



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HC.CRA NO. 135 OF 2000**

**CONSOLIDATED WITH 168 OF 2000**

**LESIT& KASANGO,J.J.**

*(From: Original Criminal Case No. 143 of 1999 MERU; P.M. NDUNG’U SRM)*

**DAVID NJILITHIA.....1<sup>ST</sup>  
APPELLANT**

**SILAS GITUMA.....2<sup>ND</sup>  
APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

These appeals were returned back to this court for retrial after the court of appeal allowed part of the appellants appeal before them.

The 1<sup>st</sup> and 2<sup>nd</sup> appellants before us were the 1<sup>st</sup> and 3<sup>rd</sup> accused in the lower court. They faced one main count of Robbery with Violence contrary to section 296(2) of the Penal Code jointly with the 2<sup>nd</sup> accused in the case. The 1<sup>st</sup> appellant faced one count of Rape contrary to section 140 of the Penal Code. They were all convicted in the main count and sentenced to death. The 1<sup>st</sup> appellant was also convicted of the count of rape and sentenced to 14 years imprisonment.

Both appellants and the 2<sup>nd</sup> accused were aggrieved by their convictions and so filed these appeals. On appeal to this court, the 2<sup>nd</sup> accused conviction was quashed and sentence set aside. The appellant’s appeals were dismissed. On appeal to the court of Appeal, it ordered a retrial as stated earlier.

The appellants relied on their written submissions. They raise similar grounds of appeal. The appellants contend that the evidence of identification tendered by PW1 was not free from mistake as she gave no description of those who committed the offence and neither were identification parades conducted. They contend that the evidence of recognition by PW3 was not credible since the conditions of lighting at the scene were not conducive. They contend that a shoe and coat alleged to belong to the appellants were recovered at the scene were not properly linked to either of them. That allegations that they were arrested with any exhibits were not proved as the police did not enter such reports in the OB, nor did the police produce any inventory to that effect.

The 1<sup>st</sup> appellant raised a further ground that he was not accorded a fair trial as he was compelled to continue with the case even though he was sick. He also challenged the conviction on the charge of rape on grounds the evidence of PW1, the complainant in that charge, was not corroborated or supported by medical evidence.

The appeals were opposed. Mr. Kimathi learned counsel for the state urged that the case against both appellants was proved beyond any reasonable doubt. Counsel submitted that PW1 identified the 1<sup>st</sup> appellant as a person she knew very well and as one she had seen at her gate during the whole day preceding the night of the incident. Mr. Kimathi urged that the evidence of identification by PW1 was good since she spent a long time with the robbers as they raped her and also because she was enabled to see them by very bright torch lights. Mr. Kimathi submitted that during a search for the robbers mounted by Police the same night, the 1<sup>st</sup> appellant was arrested wearing one shoe. That shoe resembled the shoe police had recovered at the scene the same night having been left behind by the robbers. He submitted that PW4 also identified the 1<sup>st</sup> appellant.

Mr. Kimathi urged that the 2<sup>nd</sup> appellant was identified by PW3 who knew him very well before the incident. In addition Mr. Kimathi urged that the 2<sup>nd</sup> appellant was found wearing a coat identified by PW2 as his property. Counsel urged that the doctrine of recent possession applied to the case.

The facts of the case were that on the night in question a gang of robbers struck at PW1's home where she was sleeping with her child PW4. PW1's mother, PW5 was sleeping in another house. The gang terrorized the complainant and robbed her off properties at gun point. They also raped the complainant against her will. PW1 screamed for help and members of public who went to her rescue took her to hospital where she was treated.

A report was made to the police who visited the scene the same night. At the scene, they recovered one right leg shoe near nappier grass within the complainant's home. It was identified as belonging to the 1<sup>st</sup> appellant at the scene. The police followed foot prints in company of PW1, PW2, PW3, 5 and 6. Eventually they caught up with the 1<sup>st</sup> appellant whom they found wearing one shoe on the left leg. The shoe matched the one previously recovered by the police and other witnesses at the scene of crime. It was adduced in evidence as an exhibit.

The 1<sup>st</sup> appellant was arrested and during the same night he led police to the home of the 2<sup>nd</sup> appellant. At the house where 2<sup>nd</sup> appellant was found a coat was recovered. The coat was identified by PW2 as one of the items stolen from his place.

In his defence the 1<sup>st</sup> appellant said that he was arrested for selling liquor and for refusing to bribe the police. He denied the charges.

The 2<sup>nd</sup> appellant on his part said that he was arrested as he repaired vehicles. He denied the charge.

We have carefully subjected the entire evidence adduced by the prosecution and the defence to a fresh analysis and evaluation while bearing in mind that we neither saw nor heard any of the witnesses, and have given due allowance for that.

We are guided by the case of **OKENO V. REPUBLIC [1972] EA 32**. The role of a first appellate Court

is given as follows:

**“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”**

The evidence against the 1<sup>st</sup> Appellant is by the complainant PW1 and PW4 on the basis of visual identification by recognition. There is also the evidence of a right leg shoe left behind by the robbers being the same as a left leg shoe the 1<sup>st</sup> appellant was found wearing after the robbery. We have considered the evidence of the complainant in relation to the lighting condition. It is clear from her testimony that she was attacked while inside her bed room. She said that the robbers who entered her room were six and each had a torch which they flashed inside her bedroom, and which had brought light. They spoke with her, beat her up, robbed her, and eventually roughed her before raping her. She testified that she could see the robbers as they argued over who among them should go first to rape her. She identified the 1<sup>st</sup> accused as the one who was the first to rape her. She said that she knew the 1<sup>st</sup> appellant before and had also seen him at her gate during that day. The complainant said that she also identified the 2<sup>nd</sup> accused in the case and two other persons who were not arrested and so were not in court. According to PW1 the robbery took one hour and all this time the six men were in her room with torchlight picking items from her bedroom, while demanding money and beating her up before they eventually raped her. She said that four of them raped her in turns and that before they did so they put a torch under the bed which was left on. She said that she could see her rapists with the aid of the light from that torch.

PW4 was the other witness who said that she had seen and identified the 1<sup>st</sup> appellant. This was a girl of 12 years of age, and a daughter of the complainant PW1. Her evidence was that she was able to see the 1<sup>st</sup> appellant when he went to her room with a chair and climbed into the ceiling where he retrieved a wrapped parcel. PW4 said she saw him with the aid of torch light held for him by one of his colleagues, to enable him to see the ceiling. PW4 said she had also seen the 1<sup>st</sup> appellant outside their gate that day busy attacking people.

PW4 was aged 12 years. No *voire dire* exam was conducted before her testimony was taken yet being a child, it was the duty of the court to carry out the examination for three reasons. In the case of **JOHNSON MUIRURI VS REPUBLIC [1983] KLR 445** it was held:-

**“Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.**

**It is important and to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.**

**Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration”.**

On the issue of visual identification we are guided by the principles enunciated in the case of KAVETE & OTHERS VS REPUBLIC, CA 63 OF 1986 (UNREPORTED), the court of Appeal stated:-

**“.....where the evidence is based on identification the court should closely examine the circumstances in which the identification by each witness came to be made.....”.**

In the case of ABDULLAH BIN WENDO VS REX 20 EACA 166 the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

**“Subject to certain well known exceptions it is trite law that a fact may be proved by a 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 conditions 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.”**

On account of her age, the evidence of PW4 would need corroboration on material particulars implicating the 1<sup>st</sup> appellant, before it can be relied on. The evidence of PW1 the complainant also needed corroboration for the simple reason that the circumstances under which she saw and identified the 1<sup>st</sup> appellant were difficult. We found the corroboration in the evidence of the shoe. PW2 husband of the complainant came home on the morning after the raid. He accompanied Police in a search for clues and for the robbers. The search party included neighbours PW5 and 6, and an employee PW3. Within PW2’s compound a right leg shoe was recovered. Same morning the 1<sup>st</sup> appellant was found wearing the left leg shoe of the partners of the shoe recovered in PW2’s home. The trial court confirmed this in evidence.

The 1<sup>st</sup> appellant needed to offer an explanation of how his shoe was left in PW2’s homestead. The 1<sup>st</sup> appellant gave no explanation. Instead he denied the offence.

We find that the recovery of the shoe from the 1<sup>st</sup> appellant provides corroboration to the evidence of PW1 the complainant, and PW4 that the 1<sup>st</sup> appellant had been to their home on the material night. We find that the shoe has provided material evidence implicating the 1<sup>st</sup> appellant with this offence. We are satisfied that the 1<sup>st</sup> appellant was one of the men who raided the complainants home, robbed her of money and also violated her by raping her. The evidence against him is therefore overwhelming. We reject his defence in total.

The evidence against the 2<sup>nd</sup> appellant is twofold. The 1<sup>st</sup> appellant led police, PW2, 3, 5 and 6 to the 2<sup>nd</sup> appellant’s home where he was found inside his kiosk, which he uses as his house, with a coat Pexh.5. That coat was identified by PW2 as one of the items stolen during the robbery in issue. PW2 stated that it belonged to his late brother and that he had kept it together with his deceased brother’s other properties in his house.

There was also other evidence against the 2<sup>nd</sup> appellant. There was visual identification by recognition. This was given by PW3, an employee of PW2 who lives in a house within PW2’s compound. PW3 was also raided at his house same night. He however had nothing stolen from him. He said that when he heard PW1 screaming he woke up and flashed a torch only to flash the 2<sup>nd</sup> appellant inside his bedroom. He was ordered to lie down but by then he had seen and recognized the 2<sup>nd</sup> appellant whom he knew before for 5 years. The 2<sup>nd</sup> appellant denied the offence and denied the recovery of the coat from his

house.

We find that the evidence of recognition by PW3 was made under difficult conditions of lighting and therefore needed corroboration of material particulars implicating the 2<sup>nd</sup> appellant in order to form a basis of conviction. We find the corroboration of material particular implicating the 2<sup>nd</sup> appellant in the evidence of recovery of PW2's late brothers coat in 2<sup>nd</sup> appellants kiosk. The 2<sup>nd</sup> appellant's defence is a mere denial which does not shake the prosecution case nor exonerate him from this offence. We reject that defence in total.

Having carefully considered the two appellants appeal we have come to the conclusion that the evidence against the two appellants was overwhelming and that the prosecution proved its case against both of them beyond any reasonable doubt. We therefore find that the appeals have no merit. We uphold the convictions entered against both appellants and confirm the sentences. Save to order that the sentence of 14 years imprisonment in count 3 entered against the 1<sup>st</sup> appellant should be held in abeyance pending execution of the sentence in count 1.

The appellant's appeals are accordingly dismissed.

Dated, signed and delivered this 19<sup>th</sup> May 2011

**Lesiit J**

**Judge**

**Kasango M**

**Judge**