



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MIGORI**  
**CRIMINAL APPEAL NO. 44 OF 2015**  
**WILLIS OTIENO OMUGA.....APPELLANT**  
**VERSUS**  
**REPUBLIC .....RESPONDENT**

**JUDGMENT**

1. When the appeal came up for hearing, the Learned State Counsel rightly so conceded to it.
2. The main issue in contention in this appeal was the identification of the Appellant as the perpetrator of the offences which he was charged with.
3. The Appellant was arraigned before the Chief Magistrate's Court at Migori on the charge of gang rape with an alternative charge of committing an indecent act with a child aged sixteen years old.
4. On denying the charges, the trial ensued and upon taking the evidence of the complainant G.A.B. as PW1, one M.A. as PW2, one E. O. B. as PW3, the Clinical Officer as PW4 and the Investigating Officer as PW5, the trial Court placed the Appellant on his defence and in a judgment which was delivered on 24/01/2014 the Appellant was acquitted of the main charge of gang rape but found guilty on the alternative charge and was accordingly convicted and sentenced to serve ten (10) years in jail.
5. An appeal was lodged upon grant of leave by this Court (*Majanja, J*) where five grounds were put forth.
6. At the hearing of the appeal, the Appellant who appeared in person filed and wholly relied on his written submissions whereas the State responded orally.
7. Despite the said concession by the State, it is the duty of this Court, as the appellate Court of first instance, to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that. (See: Okemo vs. R (1977) EALR 32 and Mark Oiruri Mose vs. R (2013)eKLR).
8. In discharging the foregone duty this Court is to first satisfy itself that the ingredients of the offence of committing an indecent act with a child were proved since the State did not appeal against the trial Court's acquittal on the main charge of defilement.
9. **Section 2** of the Sexual Offences Act declares an **“indecent act”** as follows:-

***“indecent act means an unlawful intention act which causes -***

**(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.**

**(b) exposure or display of any pornographic material to any person against his or her will.”**

10. The offence took place in the night of 09/06/2012 when the complainant had gone to a neighbour's funeral. She, among others, was taking care of the visitors. At around midnight as she went behind one of the houses to answer a call of nature, three people suddenly appeared and surrounded her, held her mouth and legs and carried her over into a nearby thicket where they forcefully removed her clothes and had sexual intercourse with her and thereafter ran away.

11. It was the complainant's testimony that she managed to recognize the Appellant as one of her three assailants who in fact held her mouth and eventually had sexual intercourse with her. The complainant was aided by the moonlight in recognizing the Appellant. At one point the complainant stated that she lost consciousness.

12. The complainant happened to have been the only eye-witness and despite the proviso to **Section 124** of the Evidence Act, Chapter 80 of the Laws of Kenya, this Court is called upon to carefully consider the evidence of recognition especially at night.

13. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under:-

***“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.”***

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

14. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

***“... 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 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 reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”***

As rightly submitted by the Learned State Counsel Ms. Owenga the issue of identification of the Appellant was not properly handled. As the offence was committed at night there was need to lead evidence on the brightness of the moonlight and what features made the complainant recognize the assailants in the face of such darkness.

15. We are equally not aware of the time the assailants took with the complainant and if they talked during the ordeal. Further, the complainant stated that she lost consciousness in the course of the ordeal and again we are not told at what point in time such a thing happened and for how long.

16. Taking all circumstances into account, it cannot be said with certainty that the identification of the

Appellant was free from error. High are the chances that the complainant could have been mistaken on her assailants and to that end, the conviction cannot safely stand. It is hereby quashed.

17. Having found that the Appellant was not positively identified as the assailant, it will not serve any meaningful purpose to deal with the other aspects of the offence.

18. The appeal is hereby allowed and the sentence set-aside. The Appellant is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**DATED, SIGNED and DELIVERED at MIGORI this 21<sup>st</sup> day of OCTOBER, 2015**

**A.C.MRIMA**

**JUDGE**