



**Odhiambo v Republic (Criminal Appeal E015 of 2020)  
[2024] KEHC 15997 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15997 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E015 OF 2020  
DK KEMEL, J  
DECEMBER 20, 2024**

**BETWEEN**

**CHRISTOPHER OUNDO ODHIAMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising out of the conviction and sentence of Hon C.I. AGUTU  
(Senior Resident Magistrate) in Ukwala Senior Resident Magistrate's  
Court Criminal Case No. 171 of 2019 delivered on 29th September 2020)*

**JUDGMENT**

1. The Appellant herein Christopher Oundo Odhiambo, was charged with two counts. The first count was an offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars were that on 28<sup>th</sup> April 2018 at Sega in Ugenya Sub-County within Siaya County, jointly with another not before court, robbed MAO Kshs 2500/=, shopping items worth Kshs 2458/= and a mobile phone make TECNO IMEI no. 358XXXXXXXXXX20 all valued at Kshs 12458/= and immediately before the time of such robbery threatened to use actual violence to the said MAO.
2. The second count was of gang defilement contrary to section 10 of the *Sexual Offences Act* no. 3 of 2006. The particulars are that Christopher Oundo Adhiambo on the 28<sup>th</sup> April 2018 at [Particulars Withheld] village in Ugenya Sub-County within Siaya County, in association with another not before the court, intentionally and unlawfully caused his penis to penetrate the vagina of MAO a minor aged 17 years.
3. The Appellant denied the charges. He was subsequently tried, convicted on both counts and sentenced to 3 years' imprisonment on the 1<sup>st</sup> count, and 10 years' imprisonment on the 2<sup>nd</sup> count.



4. Dissatisfied by both the conviction and the sentences, the Appellant filed an undated petition of appeal and a supplementary ground of appeal dated 24<sup>th</sup> October 2023; where he raised the following grounds of appeal:
  - i. That his right to a fair trial as enshrined in Article 50(2) of the constitution was contravened.
  - ii. That the trial magistrate erred in law and in fact in failing to evaluate the evidence on record and relied on insufficient uncorroborated and incredible evidence and came to a wrongful finding of convicting the appellant.
  - iii. That the essentials of the prosecution case were not proved to the required threshold beyond reasonable doubt.
  - iv. That the investigations were shoddy and incompetent and should not have warranted a conviction, and this occasioned a miscarriage of justice.
  - v. That the trial magistrate erred in law and in fact in relying on exhibits not produced in court.
  - vi. The trial magistrate erred in failing to appreciate that the evidence of identification of a single witness, in the circumstances of this case was not safe and accurate to be the basis of conviction.
  - vii. The trial magistrate erred in failing to appreciate that the evidence of identification parade fell short of the parade standing orders hence a nullity and an uncertainty of the case which was not proved beyond reasonable death.
  - viii. That the count of gang defilement was not proved beyond reasonable doubt.
  - ix. The trial magistrate erred in finding that the Appellant's sentence in two counts should run concurrently pursuant to section 12,14 of the Criminal Procedure Code and section 37 of the Penal Code.
5. The Appellant prayed that the appeal be allowed and both convictions and sentences be set aside.
6. This being a first appeal, this Court has to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent findings and conclusions. (See *Okeno vs. Republic* [1972] EA 32). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in *Ajode v. Republic* [2004] KLR 81.
7. The Respondent called a total of six witnesses whose evidence was as follows:
8. PW1 MAO testified that she was 17 years when the ordeal happened. Her birth certificate showed the date of birth as 26<sup>th</sup> December 2000. Same marked MFI-1. That she comes from Sega and a student at [Particulars Withheld] College of Technology. That on 28<sup>th</sup> April 2018 at about 6.30 pm she left Mama Liz supermarket and started walking home. She went on to state that at about 6.50pm she had reached Sega Dispensary when a motorbike from Ukwala stopped and the rider asked her where she was going. They were two people on the motorbike both of whom were strangers to her. That the rider was dark and had scars on the hands. That the Appellant was a passenger. That she passed them. That the same motorbike went ahead of her about 70 meters ahead and made a U –turn. She got suspicious. That she called one Boaz who was her friend and informed him that she was not safe and that he should come and get her and that he answered in the affirmative. It was her testimony that the pillion passenger (the appellant herein) took out a machete and demanded that she surrender all that she carried the shopping items worth Kshs 2458/-, money Kshs 2500/= and her phone make-Tecno. That the appellant then demanded that she gets on top of the motorbike but she hesitated whereupon he slapped her with a



panga. So she got onto the motorbike and she requested them to take her to her mother to get more money. She testified further that they took her behind Segga Dispensary then to a swampy area in a plantation. She testified that the appellant appeared know the background of her friends well. That they informed her that her friend Morgan was living in a big bungalow while Limo had a 3-bedroom house in Maseno. That both Limo and Morgan called and they asked the assailants to go for Ksh 7000/= but the duo kept quiet. That then called her mother RAO using her phone and informed her that she had been kidnapped and that the criminals wanted money. That her mother sent a total of ksh 10,100/=. That the criminals asked for her M-pesa pin number and that they transferred the money to one Sylvester Okuku Sande. Further, she stated that the appellant asked for sexual favors but she informed him that she was a student. That the appellant then informed her that he would force her to have sex with both of them and call more people who passed by. That the appellant was the first to force himself on her. That the appellant forced her to lie down and then he tore her pants and forcefully inserted his penis inside her vagina as she struggled. That the appellant used a condom. She stated that when the appellant was done, the other man came and also defiled her but without using a condom. That in the process, PW1's mother called and so they ordered her to dress up in a hurry, and that they informed her mother that she should go to Florida. That they abandoned her at Segga Air strip and they went away. That she sat down and cried. Her father came and that she informed him that she had been defiled. That her mother joined them later and they went Busia County Hospital for treatment. She identified the treatment notes marked MFI 2a, P3 form MFI 2b, Pants 3a, brown hooded jumper 3b, grey t-shirt beaded 3c. It was her testimony that when she met the duo, it was not dark yet, and later when they transacted she could see them using the phone light. She maintained that the Appellant is the one who defiled her and stole her items. She was later recalled and stated that she participated in an identification parade comprised of eight people and that she was able to identify the appellant herein.

9. PW2 was RAO, who testified that she is a teacher at [Particulars Withheld] Girls Sec School and the mother to the complainant. She testified that the appellant was a stranger to her and that she came to know him when she took PW1 for the identification parade on 29/4/2019. She went on to state that on 28/4/2018, she left the complainant at home near Segga Dispensary and went to Segga town. That she left her with her father and informed her that she would later go shopping as the father had given her Kshs 5000/=. That at 7 pm, she got back but PW1 was not home. That she called her but her number was not going through. That at about 9pm PW1 called and claimed that the kidnappers were killing her, that they wanted money. That PW2 sent a total of ksh 10,100/=. That she called PW1's father and briefed him of the kidnapping. That later on, they were able to get their daughter at the Segga Airstrip and took her to Busia County Hospital and that she reported to Segga Police station where she was referred to Ukwala police station.
10. PW3 was JOO, then a teacher at [Particulars Withheld] School. He stated that PW1 is his daughter and his second-born child. He went further to state that on 28/4/2018, he was at his home at Segga until 3.00pm when he left for Segga town. That he left PW1 in the house with her female friend. That he stayed at Segga town until 11 pm. That at that time he called his wife (PW2) to open the gate for him, but she informed him that their daughter had been kidnapped and that she was at Jera junction. He stated that he went to the junction but he did not find her. That it was around midnight. That his wife also went around looking for PW1. That he finally found her at Ukwala junction. He testified that when he found PW1, she was crying and that her clothes were soiled and who informed him that she had been defiled. That he took her to Busia County Hospital. That his wife reported to the police the following day. That he recorded his statement on 1<sup>st</sup> May 2018. He did not know the culprits. That his daughter had been abducted at around 7.00 PM and that it was past midnight when he found her.

On cross-examination, he stated that he was just going round and that he found the complainant.



11. PW4 was Risper Onyango, a clinical officer from Busia County Hospital. She testified that on 29/4/2018 at 2.09 Am, Mwent to the said hospital. One Loice attended to her. That Mclaimed that she had been kidnapped and defiled by two people at about 7.00 Pm. That her clothes were soiled. That she complained of pain on her thighs and left leg. That M complained that she was in much pain and had blood in her urine. That on 20th June 18, PW1 went with a P3 for which she filled. That her patient No. was 25XX6, and that the patient had changed clothes. That patient claimed that she had also been beaten, her left leg was still in pain, her labia was bright pink and that the discharge was thick and mucoid. She produced treatment notes as exhibit 2a and P3 form as exhibit 2b.

On cross examination, she stated that it was one Loice who attended to the complainant in the first instance that night at 2.00 Am when she arrived.

12. PW5 was No. 23XX73 Chief Inspector Timothy Kwemen Munyolmo based at Ukwala police station. He testified that he had the identification parade form for Christopher Oundo. He went further to state that on 29<sup>th</sup> April 2019 at 1420-1430 hours, he assembled seven people of same height and appearance with the appellant. That he asked the appellant if he consented with the parade and he said “ni sawa”. That he recorded his response and he appended his signature. That he asked the appellant if he wanted to appear with a friend or a lawyer and who indicated that he would appear alone. That he asked the suspect to choose between numbers two and six so that he was neither first nor last, he chose to stand between one and two. That the witness was outside all the while, she could not see the parade members. That he then called the complainant and directed her to choose the perpetrator, and that the perpetrator could be present or absent. That the complainant went through the line and touched the appellant. That the appellant indicated that he was satisfied but did not know the complainant. That he appended his signature on the parade form and likewise the appellant appended his signature. He produced the parade identification form as Exhibit 4.

On cross examination, he stated that he was a witness and that he conducted the parade. That the appellant was agreeable to the parade and that the complainant touched him once on his chest and that the appellant signed the form. That they do not force people to parade.

13. PW6 was PC Martin Wanyonyi. He stated that he was the investigations officer in the case. That on 29<sup>th</sup> 04 2018, he was in the office when Mreported a case of gang defilement and robbery with violence which had occurred on 28<sup>th</sup> April 2018. She had been treated at Busia County Hospital and discharged. That she booked the report in the OB. That she had soiled clothes which she was wearing at the time of the incident that he kept them as exhibits. He reiterated PW1’s statement in chief as what was recorded on the Occurrence Book (O.B). That he issued a P3 form to PW1. That on 27<sup>th</sup> April 2019 the suspect was arrested for shop breaking around Sega area. That they then called the complainant and an identification parade conducted. That the appellant was then charged. That they arrested the brother of the appellant who was connecting to the line of Sylvester Okuku. He produced the items recovered as exhibits.

On cross examination, he stated that on 29<sup>th</sup> April 2018 the complainant brought exhibits. That he was in the office. That he recorded the statement of PW1’s father on 1<sup>st</sup> May 2018 and started investigations immediately. That he requested for M-pesa statement, the money was already transferred to another line. That one Erick Oundo Odwaro (not a witness) had claimed that the line belonged to Christopher Oundo (the appellant). That the offence happened on 28/04/2018 at 6.50 pm. That the pillion passenger was described to have a gap in his teeth and a running scar on his face. That initially he did not know the appellant, and that the assistant chief is not a witness in the case.

14. At the close of the prosecution’s case, the court ruled that the prosecution had established a prima facie case against the appellant who was subsequently placed on his defense.



15. DW1 Christopher Oundo stated that on 27<sup>th</sup> April 2019 at 2100hrs, at Wedewo Trading Centre he was arrested by the assistant chief and a police officer as a suspect for shop breaking and stealing that had happened. That he was taken to Sega. That at 11.00 hours he was transferred to Ukwala police station. That the following day the complainant for shop breaking was called and who indicated that he was not the suspect. That he was returned to the cells where he stayed until 30<sup>th</sup> April 2019. That at 8.00 Am the following day, he was charged and the complainant withdrew the case. That the DCIO requested for more time and that he be detained for further investigations. That at 1300 hours, the DCI called him to his office. That he saw the complainant sit close to the officer in question. That he was asked if he knew the lady. That at 1400 hours an identification parade was conducted wherein the complainant pointed him out. That on 2<sup>nd</sup> May 2019, he was charged as per the charge sheet.
16. The appeal was canvassed by way of written submissions. The Appellant submitted that the trial magistrate erred by relying on documents that were merely marked for identification but not produced as exhibits, as a basis of a conviction. He submitted that these documents include inter alia: birth certificate, identification parade form, P3 form treatment notes and the safaricom communication data. On this, he relied on the case of Augustine Felix Otieno Vs. Republic Criminal Appeal No.E038 Of 2021 where Hon. Fred A. Ochieng (J) “...a document marked for identification is not yet an exhibit before court.”
17. The Appellant submitted further that the trial magistrate erred in appreciating the uncorroborated, inconclusive evidence of identification of a single eye witness under difficult condition without testing it with great care.
18. The Appellant submitted further that the evidence of the identification parade fell short of Chapter 46 parade standing orders. He also contended that the offence of gang defilement was not sufficiently proved in that inter alia; that the documents and other items were not produced as exhibits; that PW1 was examined on 29<sup>th</sup> April 2019 ie one year later as per PW4’S evidence; that no DNA or forensic test pursuant to section 36 *Sexual Offences Act* was done to connect perpetrator direct to the crime; that complainant was 17 years and some months thus should be deemed 18 years. Finally, the Appellant contended that the trial magistrate erred in not finding that the sentences in the two convictions should run concurrently. The Appellant prayed for an acquittal.
19. On the other hand, the Respondent submitted that the elements of both counts were well proved beyond reasonable doubt thus the convictions should be upheld. On the issue of identification, the Respondent submitted that PW1 testified thus: “When I met the duo it was not dark. When they transacted i saw their faces using the light.” (see page 8, line 26-27 of the Record of Appeal). That PW6 led evidence that the Appellant was identified in the identification parade. Learned counsel for the Respondent sought for the dismissal of the appeal.
20. I have considered the evidence tendered before the trial court, its judgment plus the submissions on appeal and find the issue for determination is whether the Respondent proved its case on every count beyond reasonable doubt.
21. Before delving into the merits of the appeal, i will first deal with the offence of robbery with violence, the requisite ingredients and how Courts have appreciated its prosecution.
22. The Penal Code defines robbery in section 295 as follows;

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to



obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

23. In the process of prescribing punishment for the offence of robbery, the Penal Code in Section 296(2) provides for the offence of robbery with violence in the following manner;

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.

24. In Criminal Appeal No. 116 of 2005 (Ur), Johana Ndungu V Republic the Court of Appeal listed the ingredients of the offence or robbery with violence as follows;

- i. If the offender is armed with any dangerous weapon or instrument; or
- ii. If he is in the company of one or more other person or persons, or;
- iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.

25. In Criminal Appeal No. 300 Of 2007, Dima Denge Dima & Others Vs Republic, the Court stated that the ingredients of the offence of robbery with violence are appreciated disjunctively. It is, therefore, proper to convict an offender in instances where only one of the ingredients is proved.

The Court observed: - .....The elements of the offence under Section 296(2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence....

26. In the case of Oluoch -Vs- Republic {1985} eKLR 549, the Court observed that proof of any one of the above ingredients is enough to sustain a conviction under Section 296(2) of the Penal Code.

27. Deriving from the foregoing, the offence of robbery with violence is made up of two parts. The first part is the robbery and the other part is the aspect of violence.

28. In the instant case, the record has it that the complainant was attacked by two persons who were armed with a panga. That the appellant asked the complainant to board the motorbike and that when she refused the appellant slapped her with the panga/machete. That on the element of stealing, PW1 stated that “the pillion passenger demanded that i gave him everything i had ‘leta kila kitu uko nayo’ to which she hesitated. The passenger removed a panga which was in his trouser. I had shopping worth Kshs 2458/=, tissue, star soft, dental soap, bar soap shoe polish/brush and toothpaste. I gave them my mobile Tecno phone. I had Kshs 2500/=. I had airtime in a card.” (See page 7, line 1-6 of the Record of Appeal). PW6 corroborated PW1’s testimony that her items were stolen. Indeed, the complainant was at the time threatened with violence if she refused to part with all her items and money. The appellant was in the company of another person and that they had an offensive weapon namely a sword/panga with which they used to threaten the complainant of harm should she fail to hand over her property.

29. As regards the aspect of identification, the complainant stated that the incident took place around 6.50 pm or thereabouts and that she was able to see the faces of the perpetrators and further was able to when the duo transacted the money and that the phone light enable her to see them. Besides, the duo later went ahead to defile her in turns and that she was able to see their faces. In fact the complainant was able to pick out the appellant in an identification parade conducted by PW5. Even though the incident took place during the night, the complainant was able to identify the appellant as one of her attackers. In the case of Kiarie Vs R [1984] KLR 739 the Court of Appeal held that evidence of identification/



recognition at night must be absolutely watertight to justify a conviction. Hence, the court must be satisfied that the circumstances of the identification are favourable and free from possibility of error before it can safely make it the basis of a conviction. In *Maitanyi vs Republic*, (1986) KLR 196 the court set out what constitutes favourable conditions for a correct identification by a sole testifying witness as follows: -“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

30. In *Wamunga vs. Republic* (1989) KLR 426 it was held thus: - “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 conviction.”

31. I am also aware of the guidelines set by the Court of Appeal in the case of *Mwaura vs. Republic* [1987] KLR 645, wherein it was held, inter alia, that:

“In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light”.

32. In *Anjononi and Others vs Republic*, (1976-1980) KLR 1566 it was held that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

33. In *Nzaro vs Republic* (1991) KAR 212 and *Kiarie vs Republic* (1984) KLR 739 by the Court of Appeal held that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

34. In the celebrated case of *R vs Turnbull & Others* (1973) 3 ALL ER 549, the Court held as follows on the factors to be considered when the only evidence turns on identification by a single witness and held that:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? 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? 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.”

35. From the above evidence and backed by the guidelines in the foregoing authorities, I am satisfied that the complainant properly identified the appellant as the assailant. She had ample time to see him at the



time her items were seized from her as well as at the time when the assailants transferred the money from her phone into another number as well as during the sexual intercourse by the assailants. Consequently, I am satisfied that the offence of robbery with violence was well proved beyond reasonable doubt and hence the finding by the trial court on this count was quite sound and must be upheld.

36. Turning to the second count, it is noted that the Appellant was charged with an offence of gang defilement contrary to section 10 of the *Sexual Offences Act* no. 3 of 2006 which provides that;

“Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.”

37. It was PW1’s testimony that the appellant asked her for sexual favors but that she informed him that she was a student. That the appellant then pointed out to her that he would force her to have sex with both of them and even invite more people who passed by to join in the sexual intercourse. That the appellant forced her to lie down whereupon he tore her pants and forcefully inserted his penis inside her vagina as she struggled. That the appellant had a condom. That when he was done, the other assailant took over and defiled her but without a condom.

38. The offence of defilement requires three elements to be proved beyond reasonable doubt. These are age, penetration and identity. In the case of Charles Wamukoya Karani Vs R [2015] eKLR it was held that the critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant.

On age, PW1 marked for identification her birth certificate that showed her date of birth as 26<sup>th</sup> December 2000. The same was later produced by PW6 the investigating officer as P Exhibit 1. This was sufficient proof that the complainant was 17 years old at the time of the incident and therefore a minor.

On the element of penetration, the same is described in section 2 of the *Sexual Offences Act* as the partial and complete insertion of the genital organs of a person into the genital organ of another person. PW1 testified thus

“...they removed my tights and tore my pants. The appellant sheathed his penis. He had a condom. The appellant was forceful. He inserted his penis in my vagina. He was on top of me for two minutes. I kept struggling. The other guy also raped me without a condom.”

PW4 Risper Anyango testified that she is the clinical officer, among those who attended to the complainant at Busia County Hospital on that fateful night. She presented the duly filled P3 form which showed that the complainant had inter alia had pain in her thighs, she had blood in her urine. On examination of the genitalia, the labia were bright pink, the discharge was thick and mucoid. She concluded the probable weapon being blunt object/penis /rape. She produced the treatment notes as exhibit 2a and the duly filled P3 form as exhibit 2b. There was thus evidence of penetration since the complainant’s evidence coupled by that of the clinical officer has laid that to rest.

39. On the aspect of positive identification, the question is whether the prosecution proved beyond reasonable doubt that it was the accused person herein who committed the offences. The accused has denied committing the unlawful acts leading to the said offences. The question is, who then robbed with violence and defiled MAO? What does the evidence adduced by the prosecution reveal? From the onset, the burden of proof lies on the prosecution throughout the trial and that burden does not shift to the accused person even if the accused chose to remain silent as that is his constitutionally guaranteed



right. [See Article 50(2) (i) of the Constitution]. In addition, the accused has the right not to give any self-incriminating evidence. [See Article 50(k) of the Constitution].

40. PW1 testified that “When I met the duo it was not dark. When they transacted I saw their faces using the light.” (see pg 8, line 26-27 of the Record of Appeal). That PW6 led evidence that the Appellant was identified in an identification parade.
41. The question is whether this evidence by PW1, being a single witness alleging to have identified the perpetrator at night was sufficient to find the accused guilty of the offence of murder. That being the issue here, I must examine the law on reliance on such evidence. In *Wamunga vs Republic* (1989) KLR 424 the Court of Appeal stated as follows regarding the evidence of identification generally:

“It is trite law that where the only evidence against a defendant is evidence on 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.”
42. Similarly, the Court further cited its own decision in *Abdala bin Wendo & Another vs Republic* (1953), 20 EACA 166 where it held:

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”
43. The necessity for the trial court to warn itself of the dangers of relying on the evidence of visual identification by a single witness was also dealt with by the Court of Appeal in *Kisumu Criminal Appeal No. 20 of 1989, Cleophas Otieno Wamunga vs Republic* where the Court observed that 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. The court stated that whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the accused based on the evidence of such identification.
44. PW6 PC Wanyonyi the investigation officer in this case testified in chief that they arrested the brother of the Appellant who was connecting to the line of Sylvester Okuku who was the alleged recipient of the money that had been sent by Pw2. However, he was not charged for the said robbery or made as a witness for reasons best known to the prosecution. The said Sylvester Okuku was not traced by the police. An identification parade was conducted by PW5 Chief Inspector Timothy Kwemen Munyolo led evidence that ...the complainant went through the line and touched the accused. That the accused said he was satisfied but did not know the complainant.... The Appellant herein in his defence evidence denied being involved in the crimes alleged.
45. Looking at the entire evidence, it is quite clear from the complainant’s version that the appellant herein was one of her attackers on the date in question. She had earlier given the description of the assailants to the police immediately the incident took place and that she had no problem picking him out during



the identification parade conducted by PW5. I am satisfied that the issue of the Appellant's identity as one of the assailants herein was proved by the Respondent beyond any reasonable doubt. Hence, the finding by the learned trial magistrate was sound and must be upheld.

46. As regards sentence, it is noted that the Appellant was sentenced to serve three years' imprisonment on the offence of robbery with violence contrary to section 296(2) of the Penal Code as well as ten years' imprisonment for gang defilement contrary to section 10 of the *Sexual Offences Act* and that both sentences were to run consecutively. I find the sentences imposed by the trial court are rather lenient. The Respondent has not filed a notice of enhancement of sentence more particularly on count one which warrants a sentence of life imprisonment and that in the absence of such notice, I will not interfere with the sentence under that count. However, the Appellant's ground of appeal namely that the sentences ought to run concurrently has merit. As the offences were committed within the same transaction, it is appropriate that the sentences should run concurrently. Finally, it is noted that the Appellant did not secure bond during his trial and hence the sentence should commence from the date of arrest in conformity with the provisions of section 333(20) of the Criminal Procedure Code.
47. In the result the appeal succeeds only to the extent that the sentences imposed should run concurrently. The trial court's order on consecutive sentences is hereby set aside and substituted with an order that the sentences shall run concurrently from the date of arrest namely 27/4/2029. All the other grounds of appeal lack merit and are dismissed.

**DATED AND DELIVERED AT SIAYA THIS 20<sup>TH</sup> DAY OF DECEMBER, 2024.**

**D. KEMEI**

**JUDGE**

**In the Presence of**

Christopher Oundo Odhiambo.....Appellant

Mocha.....for Respondent

Ogendo.....Court Assistant

