



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL NO. 19 OF 2010**

JEREMIAH ONYANCHA OMBAKE ..... APPELLANT

**-VERSUS-**

REPUBLIC ..... RESPONDENT

**JUDGMENT**

**(Being an Appeal from the original sentence and conviction of the Senior Resident Magistrate Hon. Mr. J. Were at Keroka in Criminal Case No. 1150 of 2009, delivered on 4<sup>th</sup> February, 2010)**

The appellant faced 5 counts in the Senior Resident Magistrate's court at Keroka. The first, second and third counts were of Robbery with violence contrary to section 296 (2) of the **Penal Code**. He was accused in those counts of robbing **N.G.A, Justus Anyona Rasugu** and **Kwamboka Elizabeth Rasugu** respectively of the various items in the charge sheet on the night of 11<sup>th</sup> and 12<sup>th</sup> September, 2009 at Gesusu village Masaba South district of Nyanza Province, and immediately before the time of such robbery threatened to use actual violence on them. In the fourth count, the appellant was accused of gang rape contrary to section 10 of the **Sexual Offences Act**. It was alleged that on the same night and place he in association with others not before court intentionally and unlawfully penetrated **N.G.A** with his Genital organ. Finally the appellant faced an alternative count of indecent act with an adult contrary to section 11 (6) of the **Sexual Offences Act**. The particulars being that on the same day and place he intentionally and unlawfully, indecently assaulted **N.G.A** by touching her private parts namely genital organ. The appellant denied all the charges. In a bid to prove its case against the appellant, the prosecution lined up a total of nine witnesses. When put on his defence the appellant gave a sworn statement of defence and called no witnesses.

Before we deal with the various grounds of appeal raised by **Mr. Ondari**, learned counsel for the appellant, we consider it pertinent at this stage to recapitulate only briefly the evidence which was before the trial court.

The facts of the case as presented by the prosecution reveal that on 11<sup>th</sup> September, 2009, **N.G.A**, the complainant in count one, was in the kitchen with her sister, **K.E.R** (PW2) the complainant in count three. At about 8.00p.m. she heard people talking outside. One of them entered the house fully covered save for the eyes and had a rungu. He ordered her to stop what she was doing and pulled her by the hair into the main house where she found another person armed with a panga but had not covered his face. That person whom the witness identified as the appellant put the panga on her neck, demanded cash and indecently assaulted her by touching her all over her body. He then pushed her into the bedroom. Her parents **J.R** (PW1), the complainant in count II and his wife I. M (PW2) had been forced to

kneel. According to PW1, as they sat in their house waiting for PW2 and PW4 to prepare supper, the appellant entered with a panga. The lamp was on. He was also armed with a torch. He placed a panga on his neck and demanded the proceeds of the sale of his motor vehicle. He told him that he had not sold the motor vehicle. He however insisted that he had and demanded Kshs. 300,000/= thereof. The witnesses had Kshs. 6,000/= in his pocket. The appellant pushed his hands into the pocket and removed the same. He also removed Kshs. 30/= from the coat. He then asked for the mobile phones but he told him that the same were with PW4 in the kitchen. As they spoke, PW4 was pushed into the room. From this room, PW4 was once again pushed into the bedroom by the appellant as he continued to demand for cash. She had kshs. 5,000/= which she had kept in the ceiling in a paper. She got the money and gave it to him. She was then pushed out where she came face to face with two masked men. They pushed her down, removed her skirt, biker and pant. They covered her head with the biker and pant and then raped her. She lost consciousness and only came to whilst at Gesusu sub district hospital where she was admitted for three days. She was able to identify the appellant among the robbers as he had caressed and kissed her, had taken her phone, cash and had also threatened her with a panga.

As both PW1 and PW3 were left kneeling whilst the robbers went about their business, their nephew **J.N (PW6)** managed to escape from the house, ran out and started screaming. Before then, he had seen and recognized the appellant as he entered the house. He was a person he was familiar with. The kerosene lamp was on and he is a person they had gone to school with. He knew his name as **Jeremiah Onyoni Ombaki**. They had been together at Getacho Primary School where the appellant was the head boy. He had no mask on. In the process of robbery, the appellant claimed that he had been sent by neighbours to take the head of PW1. As he took PW2 and 4 into the bedroom, PW6 got opportunity to sneak out and run to a neighbour, **Bernard** and informed him of what had transpired. They screamed and other neighbours joined in. The robbers then ran away. Subsequently, they took PW4 to hospital and was examined and treated by **Dr. Borome Paul (PW5)**, the in charge of Gesusu Sub District Hospital. On examining her, he noted fresh blood and she was still bleeding, her left wall was also bleeding, the cervix was torn and bleeding and the outer parts were swollen and there was semen in her private parts. The injuries were about two hours old. His conclusion was that she had suffered injury and had been through forced sex.

PW6 had told the chief that he had recognized the appellant among the robbers. The following day he went with PW1 to report the incident at Gesusu A. P Camp. The police told him that since they did not know the appellant he should alert them as soon as he saw him. At about 10.00a.m. the following day, PW6 saw the appellant observing their home and he alerted the A.P's at Gesusu. They came and arrested him. They were led by **Corporal Chirchir**. Upon arrest, **Corporal Chirchir** handed the appellant to **APC Lucak Isaac (PW7)** and **APC Bushuru Felix** who in turn escorted the appellant to Ramasha Police Station and handed him over to **Corporal Jacob Lerayora (PW9)**, the investigating officer. Following further investigations PW9 formed an opinion that he had sufficient evidence to charge the appellant with the offence.

Put on his defence, the appellant elected to give a sworn statement. He stated that he did not commit any of the offences. On the night of 11<sup>th</sup> December, 2009, he was at home with his parents and never left as he was brewing chang'aa. He was done by midnight and retired to bed. On 12<sup>th</sup> September, 2009 he took the 10 litres of chang'aa to his customer, 12 kilometres away. Between 10.30 and 11.00a.m. as he waited for his cash, three people came and arrested him. They then took him to Gesusu then to Ramasha Police Station. He was later charged with offences he knew nothing about.

Following the trial, the learned magistrate found that: ***“...the accused has not displaced the prosecution evidence. I do find that the evidence on record points to the accused as the perpetrators (sic) of the crimes in counts I, II, III and I do accordingly convict the accused person on the 3 counts of robbery with violence contrary to section 296 (2) of the Penal Code ...”***. In other words, the magistrate acquitted the appellant of the gang rape charge as well as the alternative count of indecent act. Upon convicting the appellant as aforesaid, the learned trial magistrate sentenced the appellant to ***“suffer death as provided by law”***.

The appellant was aggrieved by the conviction and sentence. He therefore lodged this appeal

initially in person but later appointed **Messrs Sonye J. Ondari & Co. Advocates** to represent him. Through a supplementary record of appeal dated 12<sup>th</sup> January, 2011 and filed in court on the same day, the trial court's judgment was faulted on nine grounds to with:

- “1. The trial magistrate erred in law and in facts (sic) by convicting the appellant herein without taking due regard to the contradictions in the prosecution witness.(sic)*
- 2. The trial magistrate erred in law and in fact by convicting the appellant by relying on the evidence of PW6 which evidence was never corroborated at all by any of the prosecution witnesses.*
- 3. The trial magistrate erred in law and in fact by convicting the appellant when no evidence was given to the intensity of light which was at the scene of robbery.*
- 4. The trial magistrate erred in law and in fact by concluding that the appellant was identified/or recognized at the scene by PW1, PW2, PW4 and PW6 who were strangers to the appellant herein.*
- 5. That the trial magistrate erred in law and fact by not finding that the appellant's fundamental rights as enshrined in the constitution were violated.*
- 6. That the trial magistrate erred in law and fact by shifting the burden of proof to the appellant.*
- 7. That the trial magistrate erred in law and in fact in the whole procedure to the mode (sic) of taking and recording evidence in trials.*
- 8. The trial magistrate erred in law and fact by convicting the appellant when in fact the appellant didn't follow the proceedings in court.*
- 9. The learnt trial magistrate erred in convicting the appellant when in fact the prosecution didn't proof (sic) their case beyond reasonable doubt as per the degree (sic) in criminal matters..”.*

When the appeal came before us for hearing on 19<sup>th</sup> January, 2011, **Mr. Ondari** submitted that the proceedings of the trial court did not show the language of the trial court or whether there was a person interpreting the proceedings to the appellant. Thus the trial was a nullity. For these submissions, counsel relied on the following authorities; **Rwaru Mwangi –vs- Republic, Criminal Appeal Number Nyr 18 of 2006 (UR)** and **Anthony Njeru Kathiari & Anor –vs- Republic NYR Criminal Appeal Number 21 of 2004 (UR)**. On the question of identification, he submitted that the appellant was not positively identified. Out of all the witness only PW6 knew the appellant and recognized him as **Jeremiah Onyoni Ombaki**. However, that is not the name of the appellant. In any event the name of the appellant was not given to the police in the first reports by PW1 and 6. Though they claimed that there was a paraffin lamp which assisted them to see and recognize the appellant, the intensity of the same was not inquired into. For these submissions, counsel relied on the case of **David Mutua –vs- Republic NYR, Criminal Appeal Number, 22 of 2002** and **Abdalla bin Wendo -vs- Republic(1953) 20 EACA 166**. There were also several contradictions in the prosecution evidence. The contradictions should have been resolved in favour of the appellant.

**Mr. Mutuku**, learned Senior Principal State Counsel supported the conviction of the appellant in respect of count II. In other words he conceded that the appellant's conviction in respect of counts I and III could not be sustained. PW1 who was the complainant in respect of count II knew the appellant. There was a lamp in the room where he was sitting with his wife. His evidence was buttressed by that of PW6, his son. He knew the appellant as they schooled together for 3 years. He gave the name of the appellant as **Jeremiah Onyoni Ombaki**. The appellant's name though was **Jeremiah Onyancha**. The difference in the names was not unusual. The fault was with drafter of the charge who should have included the other names as alias. In any event the appellant did not deny the names in his defence. Further, the other contradictions were minor and did not go to the core of the prosecution case. On the issue of the language of the court, the record showed that throughout the proceedings there was a court clerk. The record also showed the language in which each witness testified. The appellant cross-examined all the witnesses. It

must therefore be taken that he understood and participated in the proceedings.

This being a first appeal, this court has to consider the entire evidence and make its own conclusion. See **Okeno –vs- Republic (1972) EA32**.

From the onset we must agree with **Mr. Mutuku**, that there was absolutely no evidence upon which the appellant should have been convicted on counts I and III. He was thus right in conceding the appeal on that ground. However it came as surprise to us that he could support the conviction in respect of count II when the evidence tendered in support thereof was the same as regards those other two counts which he had conceded to.

However before we delve further into the issue of the conviction of the appellant in respect of the 2<sup>nd</sup> count, we would wish to dispose of the complaint by the appellant that he did not understand the language in which the proceedings were conducted. We do not take this complaint as being bonafide. The trial record shows that at every sitting of the court, there was a court clerk. A court clerk is not part of the furniture of the court. He has designated duties, one of which is to interpret the proceedings to the accused in the event that the accused does not understand the language of the court. It is a well known fact that the proceedings in the sub-ordinate courts are conducted either in English or Swahili. On the day that the appellant took his plea on 16<sup>th</sup> September, 2009, the interpretation stated therein is Kiswahili. There is nothing on record to suggest that the appellant was uncomfortable with the interpretation in Kiswahili. If the appellant had difficulties in appreciating the proceedings, nothing stopped him from alerting the court. Had he done so at the earliest opportunity, we have no doubt at all that his concerns would have been addressed as appropriate by the learned magistrate. That he did not raise the issue then can only mean one thing and one thing only, he understood the language of the court and in which the proceedings were conducted. This conclusion is supported by the fact that he cross-examined at great length all the witnesses who testified. He could not have done so unless he understood what the witnesses had said against him. Infact in his own defence he categorically stated “...***I can recall the evidence of the prosecution witnesses ...***”. He could not have done so unless he understood what they said.

It is also now trite law that the issue of the language of the trial court should be raised by the accused at the earliest opportunity. Should one fail to do so, he will be taken to have waived his right to complain over the same subsequently. Thus even if the appellant’s complaint was legitimate and we have no doubt at all that it is not, he cannot raise it in this appeal. He waived his right to do so when he did not raise it with trial court and allowed himself to participate in the proceedings knowing very well that the same was being conducted in a strange language. We have considered the authorities cited by counsel for the appellant in support of the submissions on the issue of language and we are of the view that the circumstances obtaining therein were totally different from those obtaining in this case. In any event those authorities are no longer good law.

The Court of Appeal has repeatedly stressed that it is unsafe to uphold a conviction based on improper identification. In this regard the law was settled as a long time ago as 1953 in the celebrated case of **Abdalla bin Wendo –vs- Republic** (supra). See also **Republic –vs- Eria Sebwato (1960) E. A 174** and **Roia –vs- Republic (1967) E. A 583**. Simply put, where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction. It matters not whether the evidence is even that of recognition.

From the evidence on record, it is not clear among these witnesses save for PW6, whether they were able to identify and or recognize the appellant during the robbery. In examination in chief, PW1, PW3 and PW4 conceded that they did not identify the appellant during the incident. However under cross-examination they turned round and claimed that they had in fact identified him. However, PW2 was categorical that he neither recognized nor identified any of the robbers. Further when PW1 reported to the police, he stated that the robbers were unknown yet he was in the company of Pw6 who claimed to have recognized the appellant in the act. That being the case we doubt very much that PW6, a child of about 14 years would have been able to recognize the appellant in the act and fail to tell his father that fact and leave him to tell the police that they were robbed by unknown persons. PW6 claimed that he had known the appellant for a while as they had schooled together. The appellant had even been a head boy in the

school. Yet he could not get his full names right. It also emerged that infact the appellant was schooling at Narok and not Gesusu as claimed by PW6. Finally, there was the evidence of PW1. It was to the effect that he was with his wife in the house alone. Where then did PW6 come from? Though in his testimony PW6 stated that he was seated in the back seat in the same house, that fact would not have escaped the attention of PW1 and PW2 in their testimony. They would have testified to it. That they did not may point to the fact that the said witnesses may as well have not been in the house.

All these witnesses claimed that there was a lamp in the house that assisted them to identify, nay, recognize the appellant. It was a paraffin lamp. The intensity of the light emitted by the paraffin lamp, the size of the room, the location of the lamp vis a vis the witnesses and the appellant and the time taken for the witness to observe the appellant sufficiently to be able to identify him was not inquired into by the trial court. The case of **Maitanyi –vs- Republic (1986) KLR 198** tells us that “**...in the absence of all these safeguards, it now becomes the great burden of senior magistrate trying cases of capital robbery to make these inquiries themselves ...**” and that “**...Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction ...**”. This is exactly what happened in the circumstances of this case. More interesting is the fact that the robbers were said by the witnesses to have been armed with torches which they used during the incident. That then begs the question, was there indeed light and sufficient light at that, in the house if the robbers were using torchlights?

The witnesses said that save for the appellant, his accomplices in the act had covered their faces thereby making it difficult for them to be identified. If the appellant’s accomplices took the trouble to disguise themselves, we find it difficult to believe that the appellant never took the same trouble knowing that in the home they were to attack, some people knew him, in particular PW6. As stated in the case of **Eria Sebwato (supra)** “**...That the accused, well known to the complainant, should go with seven other men to commit an organized robbery in a house where he was well known seems to me to be inexplicable. He must have known he was bound to be recognized, and that, in my view, casts doubt on the evidence of the complainant and his wife ..**”. We think that the same situation obtains here.

For these reasons, we are of the opinion that the conviction of the appellant cannot be supported. We allow the appeal, quash the conviction and set aside the sentence of death imposed on him. Unless otherwise lawfully detained, he is to be set at liberty forthwith.

**Judgment dated, signed and delivered** at Kisii this 7<sup>th</sup> day of March, 2011.

**ASIKE-MAKHANDIA**  
**JUDGE**

**RUTH NEKOYE SITATI**  
**JUDGE**