count two for the first was ordered to be held in abeyance. They now appeal against both conviction and sentence.

The appellants were represented by Carlpeters Mbaabu, learned counsel. On behalf of the appellants he had raised nine grounds but the second ground was abandoned at the time of hearing. The rest of the grounds can be summarized as follows:

1. That the learned trial magistrate erred in law and fact by meting out an illegal sentence in respect of the robbery offence.

2. That the learned trial magistrate erred in law and fact by failing to pronounce a sentence in respect of the second count.

3.That the learned trial magistrate erred in law and fact by conducting proceedings in a language the appellants did not understand.

4. That the learned trial magistrate erred in law and fact by convicting the appellants without sufficient evidence on identification.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the case are briefly as follows:

The complainant was walking home at about 8 PM in company of a neighbour. They were accosted by five robbers who robbed the complainant. Later the same evening at about 9 PM, the same gang raped her.

The first appellant denied any involvement in the offence while the second appellant pleaded an alibi.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32.**

After a conviction for an offence under section 296(2) of the Penal Code the trial court has no option but to pronounce the sentence therein. There is no room for sympathy or meting out any other form of sentence except in cases of minors or expectant women. This is what the section provides:

If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death. ***[*** *emphasis mine]*

In the case of **JOHANA NDUNGU vs. REPUBLIC[1996] eKLR** the court of appeal was confronted with a similar situation .It observed as follow:

If proved facts show that robbery under section 296(2) has been committed then the trial magistrate is obliged to convict the accused under this section and impose the sentence of death. Use of terms such as the one used in this case by the magistrate is not going to change facts so as to justify a conviction under section 296(1) when the proved facts show that the charge under section 296(2) has been proved.

In the instant case the trial magistrate convicted the appellants under section 296 (2) of the Penal Code but meted out an illegal sentence. I therefore set aside the life sentence in count one and substitute it with a death sentence for each appellant.

Whenever an accused has been convicted in more than one count where he has been sentenced to death in one of the counts, then the proper procedure is to hold the sentence in the other counts in abeyance. In the case of **MARTIN ARTHUMAN WANJALA v REPUBLIC [2006] eKLR** the high court said:

As for the sentence, we wish to correct error by the Learned Magistrate pointed out at the beginning of this Judgment. The Appellant shall suffer death in count one only. The sentence in respect of counts II and III shall be stayed and or kept in abeyance pending the execution of the sentence in Count I.

In the instant case the learned trial magistrate followed the correct procedure.

Though the record indicate that witnesses testified in Kiswahili, it is evidently clear that the appellants fully participated in the trial and also gave their defence. This is an indication that the proceedings were conducted in a language they understood. It is desirable however, that the record should always indicate which language an accused person says he understands. This is to avoid complaints later.

The incidents complained of in this appeal were committed between 8 PM and 9 PM. This being at night, I will interrogate the evidence to ascertain whether or not there was positive identification or to be more specific recognition. I will be guided by the directions given by Lord Widgery CJ, in the celebrated case of **R v TURNBULL & OTHERS - [1976] 3 ALL ER 549** where he observed as follows:

First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be make. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between the original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance" If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened: but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur. A few examples, taken over the whole spectrum of criminal activity, will illustrate what the effects on the maintenance of law and order would be if any law were enacted that no person could be convicted on evidence of visual identification alone.

I have quoted extensively for this case offers one of the best guidelines to both investigators and the trial

courts on matters of identification and recognition.

In the instant case I have the complainant's evidence and that of Andrew Muthaura John (PW4). However, the latter was declared a hostile witness. A hostile witness does not enjoy any better or worse status than the other witnesses. His/her evidence is to be evaluated just like the other evidence on record. This is what the learned trial magistrate ought to have done in the instant case.

My evaluation of PW4 raises credibility issue in his evidence. We may not be able to tell whether he told the truth while recording his statement with the police or when he testified in court. The court of appeal in the case of **NDUNGU KIMANYI –V- REPUBLIC [1979] KLR 283**, [MADAN, MILLER and POTTER JJA] held:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

In the instant case I find that the evidence of PW4 is unreliable.

I am therefore left with the complainant's evidence.

After subjecting the evidence of the complainant to the test prescribed by Lord Widgery, CJ, I make the following observations:

1.The intensity of the moonlight was not testified to.

2.The duration she had the people she said were appellants under observation and whether or not the people she claims were people she knew had covered their faces or not.

3. Though she testified that first appellant talked to her as he raped her, the evidence of voice recognition ought to have been subjected to a further test as prescribed in the case of **SIMEON MBELLE VS. REPUBLIC [1982] IKAR 578** as follows:

In relation to the identification by voice, one it would obviously be necessary to ensure:-

(a) That it was the accused person’s voice;

(b) That the witness was familiar with it and they recognized it and

(c) That the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

The complainant's evidence having not been subjected to these two test was not safe to be the basis for a conviction. I accordingly find that the appeal by both appellants has merit. Their conviction is therefore quashed and the conviction set aside. Each appellant is set at liberty unless if otherwise lawfully held.

DATED at Meru 20th day of December 2016

KIARIE WAWERU KIARIE

JUDGE