

some goods were recovered near the gate to the appellant's home compound;

(v) The learned trial magistrate failed to evaluate material contradictions in the evidence; and

(vi) That the learned trial magistrate erred in law by rejecting the appellant's alibi defence.

The respondent's submissions.

5. Mr. Omwenga, learned counsel for the state supported the conviction and sentence. He submitted that the identification of the appellant was proper and that circumstances were ideal for positive identification. PW1 testified that electric lights were on and she could see that her attackers were armed with axes and pangas.

6. Mr. Omwenga further submitted that the robbers took the complainant's (PW1's) phone and her husband's phone. PW1 stated that it was the appellant who attacked and raped her. She was able to identify the appellant as he was a neighbour. The evidence of PW1 was corroborated by that of PW3 and PW4 who said that the lights were on when the gang struck. An identification parade was conducted and the appellant was identified.

7. PW6 who conducted the identification parade stated that there were eight (8) members. The appellant on being requested to be in the parade, chose to stand in between the 4th and 5th members at the identification parade. PW1 touched the appellant thereby identifying him. The appellant said he was satisfied with the parade and countersigned the identification parade form.

8. The stolen items were found near the appellant's home thereby suggesting the appellant's culpability in the offence. The appellant was given sufficient time to prepare for his case (trial), his case started on 22/7/2013. That was sufficient time to prepare for the hearing. Mr. Omwenga prayed for dismissal of the appeal.

Re-evaluation and analysis of the evidence

9. The oft cited case of *Okeno vs. Republic* [1972] EA 32 elucidates the duty of the first appellate court as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

Bearing in mind the above duty, we will re-evaluate and analyze the evidence tendered at the trial court.

10. It was the evidence of PW1, that she, her husband and four (4) children were at home on the night of 9/11/2012 when their home was invaded by robbers. She was robbed of her mobile phone and Kshs. 23,000/= which she told the robbers to take from her handbag when they threatened to cut off her husband's hand.

11. It was her evidence that electric lights were on in the house and she saw a group of about twenty (20) men who were armed with pangas and small axes. Her husband was robbed of Ksh. 4,000/=. The robbers kept on slapping them with the pangas.

12. In the course of the robbery she was taken to the corridor, ordered to sit down and strip naked. The robbers tore her clothes and started raping her. She was raped by four (4) men. Electric light was on in the house as they raped her. She identified the appellant who is a neighbour who lives about 1 ½ km

away from her home. She had known him since he was young. He was among the four assailants who raped her. She testified that she saw him vividly as electric lights were on. She saw his face and that he has a scar near his lips, he is black and short. She informed the court that she knows that he is called Silas. She could identify two others if she saw them. She testified that the robbers were in the house for two hours. She was injured on the foot, chest, right eye and on the head.

13. PW1 further adduced evidence that her daughters were removed from their room and taken to PW1's bedroom where they were raped. She could hear them screaming and crying in pain. The ordeal they were undergoing was interrupted when someone went to their aid and the robbers ran away. Administration police officers from Gisimbai also went to the scene. PW1 testified that when she went to her bedroom, she found S.M. (PW3) and J.M (PW4) naked. They told her that they had been defiled. PW1, PW3, PW4 and E were taken to hospital where they were examined and treated. PW1 was issued with a P3 form showing that she was raped. A Post Care report form was filled. She identified some of the items that were stolen from her house after they were recovered.

14. On cross-examination, PW1 said that the appellant wore a white striped shirt with grey colour and a jacket. She told the police that she identified the appellant among the robbers. On being recalled on 5/8/2013 for further cross-examination, PW1 informed the court that she saw the appellant's face and that he was wearing a khaki jacket. She did not see the colour of his shirt. She did not give the colour of the clothes the appellant wore at the first report. She reiterated that she knew the appellant since he was young and his name was Silas also known as "Sai".

15. PW3, S.M., a minor was sleeping in the kitchen in PW1's compound, with her sister. It was her evidence that people entered therein and started beating them. They were taken to the main house where she was stripped naked and defiled at the doorway to PW1's bedroom by two people. PW3 testified that she saw PW1 being raped along the corridor of the main house.

16. PW3 informed the court that she never identified the robbers. Later in her evidence, she indicated that she identified the appellant after his friend flashed (torch light) on his face. She indicated that she had seen the appellant at Givole on three occasions. He was the 2nd person to rape her. She further said that the robbers had torches that they were flashing in the house. She was injured on the thighs and on the back.

17. It was her evidence that the Assistant chief went to their aid and started shouting. The robbers ran away. She was taken to Vihiga district hospital where she was treated. On cross examination, she said that she knew the appellant by appearance.

18. PW4, J.M., a minor testified that at midnight while sleeping at the kitchen, some people entered therein and started beating her and PW3. They were taken to the main house and to their father's bedroom. She found her father, E, on the bed. He was naked. She was told to lie on top of him and she was defiled by one of the robbers. She testified that the robbers were flashing torches and they were armed with pangas, rungas and an axe. She identified none of them.

19. The next witness to testify was E, whom the magistrate recorded as PW4. He corroborated the evidence of PW1 in material particulars. He testified that electric lights in the house were on and that he and his wife were robbed of cash. He testified that the robbers were in the house for two hours. He corroborated PW1's, PW3's and PW4's evidence that they were raped. Some people went to their rescue. He was treated as he had sustained some injuries. He did not identify any of the assailants.

20. It is apparent that the learned trial magistrate was not meticulous when recording the numerical order of the witnesses who were testifying. Had she been, she would not have recorded that J.M., was PW4 and that E was also PW4. She would also have noted that Sammy Chelule had testified as PW2 and should not have been recorded him as PW5. Sammy Chelule should have been recalled to adduce evidence as PW2.

21. Having noted that PW2 and PW5 is one and the same person, for clarity of the record, we will refer to

Sammy Chelule in this judgment as PW2. He testified that while working at Vihiga District Hospital, he examined PW1 after the rape ordeal. He observed that she had visible bruises on both the left and right inner vagina. A high vagina swab showed presence of bacteria. There were dead spermatozoa in the urine. He confirmed that she was raped. PW2 produced her P3 form as Exh. 8 and Post Care Form as Exh. 7 and Lab Request Form as Exh. 9 and Treatment notes as Exh. 9.

22. PW2 also examined PW3 and observed that her hymen was torn, swollen and tender. There were bloodstains and a whitish discharge. A high vaginal swab revealed dead sperms. He concluded that the minor had been defiled. PW2 produced PW3's P3 form as Exhibit 12, Post care form as Exhibit 11 and treatment notes as exhibit 10 and a lab request form as exhibit 13.

23. PW2 further testified that he examined PW4 who had been defiled and physically assaulted on 11/10/2012. She was defiled by one man. Her vagina was injured, she was traumatized and depressed. Her hymen was torn, swollen and there was visible reddening. There were visible tears on the labia and slight tears on the anal region. She had a whitish discharge which had blood. A high vaginal swab revealed pus cells which signified infection. PW2 concluded that PW4 was defiled. PW2 produced her post care report form as exhibit 16, P3 form as exhibit 17 and medical notes as exhibit 14.

24. PW2 also examined Evans who had several injuries sustained from the attack. He treated him and assessed the injuries as harm. He produced Evan's P3 form as exhibit 18.

25. PW6, Chief Inspector Dalmas Ongere, conducted an identification parade in respect to the appellant. The parade members were eight (8). The appellant chose to stand between the 4th and 5th members. The witness, PW1, identified the appellant by touching. The appellant indicated that he was satisfied with the manner in which the parade was conducted and signed the parade forms. PW6 countersigned the same.

26. PW7, APC Paul Ng'eno, testified that on 21/2/2012 while at Gisambai AP camp, PW1 called him to report that she had seen the suspect who had robbed them of various items and cash. She wanted him to be arrested. PW7 proceeded to the area accompanied by another officer. PW1 pointed out the suspect's house. They knocked at the door, the appellant opened the door and he was identified by PW1. The appellant was arrested and taken to Vihiga police station.

27. On cross examination by the appellant, PW7 indicated that they went to PW1's house on the night of the robbery. She said that she would be able to identify the person who had robbed her of various items and cash. PW7 informed the court that he and other officers took PW1 to hospital on the night of the robbery.

28. The investigating officer, PC. Philip Gichuhi, adduced evidence as PW8. His evidence was to the effect that he was attached at Vihiga police station, crime office. On 10/11/2014 at 1.40 a.m. he was informed by the OCS of a robbery that had occurred at Gisambai. They went to the scene where they received a report of the robbery from PW1 and E. They took the two (2) with their two (2) daughters to Vihiga District hospital for treatment. The two (2) girls had been defiled.

29. PW1 told him that she recognized one of the suspects who was a neighbour. They went to PW1's village to trace the suspect. They met a group of villagers one of them reported that a bag had been dropped by the thugs near the gate to the appellant's house. PW1 identified the items in the bag as hers. They were produced in evidence.

30. On 11/11/2012, the complainants went to record their statements. PW1 reported that she could be able to identify two (2) of those who raped her. She reported that one was tall and slim and the 2nd stout short and black and had a scar on the lower lip. She knew him quite well as he hailed from their village. She said that she knew him but not his name.

31. It was PW8's evidence that on 21/2/2013, PW6 and APC Justito took two (2) suspects to the police station. The appellant was positively identified by PW1 in an identification parade as one of the people who robbed and raped her. The other suspect Nicholas Ida escaped.

32. On cross-examination, PW8 informed the court that PW1 said that she knew the appellant's appearance but not his name.

Defence case

33. The appellant in his defence informed the court that on 20/2/2013 he was sleeping when he heard people talking with his mother. He opened the door and four (4) police officers entered his house at 9.00 p.m. and handcuffed him. His house was searched but nothing was recovered. He was taken to Gisambai A.P. camp where he slept overnight. He was taken to Vihiga police station the next day where an identification parade was conducted. He was identified. He informed the court that he was not satisfied with the manner in which the identification parade was conducted as the complainant was his neighbour and she knew him quite well.

Determination of the appeal

34. The learned trial magistrate considered the evidence of the prosecution but made no finding on the defence of the appellant. This court being the 1st appellate court is duty bound to make a finding on the same. We will therefore revisit the appellant's defence in this judgment.

35. All the indicators in this appeal show that the appellant was convicted on the evidence of identification by recognition. In the case of **Anjoni & others Vs Republic (1976-80) 1 KLR 1566 at 1568**, the Court of Appeal held:-

“ recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

36. An analysis of the evidence shows that PW1 knew the appellant as a young man from their village. She was categorical that the appellant was in the gang of robbers that attacked her and family and raped her on the night of 9/11/2012. She testified that the appellant was the 2nd one to rape her. There was electric light in the house. This being the case, it is our finding that the circumstances were conducive for positive identification.

37. In her evidence in chief PW1 stated thus:-

“I was able to identify the accused in the dock who is a neighbour, he hails from a distance of 1 ½ km. I have known him since he was a tender age (sic). I saw him vividly as the lights were still on. He was among the four (4) people who raped me. I saw his face, he has a scar near the lips. He is black and short. I know he is called Silas they were in the house for 2 hours. They came at 11.00 p.m. and left at 1.00 a.m.”

38. On being cross examined, she said:-

“I told police I had identified you among the robbers. I told police officers I knew the persons who had robbed me.”

39. PW1's evidence was supported by that of PW8, the investigating officer who informed the court that PW1 had told him that she could be able to identify two (2) of those who had raped her. She gave a description of the two and indicated that the stout short black one with a scar on the lower lip hailed from their village and she knew him quite well but not his name.

40. It is not clear to this court at what point in time PW1 got to know that the appellant's name was Silas or Sai. What is clear beyond doubt is that the appellant lived in the same village as PW1. The appellant admitted this in his defence and even indicated that the identification parade conducted by PW6 was of no evidential value as the appellant was not a stranger to PW1. Secondly, it is PW1 who led PW7 to the appellant's house and he was arrested.

41. In the decision of **Kiarie vs. Republic [1984] KLR 739**, the Court of Appeal had this to say:-

“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction.”

42. In the instant case, the gang of robbers were in PW1’s and E’s house for 2 hours. There was electric light. PW1 was raped by the appellant. The court notes that PW1 was in very close proximity to the appellant when the incident of rape occurred at the hands of the appellant. She described him as a man from the village whom she had seen since he was of tender age. We are satisfied beyond a shadow of a doubt that the appellant was part of the gang that robbed of PW1 and PW2 of their cash and personal effects.

43. We find the evidence of PW3 shaky as to the identity of the appellant as having been among those that raped her. She at one time said that she did not identify the appearance of the persons that raped her, she later in her evidence said that she identified the appellant as the 2nd person to rape her.

44. We have addressed our minds to the decision in **R. Vs. Turnbull & others [1973] 3 ALL ER 549**, on the factors to be considered when the only evidence of identification is that of a single witness. The court said 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 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.”

45. We have applied the above safeguards set out in **Republic Vs. Turnbull (supra)** to the instant case and we are satisfied that the evidence of PW1 as we have analyzed it, has addressed all the above safeguards and we find that it was free from error.

46. We undertook to consider the defence of the appellant. The defence addresses the issue of his arrest and that he was not found in possession of any of the stolen property. He also stated that he was not satisfied in the manner in which the identification parade was conducted.

47. This court finds that the identification parade was of no evidential value as the appellant was convicted on the evidence of identification by recognition. The appellant’s defence, however casts no doubt on the prosecution case.

48. Contrary to the appellant’s submission that he was not given a fair hearing, we find that he was issued with witness statements, given an opportunity to cross-examine witnesses and to defend himself. His submission on that ground is without basis.

49. The upshot of the foregoing is that we hold that the appellant was properly convicted of the charge of robbery with violence contrary to Section 296 (2) of the penal code. We also hold that he was properly convicted of the charge of gang rape in Count II contrary to section 10 of the Sexual Offences Act No. 3 of 2006. The minimum sentence provided in law is fifteen (15) years. We therefore enhance the sentence of five (5) years to fifteen (15) years imprisonment.

50. It is our finding that the conviction in Count III for the offence of gang rape was unsafe as PW3 did

not positively identify the appellant as being one of those who gang raped her. We hereby quash the conviction and set aside the sentence.

51. We also note that the learned trial magistrate failed in her primary duty of conducting voir dire examination before recording the evidence of PW3 and PW4, who were minor witnesses.

52. Having upheld the sentence of death imposed on the appellant in Count I, we order that the sentence of fifteen (15) years in respect to Count II be held in abeyance.

It is so ordered.

DELIVERED, DATED and SIGNED in open Court at **KAKAMEGA** this**28TH** day of**JANUARY**,..... 2016.

RUTH N. SITATI.

NJOKI MWANGI.

JUDGE

JUDGE.

In the presence of:-

..... Appellant.

..... for the Respondent.

.....Court Assistant.

..... Court Assistant.