



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 282,283&284 of 2011

No.654

STEPHEN ONYARI OKERI 1ST APPELLANT

THOMAS BOGONKO SEGERA 2ND APPELLANT

JARED OKERI OBAIGWA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of the SRM's court

at Keroka in criminal case No. 184 of 2011 – J. Were, SRM dated 30th November 2011)

JUDGMENT

1.The appellants herein Stephen Onyari Okeri, Thomas Bogonko Segera and Jared Okeri Obaigwa who were 1st, 3rd and 2nd accused persons respectively in the lower court where they were charged with 4 counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The 1st appellant faced an additional charge of defilement contrary to **section 8 (1)** of the **Sexual Offences Act No. 3 of 2006**.

2.The particulars of the 1st count were that on the night of 22nd February 2011 at Borabu District while armed with dangerous weapons namely pangas and runqus they robbed Bundi Moseti Atuya

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of one mobile phone make Small and cash 300/= all valued at Kshs.2800/= the property of Bundi Moseti Atuya and immediately after the time of such robbery used actual violence to the said Bundi Moseti Atuya. The particulars of the 2nd count were that on the same night in the same locality they committed a similar offence against Elijah Ombui Mose by robbing him of one torch and cash Kshs.3200/= all valued at Kshs.3,350/= and also used actual violence on the said Elijah Ombui Mose.

3. In count three, they were jointly charged with violently robbing Solomon Nyatigo Nyamosi of one mobile phone make Nokia 1110 and Kshs.400/= all valued at Kshs.2,900/= and immediately before the time of such robbery used actual violence to the said Solomon Nyatigo Nyamosi.

4. In the last joint count, they were alleged to have violently robbed Lameck Mobisa Nyangweso of 2 phones a nokia and Siemens, a bundle of wheat flour, a carton of 1 litre Golden Fry cooking oil, one carton of 250 grams cowboy cooking oil, 50 pairs of Eveready batteries, one box of menengai bar soap and cash Kshs.20,000/= all worth Kshs.34,850/=.

5.The 1st appellant also faced a separate account of defilement contrary to

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section 8(1) of the Sexual Offences Act No. 3 of 2006. The offence was alleged to have been committed in the same place against one M.K.N., a child aged 13 years.

6. They were all tried, convicted and sentenced to 20 years imprisonment on counts I, II and III.

7. The 1st appellant was also found guilty in regard to count No.V and was sentenced to a further 20 years imprisonment. However, the sentences were to run concurrently.

8.The three appellants being aggrieved by and dissatisfied with the said conviction and sentence filed their separate appeals and asked the court to quash the convictions and set the sentences aside. When the matters came before us for hearing we ordered the three appeals consolidated in the order in which the appellants appear herein. At the hearing of the appeals, we heard arguments from all the 3 appellants. We also heard submissions from counsel for the Respondent.

9. Mr. Rogito for the 1st appellant (1st accused) submitted that the 1st appellant was not in the identification parade and that in the circumstances, PW1 (a minor) who allegedly identified the 1st appellant could not have identified the said 1st appellant by voice as she had only

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known him for 2 months; she did not know his name or what he did for a living therefore the purported identification by PW1 of the 1st appellant was not a proper identification.

10.Secondly Mr. Rogito submitted that the incident took place in the month of February after Valentine's Day and therefore that red caps such as the red cap found in the appellant's house were very popular around such a time. That PW1 did not identify any peculiar marks on the cap thereby resulting in an improper identification of the cap as belonging to the 1st appellant.

11.Thirdly Mr. Rogito submitted that PW1's evidence on the defilement charge was not corroborated and as such the standard of proof was not met and that PW4's evidence was as a result of bad blood between the witness and the 1st appellant. Counsel also faulted the trial court for failing to warn itself of the dangers of relying on the evidence of a single identifying witness in respect of counts I and V and thereby ending up with wrong conclusions. Counsel also contended that no proper investigations were carried out into the case to the extent that there was no evidence whatsoever linking the 1st appellant to the alleged crimes.

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12.Mr. Okenye for the 2nd appellant (3rd accused) submitted that the appellant was not properly identified on grounds that the identification parade was not done in accordance with the standing orders. He referred the court to the case of **Joseph Kariuki –vs- Republic [1985] KLR 507** in which the court stated how many people must be lined up in an identification parade for such a parade to be validly conducted. He also referred the court to **Mboche –v- Republic [1973] EA 95** which authority stated that evidence from such a defective identification parade should be discarded. Counsel also contended that most of the eye witnesses stated they did not see the 2nd appellant during the robbery.

13.Mr. Nyambati for the 3rd appellant (2nd accused) submitted that though the incident took place at night PW1 did not tell the trial court the intensity of the light from the torch, how far the appellant was from the light and who was in possession of the torch that is alleged to have emitted the light. That therefore evidence on recognition of the 3rd appellant (2nd accused) cannot be relied on as the identifying witness apparently relied on the reflection that came from the wall.

14.Secondly Mr. Nyambati submitted that under provisions of the Criminal Procedure Code **section 169** the trial court must state the

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points for determination, that the trial court in the instant case did not comply with those provisions of the law. He urged the court to make a proper finding that the conviction was not safe.

15.The appeal was opposed by Mr. Mutua learned counsel for the state. First he submitted that the 3 appellants were armed with dangerous weapons. That PW2 clearly identified 2nd appellant with the help of light from the torch which the appellant had; that there was also moonlight and they took the victim to his house therefore there was sufficient time of interaction for the victim to recognize him. That the offence of defilement in respect of PW4 by the 1st appellant was proved for the reason that 1st appellant resided at Kipkebe Tea Factory. That PW1 and 1st appellant were within close vicinity and there was evidence of prior recognition.

16.Counsel referred to **section 113** of the **Evidence Act** and submitted that as long as the evidence is cogently credible and points to the appellant it is acceptable. Regarding the identification parade he submitted that only six suspects were lined up and that such a number notwithstanding evidence from such a parade is acceptable. He cited **Ssentale –v.- Uganda [1968] EA 365**.

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17.On procedural requirements counsel submitted that though the trial court did not warn itself on the dangers of convicting on the identification of one witness the appellants herein had planned to rob and subdue an entire neighbourhood and the ingredients of robbery with violence were proved. He urged the court to dismiss the appeal on both conviction and sentence.

18.This being a first appeal we are in law required to re-evaluate the evidence tendered before the trial court so as to come to our own conclusion on the same. We have however to take into account the fact that we do not have the advantage of hearing and seeing the witnesses as did the trial court. See **Okeno – vs- Republic [1972] EA 32** and **Pandya –vs- R [1957] EA 336**.

19.Before going into the issues for determination there is need to analyze the evidence tendered before the trial court. PW1 Samson Otigo Nyamoti testified that on the night of 21st /22nd February 2011 he was

asleep with his family when at midnight he heard a bang on the door. Shortly afterwards he saw 3 people shining torch light and demanding for cash and his phone. One of the assailants searched his pockets and took Kshs.400 and his nokia 1110 phone. He knew one of

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the assailant's face as a torch the assailants had shone and reflected light on the assailant's face. It was the 2nd accused in the lower court. PW1 stated that the very assailant hit him on the head and tied the hands of his wife, son and himself. They then left with his daughter (MK) and on return, their daughter told them she had been defiled. The whole family was thereafter taken outside near a plantation to the home of George Omboga (a clerk at the estate). They were forced to sit down as the assailants tried to gain entry into George's house. Before they could do anything, George raised an alarm, making the assailants to run away. PW1 and his family were left there in the cold near George's house.

20. On 23rd February PW1 attended an identification parade and he was able to identify the 3rd appellant (2nd accused). He identified the identification parade certificate which he had signed and marked MF1-1, P3 form MF1-2. He further told the court that the 3rd appellant (2nd accused) was, on the night of the attack bearded, just as he was on the parade. PW1 stated that he was able to see the 3rd appellant clearly with the help of light reflecting from the wall and that he saw his face easily as he was not masked and neither did he have a cap.

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21. PW2, Bundi Mosei Atwori told the court that he knew all the 3 appellants. The 1st appellant (1st accused nicknamed city) 3rd appellant (2nd accused nicknamed Boy) and 2nd appellant (3rd accused whose father's name is Phillip). That on the night of 21st/22nd February 2011 at 9 p.m. he was watching over his cattle at the Estate when he heard people from behind telling him to sit down. He began to scream but he was hit by the 3rd appellant (2nd accused) as his torch fell down. The 3rd appellant (2nd accused) took his phone a siemens worth Kshs.4,500/= and Kshs.300/= from his wallet. The assailants had torches and as they shone them he was able to see the 3rd appellant (2nd accused) because of the torch light. He produced a P3 form which was marked MF1-3. Later, he attended an identification parade and he was able to identify the 3rd appellant (2nd accused) as he was known to him.

22. PW3 Sarah Onyoni, a Nurse Aid at Kipkebe Dispensary, told the court that on the night of 22nd February 2011 at 1 a.m. she was asleep at her house when she heard noise at her window. She went to the living room and saw people in her house. They ordered her to sit down. They demanded for cash and took Kshs.8,000/=, a radio, soda and sugar. She was able to recognize the 2nd appellant (3rd accused) as he had a

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black jacket like that of the police and his face was not covered though he had a cap. She later attended an identification parade and was able to recognize the 2nd appellant (3rd accused).

23. PW4 MK (minor aged 13 years old) told the court that her father is PW1 and that she knew the 1st appellant (1st accused) before the night of 21st/22nd February 2011. That on that night while asleep she heard PW1 say: **"do not kill me, I don't have cash"**. The 1st appellant (1st accused) told her to go to

sleep with her mother. Later on the 1st appellant (1st accused) took her outside with another assailant and raped her as the other assailant held a knife to her neck. She was able to see the 1st appellant (1st accused) clearly because of the light from the moon and torch. She also knew his voice as he was a person known to her.

24.PW4 also stated that they later reported the matter to Manga police station. She led the police to the house of 1st appellant (1st accused). She identified a red cap the 1st appellant (1st accused) wore the night he raped her and told the court that earlier on, the 1st appellant had wanted her to be his girlfriend and when she declined he had promised that he would still get her. On the night she was defiled he

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reminded her that he had at last got her. The red cap was identified in court by PW4 and it was marked (MF1-1), P3 form marked MF1-5 and her birth certificate was marked **P. Exhibit 6**.

25.PW5 Joel Ongaro a medical officer at Kijauri District Hospital confirmed to court that on 24th February 2011 he examined both PW1 and PW2. He noted that PW1 had bruises on the face, upper hip, chest part, left hand and 2 cuts on the left foreleg posterior. The weapons used were sharp and blunt and noted that the injury inflicted on him was grievous harm due to head injury. The P3 forms were produced as **P. Exhibits 1 and 3**.

26.PW5 also confirmed that on 24th February 2011 he conducted a medical examination on PW4 MK, and confirmed that her private parts were bruised, her hymen was broken, she had white discharge, a HIV test was done, she was not pregnant and there were no sperms. He produced a P3 form which was marked as **P. Exhibit 7**.

27.PW6, No. 23280 Chief Inspector Stephen Ndeti the OCS Manga police station told the court that on 23rd February 2011 he conducted an identification parade on suspects who had been arrested from Kipkebe Tea Estate on various offences of robbery with violence and one on

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defilement. That the 2nd appellant (3rd accused) was identified by PW1 and PW2. PW3 identified the 3rd appellant (2nd accused). That he placed the suspects with 5 other people and the 2nd appellant (3rd accused) stood between Number 5 and 6. He further testified that the 1st appellant (1st accused) was known by PW4 and thus there was no need to conduct an identification parade.

28.PW7 George Nyabuti Omboba a clerk at Magura estate told court that on 22nd February 2011 at 1 a.m. he heard his bedroom door being pushed and on waking up the intruders asked him to open for them. He called the watchman one Solomon Mosomi and that when Solomon came, the intruders fled. Shortly after, he heard a girl screaming outside. On opening the door he found many people outside who told him they had been taken from their house and their daughter raped. He however did not see the intruders.

29.PW8 Johnson Ali Mosomi a watchman at Magura estate confirmed to the court that on 22nd February 2011 at about 1 a.m. PW7 called him and told him he had been attacked by thugs and needed assistance. He left his house and saw PW1's wife, PW1 and PW4 who told him not to blow the whistle as the assailants had run away. He

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noticed that they had been tied from behind. Later about 10 people came and together they called George Nyabuti Omboba who had not been assaulted.

30.PW9 was No.35763, Sergeant Gilbert Midibo of Manga police station, and the Investigating Officer in this case. He confirmed to the court that on 22nd February 2011 at 4 a.m. while he was at the station, he received a report that Sasini Estate had been attacked. He went to the scene and found PW1, PW4 and PW2. That on 23rd February 2011 PW4 led them to the 1st appellant's (1st accused) house at which she identified the cap which was produced in evidence as **P. Exhibit 1**. They later arrested the 2nd appellant (3rd accused) who was a cousin to the 1st appellant. On investigations, PW1 and PW2 confirmed to him that the 2nd appellant (3rd accused) was one of the people they had identified on the night they were attacked. The 3rd appellant (2nd accused) was identified by Jared. PW9 testified further that as part of the investigations, he requested for an identification parade which was conducted by PW6, the OCS, Manga police station.

31.At the close of the prosecution case, the trial court put the appellants on their defence. Each of the appellants gave sworn

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testimony with no witnesses. The 1st appellant (1st accused) told the court that he did not commit any offence and that on the material night he was asleep. He woke up at 6.00 a.m. The next day he was arrested at about 6.30 a.m. and that a cap was taken from his house.

32.The 3rd appellant (2nd accused) told the court that on the night of 22nd/23rd February 2011 he was asleep with his family when at 2.00 a.m. in the morning he heard a knock on his door. The police entered his house and arrested him. He said he knew nothing about the charges against him.

33.The 2nd appellant (3rd accused) testified that on 22nd February 2011 he was asleep in his house and he woke up at 6.30 a.m. He then went to work but heard that there had been a robbery in the estate. On 23rd night while he was asleep in his house he was ordered to open, and on doing so police officers from Manga arrested him. It was his case that he only learnt of the charges while in court. On the basis of the above summary of the facts and the evidence, the following are issues for determination:-

§ *Were the 2nd and 3rd appellants positively recognized by the witnesses?*

§ *Was the identification parade carried out on the 2nd and 3rd*

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appellants valid and done in accordance with the rules?

§ *Was the 1st appellant identified and recognized by PW4.*

34.We have carefully reconsidered and evaluated the evidence and gone through the proceedings before the trial court and note that there is a contradiction in the evidence on identification between the witnesses namely PW1, PW2 and PW3 on the one hand and PW6 and PW9 on the other hand regarding the identity of the appellants in the identification parade. PW1 and PW2 testified in court that the 3rd appellant (2nd accused) was the person they identified during the night they were assaulted and robbed. However, the

police officers who conducted the identification parade told the court that PW1 & PW2 identified the 2nd appellant (3rd accused) in the parade. Furthermore, PW3 stated that she identified the 2nd appellant (3rd accused) while the investigating officer stated that she identified the 3rd appellant (2nd accused).

35. In addition, the identification parade conducted by PW6 had six members. This was clearly contrary to **Order 6** of the **Police Forces Standing Orders** which requires that the identification parade must be conducted with scrupulous fairness otherwise the value of the identification as evidence will be lessened or nullified. It was

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***“The Force Standing Orders are often referred to as the judge’s rules.**

They are not legal instruments in the sense of being subsidiary legislation made pursuant to any principal law or Act of Parliament. They are a set of administrative directions used for the guidance of the police in questioning persons suspected of committing an offence. In England these rules have been superseded by the provisions relating to detection, treatment and questioning of persons in custody by the police and are contained in the Police and Criminal Evidence Act 1984, Part V and the relevant codes of Practice. In Kenya and indeed East Africa, the rules of identification were approved by the Court of Appeal for Eastern Africa in the case of R.-. Mwango s/o Manaa [1936] 3 EACA 29:

“In that case the Court of Appeal approved of the method of identification which was set out in Kenya Police Order No.15/26 and approved by the then Chief Justice of Kenya. Those rules entitled “Instructions for Identification Parades” originally (13) in number have in essence survived to the current Force Standing Orders Chapter 46 Order 6. These rules have guided the courts since their approval and have acquired the force of law.”

36. In the case of **Ssentale –vs- Uganda [1968] EA 365**, Sir Udo Udoma CJ held in *inter alia* that “evidence of an identification parade held in a manner contrary to the rules approved by the Court of Appeal in **R. –vs- Mwango** (supra) was irregularly admitted.” He allowed the appeal, quashed the conviction, set aside the sentence and acquitted the appellant.

37. The instant case is very similar. The judge’s Rules were not

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followed. Instead of providing eight persons in the identification parade, PW6 provided only six persons. This was contrary to the rules of the Force Standing Orders as outlined above. The evidence of identification was thereby inadmissible. It is nullified. The 2nd and 3rd appellants succeed in their appeal on this ground.

38. As for the 1st appellant, PW6 on cross examination by the 1st and 3rd accused’s advocate testified that the 1st appellant was known to PW4 and that in the circumstances, he did not need to conduct an identification parade on him.

39. PW4 in her evidence in chief stated that:-

“I saw the 1st accused clearly. I saw him clearly because of the moon

and torch. I also know his voice. He is a person known to me.”

40. Mr. Rogito, counsel for the 1st appellant, submitted that since PW4 was a minor her evidence needed to be corroborated and that without such corroboration, the 1st appellant is entitled to an acquittal. However the proviso to **Section 124 of the Evidence Act, Chapter 80 Laws of Kenya** states that:-

“Provided that where in a criminal case involving a sexual offence the

only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling in truth.

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41. There is no doubt that the prosecution’s case against the 1st appellant as far as the defilement charge goes turns entirely on the evidence of recognition by PW4. She testified that the 1st appellant was well known to her and because of this averment, PW9 stated he did not find it necessary to conduct an identification parade.

42. On cross examination by the 1st appellant’s advocate PW4 stated thus:-

“I spoke with the 1st accused while I was still on bed. He later defiled me outside the house; my dad wasn’t outside when I was defiled. The 1st accused told me he had gotten me while we were outside. I saw the 1st accused clearly The 1st accused did not tell me his name but he wanted me to be his girlfriend. City is the 1st accused village name. I had spoken with the 1st accused but refused to accept. I can’t recall the exact time he asked me to be his girlfriend but it was in January. I met him while with my brother Nyamori and then the 2nd time I was alone I did inform my mum of the 1st accused’s request that I be his girlfriend. I did not tell my teachers.”

43. PW9 also testified during the trial that PW4 led them to the 1st appellant’s house and also identified the cap the 1st appellant had won on the night of the defilement ordeal.

44. On voice recognition the case of **Chege –vs- Republic [1985] KLR 1** is relevant. At holding number 9, the Court of Appeal held that:-

“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 person’s voice, that the witness was familiar with it and recognized it and that the conditions

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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.”

45. In the instant case, it appears to us that PW4 had heard the 1st appellant’s voice on only two occasions in the past, once in January 2011 and the second time on an unidentified date thereafter. It does not come out from PW4’s testimony for how long the 1st appellant spoke to her on each of those two occasions. In the circumstances, we are not convinced that PW4’s identification of the 1st appellant through the voice was free from all possibility of error.

46. Having reached the above conclusion on voice identification of the 1st appellant by PW4, we now return to the visual identification about which PW4 testified. She testified that she was able to recognize the 1st appellant with the help of torch light from torches in the assailants' possession and also because of the moonlight. PW4 does not say in her testimony whether the torch was directed at the 1st appellant's face and for how long. As regards the moonlight there was no evidence of how bright the moon was at the material time, so that taking all this evidence together, we are of the view that the circumstances under which PW4 said she recognized the 1st appellant were difficult; thus rendering the recognition doubtful.

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47. For the foregoing reasons, the appeals by the 1st, 2nd and 3rd appellants succeed. The convictions are quashed and the sentences are set aside. All the 3 appellants are therefore to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Kisii this 21st day of March, 2013

RUTH NEKOYE SITATI
JUDGE.

R. LAGAT-KORIR
JUDGE.

In the presence of:

Mr. Majale (present) for the State

Mr. G.M. Nyambati (present) for 3rd Appellant

Mr. G.M. Nyambati h/b for Mr. Rogito for 1st Appellant and for Mr. Okenye for 2nd Appellant.

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.

R. LAGAT-KORIR
JUDGE.

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