



**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**(CORAM: CHERERE -J)**

**CRIMINAL APPEAL NUMBER 70 & 73 OF 2017**

**(CONSOLIDATED)**

**BETWEEN**

**PAUL MUNYASIA MAKHETI.....1ST APPELLANT**

**GEOFFREY WAFULA KHISA.....2ND APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(An appeal from the conviction and sentence in Criminal Case Number 1109 of 2016**

**in the Senior Principal Magistrate's Court at Kimilili**

**by Hon. D.Onyango (SPM) on 27.6.17)**

**JUDGMENT**

**Background**

1. **PAUL MUNYASIA MAKHETI** and **GEOFFREY WAFULA KHISA**, have appealed against sentence and conviction on the first charge of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code and a second charge of gang rape contrary to as section 10 of the Sexual Offences Act No. 3 of 2006. The appellant was also charged with an alternative count of indecent act with a child contrary to section 11 (1) of *the Act*. The particulars of the first count are that

**On the night of 18.10.16 in Bungoma North District within Bungoma County jointly with others not before the court robbed LKK of one Itel Mobile Phone valued at Kshs. 2,500/-, 4 kgs of dry maize valued at 1Kshs. 1,000/-, 50 kgs of beans valued at Kshs. 3,750/-, 5 hens valued at Kshs. 2,500/- and cash Kshs. 800/- all valued at Kshs. 10,550/- and immediately before or immediately after the tiem of such robbery wounded the said LKK**

The particulars of the two counts 2's are similar for both appellants and they are that:-

**On the night of 18.10.16 in Bungoma North District within Bungoma County in association with each other and others not before the court intentionally and unlawfully caused their penises to penetrate the vagina of LKK without her consent**

**The prosecution's case**

2. The prosecution called 6 witnesses in support of the charges. PW1, the complainant recalled that on 18.10.16 she was sleeping in a different bedroom from her children when at about 11.00 pm, 5 men who were armed with a torches and runqus gained entry into her bedroom, injured her on the forehead, raped her in turns and robbed her of 50 tins of dry maize 40 tins of beans, 5 hens, one Itel mobile phone, 3 memory cards, Kshs. 800/- and a bag. She stated that she reported the matter to her father in law, the same night, and the following day went to hospital and also reported the matter to the police. It was her evidence that she identified both appellants who were her neighbours among the assailants. She told court that the battery of her phone with initials LK was later recovered and she identified it as hers. In cross-examination by the appellants, she conceded that she knew them well by name but told the police that she did not know her assailants when she made her first report. PW2 SW, the complainant's son aged 13 years told court that he identified the 2 appellants who were their neighbours among the persons that broke into their house on the night of 18.10.16 and assaulted their mother. He told court that

the robbers had torches that enabled him to identify the appellants and gave their names Paul and Geoffrey, when he recorded his statement with the police. PW3 Ida Nambuya Wanyama stated that she lost her phone at the home of the 1st appellant and that when it was recovered by a village elder, she discovered that the battery in it was not hers. PW4 Moses Nabilai Sitati, a clinical officer testified that complainant was first examined on 19.10.16 and subsequently on 25.10.16 when her P3 form **PEXH 1** was filled showing that she had a deep cut on the forehead, whip marks on both thighs and bleeding from the vaginal opening. The witness also produced treatment cards for the 1st and 2nd appellants as **PEXH 9** and **PEXH 10** respectively. PW5 Ramadhan Washare Mungosi recalled that on 26.10.16, he mobilized members of Nyumba Kumi with whom they arrested the 1st appellant from whom they recovered a phone which contained a battery which complainant said was robbed from her. PW6 PC Peter Mutisya, the investigating officer received complainant's report on 19.10.16 and referred her to hospital. He confirmed that complainant did not name her assailants in her first report but that a phone containing a battery stolen her was recovered by PW5 from the 1st appellant.

3. Both appellants denied the offences and *in a judgment* dated 27.6.17; appellants were convicted and sentenced to suffer death in the 1st count and 30 years for the 2nd count which sentence was to be held in abeyance.

### **The Appeal**

4. The conviction and sentence provoked this appeal. In their separate petitions of appeal and written submissions, they raised one main ground of identification.

5. When the appeal came up for hearing on 6.11.18, the appellants stated that they were wholly relying on their grounds of appeal and written submissions.

6. Mr. Oimbo, learned State Counsel opposed the appeal and stated that the robbers had torches and spent some time at the scene which enabled PW1 and PW2 to identify the two appellants who were their neighbours since they talked to each other during the robbery. He further submitted that a phone battery from complainant's phone that was robbed on the material date was recovered from the 1st appellant. He finally submitted that the appellants were recognized by their voices and physically since their faces were not covered.

### **Analysis and Determination**

7. As the first appellate court in the instant appeal, I am required and indeed duty bound to subject the evidence tendered in the lower court to thorough re-evaluation and analysis so as to reach my own conclusion as to the guilt or otherwise of the appellant. In doing so I must give allowance to the fact that I neither saw nor heard the witnesses as they testified and therefore cannot comment on their demeanour. See **OKENO – VS – REPUBLIC (1972) E.A. 32.**

8. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the appellants and for the state.

9. The gravamen of this appeal really turns on the issue of identification, nay, recognition of the appellants by the complainant and PW2. The offence was committed at night and hence, the means by which the appellants were identified by recognition becomes critical. According to the complainant and PW2, the robbers had torches whose light enabled them to see the appellants clearly.

10. The difference in approach between identification and recognition was expressed thus by Madan J.A for the Court in **Anjoni and Others vs The Republic [1980] KLR;**

**“.....This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)”**

11. That is not to suggest of course, that cases of misrecognition cannot occur (See **Karanja & Anor vs. Republic . [2004] KLR 140**) and courts are still duty-bound to examine such evidence with great care.

12. That being the case it was necessary for the trial court to test the reliability of such identification. In the case of **Maitanyi vs Republic (1986) KLR 198**, the Court of Appeal held:-

**“.....That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.**

13. In the recent case of **John Muriithi Nyagah v Republic [2014] eKLR**, the Court of Appeal held:-

**“In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”**

14. The court record shows that the learned trial Magistrate did not at all evaluate the evidence of identification to test the reliability of the evidence of identification at night.

15. The absence of inquiries as to the light condition at the scene of crime by the trial Magistrate notwithstanding, this court is under a duty to consider if there is other evidence that point to the appellants' culpability. Whereas the complainant told court that she knew the appellants who were her neighbours both physically and by name, she did not give their names to anyone or the Police. In the case of Simiyu & Another V. R (2005) 1 KLR 193 the Court of Appeal expressed itself on this point as follows:-

**“In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who give the description and purport to identify the accused and then by the person or persons to whom the description was given. The omission on part of complainant's to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identify.”**

16. In light of the above, I have come to the conclusion that complainant failed to give the names of the appellants immediately she made a report to Police because the circumstances were not favourable for positive recognition. I similarly hold that in such unfavourable circumstances, PW2 was not in a position to identify the appellants and his evidence that he recognized them is rejected.

17. Failure by complainant to name the appellants whom she claimed she knew physically and by name ought to have sowed the seed of doubt on the mind of the learned trial magistrate concerning the recognition of the appellants. Such doubt should have benefited the appellants.

18. Concerning the recovery of a phone battery belonging to the complainant, PW5 Ramadhan Washare Mungosi told court that he mobilized members of Nyumba Kumi on 26.10.16, with whom they arrested the 1st appellant from whom they recovered a phone which contained a battery which complainant said was robbed from her.

19. The 1st appellant denied that any phone containing complainant's battery was recovered from him. Evidence of recovery of the complainant's phone battery is that of PW5 against that of the 1st appellant for the reason that the other members of Nyumba Kumi that arrested the 1st appellant were not called to corroborate the evidence by PW5.

20. The 1st appellant's defence in my humble view raised a reasonable doubt regarding recovery of complainant's phone battery which ought to have benefitted the 1st appellant.

21. Having considered the evidence in its totality, the appeal succeeds. Accordingly, the conviction is quashed and the sentences set aside and unless otherwise lawfully held, it is ordered that appellants shall be released and set free forthwith.

**DELIVERED AND SIGNED AT BUNGOMA THIS 9th DAY OF November, 2018**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistants - Ribba & Diannah**

**1st Appellant -**

**2nd Appellant -**

**For the State - Mr Oimbo**