

be a tout at Kamukuywa and the 1st Appellant to be a neighbour. PW2 stated that she was raped by the 1st Appellant. According to PW1, the 1st Appellant had a gun and the 2nd Appellant had an axe and a knife. The witnesses testified that the house was lit by solar power and the light was on throughout. The attack took about one hour.

The Appellants gave sworn defence each and denied they were in the attack. The 1st Appellant stated that he was a security guard at Kamukuywa and was arrested on 22/3/2009. The 2nd Appellant stated that he is a handcart puller at Kamukuywa and was also arrested on 22/3/2009.

The trial court considered the prosecution and the defence evidence and concluded that it had been proved beyond doubt that the Appellants had committed the offences.

It is the responsibility of this court to subject the entire evidence to fresh and exhaustive consideration and evaluation to be able to decide whether the Appellants were correctly convicted (**Okeno v. Republic [1972] EA 32**). It is noted that this court did not have the advantage of seeing or hearing the witnesses who testified before the trial court.

The trial court relied on the evidence of PW1, PW2 and PW3 to convict the Appellants. Each stated that she recognized the two Appellants in the attack. The Appellants were otherwise not found with any of the stolen items. The items were not recovered. The attack was at night in PW1's house. The two attackers came into the house and had a gun, an axe and a knife and threatened to kill. They ransacked the house, tied the complainants and took items from them. One raped PW2. It was quite an ordeal. The complainants testified that the attackers were people they knew before. The fact that the two Appellants were known to PW1, PW2 and PW3 prior to the day was not in question. But were they positively recognized in the attack?

It is clear from the judgment of the trial court that the magistrate did not caution himself regarding the need to be careful about the evidence of recognition, and the fact that even an honest witness can make a mistake about recognition and that several honest witnesses can all be mistaken (**R. v. Turnbull and Others [1976] 3 ALL ER 549**). We bear in mind that the evidence of recognition is more reliable and more assuring than that of identification (**Anjononi v. R. [1980] KLR 59**). The Appellants questioned the evidence of recognition which they said was both contradictory and fabricated. They pointed out the fact that in the body of the evidence of PW2 the magistrate had noted:

“witness is not truthful.”

When PW5 was testifying, the magistrate, once again, noted

“witness not truthful not consistence.”

PW5 did not say he recognized or identified the attackers, but PW2 said she recognized the Appellants. After the magistrate observed that PW2 was not truthful he ought not to have relied on his testimony to commit the Appellants, or any of them. That would leave only the evidence of PW1 and PW3.

The Appellants complained that whereas APC Paul Ouso Onyango (PW7) of Kimilili DC's office stated that the complainants had told him that they had recognized the Appellants in the attack, the evidence of P.C. Alphinus Musyoki (PW8) of Kitale Police Station was that the complainants had failed to name their attackers during their initial report. That was a material conflict between the evidence of two crucial prosecution witnesses and that conflict should have been resolved in favour of the Appellants. We note that PW7 testified that when he received the report at about 9.00 p.m. he went to the scene in the vehicle of the reportees. On his way, he said, the lights of the vehicle fell on three people two of whom he recognized. They were the Appellants. The 2nd Appellant was carrying what looked like bread. He proceeded to the scene as he did not know by the time that the two were the attackers. At the scene he was told who the attackers were. He did not say that he immediately went to arrest them. He

knew where they were working and was able to trace their homes. He instead testified:

“The names of the suspects were given to the police.”

PW8, of course, says the names were not given to him when the report was initially made.

Further, the evidence of PW1 was that the 1st Appellant had a gun and the 2nd Appellant had an axe and a knife. However, according to PW7 he was told by PW1 that it was the 2nd Appellant who had the gun (toy pistol). The evidence did not put the court on caution.

Following the arrest of the 1st Appellant he was medically examined by PW6. PW6 had examined PW2. PW6’s evidence was that the two had similar sexually transmitted infection. He did not isolate what kind of infection this was. In the P3 of the 1st Appellant (Exhibit 8) PW6’s remarks were:

“Client suspected to have sexually transmitted infection.”

He was not categorical that the 1st Appellant had an infection. The infection was not confirmed. He cannot say that the two had similar infection.

We have considered all the evidence as recorded and are not satisfied that the prosecution conclusively established that the two Appellants were the ones who attacked the complainants. We allow the appeal, quash the conviction and set aside the sentence. Each Appellant is ordered to be set at liberty forthwith unless he is otherwise being lawfully held.

Dated and delivered at Bungoma this 26th day of March, 2012.

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A. O. MUCHELULE

JUDGE

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F. N. MUCHEMI

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