



**Mutea v Republic (Criminal Appeal E151 of 2022)
[2024] KEHC 10745 (KLR) (21 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E151 OF 2022
LW GITARI, J
AUGUST 21, 2024**

BETWEEN

MAX MUTEA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Background:

1. The appeal arises from the proceedings in the Principal Magistrate’s Court at Nkubu Sexual Offences Case No.E006/2020 where the appellant was charged with Gang Rape contrary to Section 10 of the [Sexual Offences Act](#) No. 3 of 2006 in that on 1/10/2020 AT 22/30 Hours in Imenti South Sub-County within Meru County in association with another not before Court intentionally and unlawfully caused their penis to penetrate the vagina of JK without her consent in the alternative the appellant was charged with committing an indecent act with an adult contrary to Section 11(A) of the [Sexual Offences Act](#).
2. The appellant was also charged with Robbery with violence contrary to Section 296(2) of the [Penal Code](#) in that on 1/10/2020 at Kanyakine Sub-County within Meru County jointly with another not before court and while armed with a crude weapon namely knife robbed JK, cash Ksh.16,800/- a wrist watch, worth Ksh.550/- mobile phone make Tecno worth Ksh.8,000/- spectacles valued at Ksh.11,500/- a sweater worth Ksh.2500/- and shopping worth Ksh.5000/- all valued at Ksh.41,850/- and immediately before the time of such robbery used actual violence to the said JK
3. The appellant denied the charges and the court entered a plea of not guilty. A full trial followed and at the conclusion the trial magistrate found the appellant guilty on the two counts and sentenced him to serve twenty years imprisonment on each count and sentence to run concurrently.
4. The appellant was dissatisfied with both conviction and sentence and filed this appeal which raised six grounds which he amended and filed supplementary grounds as follows:-



1. That the trial magistrate erred in matters of law and fact by failing to note that the circumstances at the scene of crime were not favourable for identification of the appellant.
2. That the trial magistrate erred in matters of a law and fact by failing to note that the key witness was not called by the prosecution to support the allegation adduced by PW1 the complainant herein.
3. That the trial magistrate erred in matters of law and fact by failing to note that there was need of identification parade for the prosecution to prove their case beyond reasonable doubts.
4. That the trial magistrate erred in matters of law and fact by failing to note the appellant was not found within anything stolen from the complainant.
5. That the prosecution did not prove its case beyond reasonable doubts; that it was the appellant who got involved in the said offence.
6. That the trial magistrate erred in matters of law and fact by failed to note that the evidence adduced by the prosecution were a lot of inconsistency and contradictions.

It is prayer that the conviction be quashed, the sentence be set aside and he be set at liberty.

5. The Prosecution's case:

The complainant JKK (PW1) testified that on 1/10/2000 she was on her way home about 10 to 10.30 pm carrying some goods which she had shopped. She was dropped at the stage and started walking towards her home. It is at that point that she was accosted by one man who demanded money from her. The man slapped her on the mouth and she started bleeding. The man beckoned others who were on the other side of the road and they joined him. Two men came from across the road and joined the first man. The man blocked her mouth using his hand and led her to the bush; a thicket which was nearby. The three struggled with her for almost two and half (2 ½) hours as they tried to rape her. One of them then hit her on the head with a knife and stabbed her. She gave up. The three managed to overpower her then raped her in turns.

6. A passerby came and asked them what they were doing. Two of the assailants chased the man but he returned while making noise. The assailants heard the noise and ran away. They stole ksh.16,800/- a mobile phone worth Ksh.8000/- Kikoi, sweater, watch and her shopping.
7. She was escorted to Kanyakine Sub-County hospital where she was treated. The next morning she reported the matter to the police and she was issued with a P3 form which was filled at the hospital.
8. The biker, pant and bra were removed during the incident and her dress was torn. She identified the dress which was torn and bloodstained and a black bra. They were recovered from the first accused Brian Mungatia . Later she was called by the Sub-Chief of the area who told her that she had known the assailants. PW1 called the police who went and arrested one of the assailants. His house was searched and a sweater, Vikoi (2) one Red and the other black and purse were recovered from the house of 1st accused. The appellant was also arrested. She testified that she had not known the appellant before the incident.
9. Moses Baiyenia (PW2) is the clinical officer at Kanyakine Sub-County hospital where the complainant was treated and a P3 form was filled. PW2 testified that on examination her dress was torn and bloodstained, torn bra, breasts swollen, dark spots on the face, 3 centimetre wound which was torn and had a swelling, both lips were swollen with open wound on the inner aspect, swelling and tenderness on the head, neck, chest, abdomen, right hand left shoulder and bruises and tender swelling on the thigh. She had bruises on the vulva region of her private parts, hymen was broken, swelling on



the inner aspect of the thighs was noted and blood discharged was noted from the vagina. Urinalysis showed blood cells which was an indication of bleeding. The clinical officer concluded that there was penetrative activity. She was examined a few hours after the assault. He produced the P3 form as exhibit -1 and treatment card exhibit 2.

10. Isabela Mutura (PW3) who is the Senior Chief Kanyakine Location received a report on 9/10/2020 that the two who raped the complainant had been known. She called the police who went and arrested the two and recovered some stolen items from the house of one of them who was the 1st accused. The complainant identified them as the persons who raped and robbed her.
11. Daniel Kimeli, a Police Constable (PW4) attached to Ntharene Police Station received the report on 2/10/2020. Later he arrested the appellant. None of the stolen items was recovered from him. He was then charged.

Defence Case:

12. The appellant denied that he committed the offence and alleged that he is the one who rescued the complainant and identified one Muguti as one of those who raped her.
13. The appeal was canvassed by way of written submission.

The Appellant's Submissions:

14. He submits that the prosecution failed to prove the case of robbery against the appellant since the circumstances surrounding the scene of crime was not favourable for proper identification of the appellant. That the evidence was not enough to sustain a conviction against the appellant. He further submits that none of the stolen items were recovered from him.

Respondents Submissions:

15. He submits that the appellant was identified by name and stolen items were recovered from him. This submission is misplaced as it is not borne out by the evidence. He further submits that the fact of rape was proved as there was no consent to the Sexual Act. That the evidence by the doctor confirmed that the complainant was raped.

Analysis and Determination:

16. I have considered the proceedings before the lower court and the submissions, the only issue which arises for determination is;

Whether the prosecution proved the charge against the appellant beyond any reasonable doubts.

17. This is the first appellate court and the law imposes a duty on it to analyse the evidence, evaluate it and come up with its own independent finding while bearing in mind that it had no opportunity to see the witnesses when they testified and leave room for that. That was so held in the case of *Okeno v Republic* (1972) EA 32.

It is not the duty of court to analyse the evidence to see whether it will support the finding of the trial court, it must itself come up with its own independent findings. It is only then that it will decide whether the conviction should be upheld. This duty was stated in *Shantilal M. Ruwala v Republic* (1975) EA 57. Thus a first appellate court has a duty to reverse or affirm the findings of the trial court. A first appeal is a valuable right of parties which is essentially a retrial by the 1st appellate court only that the court lacks the opportunity to see the witnesses and assess their demeanor. An appeal to the



1st appellate is on both facts and the law. An appellant on first appeal is entitled to have the evidence as a whole subjected to an evaluation by the appellate court and the appellate court's decision.

18. The prosecution relied on the evidence of identification of the appellant by the complainant. The evidence of the complainant was not corroborated. It therefore remains evidence of identification by a single witness. The court is therefore enjoined to examine that evidence and determine whether the circumstances favoured a positive identification or recognition and whether the evidence is free from the possibility of error.

In *Wakamunga v Republic* (1989) KLR 424 at page 426 the court held that –

Where the only evidence against the 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 the basis of a conviction.”

In the case of *Charles O. Maitanyi v Republic* (1986) KLR 198 the court stated that it is necessary to test the evidence of witnesses' Identification and that great care should be exercised where corroboration is lacking. The law on identification is well settled that evidence relating to identification must be properly scrutinized and should only be relied on if the court is satisfied that the identification is positive and free from possibility of mistake. In *Cleophas Otieno Wamunga v Republic*, Court of Appeal Kisumu, Criminal Appeal No.20/1989. The court held that-

“..... what we have to decide now is whether that evidence (evidence of recognition of the robbers by two witnesses) was reliable and free from possibility of error as to find a secure bases for conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever a case against a defendant depends wholly or to a great extent of one or more identification of the accused which he alleged to be mistaken the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification. The way to approach the evidence a visual identification was succinctly stated by Lord Widged, C.J in the well known case of *Republic v Turnbull* (1976) 3 . All ER 549 at page 552 where he said:-

‘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 relatives and friends are sometimes made.’

19. This is a caution to the courts that even where identification is based on recognition, the court should be wary of mistaken identity.
20. In this case, the evidence of identification of this appellant is wanting. The complainant herself did not adduce evidence that she identified the appellant. It was her testimony that one person whose voice she recognized asked the assailants what they were doing. Two of them chased him. Mutugi came back making noise and they fled. Mutugi was not called as a witness nor was he charged.
21. The complainant did not adduce evidence that she had identified the assailants. This is confirmed by the fact she (PW1) testified that she was called by the Sub-Chief Kanyakine, Isabella and she told her that she had known the assailants. It was the testimony of PW1 that on fateful day it was at night and she had not known the appellant prior to the incident. One of the assailants had rastas, she later learnt it was the appellant. It is clear from this testimony that it is not PW1 who identified the appellant. PW1



simply relied on what she was told. PW2 stated that she got a report that “it had been revealed who (2) (sic) had raped her.” She did not disclose who made the report to her, secondly it was testimony of PW1 that three people were involved. Furthermore nothing was recovered from the appellant to corroborate the testimony of PW3. The evidence is insufficient as it relates to the appellant.

22. The burden of proof lay on the prosecution to prove the charge against the appellant beyond any reasonable doubts. In *Miller v Minister of Pension* (1947) 2 All ER 372-373 the court held that-

“That degree is well settled. I need not reach certainty but must carrying a high degree of probability. Proof beyond reasonable doubts does not mean proof beyond any shadow of doubt...”

In *Republic v Derrick Waswa Kuloba* (2005) eKLR, the court stated that the burden on the prosecution is to establish its case beyond any reasonable doubts. An accused person does not assume any burden of prove his innocence in a Criminal Case.

In *Woolmington v D.P.P* (1935) A.C 462 it was held that the burden of proof in criminal cases rests on the prosecution and does not leave the prosecutions backyard.

23. In this case the prosecution did in deed prove that the complainant was gang raped in a most inhuman manner and robbed. She sustained severe injuries on her body and on her genital organs. She had not consented to the sexual activity. It was used as most foul form of violence to facilitate the robbery.
24. The evidence of PW2 tells it all on the multiple injuries she sustained as elaborately highlighted in the P3 form.
25. However, in view of the reasons stated above and considering the law and the evidence. I find that there was no evidence, to prove beyond any reasonable doubts that the appellant was identified as one of the perpetrators. The finding by the learned magistrate that the complainant positively identified the appellant is not borne out by the evidence. The complainant herself said she heard the voice of Mangatia who is not the appellant and she recognized Mutugi’s voice. Nowhere in her evidence does she mention the appellant. The appellant had no burden to prove his innocence.

I find that the finding by the learned magistrate cannot be upheld.

Disposition:

The appeal has merits as the appellant was not identified by the complainant as the perpetrator.

I allow the appeal. The conviction is quashed. The sentences is set aside. The appellant to be set at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF AUGUST 2024.

L.W. GITARI

JUDGE

