



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 187 OF 2013**

**FRANCIS INYANJE INGOSI.....1<sup>ST</sup> APPELLANT**

**MICHAEL SHIVEKA MUSONYE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal from the original conviction and sentence in Criminal Case Number 487 of 2015 in the Principal Magistrate's court at Kapsabet –Hon. G. Adhiambo (Ag. SRM)***

**JUDGMENT**

1. The appellants herein **FRANCIS INYANJE INGOSI**, and **MICHAEL SHIVELA MUSONYE** were jointly charged with the offence of Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the offence were that between the nights of 3<sup>rd</sup> and 4<sup>th</sup> May 2012 at Shigonge Village within Nandi County jointly with others not before the court, being armed with a huge stone and pangas robbed Mable Isombi of her household good including electronics, food stuffs, assorted kitchen utensils, assorted clothes and cash kshs 11,000/- all valued at kshs 163,850 and at or immediately before or immediately after the time of such robbery threatened to use actual violence in the said Mable Isombi.

2. The 1<sup>st</sup> accused is faced with another count of gang rape or defilement contrary to Section 10 of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence are between the nights of 3<sup>rd</sup> and 4<sup>th</sup> May 2012 the 1<sup>st</sup> and 2<sup>nd</sup> accused persons herein while at [Particulars withheld] village within Nandi County in association with the 2<sup>nd</sup> accused intentionally and unlawfully caused his penis to penetrate the vagina of LJ (*particulars withheld*) a child aged 16 years old.

3. The 1<sup>st</sup> accused is also faced with an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence are between the nights of 3<sup>rd</sup> and 4<sup>th</sup> May 2012 the 1<sup>st</sup> accused person herein while at [Particulars withheld] village within Nandi County intentionally and unlawfully caused his penis to come into contact with the vagina of LJ (*particulars withheld*) a child aged 16 years old.

4. The 2<sup>nd</sup> accused is also faced with another count of gang rape of defilement contrary to Section 10 of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence are between the nights of 3<sup>rd</sup> and 4<sup>th</sup> May 2012 the 2<sup>nd</sup> accused while at [Particulars withheld] village within Nandi County in association with the 1<sup>st</sup> accused intentionally and unlawfully caused his penis to penetrate the vagina of LJ (*particulars withheld*) a child aged 16 years old.

5. The 2<sup>nd</sup> accused further faced with an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence are between the nights of 3<sup>rd</sup> and 4<sup>th</sup> May 2012 the 2<sup>nd</sup> accused person while at [Particulars withheld] village within Nandi County intentionally and unlawfully caused his penis to come into contact with the vagina of LJ (*particulars withheld*) a child aged 16 years old.

6. The appellants pleaded not guilty to the charges and a trial ensued in which the prosecution presented the evidence of a total of 9

witnesses. When placed on their defence, both the appellants gave sworn testimonies and called one witness. At the end of the case, the trial court found that the prosecution had established its case beyond reasonable doubt.

7. A summary of the prosecutions case was as follows:

On 3<sup>rd</sup> April 2012 at about 12 midnight, PW1 Mable Isombi was asleep in her house when robbers who were about 4 in number and armed with pangas stormed into her house after breaking the door with a huge rock. The robbers, who had torches, ransacked the house and carted away the household goods and cash highlighted in the charges stated herein above.

8. According to PW1, the robbery incident took about 3 hours as the attackers demanded that PW5 (LJ) prepares food for them which they ate before two of them defiled PW5 before leaving the house.

9. PW1 was at the time of the robbery in the house with her children PW2 (SJ) and PW5 (LJ). Both PW2 and PW5 corroborated the testimony of PW1. The robbers bound PW1 and PW5 with ropes which were produced in court as exhibits.

10. PW5 a minor aged 15 years at the time of incident narrated how 2 of the robbers led her out of the house to an isolated place where they raped her in turns. She identified her attackers as the 1<sup>st</sup> and 2<sup>nd</sup> appellants. PW2 was able to identify the 1<sup>st</sup> appellant as a person he knew before the incident while the 2<sup>nd</sup> appellant was picked out from a crowd by PW5 who was able to identify him as one of the people who defiled her on the night in question.

11. PW5 was examined and treated by PW4, a Clinical Officer who also produced P3 form as an exhibit in court. PW6 P.C. Simon Kipkurui and PW7 P.C. Linda Juma investigated the case while PW9 conducted an identification parade in which the witnesses were able to identify the appellant as the suspects in the robbery and defilement incident.

12. When placed on his defence the 1<sup>st</sup> appellant gave a sworn statement in which he denied any involvement in the offence and stated that he was, on the material night, at his home with his wife who testified as DW1. He explained that he was a boda boda rider and that on the morning of 4<sup>th</sup> May 2012, he received a telephone call from a police officer one Ali, from Cheptulu Police Post who told him to avail himself at the police post only for him to go to the said police post where he was surprised to learn that it had been alleged that he was involved in a robbery incident after which he was arrested and placed in the cells.

13. The 2<sup>nd</sup> appellant similarly tendered a sworn statement in his defence and denied any involvement in the robbery. He explained the circumstances under which he was arrested and took issue with the manner in which he was identified at an identification parade.

14. DW1 Rose Amukoto was the wife of the 1<sup>st</sup> appellant. Her testimony was that the 1<sup>st</sup> appellant was at home with her on the night that the robbery is alleged to have taken place and was surprised to learn that the 1<sup>st</sup> appellant was on 4<sup>th</sup> May 2012 arrested in claims that he participated in a robbery. She also stated that the police conducted a thorough search in her house on 5<sup>th</sup> May 2012 and that nothing was recovered from the search.

15. On cross examination, she stated that the 1<sup>st</sup> appellant used to go to the complainant's house before the robbery incident and that she had never heard the complainant say that her husband had defiled her child.

16. At the hearing of the appeal the appellant relied on their written submissions, which I have considered while Miss Mumu, state counsel, opposed the appeal and submitted that the prosecution had established its case against both the appellants. She urged the court to dismiss the appeal.

### **Analysis and determination**

17. This being a first appeal, my duty is to revisit the evidence presented before the trial court afresh, evaluate and analyze it in order to arrive at my own independent conclusion on the matter while bearing in mind that the trial court had the advantage of hearing the witnesses testimonies first hand and in the process observing their demeanor. See **Mark Oiruri Mose vs Republic [2013] e KLR.**

18. I find that the main issues for determination as follows:-

- a) The identification of the appellants as the assailants.
- b) Whether the prosecution proved its case against the appellants to the required standards.

19. It was not in dispute that the complainant was attacked by armed robbers on the night in question and that she was robbed of her household goods. The complainant's evidence on the sequence of events that took on the fateful night was corroborated by the evidence of PW2 and PW5 who were with her during the attack and witnessed the robbery and gang rape first hand. It was also not in dispute that PW5 was gang raped/defiled during the attack. The P3 form that was produced as exhibit 7a established that PW5 was sexually assaulted. The said report stated, in part, as follows:

**a) Torn pants, stained with brownish stain.**

**b) No visible suprapubi.....**

c) *Normal external genital.*

d) *Both Labia oedemators, reddered and tender, hymen torn , raw and tender minimal bleeding, cervix intact, painful vaginal examination, perineum intact, adjacent thighs, no visible bruises or swelling on thighs medially.*

e) *Brownish non-offensive discharge on examination finger*

f) *HIV –negative, DDRL-NR, pregnancy negative H.V.S. – Miscospsy- NAD, no spermatozoa, Hepatis B serface antigen negative.*

g) *Unconsented, intentionally, threatened with panga, forced penis penetration in sequence by 2 men, pulled outside her homestead, later clothing stains tied on the seats with rope resulting in soft tissue injuries.*

20. On identification, the evidence on record is in respect to visual identification at night by PW1, PW2, and PW5. The said eye witnesses testified that even though the incident took place at night, the robbers had torches which they used in their mission to rob and ransack the complainants house for a period of about 3 hours. The complainant stated as follows on the issue of visual night identification:

***“There was no electricity in the house. I saw them through their torch lights, they were searching the house and they us told not to scream.....I was able to identify two (2) of the intruders who are present in court. They took so long in the house and were criss crossing where I was with a lit torch. I had not seen them before. I saw accused 1 taking the laptop from my bedroom. Accused 1 had a blue trouser and a jumper.”***

On cross examination, she stated:

***“Every intruder had a torch which was lit. When I opened the door, the torches were directed at me. I could not identify who was flashing the torch at me.***

On cross examination by the 2nd she stated:

***“I identified you using torch light. You were leaning downwards. It was not dark. I used available light to identify you. I could not remember everything due to the prevailing confusion ..... I identified you at the parade after I recognized you in the house at the time of the incident. I had not seen you prior to the incident.***

21. PW2 testified that he identified the 1<sup>st</sup> appellant who was a boda boda operator as he used to come to their home to change oil on his motor cycle. He stated he saw him with the help of the light of the torches of his accomplices.

22. The offences in question were committed at night and hence the most critical issue in this appeal is whether the witnesses were able to identify the appellants. The eye witnesses' testimony (PW1, PW2 and PW5) was that each of the 6 robbers had torches and that they were able to see and identify them from the light emanating from the torches. In testing reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its issue, its position relative to the suspects among other considerations.

23. In the instance case, apart from the light from the torches, PW5 testified that she was able to identify the appellants clearly through the moonlight when the duo took her out of the house on the fateful night before defiling her at a nearby building that was still under construction. PW 5 stated as follows on how she was able to identify her attackers:

***“I saw him very well. There was enough moonlight it was almost looking like daytime. The persons who raped me are the 1<sup>st</sup> and 2<sup>nd</sup> accused. The person who was talking much is the 1<sup>st</sup> accused. He was the first one to rape me and he then signaled the 2<sup>nd</sup> accused who also raped me. Before the fateful night, I had seen the 1<sup>st</sup> accused severally. He used to come to our home to change oil of his motor cycle most of the time.....I saw the 2<sup>nd</sup> accused for the 1<sup>st</sup> time on the fateful night. On 10<sup>th</sup> May 2012 I was being taken to school to ask for permission to be away from school. I was with my father and my mother we were in a private vehicle and when we reached the stage a Sigongo, I saw the 2<sup>nd</sup> accused and identified him to my father.”***

24. From the above extract of the testimony of PW5, I am satisfied that the conditions were conducive for the identification of the appellants as the assailants. It came out clearly from the evidence of the prosecution witnesses that the robbers did not carry out the heinous crime in a rush or hurry. The evidence shows that they were not in a hurry to leave the complainants house. They took their time and even asked PW5 to prepare for them a meal of Ugali and omena (dagaa) which they also took their time to feast on before turning on the complainant's daughter (PW5), who was then a minor, and raped her in turns.

25. According to the complainant, the robbery incident took about 3 hours I am satisfied that there was ample time and opportunity for the witnesses to see and identify their attackers clearly. PW5 further stated as follows on cross examination by the 2<sup>nd</sup> appellant:-

***“The torches were on and our wall is white. You raped me and I cannot forget your face even if I was to meet you ten years from now.....I told the police that the 2<sup>nd</sup> person was tall and that I could recognize him on seeing him.....I cannot forget your face.....You did not cover your face.....I saw you.”***

26. This court notes that rape is an act that brings the victim and her attacker into very close and intimate contact. Infact at the time of the assault, the two people can be said to be 'one'. For these reasons I find that considering that the robbers were in the complainants house for a record 3 hours during which time PW5 even cooked for them a meal which they ate, they engaged their victims in conversation and that the 1<sup>st</sup> appellant was familiar to the witnesses. I find that the totality of the evidence that there was sufficient light from both the moon and the torches, I am satisfied that the appellants were positively identified by the witnesses. In the case of the 2nd appellant, PW5 was able to pick him out from a crowd at a market while the 1<sup>st</sup> appellant was a regular visitor to the complainant's home before the robbery incident. All the 3 witnesses who were present during the attack were able to identify the appellants at the identification parade that was conducted a few days after the robbery incident. It is acceptable in law that evidence of recognition is stronger than of identification because recognition of someone known to one is more reliable than identification of a stranger. But in **Wanjohi & 2 Others v. Republic** [1989] KLR 415, this Court held that "*recognition is stronger than identification but an honest recognition may yet be mistaken.*"

27. In the well-known case of **R V. Turnbull and Others** [1976] 3 All ER. 549 which has been referred to many times with approval and adopted by this Court, the Court of Appeal, Criminal Division, in England, warned of specific weaknesses which had appeared in the evidence of identification. In that case, the appellants were jointly convicted after a retrial, of conspiracy to burgle and were both sentenced to three years imprisonment. They disputed the evidence of identification and appealed against conviction and sentence. In his judgment, Lord Widgery. CJ, pointed out

***"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..."***

***All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger."***

28. In the instant case, the appellants were identified by the at least 3 prosecution witnesses who were present during the robbery incident and in this regard, I find that their conviction was founded on sufficient evidence.

29. In **Suleiman Juma alias Tom V.R. Criminal Appeal** No.181 of 2002 (Msa) the Court warned that "***where the life of an individual is at stake, the prosecution must be extremely careful not to bring evidence that in less than watertight.***"

30. Having regard to the findings and observations that I have made in this judgment, I find that the instant appeal is not merited and I hereby dismiss it.

**Dated and signed at NAIROBI this 6<sup>th</sup> day of December 2018.**

**W. A. OKWANY**

**JUDGE**

**Dated, signed and delivered in open court at Eldoret this 19<sup>th</sup> day of December 2018.**

**OLGA SEWE**

**JUDGE**

**In the presence of:**

Ms Mumu for the state

Appellants