



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 176 OF 2014**

**FRANKLINE GITUMA NJOKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the original conviction and sentence in the Principal Magistrate's Court at Githunguri Cr. Case No. 1173 of 2013 delivered by Hon. J.D. Kwena(SPM) on 28.11.2014).*

**JUDGMENT**

**BACKGROUND**

The Appellant in this case was charged, in the first count, with the offence of Robbery with violence contrary to section 296(2) of the Penal Code and, in the second count, with gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006.

The particulars to the first count, were that on 3<sup>rd</sup> December, 2013 at around 0100hrs at Ikinu Trading Centre, Githunguri District within Kiambu county, jointly with others not before court, while armed with pangas, robbed Margaret Njari Kihugu of her 21 inch T.V set make Tousda, solstar hoofer music system, one speaker, samsung chart 222 mobile phone, ATM cards and a cash Ksh.300/, all valued at Kshs. 35,300/ and at or immediately before or immediately after the time of such robbery used actual violence against M N K.

The particulars of the second count were that on 3<sup>rd</sup> December, 2013 at around 0100hrs at Ikinu Trading Centre, Githunguri District, Kiambu County, in association with others not before court, intentionally and unlawfully caused his penis to penetrate the vagina of M N K without her consent.

Upon being tried, the Appellant was found guilty. He was sentenced to suffer death in the first count while sentence in the second count was held in abeyance. The Appellant being dissatisfied with the decision of the trial court decided to exercise his constitutional right to appeal to this court.

**EVIDENCE.**

The prosecution's case was that the matter at hand involved a break-in at the complainant's (M N K)

house on 3<sup>rd</sup> December, 2013 at around 0100hrs by a gang of three men armed with pangas. They broke the house using a big stone although none of the occupants of the house heard them. The complainant's daughters were the first to notice them when they entered their room and asked for directions to their mother's room. The girls complied and showed them the room and the thugs proceeded there and started enquiring on the location and availability of cash. They took her handbag and mobile phone and then proceeded to the sitting room where they stole household equipment.

They tried to rape her in the house but she pleaded with them to take her outside as she did not wish to be raped in front of her kids. She was taken outside where the robbers took turns raping her and when they were done they took off. The children of the complainant went to seek help from the neighbours. The neighbours escorted her to Kiambu District Hospital where she received treatment. The village elder also notified the administrative police of the same. On 7<sup>th</sup> December, 2013 the complainant was at Ikinu Shopping Centre when she identified the Appellant as one of her attackers. She raised alarm and asked for the Appellant to be arrested whereupon a mob started chasing the Appellant who sought solace at the A.P Post at Ikinu. The complainant and her daughter identified him and he was escorted to Githunguri Police Station. The investigating officer then carried out a search of the Appellant's house but found that there was no evidence.

**PW1, M N K**, testified that she was asleep at around 1.00 a.m. on 3<sup>rd</sup> December, 2013 when a group of men armed with pangas, entered her bedroom. She had not heard them break the doors and they proceeded to wake her and demand money. She told them she had none and they moved her to the sitting room where they started harassing her. They tried to rape her but she pleaded with them to do it outside the house and not in front of her children. They agreed and dragged her outside where there was an electric light that enabled her to see their unmasked faces as they gang raped her. They proceeded to steal various household items that are set out in the charge sheet(supra). They also in the process injured her left palm using one of the pangas by specifically inflicting a cut. She also testified that her attackers were speaking in the meru language. She testified that she had never seen them before but however she saw one of her attackers four days later at Ikinu Trading Centre and upon recognizing him raised alarm and with the help of concerned members of the public they arrested the Appellant. After the incident she was taken to Kiambu District hospital where she received treatment before reporting the matter to Githunguri Police Station a few days later.

**PW2, P N**, who was a village elder and neighbor to the complainant testified that he received a phone call at 3.00 a.m. and was informed that the home of the complainant had been raided by thieves who had also gang raped her. He called the police and proceeded to the scene with them but they found that the complainant had gone to the hospital. They proceeded to the hospital where she informed them that she had been raped. He then proceeded to Githunguri Police Station where he made a report on her behalf. On 7<sup>th</sup> December, 2013 at around 7.00 a.m. he heard noises and upon enquiring he was informed that the person who had raped the complainant had been found. When he went to the main road he found persons armed with crude weapons on their way to arrest the Appellant. He called the police before following the mob but they found the Appellant had already been arrested and was being held at Ikinu AP Camp. He had never seen the Appellant before.

**PW3, No. 79108736 AP Inspector William Ndolo**, who was stationed at the Ikinu AP Post testified that on 3<sup>rd</sup> December, 2013 he received a call from PW2 and was informed that thieves had attacked the complainant and made away with some items and also raped her. They went to her house but found that she had left for the hospital and upon following her there she informed them that she was robbed of some goods and raped by three men. On 7<sup>th</sup> December, 2013 he received a call from PW2 who informed him that members of public had found one suspect in connection with the offence and he was being chased by a mob who intended to lynch him. They walked out of the police line and found that the suspect was running towards the police post. They arrested him and locked him up. The complainant, PW1 was part of the mob and she stated that she identified the Appellant as one of her attackers. Her children who were also in the mob also identified him. They then called Githunguri Police Station to facilitate the transfer of the Appellant.

**PW4, S W**, who was the complainant's daughter and aged 14 at the time of the trial, gave a sworn testimony that on the date in question she was asleep in the same room as her sister when she was awakened by a noise in the room. To her surprise there were three men in the room, two were armed with pangas and one had a torch. They asked her where her mother was and she told them she was in her room. They then asked them to go back to sleep before proceeding to PW1's bedroom. She could hear them ask her mother for her phone and money and she replied that it was in her handbag which she could not locate. The complainant called her to help her search for it but when she ran into her mother's room to help she was told to go back by one of the robbers. She testified that she could identify the Appellant since the sitting room light had been turned on and it was illuminating the bedroom through the ventilation. She testified that the Appellant was wearing a black coat and was also the one who had asked her where her mother was. After her mother handed over the bag they heard people going outside and they could no longer hear the complainant. After about an hour she came back and told them that she had been raped. She also asked them to switch off the lights. They then went out with their brother and told their neighbours who helped take the complainant to hospital.

**PW5, Dr. Mbatia Wangari**, produced the complainant's P3 Form that was based on an examination done on 15<sup>th</sup> January, 2014 after she complained of sexual assault and robbery at her home on 3<sup>rd</sup> December, 2013. The sexual examination did not divulge any particular assault but this was understandable in light of the fact she had given birth thrice. He had however assessed the degree of injury as harm.

**PW6, No. 42373 Corporal Francis Opagala**, testified that on 4<sup>th</sup> December, 2013 the complainant reported to him about the incident. When he went to the scene he found that a big stone had been used to break the wooden door to the house. The complainant then led the police to the location where she had been raped and further informed PW6 that the perpetrators of the crime had conversed in the Meru language and she identified them as the young men who sold mandazi at the local shopping center. On 7<sup>th</sup> December, 2013 Ikinu AP post informed him that they had arrested a suspect in the case. He went to Ikinu AP Post where he picked the complainant and the Appellant. The Appellant led them to his house and on searching it they found nothing of importance to the case.

After the close of the prosecution's case, the court ruled that the Appellant had a case to answer and was put on his defence. He opted to give a sworn defence. In it he testified that he was a cake salesman from Ikinu Ngemwa and had been in that line of business for ten years. He stated that on 7<sup>th</sup> December, 2013 he had risen and gone about his usual business and when he was done he boarded a motor vehicle to go back home. He alighted at Ikinu and as he was walking he was accosted by 3 men. He recognized one of the men as he was a regular customer. The men arrested him and took him to the AP Post where he was locked up for an hour before a woman came to the door in the company of a young girl and a shopkeeper whereupon a police officer pointed at him and they all left. He was later transferred to Githunguri Police Station. He was informed by the OCS that there that a complainant had claimed that she was raped by people talking in the Meru language. He asked the Appellant whether he would agree to a DNA test and the Appellant agreed. This was never done and he was instead arraigned in court.

## **SUBMISSIONS**

The Appellant in his written submissions stated his identification was not water tight and that he was a victim of a mistaken identity. That therefore his conviction was based on suspicion. He further contended that the identification evidence was not corroborated by any of the evidence adduced and he urged the court to allow his appeal. He relied on the cases of **Abdalla bin Wendo & Sheh bin Mwambere vs Regina[1953] 20 EACA 166, R vs Hanemaayer 2008 ONCA 580, Kimotho Kiarie vs Republic[1984] eKLR, Maitanyi vs Republic[1986]eKLR, Raphael Mwazige Ndaviro& others vs Republic[2008] eKLR and Peter Njoroge Kirika & another vs Republic[2012] eKLR** to support his case.

The Respondent, represented by learned State Counsel, Ms. Wario, canvassed the appeal by oral submissions. She submitted that the three ingredients of the offence of robbery with violence had been proved beyond reasonable doubt and therefore urged the court to dismiss the appeal.

This court, upon evaluating the submissions of the parties, finds that the main issues that must be

determined in this case are:

- i. **Whether the Appellant was properly identified.**
- ii **Whether the charges were proved beyond reasonable doubt.**

### **DETERMINATION**

This being a first appeal, the court is under an obligation to weigh the evidence as a whole and reach its own independent conclusion. See **NJoroge v Republic(1987)KLR,19**

*This is a case in which the police arrested the Appellant purely on the bases of his identification by the complainant. The court must then be satisfied that that identification was water tight and rule out any possible case of a mistaken identity. This observation was set out by the Court of Appeal in the case of **Kimotho Kiarie vs Republic(supra)** that;*

***“Where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction.”***

*In this particular case, the Appellant was identified by the complainant, PW1, and PW4, her daughter. According to the evidence, the complainant bumped into one of her assailants three days after the incident at their local shopping centre and raised an alarm that led to the Appellant's arrest. She was in the presence of her children when this occurred. The complainant stated under cross examination that she indicated in her original statement to the police that the most probable suspect was a Meru man who used to sell mandazi at Ikinu shopping centre and who disappeared from his mandazi selling point on 2<sup>nd</sup> December, 2013. This is further buttressed by the fact that the complainant did not, by luck just bump into the Appellant naturally, but showed up after a shopkeeper who she had tasked to be on the lookout for the Appellant sent a woman to inform her that the mandazi selling Meru man had returned and she should come and identify him.*

*The complainant, according to PW6, did not indicate to the police that she would identify her assailants if she saw them when she made the first report on 4<sup>th</sup> December, 2013 at 4.30pm. However, it should be noted that she later stated in a further statement that she would identify them. The complainant also told PW6 that she recognized her attackers as young Meru men who used to sell mandazi. The fact that her attackers spoke Meru seems to be a predominant factor in the identification process. The question is whether the same was sufficient mode of identification. This court must keep in the back of its mind as opined by then East African Court of Appeal in **Abdallah bin Wendo & Sheh bin Mwambere vs Regina(supra)** that:*

***“on an identification issue a witness may be honest yet mistaken, and may make erroneous assumptions particularly if he believes that what he thinks is likely to be true is true.”***

***“Suspicion, however strong, cannot supply a basis for inferring guilt when proof of guilt cannot be safely inferred beyond reasonable doubt.”***

*Having looked at the circumstances surrounding the identification of the Appellant when scrutinized raises various questions primarily regarding the role the shopkeeper played in the events leading up to the identification and the arrest. Upon looking at the Appellant's sworn defence he stated that he was accosted by three men, including the shopkeeper, who took him to the AP camp where a woman and a young girl appeared at the door and an officer pointed at him and then left. He was subsequently transferred to Githunguri Police Station. I note specifically that, although the complainant recorded a further statement in which she state that she would identify her assailants, she did not describe the assailants by their physical appearances save to say that they sold mandazis. The physical description would have been more assuring and more satisfying as it would have ruled out that the person(Appellant) who` was arrested is indeed the person who attacked her. I say this bearing in mind that PW1 testified that the bedroom had sufficient light by which she was able to properly see her attackers. She also*

testified that the scene of rape was well lit such that she identified the unmasked robbers. It begs then why she could not give the description of these men to the police when she made her report.

Further, there was no evidence that the attackers were the 'only mandazi sellers in that area. It was then erroneous, without a proper description of the assailants to single out the Appellant as one of the assailants. In any case, the shopkeeper who had been tasked by PW1 to keep an eye on the suspects did not testify in which case he would have erased doubts if he had been given the description of the persons he was to look for other than that they were mandazi sellers. Moreover, there was also no evidence that the mandazi sellers within the area were only Meru speakers. Further, PW4 a daughter to PW1 despite the fact that she had had a contact with the robbers and that they had spoken to her never mentioned what language they were using. That way, it is safe to conclude that the Appellant was most likely an unfortunate case of mistaken identity.

Mistaken identity does not specifically mean that the Appellant was lying. This is well set out in **Queen vs Hanemaayer (supra)** the Court of Appeal at Ontario court stated that;

**[21] "She honestly believed that she had identified the right person. What happened in this case is consistent with much of what is known about mistaken identification evidence and, in particular, that honest but mistaken witnesses make convincing witnesses."**

A similar scenario in the instant case cannot be ruled out; That PW1, under the difficult circumstances of identification (in that it was at night) may have labored under an honest mistake that she had properly identified the Appellant. Thus, the Appellant may have been arrested merely on suspicion, as he happened to have been a Meru by tribe and sold mandazis as his occupation. I emphasize that the burden of proof in a criminal case always lies with the prosecution. It never and can never shift to the accused. It must be discharged beyond all reasonable doubt. The question then is; was this burden discharged? My humble view is that with the weak evidence of identification, the prosecution dismally failed. The learned trial magistrate did not therefore properly test the evidence on record and she accordingly arrived at the wrong decision.

In the end, this appeal is allowed. I quash the conviction and set aside the death sentence. I order that the Appellant be and is hereby set free unless he is otherwise lawfully held. It is so ordered.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> Day of April, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

- 1. Appellant in person.**
- 2. M/s Atina for the Respondent.**