REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.144 OF 2012

BETWEEN

THOMAS AREBA MAGARE ..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. Were, PM, dated and delivered on the 7th day of June 2012 in the original Keroka SRMCR No.1136 of 2011)

JUDGMENT

Introduction

1. The appellant herein Thomas Areba Magare was the accused in SRM's court at Keroka Criminal Case No.1136 of 2011. He faced 3 charges. In Count I he was charged with robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the night of 4th and 5th October 2011 at [Particulars Withheld] within Borabu District jointly with others not before court and while armed with dangerous weapons namely pangas and rungus, they robbed the complainant, R B M of various household goods worth Kshs.300,000/= and at the time of the said incident used actual violence on the said R B M.
2. In Count II he was charged with gang rape contrary to **Section 10** of the **Sexual Offences Act No.3 of 2006**. The particulars of the offence were that on the night of 4th and 5th October 2011 at [Particulars Withheld] within Borabu District jointly with others not before court he gang raped R B M.
3. In Count III he faced a charge of defilement contrary to **Section 10** of the **Sexual Offences Act No.3 of 2006**. The particulars of the offence were that the accused with others not before court defiled a minor S K. on the night of 4th and 5th October 2011 at [Particulars Withheld] in Borabu District within Nyamira County.
4. The accused denied all the charges facing him and the matter proceeded to trial.

The Facts and the Evidence

5. PW1 was S R K. a minor. She gave unsworn testimony and was cross examined by the appellant. The facts and the evidence are as follows:
6. PW1 told the court that she knew the accused person as Areba and on the material night the complainant (who was her grandmother) had asked her to hold a lamp for her as she drew water.

That while outside, she saw 3 people and there were 4 inside the house; that they assaulted the complainant on the leg with a metal nod and dragged her into the house.

7. She proceeded to lock herself in her bedroom and heard them demanding money from the complainant in Kiswahili. They were then ordered to get into bed and the robbers began to take items such as utensils, table clothes and clothes. They then tied the complainant with ropes and also defiled her.
8. Furthermore, she admitted the fact that she did not identity any of the assailants, not even the one who defiled her while she was tied using cloth material on the bed. In addition she confirmed that she did not see the appellant among the attackers.
9. PW1 also testified that the complainant was tied with a wire on both hands, legs and was defiled on the same bed. She also recalled that one of the attackers wore a cap though she did not see the face.
10. In concluding her examination in chief, PW1 confirmed that she was taken to Hospital at Keroka and also to the police station where a P3 form was filled on her behalf. She did not recognize any of the assailant but only noted that one had a yellow coat while the others had black coats. She also reiterated that she did not see the appellant during the attack.
11. PW2 was R M the complainant. She told the court that she lived with PW1 who was her brother's daughter, and that she had also known the appellant for a long time since she bought her plot from his mother in 1989. That the appellant was also her neighbour.
12. She recalled the events of the material night and stated that she had come from school and in the evening she prepared to cook. It then began to drizzle and on PW1 coming home at about 5 p.m., they lit the fire and began to cook.
13. Meanwhile, she went and closed the main gate and main door and waited for the food to cook. She also closed both the main and kitchen door as she took tea and listened to the 7 p.m. news. It then began to rain again and she decided to switch off the radio and take a jerican to tap water from the rain.
14. As she opened the kitchen door, she was hit on the forehead by a heavy object and on trying to shield herself, she was hit again as someone also held her throat and began strangling her saying **"kufa, kufa"** though she did not recognize the person immediately. He demanded cash and threw her back to the house. She fell down and the attacker held her jumper and removed it. He also demanded for the tea she was taking and she in turn took a cup and poured the same for him.
15. By this time, PW2 was already bleeding from the forehead. She was pushed into the bedroom as the assailant demanded money from her. PW2 was in the company of PW1. She removed her purse from the suit case but before she could remove the money, the assailant snatched it. PW2 testified that there was no light in the house as she usually used a lamp. She lost consciousness temporarily when she was pushed into the house. She was then ordered them to get into bed and cover herself. PW1 was also ordered to do the same. They obeyed as she heard the person ransack the house. She was then hit on the right side of the head with a torch as she continued to cover herself. She also heard something being cut. She did not know who was cutting. Somebody then came and tied her hands from behind, covered them and then she heard some noise in the kitchen. She later learnt that the assailants were cooking some food in the kitchen. They made ugali, eggs and tea.
16. When PW2 was hit for the second time, she tried to look at the person and saw a tall slender person though she did not see the face. She recognized the voice of the appellant as he was asking his colleagues to search the suit case. Afterwards, the appellant came again with an insulated wire and tied her hands and also legs again. Also, he came with a net and covered her eyes. Then she heard the assailants as they carried mattresses and as curtains were being brought down.
17. Later one person went to where PW2 lay, removed her dress and her pant and raped her. The person also defiled PW1. PW1 cried for a moment, but she was threatened and told she would be stabbed if she continued crying. PW2 said she recognized appellant's voice.
18. The appellant then tied them and covered them with a blanket after which he continued with taking items to the living room. The assailants took all blankets and mattresses and demanded for her phone (mobile) which was in the kitchen. The appellant brought it from the kitchen, asked her to unlock it, went to the sitting room and started playing her CD's. She then heard utensils being taken from the wall unit. Soon after she heard a basin with sufurias being removed from under the bed. At about 3.00a.m., her alarm rang which usually wakes her up for prayers, and then she

heard a familiar voise ask **"what did some passengers want"** and that the voice was that of the appellant.

19. On switching off the phone, she heard the assailants go outside and neighbours' dogs barking. PW2 confirmed that the gang that invaded her house and attacked them were in her house between 7.00 p.m. on 4th October 2011 to 4.00 a.m. 5Th October 2011. She also confirmed that she was raped by one person who raped her 3 times and it was the same voice.
20. After the ordeal, the assailants left and on their way out, they closed the bedroom verandah and kitchen doors and left them struggling as they had been lightly tied. Both PW2 and PW1 tried to untie themselves but only succeeded after a long time though she could not untie her legs as they were tightly tied. She then began to scream after about 30 minutes but as she screamed, she heard the kitchen door being opened.
21. She then heard the voice that she had heard before ask why she was shouting and threatened to harm them. By then she had removed the net on her face and rushed back to the bedroom. Someone came again, tied her tighter than before and covered her eyes, mouth and nose. He then warned them not to make any noise, closed all the doors and left.
22. At about 6 a.m. PW2 instructed PW1 to open the window. She screamed through the window and a child to her in-law came. He found the whole house ransacked and was empty except for the seats and cushions since the robbers had taken beddings, clothes, utensils and mattresses.
23. PW2 approximated the value of the items to be roughly Kshs.300,000/=. She was bleeding from the forehead and head. She had also been hit on her left ring finger which was still numb and she was also hurt from the wires and ropes they had used to tie her.
24. In court PW2 identified the white rope (MF1-2) used to reinforce the wire used to tie her. She also identified MF1-3 as the wire used to tie her legs. Further, she identified the red cap as one usually worn by appellant and which was recovered next to her kitchen door.
25. In addition PW2 confirmed that Lameck was the first to respond when she screamed. He is the one who opened the door which had been locked from outside. Later, as her neighbours were trying to tidy up her house, they found a copy of the driving licence and a passport photo for one Henry Kipngetich Rono which was next to her simcard. They found it under a seat cushion next to her simcard.
26. PW2 went to Masaba Hospital, was treated, stitched and referred to Kisii for X-rays. She also made a report to the police and a P3 form issued and filled. She also acknowledged that when she wrote her statement she did not state that she had recognized the assailants as she was confused. On checking her documents later, she found the land sale agreement, her identity card and phisher photo album were missing. No other documents were missing.
27. Further, PW2 confirmed there was no recovery of any of the stolen items. She testified that she had bought land from the appellant's mother in 1989 but she had not yet obtained title to the land. That she had called surveyors to come and she was to pay by end of October. She got late but later she sent the cash to the appellant that is Kshs.3,500/= which he refused to take. She tried to get appellant to take the money, but he still refused to take the money and said he was going to use his own wisdom upon the advice he had received.
28. In concluding her evidence in chief, she told the court that after accused refused to take her money, he would not greet her, he would even divert his way on seeing her and he had sworn to evict her because she did not listen to him though she had no grudge with him.
29. PW3 was No.55669 Corporal Joseph Chirchir from Manga police station (the arresting officer). He told the court that on 9th October 2011 he was at the police station at 2 p.m when Sgt. Barasa a CID at Keroka called him and asked him to go to Chebilat and assist him in arresting a suspect who had committed a robbery with violence on 4th October 2011.
30. PC Abdi and PW3 then proceeded with their station motor vehicle to Chebilat, went to Chebilat police post for assistance and in the company of officers they traced the suspect at Chebilat market. They then arrested the appellant and took him to Keroka C.I.D. Office, handed him over to Sergeant Barasa. PW3 confirmed that he neither visited the scene nor met the complainant.
31. PW4 was No.67420 Corporal Nelson Wambura of Sotik police station and previously of Chebilat police station. He told the court that on the morning of 5th October 2011 he went to Sotik police station on official duties. On returning to the post, he perused the O.B and found a robbery with violence and rape report made by Richard Momanyi. He visited the scene as the same was only 500m from the police post.

32. On arrival at the scene, PW4 found the house locked from outside but a neighbour whom he knew had the key, and opened the door for him and the 2 colleagues. They accessed the house through the rear door and went to the bedroom accompanied by a neighbour to PW2. On entering the room, PW4 noticed that clothes were scattered on the floor of the bedroom. There were blood stains on the beddings, tattered inner garments on the floor and the wardrobe was wide open and empty. In the sitting room, they found an empty bottle of Richot Brandy, they collected the exhibits, left for the post after which PW4 informed his superiors and the OCS Manga police station.
33. Later, persons from CID Keroka visited the scene. PW4 handed over the exhibits to the them, namely the stained beddings, torn inner garments and Richot Brandy bottle. PW4 stated that both PW1 and PW2 were not at the premises at the time he visited as they had been taken to hospital. He also confirmed that he did not see the driving licence and passport photograph recovered from the scene.
34. PW5 was No.32924 Daniel Barasa of CID Headquarters Nyatike but previously of CID Keroka. He was the investigating officer in this case. He told the court that he took over the investigation of this case which had been reported at both Chebilat and Keroka police stations. He stated that he proceeded to Bobaracho area where PW2 had escaped to as her life had been threatened. On finding PW2, he counseled her as she was still in shock. By this time, she had injuries on the head caused by a sharp object and her arms had wounds of a strong wire used to tie her.
35. She narrated to him what had happened and asked if she could identify some of her attackers. She said one was her neighbour and that if she saw the appellant who had stayed in her house from 7.30 p.m. to about 4 a.m. before they left she could identify him. He proceeded to record her statement and also called PW3 of Manga police station to go to the home of the appellant to trace and arrest him.
36. PW5 was able to recover the red cap and wire used to tie PW2 – MF1-3 and a piece of cloth – MF1-2. He also recovered a wallet that was picked within PW1's compound and inside was an abstract for one Hillary Kipngeno Rono who had reported a loss of a driving licence on 4th September 2010.
37. After recording the statements and collecting the exhibits, PW5 found the appellant had been booked at the station as a suspect. He produced the red cap electric wire (black) white piece of cloth and wallet plus abstract as **P. Exhibit 1, 2, 3** and **4** respectively. He also confirmed that he interrogated the appellant who denied the allegations but still charged him due to the fact that PW2 said she had recognized him. He also produced the P3 form issued to PW2 under **Section 77** of **Cap 50** which was allowed and the same were produced as **P. Exhibit 5**. Further, PW5 confirmed that he did not conduct an identification parade as PW2 stated the appellant was a neighbour and had known him for a long time from 1989 when she bought land from appellant's mother.

The Defence Case

38. At the close of the prosecution case, the trial court found that the prosecution had established a prima facie case against the appellant to warrant putting him on his defence. The appellant gave a sworn statement and called 3 witnesses.
39. DW1, the appellant acknowledged he knew PW2 as his neighbour but denied the charges facing him. He also admitted that he knew PW1 and that they were not related. That on the night of 4th and 5th October 2011 he was at home the whole day with his wife and children. That it drizzled that day and he retired to bed at 10 p.m. He denied going to PW2's home on the material night at 7.00 p.m. or at all and also said he did not hear anything from the complainant's home especially because it was raining. He also confirmed that between his home and complainant's home was 100 metres. The appellant also testified as follows:-
40. On the following day his wife woke up at 5 a.m. to prepare their children for school. He left his house at 6.00 a.m. and while outside he heard a loud scream. He then headed to PW2's homestead and found a group of people there. Through the window they checked and saw PW2 tied both hands and also her legs while the door had been locked form outside.
41. PW2 gave his wife the keys, they opened the door and they got into the house only to find it had been left in dismay. He admitted that PW2 had been his neighbour from the time she bought land

in the area in 1989 from his parents. That she had built on the same plot and they lived peacefully as they had never quarrelled over land or had any dispute over the land.

42. Further, he denied that he ever told PW2 to vacate her piece of land. He denied taking the land sale agreement on the night of the robbery and questioned whether he was the only slender and tall person in his village as described by PW2. In concluding his defence, the appellant stated that PW2 was only suspecting him of committing the offence. He went to PW2's home on the morning after the attack with one Mr. Ondicho and later went to the police station. He also confirmed that he attended Borabu primary school and in 1993 he was in standard 8 and thought PW2 was a teacher in that school, but she never taught him.
43. DW2 was Margaret Kwamboka, the appellant's wife. She confirmed that PW2 was their neighbour and on the night of 4th/5th October 2011 the appellant was at home from 6 p.m. till morning. That it rained that evening and she went to bed between 9.30-10 p.m.
44. That on the morning of 5th October 2011 she woke up at about 5.45 a.m. to begin her chores. She was milking the cows when suddenly as she was almost done, she heard someone yelling form the neighbour's compound. She rushed there together with Lamech (a relative who lives with her). On arrival, she discovered that the doors to her neighbour's home were locked and rushed back to the road to seek assistance. She found Davis a neighbour and asked him to go and break the door.
45. Meanwhile, she told Lameck to go and inform the police. She then went to PW2's bedroom window and told her she could not access the house. By this time a crowd had gathered. Since the key to the door was in the cupboard, PW1 took the key passed it to PW2 who then gave it to her. She then managed to open the door.
46. She also confirmed that appellant arrived at the scene moments after she had managed to open PW2's door. She also confirmed that they had never had any differences with PW2.
47. DW3 was Lameck Nyangau, a nephew to appellant. He told the court that on the material night they had been together with his cousins upto 9.30 p.m. When he went to sleep in their house which was different form the one appellant slept in.
48. On the morning of 5th October 2011, he was assisting DW2 when he heard a scream. He ran a head of PW2 to where the scream was coming from and found PW2 peeping from the window. She had also been injured. DW3 corroborated DW2's testimony on how PW2 was rescued.
49. On being sent to the police station, he found the officer on duty and the said officer told him to go and tell PW2 to go to hospital first and later go and make a report to the police.
50. On his way back he met appellant and one Ondicho going to the police station and he informed them of what the officer had said. They insisted on getting an officer from the police station which they did. On getting back to the scene, he found that the doors to PW2's house had been opened.
51. DW4 was Zeruel Ondicho Bwana a neighbour to both appellant and PW2. He told the court he bought his piece of land in 1980 when appellant was still a small child. That PW2 is sandwiched between his home and that of appellant.
52. DW3 confirmed that on the night of 4th/5th October 2011, PW2 was attacked and that his son Davis came to pick a hammer for purposes of breaking the door but on arrival he found that the door had been opened. DW3 also testified that on arrival at PW2's house, he found that PW2's legs and hands had been tied and her house was in dismay. He requested appellant to accompany him and to inform the police to come and assist them. He accompanied appellant to the police station and came back with him and one police officer.
53. DW3 testified that on the morning of 5th October 2011, he spoke to PW2 while the appellant was present. He acknowledged that there had been a dispute over land in that all buyers who had bought land from appellant's mother were asking for title deeds. The land in question was still in appellant's mother's name and they wanted the family to process succession and transfer to them their portions of land.

Judgment of the Trial Court

54. In his judgment the trial court noted that there were unresolved land issues between the appellant and PW2, the unrebutted assertions by PW2 that among items stolen from her house was a land sale agreement for the parcel of land in dispute; the fact that PW2 and the appellant had interacted for about 22 years; that though changes in the appellant's voice had taken place, there had been

continuous interaction between PW2 and the appellant and that PW2's assertions that the cap recovered near the kitchen on 5th October 2011 was usually worn by the accused. On gang rape and defilement, the learned trial magistrate stated that it was immaterial that the appellant was not the one who actually raped and defiled PW2 and PW1 respectively. That it was sufficient that he was in the group where one or more persons committed the act while carrying out a common assignment.

55. After carefully evaluating the above evidence, the learned trial magistrate was satisfied that the prosecution had proved its case beyond any reasonable doubt on all the 3 counts against the appellant. On counts 1 and III, the appellant was sentenced to serve life imprisonment on each count while on count II the appellant was sentenced to serve 15 years in jail.

The Appeal

56. Being dissatisfied with both conviction and sentence the appellant has appealed. In his petition of appeal dated 15th June 2012 through the firm of Oguttu Mboya & Co. Advocates, he has preferred 14 grounds of appeal which are that:-

1. *The Learned Trial Magistrate erred in law in finding and holding that the prosecution had proved the essential ingredients, over and in respect of the offences charged, to warrant a conviction and attendant sentence against the appellant.*
2. *The Learned Trial Magistrate erred in fact and in law and finding and holding that the appellant was sufficiently identified by PW2, notwithstanding the difficult circumstances obtaining, both prior to and during the commissions of the offences charged, to warrant the conviction under reference.*
3. *The Learned Trial Magistrate erred in law in finding and holding that the voice identification by and/or at the instance of PW2, during the terrifying circumstances, constituted a sufficient foundation to warrant a conviction, in the absence of corroboration and necessary precaution, to safeguard circumstances of honest, but mistaken identification/recognition.*
4. *The Learned Trial Magistrate erred in fact and in law, in holding that evidence of suspicion constitutes and/or amounts to corroborative circumstantial evidence, capable of being relied upon by the honourable court and/or founding a conviction in law, whatsoever and/or howsoever.*
5. *The Learned Trial Magistrate misconceived, misunderstood and misapplied (sic) circumstantial evidence, without necessary corroboration and thereby arrived at an erroneous conclusion and conviction.*
6. *The Learned Trial Magistrate erred in fact and in law in failing to consider and/or scrutinize the extent, nature and intensity of the light and/or lamp, which was the sole source of lighting available and/or obtaining at the Locus in Quo, so as to ascertain the accuracy of the evidence of identification tendered and/or relied upon.*
7. *The Learned Magistrate erred in law in ignoring, failing to take into account and/or disregarding material discrepancies, apparent and discernible in the prosecution's case and consequently, failed to appreciate the salient features of the complaint and the charges against the appellant.*
8. *The Learned Trial Magistrate failed to cumulatively evaluate and/or analyze the totality of the evidence tendered and consequently, the Learned Trial Magistrate reached and/or arrived at an erroneous conclusion, contrary to the weight of evidence on record.*
9. *The Learned Trial Magistrate erred in law in failing to consider and/or in disregarding the appellant's defence, including the plea of alibi, without assigning any reason(s) and/or explanation(s), for such disregard. Consequently, the Trial Court did not afford the appellant a fair and reasonable treatment.*
10. *Having found and held that there existed a grudge and/or vendetta between the complainant and the accused person, which most likely fueled and/or admittedly formed the basis of the suspicion, the Learned Trial Magistrate erred in law in failing to exercise sufficient caution and/or pre-caution, before arriving at the conviction against the appellant.*
11. *The Learned Trial Magistrate misconceived and/or misapprehended the nature of the evidence before the honourable court and thereby failed to address his judicial mind to the requisite standard and burden of proof, in respect of the offences charged. Consequently, the conviction and sentence has occasioned a miscarriage of justice.*

12. *The Learned Trial Magistrate erred in fact and in law in finding and holding that the Red Cap, allegedly found and/or retrieved from the scene of the offence, belonged to the appellant, in the absence of any sufficient and/or credible corroboration, from any other witness.*
13. *The judgment of the learned trial magistrate is perfunctory, wrought with and/or take into account the mitigation by the appellant. Consequently, the judgment under reference is manifestly unsafe and/or unreasonable.*
14. *The Learned Sentencing magistrate erred in law in failing to adopt, consider and/or take into account the mitigation by the appellant. Consequently, the sentence meted out against the appellant is manifestly excessive, unlawful and otherwise <u>void</u>.*

<u>The Submissions</u>

1. When the matter came before us on 2nd December 2013, Mr. Oguttu for the appellant submitted on Grounds 2, 3 and 6 together and argued that the background and circumstances prevailing at the time of the alleged commission of the offence were such that it was not possible for positive identification/recognition of the attackers. He also submitted that even if identification/recognition could be used to warrant conviction, it was incumbent upon the trial court to examine the difficult situation on the ground including the fear that arose from the attack, and that with such fear, in the mind of PW2, it was not possible to have positive identification/recognition.
2. On voice identification, Mr. Oguttu submitted that the words allegedly uttered by the appellant have not been recapped and further that the alleged words and noise were not part of PW2's statement with police.
3. In addition counsel submitted that voice identification could also be subject to honest but mistaken belief and that in the circumstances, the trial court ought to have exhibited necessary circumspection which was not done at all. He relied on the case of **<u>Said Nguro Masila & another -vs- Republic – Criminal Appeal No.156 of 2005</u>** in the Court of Appeal at Mombasa at pg.12. In that case, the Court of Appeal quoting from their earlier decision in **<u>Anjononi -vs- Republic [1980] KLR 59</u>** stated:-

   "The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; 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."

4. Counsel urged the court to find and to hold that the circumstances of the alleged recognition of the appellant were difficult although PW2 may have known the appellant for 22 years.
5. On grounds 4, 5 and 11 Mr. Oguttu submitted that the evidence of the red cap (kofia) was disbelieved by PW5 (the investigating officer) yet the trial court accepted the said evidence. Counsel also submitted that the manner in which the circumstantial evidence was handled does not meet the requisite standards.
6. On the issue of suspicion Mr. Oguttu submitted that suspicion per see cannot take the place of credible evidence and further that suspicion cannot found a conviction. That while aware of this principle of law, the trial magistrate proceeded to anchor the conviction on suspicion.
7. On grounds 7, 8 and 12 Mr. submitted that the prosecution evidence was fraught with discrepancies that is:-

1. *When PW2 states that she saw a tall slender person and that it was this same person whose voice she recognized and that it was the same person who was asking the colleagues to look into the suit case yet PW2 said that she did not recognize any of the assailants.*
2. *Whereas both PW1 and PW2 said they were not able to recognize any person yet at page 65 paragraph 6 of the judgment, the trial court said PW2 was able to recognize the appellant as among the attackers. Thus the evidence is contradictory.*

3. *Where both PW1 and PW2 conceded that they could not say who defiled and raped PW1 and PW2, respectively (page 18 line 3) yet the trial magistrate at page 67 proceeded to convict appellant of offence of defilement and rape without any evidence pointing to the person who is culpable.*

1. On grounds 1 and 10 it was submitted that the duty of the trial court was to apply evidence offered and not base a conviction on hypothesis and persuasion which were made to take the place of admissible evidence. Furthermore, he submitted that none of the offences charged was proved to the required standard. He thus urged the court to find the appeal merited and allow the same.
2. The appeal was opposed by the state. On the issue of identification Mr. Ochieng submitted that PW2 in her testimony laid down the basis from which she was able to convince the court as to how she was able to identify the appellant, which included the fact that PW2 had taught the appellant and had known him for 22 years and they were also neighbours. Mr. Ochieng also submitted that during the attack, the appellant was not wearing the red cap which was recovered from near PW2's kitchen on the morning after the attack.
3. On grounds 1, 7,8, 9, 11 and 14 Mr. Ochieng conceded that there was existence of some grudge between the complainant and appellant.
4. On grounds 4, 5 and 10 he submitted that the trial magistrate was not solely persuaded by suspicion; that the trial magistrate warned himself of the dangers of relying on suspicion and was able to separate suspicion from facts and concluded that after evaluating the evidence the issues were now not mere suspicion but credible circumstantial evidence. He therefore urged the court to dismiss appeal.
5. Mr. Oguttu in reply submitted that the fact alone that PW2 had taught appellant in 1993 and that appellant had lived with PW2 for 22 years in neighbourhood was not sufficient to support the conviction. Furthermore, that PW2 had admitted during her testimony that appellant's voice had changed since 1993 or thereabouts when she taught him.
6. Secondly, he submitted that the issue of the trial magistrate warning himself before convicting the appellant was by implication and not by any direct such warning.
7. On circumstantial evidence of the red **"kofia"** or red cap he submitted that the owner of the kofia was not given by PW1 nor did she describe the wearer. PW2 did not adduce any evidence of any of the attackers wearing a red kofia; and that the evidence of PW5 does not support the state's contention that the prosecution met the threshold of circumstantial evidence.
8. Finally he submitted that it was up to this court to confirm from the record whether it was truly the appellant who carried out the heinous act. He urged the court to find merit in the appeal and to allow the same.

Duty of this Court

9. As a first appellate court we must reconsider and evaluate the evidence afresh. In this duty we are guided by precedent in **Pandya -vs- Republic [1957] EA 336**; **Okeno -vs- Republic [1972] EA 32**. In evaluating the evidence however we are mindful of the fact that unlike the trial court we can neither see nor hear the witnesses to benefit from observing their demeanour.

Issues for Determination

10. From the Petition of Appeal, the record and submissions by both counsel, the following issues stand out for our determination:-

1. *Whether or not there was proper identification of the appellant by PW2.*
2. *Whether there was sufficient circumstantial evidence to link the appellant to the robbery.*
3. *Whether there was sufficient evidence to convict the appellant for gang rape and defilement.*

1. It is not in dispute that a robbery and indeed rape of PW2 and defilement on PW1 was committed on the night of $4^{th}/5^{th}$ October 2011. In the course of the robbery it was established from the evidence of PW1 and PW2 that the robbers were more than 2.

Findings

2. On the issue of identification of the people who attacked PW2's home, PW1 stated the following:-

"I didn't see the accused among the attackers. … I can recall the cap I don't know where it was recovered. I saw the cap with one of the attackers, but I did not see the face.

I did not recognize any of the assailants. One had a yellow coat and others black. I did not see the accused person."

And PW2 stated the following:-

".... the time he hit me a second time. I tried to look at the person. I saw a tall slender person. I did recognize the voice as the accused. He was asking his colleagues to look into the suit case.

…. At about 3.00 I however sift phones that wake us up to pray. Then I heard the familiar voice ask "what did some passengers want" The voice was that of the accused.

….They got in at 7 p.m. as the news was going on. They left at 4.00 a.m. I was raped by one person who raped me 3 times. It was the same person from the voice.

….. I called the name of my neighbours but there was no response. I heard the voice that I had heard before ask why I was shouting. He threatened to harm us.

…. The red cap is usually worn by the accused. It was recovered next to the kitchen door. I saw it also before my eyes were covered.

…. When I wrote my statement, I did not state that I had recognized the assailants. It was because I was confused. I knew my assailant.

3. On cross-examination, PW2 stated:-

"In 1993 it was when I was teaching the accused (reads the statement). I suspect the accused as he never came to my home when I shouted for help, other members of his family came. He stays at home. I suspect him with the voice. I also taught him at Borabu in 1993.

…. I suspected him because he did not respond to my alarm in the morning. Those who came were Lameck, some women(Jane) Davis, and many others."

PW2 also stated:-

"The accused is medium height and not tall. He is slim. I linked the accused because of the words uttered and search in the suit case. I suspect he was after the land case agreement. May be that is what they were looking for."

4. PW5 (the investigating officer) on cross-examination stated as follows:

".... The cap has inscriptions on the front "Speedy". It is a cap found at the scene. I had not seen the accused put on the cap and I thus did not believe if the cap was the accused's without the chemist report, I cannot ascertain the cap is the accused's.

…. She did not mention that she knows the accused. She was in class 2 then. I did not find out any relationship between the accused and the minor."

5. In his evidence, the appellant denied committing the offences. His evidence was corroborated

by that of his wife DW2 who attested to the fact that he was at home by the time PW2 was attacked in her house hold and only got to learn about PW2's attack the following morning 5th October 2011 on hearing her screams. Both the appellant and DW2 his wife also attested to the fact that they had no grudge over the land with PW2 (the complainant). However, the evidence of DW4 who in my humble view was an independent witness since he was not related to the appellant shads some light on the following two issues:-

a. *That contrary to the evidence of PW2, the appellant was actually present when PW2's neighbours went on a rescue mission to her house. DW4 attested to the fact that he was accompanied by the appellant to the police station to get a police officer to visit PW2's home (the scene of the robbery).*
b. *That in contrary to the evidence of the appellant and DW2 (his wife) that there was no grudge over land, DW4 confirmed that indeed there was anxiety among all the people who appellant's mother sold land to since they did not have titles to the pieces of land. It was DW4's testimony therefore that they were urging the appellant to take out letters of administration to his deceased mother's estate in order for them to acquire their own title deeds.*

6. In **Choge-vs- Republic – Criminal Appeal NO.69 of 1984 the Court of Appeal sitting in Nairobi,** Hancox, Nyarangi JJA and Platt Ag. JA held:-

"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's person's voice, that the witness was familiar with it and 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. In the instant case it was not safe to say that Okumu's identification of the 1st appellant's voice was free from all possibility of error."

7. As earlier pointed out, PW2's identification of the appellant was not only based on his voice but was based on a strong suspicion that it was him who attacked her because they were not in good terms over land and also the fact that her land sale agreement went missing during the night of the attack. The complainant herself attested to the fact that she did not write in her statement to the police that she recognized one of the people who attacked her. Could it be that after recording her statement and upon realizing that her title deed had gone missing PW2 could have planted the idea in her mind that the appellant was one of her attackers? May be that was so.
8. According to the evidence of PW2, she did not identify any of her attackers and only recognized the familiar voice of the appellant telling his gang members to search for something in the suit case. She also stated that one of her attackers whom she recognized as the appellant was tall and slim and yet on cross examination she confirmed that the appellant was actually of medium height and slim.
9. Then comes PW2's evidence that she strongly suspected the appellant of the attack since he never came to rescue her after she cried out for help. Her testimony was however thrown out the window by that of DW4 a neighbour to both PW2 and appellant who testified that the appellant was actually among the people who went to the police station to get a police officer to come to the scene of crime (PW2's home).
10. The defence also rebutted the prosecution's case when DW2 testified that the appellant was at home throughout the entire night of the alleged attack upon PW2. There is also evidence of PW5 (a prosecution witness who also couples up as the investigating officer) which casts some doubt on the evidence of the red cap allegedly found at the scene of the attack (PW2's home) and that the said red cap belonged to the appellant.
11. Secondly, on the issue of whether or not the available evidence against the appellant can be described as circumstantial evidence upon which guilt can be inferred it was clearly held in **Republic -vs- Kipkering Arap Koske & another [1949] EACA 135** that:

"In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

12. In **Sawe -vs- Republic Criminal Appeal No.2 of 2003 KLR page 364 – Court of Appeal Nairobi** Kwach, Lakha and O'kubasu JJA held:-

"In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial judge we have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made it clear in the case of Mary Wanjiku Gichira -vs- Republic – Criminal Appeal No.17 of 1998 (unreported) suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence."

Conclusion

13. That being the position, were are unable to concur with the trial magistrate's decision that indeed the prosecution had proved its case beyond all reasonable doubt. The mere fact that the investigating officer also doubted the appellant's ownership of the red cap whose presence at the scene was used to pin him down coupled with the fact that the appellant adduced evidence supporting his contention that he was at home the night PW2 was attacked has clearly created considerable doubt in our minds as to the culpability of the appellant. In criminal matters the burden of proof being beyond all reasonable doubt, and such proof always being the burden of the prosecution, we are not fully convinced of the appellant's participation in the crime
14. Therefore the appeal succeeds. The conviction on all 3 counts is quashed and the sentences set aside. The appellant shall be released forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kisii this 24th day of July, 2014

R.N. SITATI **E.N. MAINA**

JUDGE. **JUDGE.**

In the presence of:-

Mr. Anyona h/b for Mr. Oguttu Mboya for the Appellant

Mr. Majale (present) for the Respondent

Mr. Bibu - Court Clerk