



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.147, 148, 149 & 150 OF 2018

(An Appeal arising out of the conviction and sentence of Hon. H.M. NYAGA – CM delivered on 24th August 2018 in Makadara CMC. CR. Case No.1994 ‘B’ of 2016)

ABDI KAFAR AHMED.....1ST APPELLANT

MUSTAFA ABDI RIZACK.....2ND APPELLANT

ABDALLAH JAMA SULEIMAN.....3RD APPELLANT

HARUN ALI ELMI.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Abdi Kafar Ahmed (1st Appellant), Mustafa Abdi Rizack (2nd Appellant), Abdallah Jama Suleiman (3rd Appellant) and Harun Ali Elmi (4th Appellant) were charged three (3) others (who were however acquitted) with the offence of **Robbery with Violence** contrary to **Section 296(1)** of the **Penal Code**. The particulars of the offence were that on 14th July 2016 at Eastleigh Estate, Muratina Road within Nairobi County, the Appellants, jointly with others not before court, robbed KS of a motor vehicle registration No. [particulars withheld] Toyota Isis valued at Kshs.980,000/- and immediately after the time of such robbery wounded the said KS (the complainant). The Appellants were further charged with **sexual assault** contrary to **Section 5(1)(b)(2)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellants, jointly with others not before court unlawfully manipulated the hips of the complainant so as to cause her vagina to be penetrated with a metal rod. They were further charged with **abduction in order to subject grievous harm** contrary to **Section 260** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Appellants, with others not before court abducted the complainant in order to subject her to grievous harm. They were finally charged with **attempted rape** contrary to **Section 4** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellants intentionally and unlawfully attempted to cause their penises to penetrate the vagina of the complainant without her consent. The Appellants pleaded not guilty to the charges. After full trial, they were acquitted of the charge of **robbery with violence** contrary to **Section 296(1)** of the **Penal Code**. They were however convicted of the second count of **sexual assault** contrary to **Section 5(1)(b)** of the **Sexual Offences Act**, **abduction** contrary to **Section 260** of the **Penal Code** and **attempted rape** contrary to **Section 4** of the **Sexual Offences Act**. For the second, the Appellants were each sentenced to serve twenty (20) years imprisonment. For the third, each Appellant was sentenced to serve seven (7) years imprisonment and finally for the fourth, each Appellant was sentenced to serve fifteen (15) years imprisonment. The Appellants were aggrieved by their conviction and sentence. Each Appellant filed a separate appeal challenging the conviction and sentence.

For the purpose of this appeal, the separate appeals by the Appellants have been consolidated. In their respective petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of the evidence of identification that lacked credibility and had obvious inconsistencies that if the trial court had cautioned itself it would not have arrived at the decision to convict the Appellants. The Appellants were aggrieved that the trial court relied on extraneous evidence and circumstances to reach the verdict finding the Appellants guilty of the charges. In particular, the Appellants were aggrieved that the trial court had relied on evidence purportedly received from informers without affording the Appellants the opportunity to question such informers. The Appellants were aggrieved that they were convicted of the sexual offences yet the evidence did not establish the respective charges, and further, the evidence was not sufficiently corroborated. The Appellants faulted the trial magistrate for failing to properly evaluate the evidence adduced by the prosecution witnesses and that of the Appellants in their defence and thereby arrived at an erroneous determination finding them guilty as charged. The Appellants took issue with the fact that their respective alibi defences were not considered before the trial court reached the impugned decision. The Appellants questioned the manner in which the trial court considered their mitigation. In particular, two of the Appellants were aggrieved that they were sentenced to serve a custodial sentence yet it was established that they were children when the alleged offences were committed. The Appellants accused the trial court of exhibiting manifest bias towards them and thereby drew

inferences in his finding that was not supported by evidence. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their conviction and set aside the sentences that were imposed on them.

During the hearing of the appeal, this court heard oral submission made by Mr. Ngatia for the 2nd Appellant, Mr. Noor for the 1st Appellant and Mr. Kareru for the 3rd and 4th Appellants. Ms. Atina responded on behalf of the State. The thrust of the Appellants' counsel submission was that the Appellants were not identified by the complainant as the persons who committed the offences. It was their argument that the circumstance under which the offence occurred precluded the Appellants as persons who committed the offences. After the occurrence of the crime, the complainant was taken to hospital. She did not give description of her assailants to the police. She recorded three statements with the police. With each subsequent statement, her memory improved in regard to the persons she alleged sexually assaulted her. The Appellants' counsel urged the court to evaluate the manner in which the identification parade was conducted. They posed that the identification parade was riddled with such irregularities that it was not possible for this court to arrive at a verdict that the complainant had indeed identified the Appellants and had further reconfirmed that identification in the identification parade held by the police. Learned counsel urged the court to take into consideration the circumstances of the Appellants' arrest which clearly suggested that the Appellants had long been profiled even before investigations had commenced. They further submitted that the trial process was tainted by unsubstantiated allegations made by the prosecution during trial which ultimately rendered the fair trial of the Appellants unattainable. They urged the court to consider the entire circumstances of the case and the existence of tensions caused by business rivalry at Eastleigh as a factor that led to the arrest and subsequent charging of the Appellants. They complained that the Appellants' respective defences were not considered before the trial court reached the impugned verdict. In the premises therefore, they urged the court to allow the appeal, quash their respective conviction and set aside the sentences that were imposed on them.

Ms. Atina for the State opposed the appeal. She submitted that the Appellants were recognized by the complainant during the commission of the offence. Some of the Appellants were known to the complainant prior to the commission of the offence. She submitted that the evidence by identification adduced by the prosecution was watertight as it was confirmed when the complainant pointed out the Appellants in an identification parade conducted by the police. She further submitted that medical evidence adduced by the prosecution established that indeed the complainant was sexually assaulted. She submitted that the prosecution adduced sufficient culpatory evidence which placed the Appellants at the scene of crime. Any contradictions or gaps in the prosecution's case were easily resolved by the explanation given by the prosecution witnesses. In the premises therefore, Learned Counsel urged the court to dismiss the respective appeals lodged by the Appellants.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charges brought against the Appellants to the required standard of proof beyond any reasonable doubt.

In the present appeal, it was common ground that the Appellants were convicted on the basis of the evidence of identification. There was no other evidence that the prosecution alleged connected the Appellants to the crime other than the evidence of identification. It is now settled that where a court relies on evidence of identification to convict an accused person, it must scrutinize the evidence with care so as not to cause miscarriage of justice. The court is required to caution itself of the dangers of convicting an accused person on the basis of the evidence of identification especially where the identifying witness is single. The Court of Appeal in **Victor Mwendwa Mulinge -vs- Republic [2014] eKLR** held thus:

“More often than not, the conviction of an accused person solely on the evidence of a single identifying witness poses some uncertainty. In Maitanyi -vs- Republic [1986] KLR 198, this court stated as follows:

“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this 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.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”

The court further held that:

“The complainant's identification of the Appellant on the basis of his appearance, as vague as it was, naturally causes us considerable anxiety and discomfort. In AJOE V REPUBLIC [2004] 2 KLR 81 this court held that before an identification

parade is held, a witness should be asked to give the description of the person sought to be identified. Ideally, that advanced description of the person ought to be in writing and the same, together with the parade forms, availed to the trial court so that it can compare the description given of the accused. It is doubtful whether the Appellant (complainant?) could vividly remember his assailant eleven days after the robbery, given the short period that he had interacted with him and the prevailing circumstances.”

As regard the manner in which an identification parade ought to be conducted, the court in **David Arum Okullo & Another -vs- Republic [2017] eKLR**, held thus:

“Identification parade procedures are regulated by Police Force Standing Orders now under the National Police Service Act 2011, and previously under the Police Act (Cap.46) which has since been repealed. The procedure for identification parades were also laid out in the cases of R V. Mwangi s/o Manaa (1936) 29 and Ssentale v Uganda (1968) E.A.L.R 365. The rules include the following:

- *The accused has the right to have an advocate or friend present at the parade;*
- *The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;*
- *Witnesses should be shown the parade separately and should not discuss the parade among themselves;*
- *The number of suspects in the parade should be eight (or 10 in the case of two suspects);*
- *All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;*
- *Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and*
- *As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.”*

In the present appeal, according to the complainant, on 14th July 2016 at about 5.10 p.m. as she was driving from Eastleigh where her medical clinic was situate to South B where she intended to pick her son from school. She testified that when she reached near Pumwani, a motor vehicle stopped ahead of her thus blocking the road. She stopped her vehicle. Four people emerged from the car and entered her motor vehicle. She was removed from the driver’s seat and pushed to the rear seat of the vehicle. She was sandwiched between two of the men while two of them sat in the front seat of the vehicle, including the driver’s seat. They then drove off in the motor vehicle. While the vehicle was moving, one of the two men cut her hijab with a small knife. He also cut her dress that she had worn underneath. He then lifted the T-shirt that she was wearing and burnt her left breast and abdomen area using a cigarette. One of the men ordered her to perform oral sex with him. The complainant complied because she was scared. The two men fondled her breast and her vagina. They also sucked her breasts. They pulled down her panties and attempted to insert a metal bar into her vagina. She resisted. The complainant testified that she was beaten and injured during the ordeal. The men took photographs of her vagina using a mobile phone. She was told to leave Eastleigh and go back home. She was driven a short distance before the men alighted from the car. She did not know what happened the next. She found herself admitted at hospital. She was in hospital for nine (9) days. She testified that she knew the 1st and the 3rd Appellants prior to the incidents as she had seen them near her business premises. As for 2nd Appellant, he met him for the first time on the date of the incident. He met the 4th Appellant two days prior to the incident. She testified that she was able to point out the Appellants in an identification parade that was later held by the police. She confirmed that in total, she identified seven identification parades where she was able to point out her assailants. It is noteworthy that three of the accused before the trial court that she had identified in the identification parade were acquitted.

PW2 Sgt Issa Hassan, an Administration Police Officer then based at Uhuru Camp told the court that he knew the complainant’s husband who at the time was the County Police Commander at Mandera. He recalled that on 12th July 2016, the complainant called her and told her that she was being harassed by some boys. She went to the complainant’s clinic but did not find the boys. He advised the complainant to report the incident at Eastleigh Police Patrol Base. On 14th July 2016 at about 5.00 p.m. he received a call from the complainant. Unfortunately, the complainant did not communicate with him. He sensed there was a problem. He informed Sgt. Biwott of the incident. PW3 Apc. Ahmed Mohammed Omar testified that at the material time he was attached at Eastleigh North AP Post. He recalled that on 14th July 2016 at about 5.30 p.m. he was informed that the complainant was in danger. He was given this information by Sgt. Biwott. A report was made of her abduction. Her motor vehicle registration number was circulated. Soon thereafter he received information that the complainant’s motor vehicle had been seen at Gulf I Petrol Station within Eastleigh area. He immediately went to the scene and found the complainant slumped on the driver’s seat. She appeared to have been injured. He drove her to hospital. The complainant lost consciousness when she saw him. She did not tell PW3 the persons who had assaulted her.

PW4 SSP. Ali Nuno was the OCPD of Kayole Police Division at the time. He was a relative of the complainant’s husband. He had known the complainant since she got married to his relative. He narrated how on 14th June 2016, a month before the complainant’s assault, he received intelligence report that there was a group of young Somali men who were involved in robberies. The suspects resided in a house in Komorock. The suspects were the 1st and 2nd Appellants and 5th accused in the trial who was acquitted. On 14th July 2016 he got information of the complainant’s attack. He told the court that when he received this information, he received another tip off from an informer that the persons who were involved in the assault on the complainant were the 1st, 2nd and 3rd Appellants. He later got information that another suspect was the 4th Appellant.

From his testimony, it was clear that he had not interviewed the complainant at the time. He claimed that the complainant was still in a comma. PW4 gave instructions to PW5 Cpl Cosmas Ruto, PW6 PC Vincent Maroka and PW7 PC Vincent Odhiambo all of Kayole Police Station to look for the Appellants. It is instructive at this juncture to point out that the crime in which the complainant was a victim occurred in Starehe Division and not in Kayole Division where PW4 was the OCPD. When questioned about his involvement in a case that occurred in another police division, PW4 explained that he was involved in the case because he went in hot pursuit of the suspects. What became clear

from his evidence however is that he got involved in the case because the victim happened to be his relative's wife. The relative also happens to be a senior police officer. The unorthodox manner in which PW4 conducted the initial investigation became apparent when the PW4 realized that he could not conduct the investigations. It was then that he took the Appellants to Pangani Police Station and requested that they be detained. However, the police at the police station refused to detain the Appellants because no statement had been recorded from the victim nor had any investigations to be conducted to point to the Appellants as suspects in the commission of the crime. PW4 was undaunted. He sought orders from the court to have the Appellants detained while investigations were being undertaken. This attempt was thwarted. PW4 had no alternative but to release the Appellants.

PW4's involvement in the investigations did not end there. It was apparent from the evidence adduced that he was actively involved in the investigations even when the matter had been taken over by police officers from Pangani Police Station. There are photographs which PW4 took of the Appellants, which on his own admission, he showed to informers to confirm if the Appellants were the ones who were involved in the attack on the complainant. The issue of photographs would come significant when the complainant was called upon to identify her attackers in an identification parade that was held at Pangani Police Station by PW8 Assistant Superintendent of Police Samuel Agutu and CIP Margaret Abae. The parade was conducted on 27th July 2016. The 3rd Appellant in the identification parade form made the remarks that the whole identification parade was a set up by the OCPD Kayole because he had shared their photographs with the complainant. As regards the conduct of the identification parade, the members of the identification parade in all the seven identification parades that were held on that day were the same. The only difference in the seven identification parades that were held was the insertion of each of the Appellants in the lineup.

PW12 Henry Kiptoo Sang from the Government Forensic Laboratories testified that his examination of the complainant's clothes did not reveal any DNA material from the Appellants. PW10 Dr. Joseph Maundu saw the complainant on 26th July 2016. He noted that the complainant had sustained multiple injuries on her body including several burn marks on her left breast and sternum, tenderness on the lower abdomen, multiple bruises on her back, bruises on the medial aspect of the left elbow, multiple bruises on the right leg, bruises on the left posterior part and calf muscles and bruises on the right thigh. He formed the opinion that the complainant had been injured using both a blunt and a hot object. He also noted that there were healing injuries on the pubic region. There were also scratches around the anal area. He produced Post Rape Care form and the P3 form as *Exhibits 1* and *2* respectively.

When the Appellants were put to their defence they denied committing the offences. They attributed their travails to PW4 who had taken their photographs and who all along had suspected them to be criminals. They denied assaulting the complainant or being at the scene where the crime took place.

As stated earlier in this judgment, the prosecution relied solely on the evidence of identification to secure the conviction of the Appellants. There was no other evidence to connect the Appellants to the crime. For a court to convict an accused on the sole evidence of identification, such evidence must be watertight as to exclude the possibility of error or mistaken identity. In the present appeal, it was clear from the complainant's testimony that she was subjected to a dehumanizing ordeal. She was beaten and sexually assaulted. She testified that although she was not penetrated, she was made to perform oral sex on one of the men who had abducted her. The issue before this court is whether in the traumatic circumstances that she went through, she was able to identify her assailants. From the testimony adduced by the prosecution witnesses, particularly PW3, it was clear that the complainant did not give the description of her assailants to the police after the incident. PW4 testified that the Appellant was in a comma for a substantial period that she was in hospital. The complainant was admitted in hospital for nine days. During this period, she was not interviewed by the police with a view to establishing from her the identity of her assailants.

As observed earlier in this judgment, it is imperative, where the prosecution seeks to rely on the evidence of identification to record the impression formed by the identifying witness of the perpetrator of the offence at the time of commission of the offence. This impression includes, for instance, the clothes that the assailant was wearing and the description of his appearance. This includes the height, complexion and any other distinguished features of the assailant. In the present appeal, it was clear that the complainant gave no such descriptions in the various statements that she recorded with the police. Her claim to the effect that she had met some of the Appellants prior to the incident does not ring true. This court reached the conclusion that the reason why the investigators deemed it necessary to conduct an identification parade was because the complainant did not know the identity of the persons who had attacked her.

This court would have accepted the evidence of police identification parade as supporting the complainant's testimony of identification if the identification parade had not been bungled. Instead of each of the seven identification parades containing different members, the same members were present in all the seven identification parades including the four parades where the Appellants were involved. It would not take a genius or a rocket scientist to conclude that the said identification parades were designed for the sole purpose of enabling the complainant to point out to the odd men out in the parade as suspects. Further, this court concludes that it was not beyond the realm of conjecture that the complainant was shown the photographs of the Appellants by PW4 before the identification parades. PW4 admitted in evidence that he had indeed taken the photographs of the Appellants prior to the holding of the said identification parades.

In the circumstances of this case, this court is unable to reach a finding that the complainant had identified the Appellants during the incident. The complainant did not give the description of her assailants in the first report that she made to the police. It was therefore impossible for this court to compare her impressions on identification with the identification that was later undertaken by the police when they held the identification parades. The evidence of identification was therefore not watertight as to exclude the possibility of error or mistaken identity.

Another aspect of this case that was disturbing was the participation of PW4 in the investigations. As observed earlier in this judgment, PW4 was a relative of the complainant. He is a senior police officer. He told the court that immediately after he got information that the complainant had been assaulted, he went looking for the Appellants on reliance on information that he had received from an informer. What was instructive was that prior to the incident, PW4 had already profiled the Appellants as suspects in robberies within his area of jurisdiction. PW4 immediately arrested the Appellants even before he had taken a statement from the complainant. From his own evidence, he could not interview the complainant at the time because she was in a comma. PW4 made attempts to have the Appellants placed in custody while awaiting to investigate the case. His attempts were however thwarted when the police station with jurisdiction to investigate the case i.e. where the crime was committed, declined to detain the Appellants before the complainant had recorded her statement. It was clear to this court that PW4's involvement in the case tainted the entire investigation to the extent that the observation made by the Appellants that they were victims of PW4's vendetta cannot be said to be without merit.

In the premises therefore, upon re-evaluating the evidence adduced before the trial court, and the submission made before this court on this appeal, this court is unable to reach a finding that the complainant identified the Appellants. The evidence of identification that was relied on by the prosecution has many gaps which raises doubt that the complainant identified the Appellants as her assailants. The circumstances of the Appellants' arrest raises suspicion as regard the exact motive of the Appellants' arrest and arraignment before court. These doubts will be resolved in the Appellants' favour. The Appellants' respective appeals are hereby allowed, their conviction is quashed. The custodial sentences that were imposed upon them are set aside. The Appellants are acquitted of all the charges that were brought against them. They are ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE