



REPUBLIC OF KENYA



**Otieno & another v Republic (Criminal Appeal E004 of 2023)
[2025] KEHC 1515 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E004 OF 2023
DK KEMEL, J
FEBRUARY 14, 2025**

BETWEEN

ADONIJA OGINGA OTIENO 1ST APPELLANT

CORNEL ODONGO OPONDO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of the conviction and sentence of Hon. J.P. Nandi
(Principal Magistrate) in Bondo Principal Magistrate's Court
Criminal Case No. E078 of 2020 delivered on 10th January 2023)*

JUDGMENT

1. The Appellants herein Adonijah Oginga Otieno and Cornel Odongo were charged with three counts. The first one was robbery with violence contrary to Section 296(2) of the *Penal Code*. The particulars were that on the 5th September 2020 along Bondo-Usenge road near Koyucho area, in Bondo township location Bondo Sub-County within Siaya county, while armed with offensive weapon namely panga jointly robbed Sylvia Akinyi Odundo, one mobile phone make ITEL and cash Kshs 27,889/= and at the time of such robbery threatened to use actual violence.
2. The second count was kidnapping with intent to confine contrary to Section 259 of the *Penal Code*. The particulars thereof were that on the 5th September 2020 along Bondo-Usenge road near Koyucho area, in Bondo township location Bondo Sub-County within Siaya county, jointly kidnapped Sylvia Akinyi, with the intention of dishonestly receiving Kshs 27,889/= from the relatives of the said Sylvia Akinyi.
3. The third count was gang rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 5th September 2020 along Bondo-Usenge road near Koyucho area, in



Bondo township location Bondo Sub-County within Siaya County, in association with each other, they each intentionally and unlawfully caused their penis to penetrate the vagina of Sylvia Akinyi without her consent.

4. The Appellants pleaded not guilty to all the counts. They were subsequently tried, found culpable and convicted of all the three offences and that on 17/1/2023 they were sentenced as follows:

- i. Count one.....death sentence.
- ii. Count two.....five years' imprisonment.
- iii. Count three..... fifteen years' imprisonment.

The sentences in count two and three to remain in abeyance pending execution of the sentence in count one.

5. Dissatisfied by both the convictions and the sentences, the appellants filed a joint petition of appeal dated 28/1/2023 wherein they raised the following grounds of appeal:

- i. That the trial court erred in law and in fact in failing to appreciate that identification of suspects by a single witness must be positive and accurate.
- ii. That the trial court erred in law and in fact in finding that identification parade was done yet evidence tendered by police indicated that the same was not done.
- iii. That the trial court erred in law and in fact by failing to appreciate that the prosecution failed to prove their case beyond reasonable doubt.
- iv. That the trial court erred in law and in fact by failing to appreciate that the prosecution's case had a lot of doubts as to whom exactly among the two suspects operated the phone upon which she used its light to identify the suspects' faces in the dark the basis upon which the conviction was arrived at.
- v. The trial court erred in fact and in law by failing to appreciate that the prosecution did not tender evidence to connect the appellants with the alleged offences through their phone numbers and phones found in their custody upon arrests.
- vi. The trial court erred in failing to appreciate that the evidence of identification of a single witness, in the circumstance of this case was not safe and accurate to be the basis of conviction.
- vii. The trial court did not consider the appellants' defense.
- viii. The trial court erred in finding the appellants guilty.
- ix. The trial court meted harsh sentences upon conviction against the appellants.

The appellants prayed that the appeal be allowed and that both conviction and sentences be set aside.

6. This being a first appeal, it is the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent findings and conclusions. (See *Okeno vs. Republic* [1972] EA 32). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in *Ajode v. Republic* [2004] KLR 81.

7. The prosecution called a total of nine witnesses in support of its case which was as follows:



8. PW1 Clifford Omondi testified that they worked with Sylvia Akinyi, the complainant herein at Sady Beach Hotel. That on the night of 5/9/2020 they worked till about 10.00 PM when they left to go home together with Sylvia and one Salome. That Sylvia and Salome branched towards their residences as he went to his. That the following morning, Salome informed him that Sylvia had been attacked. On cross-examination, he stated that he did not witness the attack and that he spoke with Salome in the morning but not at night.
9. PW2 Salome Rose Atieno testified that she works in a pub. That on 5/9/2020 at about 9.40pm she together with PW1 and Sylvia were going to their houses from work. That she was walking ahead of them as the others walked slowly. That when she reached the gate, she saw a motorcycle emerge from behind them and whose lights were suddenly switched off. That she entered the gate and later called Sylvia but who didn't pick her call. That she then called PW1 who informed her that they had parted ways with Sylvia. That she lived in the same plot with Sylvia but she was not in her house. That at 12.00 midnight, Sylvia's brother called her to enquire on her whereabouts and who informed her that it seems like Sylvia had been kidnapped. That she called Sylvia's phone and that a man answered the call. She heard her crying and that she asked her for 5000/- which she sent and slept. In the morning, she went to Bondo police station and recorded her statement and met Sylvia at the station. On cross examination, she stated that she did not know what happened behind after she had gone to her house. That she sent the money at about midnight and that she didn't know the attackers.
10. PW3 Christopher Odundo Omondi, a businessman, testified that he was the brother of Sylvia Odundo, the complainant. That on 5/9/2020 he received a call from Sylvia Odundo that she had been kidnapped and that the kidnappers were asking for Kshs 25 000/=. That he did not have money and so he called his uncle Dr. Francis Odundo who sent the kidnappers Kshs 10,000/=. That at around 4.00 AM, his uncle went to pick Sylvia and took her to hospital. Thereafter, he went to his uncle's house where Sylvia was after her discharge from hospital. On cross examination, he stated that Sylvia informed them that she did not see the attackers as her face was covered. That the attackers used his sister's phone to get the money. That she went to Bondo Sub-County hospital. That he never sent Sylvia money.
11. PW4 Dr. Francis Odundo testified that he is a lecturer at Jaramogi Oginga Odinga University of Science and Technology. He recalled that on 6/9/2020 at around 11 PM he was asleep when he received a phone call from his nephew Christopher Omondi (PW3), who informed him that Sylvia Odundo, his niece had been kidnapped. He looked at his phone and realized that she had tried to contact him. That he called her back and talked to the kidnappers who demanded for Kshs 25000/=. That he sent 10,000/=. He called Sylvia's employer who informed him that he too had sent Kshs 5000/=. That at around 4.00AM, he received a call from Mr. Angiela, former principal Akoko Secondary School who informed him that he had received a call from Sylvia, a former student at Mitiro Secondary School. That they together with the police, proceeded to the home where she was then seeking refuge. They found her and who informed them that she had been raped. That he took her to Bondo Sub County hospital then later took her to his house. In the morning, they went back to the police and recorded statement. On cross examination, he stated that Sylvia informed him that she never knew the attackers. That he can confirm that Kshs 20 000/= was sent to Sylvia that night and that she had Kshs 8000/= in her phone. That from Safaricom data, it showed a total of Kshs 28000/=. That his nephew came to his house and they together went to the police. He recorded his statement on 8/9/2020.
12. PW5 Sylvia Akinyi Odundo is the complainant. She testified that on 5/9/2020 as she walked to her house from work at around 9.00 PM, she was attacked by two people whom she did not know. That they blindfolded her using her sweater that she was wearing, forced her to climb on a motorbike and rode away. That they took her to an unknown place, into a thicket where they beat her with the flat



side of a panga, forced her to remove her clothes and took turns raping her. All that time, they used her phone to call her relatives and demanded that money be sent to her phone number. At some point in the thicket, they demanded for her M-Pesa pin number. They unfolded her eyes so she could dial the pin number. At that point, she was able to see their faces using the phone light. That one was in a pink jacket and black trouser while the other had a black jacket and black trouser. She testified further that during the rape ordeal she realized that both of them had dreadlocks on their heads. That at about 3.00AM, they took her out of the bush and abandoned her by the road and that they ran away. That she walked to a certain home and asked for help. That she borrowed a phone and called her uncle (PW4) who came with the police and took her to hospital at around 5.00 AM. That she was later issued with a P3 form dated 7/9/2020 marked as MFI-2 and a lab request form marked as MFI-3.

On cross examination, she stated that the attackers took away her phone but she renewed her line for purposes of investigations. That the M-pesa statement for No. 0715280694 marked as MFI-1 was produced and revealed that her line had received money from several people including Dr. Odundo and Salome all totaling up to Kshs 28000/=. That it was her uncle (PW4) who reported the matter to the police.

13. PW6 Lilian Achieng testified that she is a cook at Uyawi primary school. She recalled that on 6/9/2020 at around 2.00AM she was at her house when she heard a knock at the door. It was a female voice. That she opened the door and found a young lady who was muddy and dirty. That lady requested for a phone to call her relatives. She gave her the phone and that the lady called her uncle who later came accompanied by the police and picked her up. On cross examination, she stated that the lady had a full blue dress and that she used her husband's phone to call her uncle. That her husband is called Francis Bwong Ngiela.
14. PW7 Sammy Aluda Luzuki testified that he is the clinical officer currently at Ndori Health Centre but previously at Bondo Sub County hospital. He presented the duly filled P3 form which showed that the complainant had injuries inter alia; bruises on the right elbow, tenderness on both thighs; tenderness on lower back, bruises on right side of the mid back. On examination of the genitalia, it showed inflammation around the opening of the vagina. High vaginal swab revealed presence of red blood cells and epithelial cells. He concluded that there was soft tissue injury with forced vaginal penetration. He produced the duly filled P3 form as Exh. 2 and the lab request as exhibit. 3.

On cross-examination, he testified that the complainant was attended to by different medics, including himself, and that the contents of the P3 form were true.

15. PW8 was Pc Nickson Aringa stated that he is with the DCI Bondo and that he is the investigating officer in the case. That on 5/9/2020 at 2300hrs he was on duty when he received information from his boss that one Mr. Francis Odundo had received a call from strangers using his niece's phone number 0715280694 and that the men demanded a ransom of Kshs 20000/= in order to release his niece. That they managed to trace the location of the mobile number which was at Atilili area. They realized Mr. Odundo had already sent them Kshs 10000/= through the mobile number of his niece Sylvia Akinyi Odundo. That investigations revealed that several people had been contacted to send money.

He stated further that on the morning of 6/9/2020, Dr. Odundo was contacted by the complainant stating that the kidnappers had set her free. They went together with the uncle to where she was at the homestead of Ngiela and took her to hospital. That he later requested for her M-pesa statement, which revealed the two numbers that the suspects had transferred money to through M-pesa. The numbers were 0752218706 and 0786499758 and that both numbers were not registered. He produced the M-pesa statement marked as MFI 1. He further stated that at some point the complainant's phone went off and the



kidnappers switched her sim card into their phone. The sim card is marked MFI -4. Further, he stated that he received the call data from Airtel for both numbers of the suspects which indicated that the suspects were using the same phone. The Airtel call data for 0786499758 and 0752218706 were marked as MFI-5(a) and (b). Further investigations revealed that one Christine Ajwang Adhiambo had been a victim of the suspects on the midnight of 12/6/2020 and that he contacted her and opened a file for her. He also established that the person who was using both numbers was one Adonija Oginga Otieno, as the mobile phone he was using had both of these numbers and a Safaricom number registered in his name. That the phone Adonija was using had been stolen from a student of Jaramogi Oginga Odinga University and that Adonija was unable to prove ownership of the same.

That on the midnight of 6/9/2020, they arrested Adonija Oginga Otieno at his rental house at Opolimbo area in Bondo Township. In the house of Adonija, they recovered inter alia: black ITEL mobile phone-(exhibit 6), a big Nokia battery (exhibit 7), ladies pair of open shoes golden in colour (exhibit 8 (a)), ladies underwear grey/ black in colour (exhibit 8 (b)), Techno spark plus Sim card, panga (exhibit 9), motorcycle number plate KMFC 638A produced as exhibit -10.

That Adonija led them to his accomplice's house in Ratiya where they managed to arrest two suspects' twin brothers CORNEL Odongo Opondo and John Onyango Opondo. In Cornel's house, they recovered a number-less Bajaj boxer motorcycle chassis number ND2A18AYILWM89852 -(exhibit 11). In Onyango's house, they also recovered a numberless motorcycle chassis No. MD2AI8AY4LWM19355 red in colour (exhibit -12). That he prepared an inventory signed by the suspects and the arresting officers dated 6/10/2020 and produced as exhibit 13(a-c). That the suspects were arrested, taken to the station and charged as before court.

On cross-examination by the 1st Appellant, he stated that the complainant did not describe the features of the kidnappers.

On cross-examination by counsel for the 2nd Appellant, he stated that they located the home of 2nd Appellant through the 1st Appellant. That they did not do a search of the registration of the number plates recovered. That an identification parade was not necessary since the call data led the suspects to the offence. That he does not have evidence to show that the mobile line belonged to the 2nd Appellant and that he does not have the forensic report showing that the 2nd Appellant's phone sim card was used in the phones recovered from his house.

16. PW9 was James Makobi from Safaricom Law Enforcement Liaison based at Safaricom Kisumu. That his duties entail receiving of formal request letters or court orders from various law enforcement agencies within the Kenyan Republic requesting for information that can assist them. That once the information is processed, they send it via email and appear in court to produce the various documents. That in the instant case, he had two documents. The first one was call data for mobile phone number 0715280694 obtained following the request of the DCI Bondo office vide letter dated 9/9/2020. The data is from 20/7/2020 to 8/9/2020. The number is registered under the name Sylvia Okello of ID No. 33200024. Call data form earlier marked as MFI 4 produced as exhibit 4.

The next document he had was an M-pesa statement for mobile No. 0715 280 694 for the period 1/6/2020 to 10/9/2020. The statement was processed on the same date a court order was issued vide miscellaneous application No. 59 of 2020. The M-pesa statement is for Sylvia Akello Akinyi, same produced as exhibit 1 earlier marked as MFI 1.



On cross-examination by the 1st Appellant, he reiterated his evidence in chief to wit that he had his job card in court and that he has worked for six years. That the M-pesa statement showed the 1st appellant as the recipient of money from Sylvia's number. On page 24 of the data, it showed that Sylvia's sim card changed handsets twice from 20/7/2020 up to 5/9/2020 at 2351 hrs. That the mobile No. 0715280694 was using IMEI 354756000784880. On 5/9/2020 the sim card was inserted into IMEI number 353842113781000. That it was used up to 6/9/2020 at 2235hrs when it was inserted back to IMEI No. 354756000784880. That when you buy a line you must register it using your ID number for you to access the safaricom network.

On cross-examination by counsel for 2nd Appellant, he stated inter alia that he could not tell whether the simcard changed from person A to person B physically. That he could not confirm from the data who actually had the handset at the time they changed the sim cards.

17. At the close of the prosecution's case, the court found that a prima facie case had been made out against both Appellants who were subsequently placed on their own defence.
18. The 1st appellant gave a sworn statement. That he was a welder. That he was called by his customer on 4/9/2020 and who informed him that he would visit his workshop the following day. That on 5/10/2020, his customer came to his workshop and requested him to put glue/gum on his motorcycle plate. That as he worked on it, he realized it was curfew time and so he bought supper and breakfast and carried the motorcycle plate to his house. On his way, he was arrested by police officers as it was curfew time and who escorted him to the police station where a search was conducted on him whereupon a phone make Tecno spark 4, sim cards for both Safaricom and Airtel No. 0734553204 and 0796482601, number plate and house keys were recovered from him. That he showed the police the plates to confirm that he was a welder.

That he took the police to Ratiya where his said customer stayed. At his house, his customer confirmed that he had given him the number plates. The customer took the police to where the motorcycles were at his brother's house. The customer showed police the ownership documents but was still charged for an offence he did not commit.

On cross-examination by the 2nd Appellant, he stated that he came to know him for the first time on 20/9/2020 when he gave him the number plate.

There was no cross-examination by the prosecution.

19. The 2nd Appellant gave a sworn statement. He testified that he is a boda boda rider from Ratiya. That on 20/9/2020 at 2.00 PM he went back to his house from work. There were two artisans working at the gate. That at 3.30pm he heard a knock at the door. It was the two artisans that he had carried on his motorcycle up to Opulimbo area where he left them and went back to Bondo. That on 5/10/2020 he went to do boda boda until 4pm when he took his number plate to an artisan to repair it and who informed him that he had a customer so he left the number plate with the artisan as he took the customer to Amwoyo. On returning, it started raining and thus he went to his house. Later at around midnight, he heard a knock at the door by persons who introduced themselves as police officers. He saw one person who lay on the ground and that the police asked him whether he knew him. That they asked for a motorcycle to which he informed them that it was at his brother's house. That at his brother's house, there were two motorcycles, one was his and the other his brother's but registered in their mother's name. That they were arrested and taken to Bondo police station. That the police



charged him with an offence he knew nothing about. That he did not know the complainant as he had never met her before.

On cross-examination by the 1st Appellant, he stated that he only came to know him on 20/9/2020 and on 5/10/2020 when they were arrested and that he hadn't known his name. That he only knew him as fundi.

20. The appeal was canvassed by way of written submissions. The appellants submitted that the trial court ought not to have relied on the evidence of PW5 as the only witness who identified the Appellants. They relied on several cases including the Court of Appeal case of RORIA V. REPUBLIC (1997)EA 573 where the court held that:

“a conviction resting entirely on identity invariably causes a degree of uneasiness that danger is of course greater when the evidence against the accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of the court to satisfy itself that in all the circumstances it is safe to act on such identification.”

The appellants submitted that there was no police identification parade and that the evidence linking the Appellants to the crime was quite shaky and left a lot of doubt that can only be cured by an acquittal. It was further submitted that the benefit of doubt should have been resolved in favour of the Appellants.

21. The Respondent, on the other hand, submitted that regardless of whether an identification parade was done or not, the victim's testimonial evidence is compelling and stands as a robust basis for upholding the conviction and by extension the accompanying sentence. On this, it relied on the Court of Appeal case of Stephen Nguli Mulili VS Republic (2014) eKLR concerning the applicability and placing reliance on section 124 of the *Evidence Act* as a foundation for a conviction based on the evidence of a single witness.
22. I have duly considered the evidence presented before the trial court as well as the rival submissions on this appeal and find the issue for determination is whether the Respondent proved its case against the Appellants beyond reasonable doubt.
23. It is noted that the Appellants faced charges of robbery with violence, kidnapping with intent to confine and gang rape.
24. As regards the offence of robbery with violence, the *Penal Code* defines robbery in section 295 as follows;

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

25. The *Penal Code* in section 296(2) provides for the offence of robbery with violence in the following manner;

If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.



26. In Criminal Appeal No. 116 of 2005 (UR), Johana Ndungu V Republic, the Court of Appeal listed the ingredients of the offence of robbery with violence as follows;
- i. If the offender is armed with any dangerous weapon or instrument; or
 - ii. If he is in the company of one or more other person or persons, or;
 - iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.
27. In Criminal Appeal No. 300 of 2007, Dima Denge Dima & Others Vs Republic, the Court stated that the ingredients of the offence of robbery with violence are appreciated disjunctively. It is, therefore, proper to convict an offender in instances where only one of the ingredients is proved.

The Court observed: - ‘.....The elements of the offence under Section 296(2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence....’

28. In the case of Oluoch -Vs- Republic {1985} KLR 549, the Court observed that proof of any one of the above ingredients is enough to sustain a conviction under section 296(2) of the Penal Code.
29. Flowing from the foregoing, the offence of robbery with violence is made up of two parts. The first part is the robbery while the other part is the aspect of violence.
30. In the instant case, the record indicates that the complainant was attacked by two persons who were armed with a panga. That they put her on a motor cycle and upon reaching a destination which was described as a thicket, they beat her using the flat side of the panga and forced her to contact her relatives and demanded for a ransom which was sent by her relatives through her mobile phone number whereupon the assailants wired the same to other numbers. The assailants thereafter raped her in turns before abandoning her.
31. It was the evidence of PW5 that on 5/9/2020 as she walked to her house from work at around 9.00 Pm, she was attacked by two people whom she did not know. That they blindfolded her using her sweater that she was wearing, forced her to climb on a motorbike and rode away. That they took her to an unknown place, into a thicket where they beat her with the panga, forced her to remove her clothes and that they raped her in turns after demanding for ransom from her relatives.
32. It was the evidence of PW9 that the next document he had was an mpesa statement for mobile No. 0715 280 694 for the period 1/6/2020 to 10/9/2020. The statement was processed on the same date a court order was issued vide miscellaneous application No. 59 of 2020. The mpesa statement is for Sylvia Akello Akinyi which was earlier marked as Mfi-1 was produced as Exhibit 1.

On cross examination by 1st appellant, PW9 reiterated his evidence in chief to wit that he had his job card in court and that the mpesa statement showed the complainant’s phone handset was inserted with a different sim card for some time before the previous simcard was inserted back.

33. It is noted that the incident took place at night and thus the issue of identification is usually quite challenging. The complainant (PW5) stated that the two assailants wore dreadlocks and that she was able to see them during the time they were raping her in turns and when the assailants were handling her mobile phone over the ransom money sent to here number by her relatives. It also emerged that the complainant had not known the assailants prior to the incident. It is also noted that the police did not conduct an identification parade so as to have the identity of the assailants established beyond



any shadow of doubt. The courts have in the past given clear guidelines regarding identification at night. In *Kiarie Vs R* [1984] KLR 739, the Court of Appeal held that the evidence of identification and recognition at night must be absolutely watertight to justify a conviction. Similarly in *Maitanyi Vs R* [1986] the court set out what constitutes favourable conditions for a correct identification by a sole testifying witness as follows:

“Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification especially when it is shown that the conditions favouring a correct identification were difficult.....A court has to evaluate the evidence of the single witness and find that the same is free from possibility of error.

Again in *Wamunga Vs R* [1989] KLR 426 the court held as follows:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

Also in *Mwaura Vs R* [1987] KLR 645 the Court of Appeal set out some guidelines- in cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what as alleged, the position from the accused and the quality of light.

In *Anjononi & Others Vs R* [1976-1980] KLR 1566 it was held that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

In *R Vs Turnbull & Others* [1973] 3 ALL ER 549 the court held that the factors to be considered when the only evidence turns on identification by a single witness is as follows:

“.....the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?

Also in *Abdalla Bin Wendo Vs R* [1953] 20 EACA the court of Appeal for Eastern Africa held as follows:

“Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not mean 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 is 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.

34. Flowing from the foregoing authorities as juxtaposed to the circumstances of the complainant in this case, it is appropriate to find out if the identification of the Appellants by the complainant herein was free from the possibility of error. The complainant claimed that the Appellants assaulted her and later forced her to call her relatives to pay ransom and this was after she had been gang raped. She gave the description of the assailants to the police that the two assailants wore dreadlocks. However, the police did not conduct an identification parade which in my view was very crucial since the complainant did not know the Appellants prior to the incident and that the Appellants were strangers to her. It appears that the police relied on mobile phone technology in that the complainant's phone was used by the robbers to insert their sim card and thereafter received the ransom money sent by the complainant's relatives. In this regard, the evidence of the investigating officer (PW8) and the official from Safaricom (PW9) is crucial to support the circumstantial evidence linking the Appellants to the crime. It is noted that the investigating officer visited the home of the 1st Appellant and recovered a mobile phone make Spark ITEL and a Tecno mobile phone handset. He gave the serial numbers of those phones and added that he sent the recovered phones to Safaricom for forensic examination. He also stated that the complainant's mobile phone number 0715280694 was used to transfer money to two airtel lines names 0752218706 and 0786499758. PW9 testified and produced the Mpesa statement which showed that the transfer of money from the complainant mobile phone number to the two airtel numbers. The witness also produced call logs regarding the complainant's number for period prior to the incident and thereafter. The witness also confirmed that the complainant's phone handset IMEI number was 756000784880 and that the simcard was removed shortly and replaced with another simcard whose IMEI number is 353842113781000. Whereas the numbers given by the investigating officer as 358452117908372 and 353452117908364 which he obtained from the recovered phone handsets, the same do not tally with the version of the expert witness from Safaricom. PW9 told the court that the two airtel lines which received the money from the complainant's number were not registered to any individual. It is instructive that even if the two numbers were not registered, and even if the simcards were thrown away by the suspects, it was still possible to follow leads upto the point where the money is finally received by the recipients. It is baffling to note that the police failed to tie this loose end so as to ensure that the perpetrators of the crime were nailed. As it is, there is some doubt as whether or not the Appellants were the individuals who were involved in the three offences. The worst part of the investigation is that the police failed to perform a crucial task namely conducting an identification parade. This would not have left out any doubt. Again, it seems the police relied on another case involving the 1st Appellant herein but forgot to find that the two cases are different because circumstances are different as well. If indeed the police wanted to rely on the other case, it was prudent for them to avail the witnesses in those other cases to come and testify in this other case so as to bolster its case against the Appellants. As it is, there is some doubt regarding the involvement of the Appellants which has been brought about by the shaky nature of the identification and the weak circumstantial evidence. In the case of *Sawe Vs Republic* [2003] eKLR, it was held that circumstantial evidence can at times sustain a conviction. However, the circumstances must be such as to leave no doubt about the guilty of an accused and that there are no other co-existing circumstances that would weaken the inference of his guilt.

Based on the foregoing, it is my finding that the Respondent did not prove its case beyond reasonable doubt regarding the offence of robbery with violence in Count 1. Therefore, the finding on conviction by the learned trial magistrate was in error.



35. The second count was kidnapping with intent to confine contrary to Section 259 of the [Penal Code](#) which stipulates thus kidnapping or abducting with intent to confine as:

“Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years.”

36. From the evidence on record PW5 Sylvia Akinyi Odundo testified that she is the complainant. She testified that on 5/9/2020 as she walked to her house from work at around 9pm, she was attacked by two people that she did not know and who blindfolded her using her sweater that she was wearing, forced her to climb on a motorbike and rode away. They took her to an unknown place, into a thicket where they beat her with the panga, forced her to remove her clothes and took turns raping her. All that time they used her phone to call her relatives and demanded that money be sent to her phone.

The complainant’s testimony was corroborated by that of PW3 and PW4. PW3 Christopher Odundo Omondi, a businessman, testified that he was the brother to Sylvia Odundo the complainant. That on 5/9/2020 he received a call from Sylvia Adundo that she had been kidnapped and that they were asking for ksh 25 000/=. PW4 Dr. Francis Odundo testified that he is a lecturer at Jaramogi Oginga Odinga University of Science and Technology. He recalled that on 6/9/2020 at around 11pm he was asleep and received a phone call from his nephew Christopher Omondi (PW3), who informed him that Sylvia Odundo, his niece, had been kidnapped. He looked at his phone and realized that she had tried to contact him. That he called her back and talked to the kidnappers who demanded for Kshs 25000/=. That he sent Kshs 10,000/=. That other family members including the complainant’s employer also sent money as demanded by the robbers.

As noted in the other paragraph 46 above, the identity of the robbers was not established. It is instructive that the police did not pursue thoroughly the recipients of the said monies so as to leave no doubt about the identity of the robbers. It is also noted that no identification parade was carried out by the police to leave out any doubt about the Appellants involvement. The evidence of PW9 was not conclusive as to identity of the persons who eventually withdrew the money which had been wired from the complainant’s mobile phone. Consequently, it is my finding that the prosecution did not prove this charge beyond reasonable doubt and therefore, the finding by the learned trial magistrate was in error.

37. As regards the offence of gang rape, the same is provided for by section 10 of the [Sexual Offences Act](#) No. 3 of 2006 which provides thus “Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.”

38. It was PW5’s testimony that “They told me to remove my clothes and I declined and they started beating me with pangas. They removed my clothes. I was putting on a dress and they told me to lie down. I declined and they started beating me and they forced me down. One of them removed his penis and inserted in my vagina and raped me. While he was forcefully having intercourse with me the other one was busy on the phone. When he had finished the other one also came and raped me...”



39. PW7 Sammy Aluda Luzuki testified that he is the clinical officer currently at Ndori health centre but previously as Bondo sub county hospital. He presented the duly filled P3 form which showed that the complainant had inter alia; bruises on the right elbow, tenderness in both thighs; tenderness on lower back, bruises on right side of the mid back. On examination of the genitalia, it showed inflammation around the opening of the vagina. The vaginal swab revealed presence of red blood cells and epithelial cells. He concluded that there was soft tissue injury with forced vaginal penetration. He produced the duly filled P3 form as exh. 2 and the lab request as exh. 3.

On cross examination, he testified that the complainant was attended by different medics including himself and that the contents in the p3 form were true.

Regarding the issue of the gang rape, there is no doubt that the complainant was raped and that the ingredient of penetration was established by the clinical officer and therefore the same was proved by the prosecution beyond reasonable doubt.

As regards the issue of consent which is a key factor in this kind of offence, it is clear that the complainant did not give consent to the sexual intercourse as the same was by force. In fact, the complainant was viciously assaulted before the ordeal.

40. On the aspect of Positive Identification, PW5 testified on cross examination that “they unblindfolded me when they asked for my password...I saw the rasta when I was being raped...when we reached the bush they gave me my phone and used the phone light to see them.”

As noted in paragraph 46, the police did not conduct the identification parade so as to rule out any doubt about the identity of perpetrators. Therefore, there was doubt regarding the identity of the perpetrators. Indeed, the money trail ended up cold because both the police and the Safaricom expert did not clarify about the identity of the persons who received the money.

I am satisfied that this ingredient was not proved by the prosecution beyond reasonable doubt.

41. The totality of the evidence tendered before the trial court show that there was some doubt about the identity of the perpetrators. The benefit of such doubt should have been resolved in favour of the Appellants in any event.

42. In conclusion, it is my finding that the appeal has merit. The same is allowed. The conviction by the trial court is hereby quashed and the sentences set aside. The Appellants are ordered to be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED THIS 14TH DAY OF FEBRUARY, 2025.

D. KEMEI

JUDGE.

In the presence of:

Adonijah Oginga Otieno.....1st Appellant

Cornel Odongo.....2nd Appellant

N/Afor Appellants

M/s Kerubo.....for Respondent



Ogendo.....Court Assistant

