



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM: D.S. MAJANJA J.**

**CRIMINAL APPEAL NO. 103 OF 2018**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 105 OF 2018**

**BETWEEN**

**FRED MOSE NYAKANGI .....1<sup>ST</sup> APPELLANT**

**GEOFFREY NYAKUNDI OUKO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from the original conviction and sentence of Hon. S. N. Makila, SRM dated 25<sup>th</sup> September 2018 at the Magistrate's Court at Kisii in Criminal Case No. 1222 of 2017)**

**JUDGMENT**

1. The appellants, **FRED MOSE NYAKANGI** and **GEOFFREY NYAKUNDI OUKO** were charged together with 7 other accused. In count 1, the accused were jointly charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence are that 10<sup>th</sup> June 2017 at around 2200 hours at Rianyamwamo village in Kegati Sub-location within Kisii while armed with crude weapons namely pangas, rungas and axes, they robbed EGK of Kshs 600/-and immediately before the time of such robbery used physical violence to the said EGK.
2. In Count 2, the accused persons were jointly charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence were that on 10<sup>th</sup> June 2017 at around 2200 hours at Rianyamwamo village in Kegati Sub-location within Kisii while armed with crude weapons namely pangas, rungas and axes, the robbed PON of Kshs 36,000/-and immediately before the time of such robbery used physical violence to the said PON.
3. In Count 3, the accused persons were jointly charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence are that 10<sup>th</sup> June 2017 at around 2200 hours at Rianyamwamo village in Kegati Sub-location within Kisii county while armed with crude weapons namely pangas, rungas and axes, they robbed KNM of Kshs 35,000/-and immediately before the time of such robbery used physical violence to the said KNM.
4. The 1<sup>st</sup> appellant faced two additional counts of gang rape contrary to **section 7** of the **Sexual Offences Act**. The particulars in Count 4 were that the accused, on 10<sup>th</sup> June 2017 at around 2200 hours at Rianyamwamo village in Kegati Sub-location within Kisii while armed with crude weapons namely pangas, rungas and axes caused his penis to penetrate the vagina of EGK, one after another without her consent.
5. The particulars of Count 5 were that the 1<sup>st</sup> appellant on 10<sup>th</sup> June 2007 at around 2200 hours at Rianyamwamo village in Kegati Sub-location within Kisii while armed with crude weapons namely pangas, rungas and axes caused his penis to penetrate the vagina of INN, one after another without her consent.
6. The 1<sup>st</sup> appellant was convicted on Count 1 and Count 4 which was reduced to rape contrary to **section 3** of the **Sexual Offences Act**. He

was sentenced to 10 years' imprisonment on Count 1 and 7 years' imprisonment on Count 4 with both sentences ordered to run consecutively. The 2<sup>nd</sup> appellant was sentenced to serve 10 years' imprisonment upon conviction on Count 1. Both appellants now appeal against conviction and sentence.

7. Before I deal with the grounds of appeal I must recall that I am guided by the principle that the duty of the first appellate court is to re-appraise the evidence and reach an independent conclusion as to whether to sustain the conviction bearing in mind that the court neither heard or saw the witnesses testify (*Okeno v Republic* [1972] EA 32). In order to proceed with this task, it is necessary to set out the evidence as it emerged before the trial court.

8. The prosecution evidence was as follows. INN (PW 1), a child aged 14 years, testified on oath that on the material night she was asleep when she was awoken by 6 of 7 people armed with panga and a gun. One of them was dressed in police uniform and they had torches. She told the court that there was a solar bulb outside the house. She was ordered to go to the sitting room where she found her father, her sister in law, EGK (PW 3) and other men. The assailant beat up her father with a panga as they demanded money. One of the men, whom she could not identify, pulled her to another room and sexually assaulted her as he threatened her with a panga. She recalled that the incident lasted for about half an hour and she was able to identify one assailant who had a missing tooth. After the gang left, they raised alarm causing people to come and rescue them. She was taken for examination and treatment at the Kisii Teaching and Referral Hospital on the next day. When called to the identification parade, she identified the 2<sup>nd</sup> appellant as he had a missing tooth. She also identified the 1<sup>st</sup> appellant at the dock as among the suspects who robbed them. She testified that she did not know the appellant prior to the incident.

9. PON (PW 2) recalled that he was with his wife EGK (PW 3) on the material night when the house was broken into and about 7 assailants entered. The assailants had pangas and one of them was dressed in police uniform. They ordered him to lie down and started demanding money from him and his wife as they slapped her with a panga. She gave them Kshs 600/- as he directed them to take Kshs 3,600/- from his trouser pocket. When they asked for more money he referred them to his father. Two assailants remained in his house watching him as the others went with his wife to his father's house. As the robbers led away his wife, he heard his uncle calling out his name. He said that he could not identify any of the assailants.

10. EGK (PW 3) was with her husband, PW 2, and their two children when she heard a loud bang at their door. The assailants entered the house and took him to the bedroom. They ordered him to lie down as they demanded money. She testified that she was assaulted with a panga and gave them Kshs 600/- as PW 2 directed them to take Kshs 3,600/- from his trouser pockets. The assailants then frog marched her to her father's house. He opened the door and they entered the house where they found PW1 still sleeping. The assailants assaulted him with panga as he gave them Kshs 35,000/=. She recalled that one of the suspects had a missing tooth. One suspect pulled her away from the rest and sexually assaulted her before they all left. They raised alarm whereupon police officers arrived and she went to KTRH on the next day for examination and treatment. On the following day, the chief brought one of the arrested suspects. She was able to identify him as the one who had raped her since she saw him using the torchlight and moonlight when they were outside the house. She attended the identification parade and was able to identify the 2<sup>nd</sup> appellant who had a missing tooth. She said that the incident lasted for about 40 minutes.

11. APC Immanuel Sentero (PW 4) testified that on the night of 10<sup>th</sup> June 2017, he was on patrol in Nyagata area with his colleagues when they heard screams at about 10pm. They proceeded to the scene and found that some residents of that area had been robbed and two women had been raped. On the following day, at about 2.00pm, the area assistant chief informed them that a suspect had been arrested. When they went to the scene they found the 1<sup>st</sup> appellant being beaten by a mob, and they re-arrested him.

12. Corporal Wilson Kiptum (PW 5) recalled that on the material night he was on patrol when they went to the home of PW 2 and PW 3 where a robbery and rape had taken place. With the help of community police, they arrested the suspects who were identified in an identification parade. Inspector Nicholas Wambugu (PW 6) testified that he did the identification parades in conformity with the law and regulations for all the suspects except the 1<sup>st</sup> appellant. He told the court that the 2<sup>nd</sup> appellant was identified by PW 1 and PW 3.

13. A clinical officer from KTRH (PW 7) testified that on 21<sup>st</sup> June 2017 he examined PW 1 who had a history of physical and sexual assault. She was aged between 15-16 years. She had been treated prior to his examination and he relied on the PRC form which noted that she had lacerations and bruises on the labia minora and the vaginal wall. The hymen was broken and there was a whitish yellowish discharge. A high vaginal swab revealed pus cells and epithelial cells. The approximate age of injuries was 10 days. The possible assault weapon was a blunt object and an erect penis. The patient sustained harm. He also examined PW 3 who had already been treated. On examination it was noted that she sustained a dark tender swelling on the left shoulder joint area. He relied on a PRC form which noted bruises on the external genitalia and labia. There were also bruises on the wall and the hymen was broken. The urine was tested and it was found to be bloody, had white blood cells and red blood cells. A high vaginal swab was taken and it revealed multiple epithelial cells, pus cells and red blood cells. The probable assault weapon was a blunt object and an erect penis. The degree of injury was harm. He produced the two P3 forms as exhibits.

14. When put on their defence the appellant elected to give sworn testimony. All the accused persons elected to give sworn testimonies. The 1<sup>st</sup> appellant testified that he was arrested on 11<sup>th</sup> June 2017 at around midday by members of public and taken to the scene where a robbery had taken place the previous night. He testified that on the night of the robbery he was at home with his wife Risper Nyamache and that he never left his house on the material night. He stated that he did not know any of the people who had been arrested with him.

15. The 2<sup>nd</sup> appellant testified that on 16<sup>th</sup> June 2017 at about 10 pm he was in his house when some people arrived at his house and handed him to police officers by luring him into a Government vehicle to assist with investigations. He was arrested and taken to Kisii Police Station where he was subjected to an identification parade. He stated that he was never given a chance to change clothes or bathe prior to the parade and that the parade was conducted in the absence of an advocate or close family. He said that he did not know the complainants.

16. The offence of robbery with violence under **section 296(2)** of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence

to any person (see *Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, *Oluoch v Republic* [1985] KLR 549 and *Ganzi & 2 Others v Republic* [2005] 1 KLR 52).

17. The evidence before the trial court as I have set out satisfies the elements of robbery with violence. PW 1, PW 2 and PW 3 gave clear and graphic evidence of how a group of assailants armed with weapons, including pangas and a gun, attacked them and inflicted injuries and in the course of the attack stole money. PW 1 and PW 3 also gave an account of the sexual violence inflicted on them. The key issue raised by the appellant in their respective petitions of appeal and written submissions is that of identification. Both appellants contended that there was insufficient evidence pointing to them as part of the assailants and that the trial magistrate failed to assess the evidence and come to a conclusion that they were not involved in the robbery.

18. Counsel for the respondent supported the trial magistrate's decision and submitted that the 1<sup>st</sup> appellant was properly identified and arrested immediately after the incident while the 2<sup>nd</sup> respondent was identified in an identification parade.

19. The principles upon which the court must assess identification in difficult circumstances are now well settled. The duty of the trial court is to examine the evidence carefully in order to avoid a case of mistaken identity and therefore a miscarriage of justice. I accept the exhortation of the Court of Appeal in *Wamunga v Republic* [1989] KLR 424 where it was stated that:

Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant 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 defendant in reliance on the correctness of the identification.

20. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see *R v Turnbull* [1967] 3 ALL ER 549).

21. The prosecution case was that the 1<sup>st</sup> and 2<sup>nd</sup> appellants were identified by INN (PW 1) and EGK (PW 3). Both witnesses, in their testimony, confirmed that the appellants were strangers. PW 1 described the condition of lighting as follows, "There was solar lighting. It was a bulb. I saw around 6 – 7 people armed with pangas, torches and one was in a police uniform one had a gun." As regards the appellants, PW 1 stated that, "We went to the police station to identify the suspects who attacked us. I cannot recall the day of the attack. I can identify some of them. I can see them in court. One of them had a missing tooth." When cross-examined about the nature of light, she told the court that when the robbers came into the room, the light in her room was off. She also stated that the 2<sup>nd</sup> appellant, who had a missing tooth, is the one who demanded money from her father.

22. In her testimony, PW 3, stated that she had a solar lamp in her house and the assailants had torches. She also recalled that one of the assailants who demanded money from her father in law had a missing tooth. As regards the 1<sup>st</sup> appellant, she stated that she saw him using a torch and when he pulled her outside the house, she saw him by the moonlight. Moreover, she returned home from the hospital, and the 1<sup>st</sup> appellant had been arrested by the Chief, she pointed him out. She identified the 2<sup>nd</sup> appellant at the identification parade as he had a missing tooth. PW 3 also confirmed PW 1 was present when the assailants were sharing money.

23. The question then is whether, in those circumstances, the identification of the appellants was positive and free from error. The appellants were strangers to PW 1 and PW 3 and even though the circumstances obtaining at the time of the robbery were favourable for positive identification due to the nature of lighting and the length of time they spent with the assailants and the close interaction, the identity of the suspects was required to be tested by an identification parade.

24. As regards the 1<sup>st</sup> appellant, PW 3 identified him after he had been arrested by the Chief as a suspect. This was a dock identification as the circumstances under which the suspect was identified by the complainant were suggestive that he was in fact the assailant. As I understand the law, identification parades are useful but they are not always mandatory and the trial court may rely on dock identification if there is sufficient evidence to assure itself that such identification is safe and free from error. In *Muiruri & Others v Republic* [2002] 1 KLR 274 it was stated:

It is believed because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of...we do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like *Abdulla bin Wendo versus Republic* [1953] 20 EACA 166, *Roria versus Republic* [1967] EA 583 and *Charles Maitanyi versus Republic* [1986] 2KLR 76 among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases the courts have emphasized the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that the evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if it is satisfied on facts and circumstances of the case the evidence must be true and is prior thereto the court warns itself of the possible danger of mistaken identification. [Emphasis mine]

25. In this case, PW 3 did not describe the 1<sup>st</sup> appellant or give any indication of why she identified him as the person who robbed and raped her, since the testimony of PW 5 was that he was arrested on the same night of the incident, was he dressed in the same clothes he was wearing when he robbed and raped PW 3. I also note that there was inconsistent evidence regarding the arrest of the 1<sup>st</sup> appellant which undermines the issue of identification. PW 4 told the court that on 10<sup>th</sup> June 2017 at about 2 – 3pm, he was informed by the area Chief that a suspect had been arrested and was being beaten. He proceeded there and found it was the 1<sup>st</sup> appellant who had been identified by a witness.

On the other hand, PW 3 stated that he arrested the 1<sup>st</sup> appellant on the night of 9<sup>th</sup> – 10<sup>th</sup> June 2017. This inconsistency was in my view material since the identity of the suspect was in issue and was dependent on dock identification as the suspect was brought to PW 3 to identify him. *In James Tinaga Omwenga v Republic NKU CA Criminal Appeal No. 143 of 2011[2014] eKLR, the Court of Appeal expressed the view that:*

The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless.

26. As regards the 2<sup>nd</sup> appellant, PW 3 recalled that she identified the 2<sup>nd</sup> appellant because he had a distinctive feature namely a missing tooth. When the identification parade was done, she was able to pick him out but PW 6 recorded on the parade forms she was able to identify him as he is the one who took her outside and there was moonlight. He did not record that PW 3 identified him because he had a distinctive feature. In my view and from the authorities that I have cited, it is at the identification that the complainant's recall is confirmed. I would expect that an important and distinctive feature would be highlighted and recorded. For PW 6 to fail to record this aspect of the identification is not merely an irregularity but goes to the weight of the evidence of identification.

27. For the reasons I have set out, I find and hold that the identification of the appellants was not watertight. I therefore allow the appeal, quash the conviction and sentence. The appellants are set free unless otherwise lawfully held on a separate warrant.

**DATED and DELIVERED at KISII this 15<sup>th</sup> day of APRIL 2019**

**D.S MAJANJA**

**JUDGE**

Appellants in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.