IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 227 OF 2007

BETWEEN

JEREMIAH MUTHENGI MATHINYO …..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Kasango &

Makhandia, JJ.) dated 4th October, 2007

in

H.C.CR.A NO. 178 OF 2004)

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JUDGMENT OF THE COURT

1. ***Jeremiah Muthengi Mathinyo,*** the appellant, was charged with one count of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code,*** Chapter 63, Laws of Kenya and one count of rape contrary to ***Section 140*** of the ***Penal Code*** in the Senior Principal Magistrate's Court at Kerugoya. The particulars of the offence of robbery with violence were that on 1st January, 2003 at Karira Village in Kirinyaga District within the then Central Province the appellant jointly with others not before the court while armed with dangerous weapons namely pangas, rungus and axes robbed L W M of one mobile phone make Siemens and cash Kshs. 3,000/= all valued at Kshs. 8,400/= and at or immediately before or immediately after the time of such

robbery used actual violence to the said L W M. The particulars of the offence of rape were that on the above mentioned date and place the appellant with others not before the court had carnal knowledge of E M without her consent.

2. The prosecution called a total of four witnesses in support of its case against the appellant. It was the prosecution's case that on 1st January, 2003 at around 2:00 a.m while PW1, L W M (L) was asleep in her house with her two daughters namely, PW2, E M (E) and D N she heard a loud bang on the door and she lit a lamp that was next to her bed. L saw two robbers enter her bedroom and later discovered that two other robbers had gone into her daughters' room. Those two then came into her room and demanded money. She recognized the appellant by his voice. L testified that the robbers took her purse which had Kshs. 3,000/= and her mobile phone make Siemens. They then took E outside the house. E was raped by three of the robbers in turns. Thereafter, she was taken back into the house.The robbers demanded more money but L told them she did not have any more money and after searching the house they left. L reported the incident to the at Wanguru Police Station.
3. L maintained that despite the robbers having put on masks she was able to recognize the appellant using the light from the lamp in her room by his walking style and his voice. E also testified that she was able to recognize the appellant by his walking style during the ordeal and that it was the appellant who raped her first. Both L and E testified that the appellant used to operate *boda boda* business and that they were his customers. PW3, PC Timon Meli (PC Timon), testified that L in her initial report indicated that she had recognized one of the robbers as the appellant and that his name was Muthengi. He stated that the appellant went underground until he was arrested on 26th May, 2002 by members of the public for another offence of housebreaking. PW4, Dr. Douglas Njau (Dr. Douglas), examined E and observed that she had bruises on her vaginal opening confirming that she had been raped.
4. In his defence the appellant gave an unsworn statement. He confirmed that prior to his arrest he operated a *boda boda* business using his bicycle at ***[particulars withheld]*** Village. On 2nd January, 2003 L approached him and inquired how much he would charge to take her to Wanguru Police Station and he informed her he would charge her Kshs. 40/=. He took L to the Police Station and waited for her for almost one hour. On 6th April 2003 the appellant was taken to the Wanguru Police Station on allegations that he wanted to steal from a certain person. He was kept in custody and later charged with the aforestated offences. He denied committing any of the offences.
5. Being satisfied that the prosecution had proved its case the trial court convicted the appellant for the offences of robbery with violence and rape. The trial court sentenced the appellant to death for the offence of robbery with violence and life imprisonment for the offence of rape. Aggrieved with the said decision, the appellant filed an appeal in the High Court. The High Court (Kasango & Makhandia, JJ.) vide a judgment dated 4th October, confirmed the appellant's conviction on the two offences and the sentence of death in respect of the offence of robbery with violence. The High Court set aside the sentence issued against the appellant in respect of the offence of rape and directed the same to be held in abeyance. That decision is what has instigated this second appeal based on the following grounds:-

- ***The Honourable Judges of the Superior Court erred in law and in fact by failing to find that the appellant was not properly identified because the issue of his walking style was not properly tested.***
- ***The Honourable Judges of the Superior Court erred in law by failing to find that the prosecution had failed to produce a crucial witness to the proceedings therefore occasioning a serious miscarriage of justice.***
- ***The Honourable Judges of the Superior Court erred in law by taking into account extraneous facts and therefore arriving at the wrong conclusion.***

6. Mr. A. Ng'ang'a, learned counsel for the appellant, submitted that the circumstances surrounding the identification of the appellant were not favourable given that a small lamp was the only source of light and the same was insufficient. He argued that the L did not give a description of the appellant's voice; the alleged walking style which the prosecution's witnesses used to recognize the appellant was not adequately tested by the trial court; and that there was a possibility of mistaken recognition of the appellant by the said witnesses. Mr. Ng'ang' a argued that the prosecution failed to call two witnesses who he considered crucial because they were present at the scene. The only inference that can be drawn by the failure to call the said witnesses is that the evidence of the said witnesses was against the prosecution's case.
7. According to Mr. Ng'ang'a Dr. Douglas' testimony was at variance with the evidence contained in the P3 form. He stated that despite E testifying that she was hit by the robbers with a panga, such injuries were not reflected on the P3 form. He also stated that E did not give an explanation why she waited for two days after the incident to seek medical attention. He maintained that there was need for corroboration of E's evidence on the offence of rape. He urged us to allow the appeal.
8. Mr. Makunja, Senior Prosecution Counsel, in opposing the appeal argued that the evidence against the appellant was overwhelming. He submitted that E did not delay in getting medical attention.He submitted that both L and E recognized the appellant who they had known for a long time, as one of the robbers. The appellant admitted that L was a customer in his *boda boda* business. According to Mr. Makunja, the absence of Dorothy as a witness was not fatal to the prosecution's case because there was no requirement under the law as to the number of witnesses required to prove the fact that the appellant was positively recognized as one of the robbers. He further submitted that there was no variance between the evidence adduced by Dr. Douglas and the P3 form.
9. This being a 2nd appeal, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See ***Chemangong -vs- R [1984] KLR 611***. In ***Kaingo -vs- R*** **(1982) KLR 213 at p. 219** this Court said:-

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"

10. We are of the considered view that the issues that fall for our consideration are as follows:-

- ***Was the evidence on recognition free from error"***
- ***Did the prosecution fail to call a crucial witness in this case" If so what is the effect of the said failure on the prosecution's case against the appellant"***
- ***Was the offence of rape satisfactorily proved against the appellant"***

11. In this case it is not in dispute that the appellant's conviction was based on the evidence of recognition by L and E. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. A court must always satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. In **Wamunga -vs- Republic (1989) KLR 424** this Court held at page 426 that,

"..it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

12. In this case L testified that she was able to recognize the appellant's voice when he demanded money from her since she had known the appellant for a long time prior to the incident and was familiar with his voice. The appellant did admit that L used to be his customer in his *boda boda* business. We therefore do concur with the two lower courts that L was familiar with the appellant's voice and could recognize the same. In ***Karani -vs-Republic (1985) KLR 290*** this Court held at page 293:-

"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification."

L also recognized the appellant by his walking style. E too testified that she recognized the appellant by his walking style as they were heading back to the house after she had been raped. They both gave evidence that the appellant walked with a limp. Further, it was PC Timon's uncontroverted evidence that L indicated in her initial report that she had recognized the appellant who she had known for a long time as one of the robber and gave his name. Based on the foregoing we find that the evidence on recognition was free from error and there was no possibility of mistaken identity. In ***Anjononi & others -vs- Republic (1976-80) 1 KLR 1566***, this Court held at page 1568,

"This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."

13. We further find that evidence on recognition tendered by the prosecution was sufficient and there was no need for the prosecution to call any more witnesses on the said issue. ***Section 143*** of the ***Evidence Act***, Chapter 80 , Laws of Kenya provides,

"***No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact"***

Further, in ***Julius Kalewa Mutunga -vs- Republic- Criminal Appeal No. 31 of 2005*****,** this Court held,

" ***...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."***

14. Emily testified that when she was taken out of the house she saw three robbers, one of whom ordered her to follow them. When E refused to do so she was hit with a panga and one of the robbers pulled her up to ***[particulars withheld]*** Primary School which was about 200 metres from her home. The robbers removed her clothes and proceeded to rape her in turns. Thereafter, the robbers took E back to the house into L's room where L and D were. L testified that she noticed that E was bleeding profusely from her private parts. It was E's evidence that the appellant raped her. Having found that the appellant was positively recognized by both L and E

as one of the robbers, we find E positively identified the appellant as one of the robbers who raped her and there was no requirement for further corroboration of the same. The proviso to ***Section 124*** of the ***Evidence Act***, provides:-

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

We also find that the prosecution proved the necessary ingredients of the offence of rape. We have considered the evidence by Dr. Douglas and examined the P3 form produced in respect of E and find that they are not in variance. The P3 form confirms Dr. Douglas's evidence that E had bruises on her vaginal opening indicating that she had been raped. We find that the trial court correctly convicted the appellant for the offence of rape.

15. Accordingly, we see no reason to interfere with the concurrent findings of facts by the two lower courts. We dismiss this appeal and confirm the sentence meted against the appellant by the High Court. Orders accordingly.

Dated and delivered at Nyeri this 10th day of December, 2013

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J.OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR