

to Karura to attend a women's merry-go-round meeting at the home of one Mama S. She was walking along a road and on the upper part of the road there were residential houses, and thickets on the lower side of the road. Just after crossing the bridge, she saw a man from behind running towards her. She did not recognize him and confidently continued walking. She then felt a grip on her throat and the same man held her in a stranglehold position and pointed a knife at her face. She let out a cry and the Appellant asked her for her phone which she surrendered. He also demanded for her watch and she unstrapped her wrist watch and gave it to him. Without letting her go he pulled her towards the side of the road. There was a slope and she lost her balance and laid on a flat surface and fell on her side. She tried to rise but the Appellant towered above her while pointing the knife at her. He gestured for her to remain still and demanded for money. She surrendered a tiny pouch she was holding and he took Kshs.325/= from it and threatened P.W. 1 he would kill her for lying to him and that he was thirsty for human blood and that he would chop off her head and drink her blood. She became afraid and asked the Appellant to spare her life and that is when he said that he had to have sex with her before drinking her blood. The Appellant ordered P.W. 1 to undress but she refused and a struggle ensued and in the process he cut P.W. 1 on the right hand with the knife. The Appellant proceeded to kick her on the left leg thus tripping her and she fell backwards. He lifted her skirt and pulled down her panties to her knees. He also undid his trouser and pulled down his underpants and he lay on her and tried to penetrate her. The Appellant was unable to do so because the panty prevented him from prying her legs open. The Appellant stood up and ordered her to stand up as well and P.W. 1 pulled her pants up. The Appellant asked P.W. 1 whether she was married or had any children and she replied in the negative. The Appellant asked her to unlock her phone and then he made a call to someone and spoke to that person in a coded language that she could not understand. Then afterwards he took her hand and led her deeper into the thicket while telling her that he belonged to a proscribed sect. Once deep in the thicket he ordered her to undress again and she removed her skirt, panties and petticoat. He dug into his pockets and removed a rope which was already knotted into a loop. The Appellant then ordered P.W. 1 to remove her blouse and afraid she obliged and he pulled down his trousers and inner pants and lay on top of her and proceeded to have unlawful sex with her. After he finished the act he dressed and P.W. 1 dressed too and the Appellant asked her whether she knew him and she replied in the negative. He also asked her if she knew one K and again she replied in the negative although in the real sense she did but she was afraid that if she revealed this to her assailant, he would carry out his threat and harm her. P.W. 1's phone rang and the Appellant asked her if she knew the caller and she replied in the affirmative and he ordered her to speak to the caller but she was too shaken to talk. He then grabbed her phone and put it into his pocket before continuing to badger her with many questions. P.W. 1 testified that she was seated while the Appellant was kneeling before her. Her phone rang again and the Appellant ordered her to wear her blouse in the reverse before leading her out of the thicket and ordered her to walk back in the direction she had come from. She walked into the main road and resolved to go on to Mama S's house to seek help and on getting there she was escorted by members of the merry-go-round group to Nazareth hospital where she received first aid before going to Kikuyu Police Station where she reported the matter and she was then referred to Nairobi Women's Hospital where she was examined and treated.

5. P.W. 1 testified that although she had reported to the police that the assailant was not previously known to her she could identify him later owing to the time she spent with him and the time of the day when the incident occurred. The police asked P.W. 1 to be on the lookout for the suspect and notify them if she sighted him. On the 21st October 2007 as P.W. 1 was heading home from town at Gikuni Trading Centre she spotted the Appellant standing on the verandah of a building where people were playing pool. P.W. 1 testified that the verandah was illuminated by light from the very building as well as the buildings adjacent to it. Recognizing the person as the Appellant, she hurried to the AP camp and notified the officers who then accompanied her to the same place where she had seen the Appellant. The Appellant was arrested. The next day P.W. 1 went to record a statement.
6. **P.W. 2 – A K (P.W. 1'S father)** testified that on the material day he received the news of her daughter's ordeal from a neighbour, one J N. P.W.1 had called the neighbour and asked him to inform P.W. 2 that she required money from the house to go to Nazareth Hospital. P.W. 2 rushed with the neighbour to the hospital and found P.W. 1 crying intolerably and her clothes were

muddy. P.W. 2 testified that P.W. 1 was attended to at the hospital and then referred to Kikuyu Police Station to report the matter and she was later referred to Nairobi Women's Hospital where she was examined and treated. P.W. 2 then recorded his statement.

7. **P.W. 3 - No. 2001002673 AP Cpl. James Wambua** – testified that on the material day P.W. 1 made a report that she had been accosted by a man who was armed with a knife and later the man robbed her and then raped her. On 21st October 2007 P.W. 1 returned to the station and reported that she had spotted the man who had assaulted her standing on a verandah of a building where pool was played. P.W. 3 and another officer, A.P. Koome accompanied P.W. 1 to the place where the assailant was and they arrested him after P.W. 1 identified him.
8. **P.W. 4 – J N W** testified that earlier on the material day he was with P.W. 1 at a church function when at the end of it they parted ways as he went home while P.W. 1 went to a merry-go-around meeting. Later that afternoon he received a call from one Mama S that P.W. 1 had been involved in a mishap and that she required him to go home and get some money and meet her at the Nazareth Hospital. P.W. 4 did as he was told and accompanied by P.W. 2 they proceeded to the hospital where they met a distraught P.W.1. P.W. 4 testified that P.W. 1 was hysterical and had a disheveled appearance and she informed him she could identify the Appellant.
9. **P.W. 5 - Dr. George Mwaura Kungu** testified that on 9th August 2007 he examined P.W. 1 with complaints of assault and rape. On examining P.W. 1, he found her to have pain and tenderness in the neck, a 3cm scar on the right wrist, minor lacerations on the external genitalia and a whitish discharge that appeared to him to be semen. Laboratory examination of the discharge revealed spermatozoa confirming that P.W. 1 had sexual contact. He later completed and signed a P3 form.
10. **P.W. 6 – No. 47423 Sergeant Catherine Omollo** testified recalling that on 22nd October 2007, she was going through the O.B. and came across a robbery and rape report. The suspect was already in the cells having been brought in from Gikuni. As per the O.B. the report had been made on the material day. She commenced investigations and took P.W. 1's statement who had duly completed a P3 form. She then preferred the charges against the Appellant. P.W. 6 testified the delay in arresting the Appellant was because the police were still looking for him.
11. When he was placed on his defence the Appellant chose to give a sworn evidence and did not call any witnesses. He denied having committed the offence and testified that on the material day he set off to work as usual. However on the 11th August 2007, he was arrested by officers from Gikuno on allegations of having committed a robbery with violence and released on the 21st October 2007 only to be re-arrested the same day at around 6.30 a.m. by the same officer on allegations that there was another complaint against him. He testified further that P.W. 1 failed to give any description of him saying that she identified him visually adding that there was nothing peculiar about his appearance.
12. On 13th April 2011 the trial court delivered its Judgement and found the Appellant guilty of the two counts and convicted him to suffer death as is by law provided.
13. Being dissatisfied with the trial court's Judgement the Appellant filed this appeal dated 29th June 2011 based on the following grounds namely:-
 1. *That the learned trial magistrate erred in law and fact when she misdirected herself by convicting him on the evidence which was not sufficiently trustworthy to have sustained conviction.*
 2. *That the learned trial magistrate erred in law and fact when he dismissed his sworn defence contrary to Section 169 (1) of the Criminal Procedure Code Cap 75 of the Laws of Kenya. .*
 3. *That the learned trial magistrate failed to observe that the prosecution case was full of contradiction and was not proved to the required standard.*

4. ***That the trial magistrate erred in law and fact when he assumed his fate whereas the evidence on record was not favourable to sustain conviction.***

14. The Appellant also filed amended grounds of appeal namely:-

1. ***That the learned trial magistrate made an error in both law and facts and grossly misdirected himself by convicting him on the sole evidence by a single witness (P.W. 1) without warning himself nor the court to the dangers of convicting on such identification evidence made after a span of 2 month and 16 days more so given that no descriptive evidence of the attackers was given to police upon report of the incident.***
2. ***That the learned trial magistrate did not put proper consideration to the evidence of my defence.***
3. ***That the learned trial magistrate made an error in law by sentencing him on the sole identification evidence by P.W. 1 on the main count while at the same time imposing jail term of ten years in count two.***

15. In response to the grounds of the appeal and the Appellant's submission, the State, represented by M/s Ngalyuaka, while opposing the same, submitted that the offences were proved beyond reasonable doubt, and that there was no need to carry out an identification parade as P.W. 1 recognized the Appellant and reported the matter to the police who arrested the Appellant. The counsel also submitted that the offence occurred in broad daylight and for a considerable time, and that the complainant had ample time to recognize the Appellant and that she had all along been looking for the Appellant.

16. After carefully considering the grounds of appeal and submission of the parties, and after reviewing the evidence before the trial court, this court considers that the only issues for determination are:-

- i. ***Whether the Appellant was properly identified and connected with the offence,***
- ii. ***Whether the trial court properly considered the Appellant's defence,***
- iii. ***Whether it was safe for the court to convict the Appellant on uncorroborated evidence of a single witness,***
- iv. ***Whether the alleged offences actually took place.***

17. To begin with the last issue, evidence provided by P.W. 1 clearly show that an offence was committed. P.W. 1's evidence is further corroborated by P.W.5 – Dr. George Mwaura Kungu who examined the injuries suffered by the P.W.1 and confirmed that she was actually violently attacked and raped. The doctor found that P.W. 1 had pain and tenderness in the neck and scar on the right wrist, minor lacerations on her vagina and a presence of what appeared to him to be dried semen. We believe that the offences took place and that P.W. 1 was assaulted and raped.

18. The next issue is who was responsible for carrying out the said offences. According to P.W. 1 the offences were carried out by the Appellant. The duty of this court is to establish if P.W. 1 was able to recognize the Appellant so as to convict the Appellant with the offence. The trial court found that P.W. 1 had identified the Appellant. For us, however, the issue is whether, during the period of attack, the P.W. 1 had ample time to know and later on recall her attacker and rapist. To address this issue we have noted the offence took place during the day. Besides, the offence took place in two different locations over a long period of time. During that time, P.W. 1 and her accuser were in some kind of conversations. These conversations involved demands by the attacker for her to remove her panties, undress, dress again. There were also phone calls which the attacker allowed P.W. 1 to receive. From the initial place of crime the attacker moved P.W. 1 into a bush where he concluded the offence of rape. We are satisfied that there was very good and clear opportunity for P.W. 1 to see the features of her attacker, which would enable her later to

clearly recognize him when she saw him. It must be noted that P.W. 1 did not just choose to point at anybody. It took her time to find her attacker. If P.W. 1 wanted to frame any man for this offence she could have done that as soon as the offence had occurred, but this she did more than 60 days later, and only when she was satisfied that she had recognized the right person. Although the trial court based conviction on uncorroborated evidence of a single witness, we are satisfied that the said single witness had the opportunity to correctly recognize the Appellant, having had ample time running into two hours and in broad daylight, during which time the Appellant and P.W. 1 had time to talk. We find that the Appellant was properly recognized and that the trial court properly convicted the Appellant with the offence that was alleged to have been committed. The conviction was therefore safe. We also find that the trial court carefully considered the defence offered by the Appellant, and rightfully rejected the same.

19.As regards count number 1 it is necessary to establish if the offender was armed and if he was in company of one or more people and if he used violence. The test of this was stated in the case of **Oluoch – Vs – Republic [1985] KLR 519** where the Court of Appeal in its obiter judgement established what constituted robbery with violence under Section 296 (2). The court stated that one would be found guilty of robbery with violence where:-

i. ***The offender is armed with any dangerous and offensive weapon or instrument.***

ii. ***The offender is in company of one or more other persons or persons.***

iii. ***At or immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any persons.***

20.We find that the test established in the **Oluoch** Case was satisfied in this matter as the offender had a knife which he used to threaten the complainant into submission. We find that the trial court correctly found the Appellant guilty of count number 1.

21.As for count number 2, P.W. 1 was consistent on how the accused initially attempted to rape her, but the conditions were not satisfactory as P.W. 1' s panty was difficult to remove. The Appellant then moved her to a nearby bush and raped her. Her testimony was corroborated by other witnesses including P.W. 5 the medical officer who examined her. We find that the trial court was correct to find the Appellant guilty of count Number II.

22.The upshot of the foregoing is that we dismiss the appeal in its entirety. However, since the Appellant has been sentenced to death in count number 1, we hereby suspend the sentence in count number 2.

That is the Judgement of the court.

DATED, READ AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER 2013

E. K. O. OGOLA

JUDGE

J. KAMAU

JUDGE

PRESENT:

..... - **Appellant**

..... **for the State**

Teresia & Kipkurui - Court Clerks