



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL APPEAL NO. 8 OF 2017**

**KITONYO KALUKU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the Original conviction and sentence in Kitui Chief Magistrate's Court Criminal Case No. 694 of 2012 of by E. Boke S P M on 02/02/17)*

**J U D G M E N T**

1. **Kitonyo Kaluku**, the Appellant, was charged with various counts thus:

**Count 1 – Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. Particulars of the offence were that on the **30<sup>th</sup> day of November, 2012** at about **1.00 a.m.**, at **[particulars withheld] Village, Itoleka Location**, in **Katulani District** within **Kitui County**, jointly with others not before Court, while armed with pangas, robbed **M M**, one mobile phone make **Nokia 1620** valued at **Kshs. 4,500/=** and at or immediately before or immediately after the time of such robbery used actual violence to the said **M M**.

**Count 2 – Rape** contrary to **Section 3(1)(a)(c)** as read with **Sub-Section 3** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **30<sup>th</sup> day of November, 2012** at about **1.00 a.m.**, at **[particulars withheld] Village, Itoleka Location**, in **Katulani District** within **Kitui County**, unlawfully and intentionally caused his penis to penetrate the vagina of **M M**, a person aged **27 years** without her consent.

In the alternative he was charged with the offence of **Committing an Indecent Act with an Adult** contrary to **Section 11A** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **30<sup>th</sup> day of November, 2012** at about **1.00 a.m.**, at **[particulars withheld] Village, Itoleka Location**, in **Katulani District** within **Kitui County**, intentionally committed an act of indecency with **M M**, a person aged **27 years** by touching her private parts namely vagina, buttock and breast with his hands.

**Count 3 – Attempted Defilement** contrary to **Section 9(1)** as read with **Sub-Section 2** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **30<sup>th</sup> day of November, 2012** at about **1.00 a.m.**, at **[particulars withheld] Village, Itoleka Location**, in **Katulani District** within **Kitui County**, attempted to penetrate the vagina of **R K**, a child aged **11 years** with his penis.

In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **30<sup>th</sup> day of November, 2012** at about **1.00 a.m.**, at **[particulars withheld] Village, Itoleka Location**, in **Katulani District** within **Kitui County**, committed an act of indecency with **R K**, a child aged **11 years** by touching her private parts namely vagina, thighs and breast with his hands.

2. Facts of the case were that on the night of **30<sup>th</sup> November, 2012** at about **1.00 a.m.** PW1 **M M** was asleep in the same bed with her minor son and PW2 **R K** a minor. A person broke her window and entered her bedroom. It was raining heavily. There was thunder-storm. The person who was armed with a knife with sharp edges threatened to kill her if she screamed. She held the knife that cut her on the palm of her hand. The person forcibly removed her pant and violated her sexually. On finishing he removed the blanket and touched PW2's biker and lifted up her skirt but PW1 told him that she was a child and he left her. The person took her cellphone and left through the door. In the morning PW1 sent PW2 to call her sister-in-law, PW3, **A M K**. They reported the matter to **Itoleka Police Station**. PW4 No. **334478 CIP David Mumasi** conducted an identification parade where the Appellant was identified as the assailant. He was charged.

3. When put on his defence the Appellant stated that on **29<sup>th</sup> December, 2012** he was engaged in his business as a 'bodaboda' operator. He worked until **7.00 p.m.** He went home and slept with his wife. The following morning he worked until **10.30 a.m.** when a customer gave him an assignment to deliver luggage at some place. On his way back he encountered a crowd of people at **Kakuuli Shopping Centre** led by the area Chief. He stopped to enquire what was happening. A shop had been broken into. He was searched and found carrying a 10 litre jerrican of petrol which was alleged to have been stolen from the shop. He was beaten and taken to **Itoleka Police Station**. The customer

escaped. The police promised to look for the person but failure to find the person would result into him being answerable. On 30<sup>th</sup> December, 2012 he was taken to Court and charged with the offence of **Burglary and Stealing**. He was taken to hospital where his blood samples were taken for purposes of being taken to the Government Chemist for examination. Thereafter he was arraigned in Court again and charged.

4. The learned Magistrate analyzed evidence adduced and reduced the charge of **Robbery with Violence** to that of **Stealing** contrary to **Section 275** of the **Penal Code**. Further she found that the Appellant was properly identified therefore convicted him on the main counts and sentenced him thus:

**Count 1** – To serve **two (2) years imprisonment**.

**Count 2** – To serve **twenty (20) years imprisonment**.

**Count 3** – To serve **eighteen (18) years imprisonment**.

The sentences were to run concurrently.

5. Aggrieved by the conviction and sentence the Appellant appealed on grounds that:

- The identification in the circumstances was not positive.
- The offence of rape was not proved.
- The identification parade did not meet the Rules of the Force Standing Orders as the Investigating Officer was involved in conducting the identification parade.
- There was a possibility of PW2 having been coached on what to state being the sister of PW1.

6. The State through learned State Counsel **Mr. Mamba** opposed the Appeal arguing that the Appellant was identified on an identification parade and he was a person the Complainant had known though not by name.

7. This is a first Appellate Court that is duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. (**See Okeno vs. Republic (1973) EA 32**).

8. The incident happened at night. The prevailing circumstances were that there was thunderstorm, the rain was heavy when the intruder entered the bedroom through the window. It is therefore a case of visual identification at night. In the case of **Wamunga vs. Republic (1989) KLR 426** the Court of Appeal stated that:

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

Factors that the Court ought to take into consideration in interrogating whether visual identification was positive were stated in the case of **Republic vs. Turnbull & Others (1976) 3 ALL ER 549** thus:

*“..... 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 much time 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 as 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.”*

9. PW1 and PW2 also stated that they identified the Appellant by voice. PW1 in particular stated that she asked him to utter the words he uttered on the fateful night namely, ‘**Nyamazaa Nitakuua**’.

10. In the case of **Chogo vs. Republic (1985) IKLR 1** the Court of Appeal stated that:

*“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, that the witness was familiar with and it recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.”*

11. PW1 stated that she heard the window breaking and she saw the person already inside the room. The person was wearing a striped shirt, no trouser but had a marvin gaye hat. The person told her to stop screaming or he would kill her. The person had a torch but there was lightening. The light enabled her to see. She said that she identified the person because he was of a medium height and width. That she used to see the person passing along the road. However on cross examination she stated that in her statement she stated that the person was slim not big. It was the evidence of **No. 334478 CIP David Mumasi** on cross examination that per the first report of PW1 she only felt a

person touching her on her bed since it was raining. The person raped her and she realised that he was naked with only a shirt and his face was covered. That she did not indicate if she could identify the person if she saw him. The witness stated that he could not conduct a parade if the person stated that he could not identify the culprit and the Investigation Officer was better placed to answer the questions.

12. It is submitted that the identification parade did not meet the Rules of the Force Standing Orders and the Investigation Officer took part in conducting the parade. In the case of **David Mwita Wanja & 2 Others vs. Republic Criminal Appeal No. 117 of 2005** it was stated that:

*“The purpose for, and manner in which identification parades ought to be conducted have been a subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936 the predecessor of this court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Order see R V Mwongo s/o Manaa (1936) 3EA CA 29. There are a myriad other decision, on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic (1986) KLR 422 where the court stated at page 424:*

*“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interest of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at the improperly conducted parade, it will be concluded that the witness that the man in the dock, is the person of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”*

*Indeed, Police Form 156 which is designed pursuant to force standing orders issued by the commissioner of police under Section 5 of the Police Act Cap 5 (K) and which is invariably used in the conduct of identification parades expressly provides for 16 or requirements which ought to be observed....”*

13. It is indicated the parade form was produced in evidence. I have perused the entire record and found it missing hence I have no opportunity of analyzing it.

14. The only evidence regarding how the parade was conducted is for PW4. He stated thus:

*“..... I left Itoleka Police Station in the year 2014 November. I’m aware of this case. On 2/12/2012 I was at Itoleka Police Post at around 3.30 P.M. There was an I.O. by the name PC Kilatya, who was investigating this case. He approached me with a request that I conduct an identification parade. I gathered 8 people to attend the parade. I also asked him to bring the accused person so that I could explain to him why we were conducting an ID parade. I did not know his name by then but when he was brought, he told me that his name is Kitonyo Kaluku. When he was brought, I explained to him why we were conducting the identification parade and he accepted. I also informed him that he was free to change positions and clothings after identification by each and every witness. I also told him that he was free to call a friend or anyone to witness the parade if he wanted and he told me that he had no one or any representative to call. I then prepared the 8 people I took them to the communication office of our station so together with accused person, they were 9 people. I also told him while inside the communication office that he was free for change and to choose the position to stand. He first chose to stand between the 4<sup>th</sup> and 6<sup>th</sup> person so he was the 5<sup>th</sup> person in the parade. I had two (2) complainants or witnesses at that time....”*

Of importance is where the Appellant was held prior to being taken to the parade. Was it at a place where witnesses who later identified him could see him or not. This witness did not tell the Court this important aspect. The allegation that the Investigation Officer participated in conducting the parade cannot be disputed because he was not availed as a witness.

15. In the matter the Investigation Officer was stated to have been paralyzed. PW5 No. 54343 Corporal Joseph Karanja who took over the police file and exhibits had no idea of how the case was investigated.

16. Circumstances under which the Appellant was arrested were therefore not divulged. The witnesses PW1 and PW2 were called to identify suspects on a parade. The only version of how the Appellant ended up at the police station was what was stated by the Appellant in his defence. If indeed PW1 used to see the Appellant passing by the roadside then nothing could have been easier than stating that he was familiar to her. The contradiction in her evidence as to how the person was built cannot be overlooked.

17. PW2 a minor was woken up by screams and was ordered to go and sleep. It was her evidence that she saw the person as she did not cover her head. He could recall his facial appearance but could not recall what the person was wearing.

18. None of the witnesses stated something peculiar that made them identify the culprit.

19. Taking into consideration the circumstances in which the offence was committed, there was a possibility of mistaken identity. The Appellant was arrested on **17<sup>th</sup> December, 2012** pr the date indicated on the charge sheet. In his defence he stated that he was arrested on **3<sup>rd</sup> December, 2012** and charged with the offence of **Burglary and Stealing**. Then when he was taken to Court for mention after fourteen (14) days he was taken back to the police station and charged with another offence of **Robbery with Violence, Rape and Attempted Defilement**.

20. In his evidence PW5 stated that he knew nothing about the case. In the premises there are doubts that were established regarding

identification of the Appellant as the perpetrator of the offence. Therefore it was unsafe for the learned Magistrate to convict on all Counts.

21. In the result the Appeal is meritorious. It is allowed. The conviction is quashed and sentence imposed set aside. The Appellant shall be set at liberty unless otherwise lawfully held.

22. It is so ordered.

**Dated, Signed and Delivered at Kitui this 15<sup>th</sup> day of February, 2018.**

**L. N. MUTENDE**

**JUDGE**