

2. In further arguments, M/s. Munialo, learned counsel for both appellants argued all the four grounds of appeal together. The judgment by the trial court was faulted, according to counsel for the appellants, after the close of the prosecution's case; there was no evidence to support the offence of rape. The complainant testified that she was able to identify the assailants by the moonlight which enabled her to recognize the appellants. However, the complainant who said she was raped in the house did not adduce evidence on whether the door or the windows of the house were opened to give way for the moonlight which assisted her to recognize the appellants. The trial court also did not analyze the intensity of the moonlight.

3. Moreover, going by the evidence by **Linus Ligale**, PW2, the clinical officer who examined the complainant found no bruises on her private parts. Therefore there were no injuries to support the charge of rape. The complainant said that she was raped by three people. It would follow that they would have inflicted injuries on her private parts. It was further submitted that there was no evidence to connect the appellants with the offence of rape because the complainant was found to have a sexually transmitted disease thus it was necessary to conduct a medical examination on the appellants. Counsel referred to the case of; **OCHARO OBAIGWA VS. REPUBLIC CRA. NO. 92 OF 2003** where the Court of Appeal held:-

“The evidence of Dr. Michael Njeru (PW5) was not specific. He did not reveal the type of sexually transmitted disease that the complainant had contracted. There is no evidence that the complainant was put under any treatment. Curiously, the appellant was not examined to find out if he suffered from any sexually transmitted disease and if so its relevance to the offence charged. The evidence of the Doctor does not in any way connect the appellant with the commission of the offence and therefore does not in law amount to corroboration”

4. M/s Munialo further argued that the evidence of the complainant needed corroboration. The P3 form did not offer any corroboration. Counsel for the appellants drew a parallel between this case and the case of; **BERNARD KEBIBA VS. REPUBLIC CRA. C. NO. 104 OF 2000** where the Court of Appeal held that where the trial court forms an opinion that there is need for corroboration the court must say so expressly in the judgment. The court must then look for corroboration from the evidence and state so in the judgment. In this case the trial magistrate was faulted for failure to acquit the appellants because the complainant evidence was not corroborating.

5. This appeal was opposed by the state; the learned Senior Principal State Counsel Mr. Onderi supported the conviction which he submitted was consistent with the evidence on record. There was sufficient evidence by the complainant who gave an account of how she was attacked by three people who assaulted her, held her and raped her in turns. The complainant was able to recognize the appellants who she knew as neighbours and they kept on referring to each other as **“Babu”** and **“Rodgers”**. She however did not recognize the 3rd assailant. When the complainant screamed, **P. N, PW4**, respondent to the distress. She went to the home of the complainant and heard male voices who were threatening to stab the complainant if she did not stop screaming.

6. **P. N** stood behind the kitchen and when she checked through, she saw a person who is called **Babu** who she knew she saw him coming out of the house of the complainant. Babu then called Rodgers who came out saying he had dropped his necklace. Babu told Rodgers people had come to answer the distress call so they ran away. The complainant and P.N told the trial court that they were able to identify the appellants through the moonlight. According to **Mr. Onderi**, the medical examination which was conducted on the complainant was done seven (7) days later. However, the clinical officer noted the physical injuries on the complainant. Further more the evidence by the complainant who was the victim of rape did not require corroboration which is simply a rule of practice but not a rule of law.

7. Under the Evidence Act, a court can convict based on the evidence of the victim alone. The complainant made a report to the village elder and gave the names of the appellants but the village elder did not take any steps although testifying as a defence witness and admitted the report was made to him. According to **Mr. Onderi** the conviction is safe from any error and the court should uphold it. This

being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction. In so doing, this court should bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of **Njoroge vs. Republic [1987] KLR 19**. I now wish to set out, albeit briefly the evidence before the trial court which led to the conviction and sentence of the appellants.

8. On 22nd December, 2004 at 9.00 p.m. the complainant testified that she was asleep in a house with her two children aged 2 and 3 years. She heard people knock at her door and within no time they kicked it until it open. She said there was moonlight and three young men stormed in and demanded for money and a mobile phone. They strangled her and beat her up. They tore her pants when one was holding her by her hand, the other one by the legs and raped her in turns.

9. The complainant said that she recognized the assailants by their voices as they were her neighbours. She recognized Babu and Rodgers but did not recognize the third assailant. Neighbours rescued her and P.N , PW4 testified how she responded to the distress call coming from the complainant's house. She hid behind the kitchen and saw the appellants whom she recognized as **Babu** and **Rodgers**. P.N found the complainant crying in agony. She screamed and more neighbours came although the other neighbours refused to record a statement. The following day P.N assisted the complainant to fix the door. She also said that the complainant sustained injuries and had scratch marks on the neck and the face.

10. **Linus Ligale PW2**, a clinical officer examined the complainant on 28th December, 2004. He noted the following injuries:-

1. *Bruises on the frontal surface on forehead, left cheek and all over the frontal neck.*
2. *Linear bruise at the back, on the left.*
3. *Bruises on both elbow joints.*
4. *A bruise over the right knee when she came the incident was 6 days old. Weapon used was probably blunt.*

On the examination of complainant's private parts no bruises were found but the clinical officer found discharge from vagina opening although there was no spermatozoon traced. Laboratory test showed that the complainant had a sexually transmitted disease. The appellants were arrested by **P.C. Alice Etale** on 6th January, 2005 after each was arrested by members of public and they were brought to Kitale Police Station by a police reservist from Kiminini area.

11. Put on their defence both appellants gave sworn statement of defence. They both denied having committed the offence and gave evidence regarding the day when they were arrested. They however confirmed that the complainant was their neighbor at Mbai farm. The appellants also relied on the evidence of **Alfred Nalianya Watwati**, DW1, he confirmed that the complainant reported to him in December, 2004 that her house was broken into and she was assaulted. He however visited the scene and saw no sign of breakage but the complainant told him that it was possible she was attacked by Edmond and Rodgers although she was not sure. DW1 did not take any steps to report the complainant's case to the authorities.

12. The learned trial magistrate after considering that evidence, was satisfied that the prosecution proved its case to the required standard. The court also disregarded the defence as lacking credibility. The court believed the evidence by the complainant and found it was supported by the evidence of the clinical officer which established that the complainant and sustained physical injuries. The trial court went on to lament that had the police carried further investigations there could have been other supportive evidence. However, I am now bound by the findings by the trial magistrate. I am supposed to re-evaluate the evidence and I arrive at my own independent judgment.

13. The evidence before the trial court is basically by the complainant and P.N who said she responded to the distress call from the complainant's house. The issue of identification has been raised in this appeal. The complainant and P.N said they identified the appellant by recognition and through the moonlight. It is true the trial court did not evaluate the evidence of intensity of the light illuminating from the moonlight, however in my own analysis of the evidence, I find that this was not identification of a stranger but identification through recognition which is more reliable. The complainant said she identified the appellants through voices recognition in addition to the light from the moon. This evidence of identification of appellant was corroborated by that of P.N. Besides even when the complainant reported the attack to DW1, the names of the appellants were mentioned in that first report.

14. This court is aware of importance of the evidence of corroboration which in essence does not only tend to connect the accused persons with the crime, but confirms in material particulars the evidence that the crime was committed by the accused person and non other. See the case **of Mutonyi vs. Republic [1982] KLR Pg. 203**. The court is also aware of the fact that the evidence in this case was meant to support charge of rape. The crime of rape will not ordinarily be committed in public and in this case the attack took place 9.00 p.m. when the complainant was woken up by the assailants who broke into the house. That explains why under section 124 of the Evidence Act especially the proviso thereto is 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 the truth.”

15. In this case the evidence of the complainant is categorical that there was no consent because she was assaulted and strangled by the appellants who raped her. This distinguishes this case from that of **Musa Kipsongok vs. Republic CR.A. No. 116 of 2001** where the Court of Appeal held that in a charge of rape the fact of non consent must be proved beyond reasonable doubt. The examination of the complainant showed that she had physical injuries which were consistent with the evidence of the complainant and that of P.N. It is also noteworthy the medical examination was carried out several days later and there was no evidence or bruises in the private parts of the complainant. The issue to determine further is whether the learned trial magistrate erred by convicting the appellants with the offence of rape. It is on record that the complainant was a mother of two children and the medical examination was done several days later and the physical injuries were noted.

16. Was the court correct by admitting the complainant's evidence as opposed to that of defence. The provisions of the Evidence Act clearly provide that the evidence of the victim of a sexual assault is adequate so long as the trial court is satisfied that the complainant was telling the truth. I find that the injuries sustained by the complainant were consistent with her evidence that she was raped I sympathize with the lamentation by the trial magistrate that the police did not carry out investigation. I however find that even without those further investigations there were no gaps left in the prosecutions case. I find that the complainant was able to identify her attackers through recognition and this was supported by the evidence of P.N. This is also in line with the principles set out by the Court of Appeal in the case of **RORIA VS. REPUBLIC 919670 EA 584** where it was held:-

“Subject to certain well know exceptions it is trite law that fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the condition favouring a correct identification were difficult.

In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

17. The complainant was also able to give the names of her attackers to DW1, a village elder, when she

reported to him about the attack. I have also re-evaluated the defence and I agree with the learned trial magistrate that it did not dent the prosecution's case. Having considered the entire evidence, I find no merit in this appeal which is dismissed. The convictions of the 1st and 2nd appellant as well as the sentence imposed by the learned trial magistrate are hereby confirmed.

Judgment read and signed this 22nd day of February, 2011.

**M.K. KOOME.
JUDGE.**