



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 274 of 2008

JAMES TINEGA OMWENGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

- *Criminal Law - Evidence - Identification Parade - Irregularity in holding parade - whether irregularity necessarily leading to exclusion of evidence*

JUDGMENT

The Appellant was charged with one count of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code (Cap 63 Laws of Kenya)**, and a Count II of **rape** contrary to **Section 3(1)** of the **Sexual Offences Act 2006 (No. 3 of 2006)**, and an alternative charge of **indecent assault on female** contrary to **Section 5(1)(B)** of the **Sexual Offences Act 2006**.

The Appellant denied the charges, and a plea of not guilty was entered in respect of all them. The prosecution subsequently led evidence from six witnesses, and at the end of which the Appellant was put on his defence. The Appellant gave sworn testimony and denied committing any of the offences. The court considered the prosecution and defence evidence and at the end thereof, found the Appellant guilty in respect of count I and II (*robbery with violence and rape*), and sentenced the Appellant to the mandatory death sentence on count I (*on robbery with violence*), and to 20 years for rape - which sentence was put in abeyance.

The Appellant being aggrieved with both his conviction and sentence appealed to this court on both the conviction and sentence on initial seven grounds, which were reduced to five under an Amended Memorandum of Appeal handed to the court on the hearing date but the most important of which concerned the evidence of identification by the complainant at the commission of the offence, and irregularity of the identification parade, and alleged violation

of **Section 77(2)** of the **Constitution**.

During the hearing of the appeal the Appellant relied on his written submissions, and contended that the complainant could not under the circumstances of the attack have identified him as the attacker. He cited the case of **M'IKUNYUA and SAID WAZURI vs REPUBLIC Cr. Appeal No. 90 of 1985 (CA)** - where it was held that in view of the circumstances and brevity of the opportunity for identification, there is need to look for corroboration of the evidence of identification.

The Appellant also contended that there was danger on relying on the evidence of a single witness, the complainant; the Appellant relied on the case of **ABDALAH BIN WENDO vs. REPUBLIC [1953] E.A.C.A. 66** where it was held -

"It is trite law that a fact may be proved by 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 especially when it is known that the conditions favouring a correct identification was difficult."

The Appellant also contended that the identification parade was conducted by a Police Constable, contrary to Force Standing Orders which require that an identification parade be conducted by an officer who is at least of the rank of Inspector of Police. The identification parade was therefore irregular and its evidential value lessened.

Without the evidence of identification, the conviction cannot stand and that the appeal should be allowed.

On his part, **Mr. Mugambi** State Counsel, initially opposed the appeal, but on being challenged by the court on the conduct of the parade, changed his mind and conceded the appeal on that ground alone.

Notwithstanding the learned State Counsel's conceding the appeal, it is still our duty as the first appellate court to examine all the evidence before the lower court, and draw our own findings and conclusions on whether or not the conviction and subsequent sentence were supported by the evidence.

As already stated above the prosecution called six witnesses. The 6th witness was PW6 (*P.C. Joseph Muguti*) was both the investigating officer, and also the officer who conducted the identification parade. According to the Force Standing Orders Chapter 46 Guide to Criminal Investigations) Revised Edn. 2001 (1962), Section 6 (iv)(b) ***The Police Officer-in-charge of the case, although he/she may be present; will not conduct the parade.***

In this case, the identification parade was conducted by an officer who was in charge of the case. He was the investigating officer. Section 6(v)(m) provides that ***"the parade must be conducted with scrupulous fairness, otherwise the value of the identification(s) as evidence will be lessened and nullified."***

The conduct of the Identification Parade by the officer-in-charge of the case (*the investigation officer*) was certainly in breach of Section 6(iv)(b) of the Force Standing Orders, and thus lessened the value of the evidence, but did not nullify it.

In the case of **MWANGI MAHITA vs. REPUBLIC [1976] K.L.R. 127**, (Law V-P, Mustafa and Musoke JJA)

after referring to the cases of **OSONGO vs. REPUBLIC [1972] E.A. 170, R. vs. MWANGO [1936]3 EACA 29**, and **MBOCHE vs. REPUBLIC [1973] E.A. 95**, and taking into account the Appellant's Counsel's submission that the parade was irregular, and that the first appellate court should have appreciated this, and not dismissed the appeal summarily, said -

"Whether or not a parade is so irregular as to necessitate - p. 128 lines B-D.. conviction."

Looking at this case, we are satisfied that even though the identification parade was tainted with irregularity, there is independent evidence of identification as well as circumstantial evidence which goes to show beyond reasonable doubt that the Appellant committed the offence for which he was properly convicted and sentenced.

The first evidence of direct identification is that of PW1 the complainant. PW1 sets the scene clearly. The date was 7th November, 2006. The time was 6.00 p.m. She was a businesswoman. She makes necklaces. She had a day in Narok Town. She was on her way home. She had done what any responsible mother going home from the market would do. She had bought 6 litres of milk. She delivered 3 litres to her daughter at Narok Teachers College, and left for her home in an area called Kipangas. Together with the milk she had bought; two loaves of bread, tea leaves, a 0.5 kg of meat, kerosene, and says other small items she could not remember. Above all, she also had Kshs 8,000/= cash in a hand bag, her own identification card, and that of her daughter.

PW1 testified that which she was about 500 metres from her home, in the bush, while gang round a path, she felt someone hold her from behind. That person held her paper bag and pushed her to the bush, full of shrubs. She was pushed or pulled to a distance of about 40 metres, while holding PW1 by both her hands. This is the critical bit about.... identification -

"I saw the man properly. It was not dark at 6.00 p.m. There was enough light to enable one recognize another."

PW1 testified further that once they reached a distance of 40 metres (*"the scene"*), she screamed once. The Appellant told PW1 to shut up or he would kill her. The Appellant had stove harvesting metals and tools. He hit her with a metal piece on the back of the head. She lost consciousness. The Appellant forced her to the ground, took her items including her keys and went to hide them. Her attempts to escape were futile, for the Appellant returned as he had apparently not gone far. He knocked her to the ground again, removed PW1's underpants, but left her skirt and a blouse she was wearing. The Appellant lower his trouser, and raped (*had carnal knowledge of the complainant PW1*) and he did it for about half an hour, while she was pleading with him not to kill her and covered her mouth all the time using a piece of cloth. PW1 described the Appellant further -

"The man I saw was like the accused in court. He was light coloured and had a scar on the left side of his head."

To crown his beastly act, the Appellant hit PW1 four times on the head causing the Appellant to loose consciousness, and was found by the Police and neighbours at about 9.00 p.m. When she recovered consciousness and

cried in Kiswahili; "*I am here, I am here*". PW1 discovered her left arm was injured, and she was admitted at Narok District Hospital for 7 days.

In cross-examination by the Appellant PW1 testified that she had seen the Appellant first on the day of the attack, and that she saw him properly during the incident.

In addition to that direct evidence of identification, there is also the substantial circumstantial evidence which goes to show without a shadow of doubt that PW1's attacker was the Appellant. The evidence of PW2, corroborates that of PW1, that her dress had been pushed to shoulders level, she was totally naked on the lower part of her body. She was photographic after I had pulled her clothes back to cover her nudeness.

PW3 also corroborated PW1's testimony that she had bought and took some milk to her daughter, and that PW3 escorted her mother to Narok Teachers College gate at about 5.30 p.m.

The next circumstantial evidence was that of PW4. He is a mason and works at Kipangas in a quarry. PW4 testified that on 10th November, 2006, some 3 days after the incident of (7th November 2006), the area called a meeting of all the quarry workers and warned that they would lose their jobs unless they found the attacker of **Mama W**, was found, and arrested. He testified that the description of the attacker was "*chocolate in complexion, and his teeth were brown*". PW4 noted that one young man who worked with them did not attend the meeting of 10th November, 2006.

Two weeks later the Chief called another meeting of all quarry workers, and again warned them that the attacker was known to him, and unless he was arrested there could be clashes, all quarries closed, and they would all lose their jobs. The Chief told them that the suspect was known by the name "*Mwenda Pole*"(*the silent one*). It is this Mwenda Pole who had missed the first meeting and thereafter left the quarry and kept moving from quarry to quarry. PW4 described the Appellant as brown and has brown teeth.

PW5, the Clinical Officer at Narok District Hospital testified that she examined PW1 the complainant, who was bleeding from the head, left hand was broken, an x-ray taken confirmed so. An examination of the sexual assault found her labia minora and majora were wet, the vagina had bruises and had a discharge and laboratory test revealed the presence of spermatozoa, confirming the sexual assault. This evidence corroborated that of PW1 that she was sexually assaulted.

In his defence, the Appellant only talked about his arrest on 26th November, 2006. He expressed no knowledge of the offence he was charged with. He denied it.

The question before us is whether was evidence to convict the Appellant with the offence, or as the lower court put it, whether the circumstances under which the offences took place favoured positive identification of the Appellant. The lower court came to the conclusion that there was such evidence. In the case of **OLUOCH vs. REPUBLIC [1985] K.L.R. 549**, the Court of Appeal held inter alia -

"A fact may be proved by a single witness but when such evidence is in respect of identification, it must be tested with the greatest care."

Having reviewed the evidence, the Appellants submissions and submissions by learned State Counsel, and their disregarding the evidence from the identification parade, we hold that the lower court came to a correct decision in finding the Appellant guilty as charged and convicting him.

There is complete and direct evidence of PW1, the complainant herself. It is very lucid evidence of her day of work, her delivery of food items to their daughter PW3. There is PW3's own evidence to corroborate that part of PW1's evidence, that her mother left her at about 5.30 and should have arrived home by 6.00 p.m. or thereabouts, and feared the worst when her sister S called her at 7.00 p.m. that their mother had not yet reached home. PW1 was only 500 metres (or 0.5. km) from her home where she was attacked at 6.00 p.m. It was still day light, not even dusk. PW1 was able to see her assailant clearly. He took half an hour sexually assaulting her, and even in that ordeal she would not have failed to master the face and appearance of her attacker. He was brown and wore a scar on his head and could not have been mistaken in her evidence.

In addition to that direct evidence, there was the strong circumstantial evidence directed at the Appellant. PW4 testified that the area chief (*although he did not testify, and it was not necessary for him to do so*), as the primary contact for law and order in his Location, there was suspicion that the attack on PW1 was carried by one of the workers in the various quarries in the Kipangas area, and threatened that unless the quarry workers owned up, there would be clashes and the quarries closed. The first meeting called by the Chief yielded no results. PW4 noticed that the Appellant was a notable absentee from that meeting.

At the second meeting matters became urgent, and there were concrete revelations that the culprit was one known as "*Mwenda Pole*" the "*cool*" or "*silent walker/operator*". It was said "*Mwenda Pole*" had chocolate complexion and wore a scar. To hide his identity which had now been blown away, the Appellant kept moving from one quarry to another until his movements were blown away by a citizen, and was found buying maize near Tony cinema, in Narok Town. When PW4 and his companion spoke to the Appellant that he was wanted by the Police as a rape suspect, he agreed to be taken to Narok Police Station where he was placed in cells.

PW6, who helped in locating the complainant from the scene of the attack corroborated the testimony of both PW1 and PW4 that the assailant was of brown complexion, and on his findings that the Appellant had escaped from the quarry after the incident is consistent with the testimony of PW4, that the Appellant kept moving from quarry to quarry until his "*40*" days were over on 26th November, 2006 or when he was subjected to - citizen's arrest, and taken to Narok Police Station.

For those reasons, we find that the Appellant was properly identified, the circumstances for his identification were favourable. We affirm the conviction and sentence of the lower court and find no merit in the Appellant's appeal

and dismiss the same.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 12th day of March 2010

D. K. MARAGA

JUDGE

M. J. ANYARA EMUKULE

JUDGE