



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NOS 187 AND 188 OF 2013**  
**(CONSOLIDATED)**

**BETWEEN**

**DOUGLAS AMBASI KAVUNA.....1<sup>ST</sup> APPELLANT**

**HILLARY SINDIJI CHUKUNSI.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the Judgment of Hon. B. N. Ireri, Ag Pm delivered on 04.10.2013 in Vihiga  
PMC Case No. 27 of 2012)**

**J U D G M E N T**

**Introduction**

1. The two appellants were the first and second accused in the lower court. They were tried, found guilty and convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. They were also found guilty of gang rape and convicted accordingly. They were both sentenced to suffer death as by law provided.

**The Appeal.**

2. Being aggrieved by both conviction and sentence, they filed their separate appeals which appeals were consolidated by an order of this court made on 06.10.2016. the common grounds of appeal set out in the supplementary memorandum (should be petition) of appeal dated 29.02.2016 are that;-

- 1.) The learned trial Magistrate erred in law and in fact by convicting and sentencing the appellants on evidence based purely, on suspicion and dock identification.
- 2.) The learned trial Magistrate misdirected himself in his judgment by failing to evaluate the whole evidence on record and instead selectively relied on the evidence of PW1, PW2 and PW3 which was biased against the appellants.

3.) The learned trial Magistrate failed to consider the defence evidence which was sworn, strong, consistent and supported by record vis a vis the weak and inconsistent evidence of the prosecution.

4.) The learned trial Magistrate misdirected himself by failing to take into account the fact that there was no proper investigation and investigating officer® never testified thereby prejudicing the appellant's case.

3. Reasons wherefore the appellants pray that the appeal be allowed, conviction quashed and sentence of death set aside and they be released.

### **The Law**

4. The offence of robbery with violence is defined under Section 296 of the Penal Code which provides as follows:-

296 (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) 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.

5. In this case, this court has the duty, as the first appellate court, to sift through the evidence afresh with the view to satisfying itself that the findings of the learned trial Magistrate on proof of the offence were well founded, only remembering that it has no opportunity of seeing or hearing the witnesses who testified during the trial. Generally see **Okeno vs – Republic [1972]E.A 32.**

6. The second point that this court has to satisfy itself about is whether the appellants were properly identified during the alleged robbery. It is clear from the evidence on record that the alleged incident took place at night, so it is critical for this court to satisfy itself that the identification of the appellant was free from error. In this jurisdiction, the principles on identification in the English case of **R-vs Turnbull [1967]3 all ER 549** have been applied freely.

7. In the case of **Odhiambo – vs – Republic [2002] KLR 241**, the court held, inter alia, that “the court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. This was the position held in the earlier case of **Joseph Ngumbao Nzaro – vs – Republic [1991]2KAR 212**, the Court of Appeal held, and quite rightly that:-

1.) Before accepting visual identification as a basis for conviction the court had a duty to warn itself of the inherent dangers of such evidence.

2.) A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was essential. The above are the principles I shall apply in this appeal.

### **The Prosecution Case**

8. The facts of this case are brief. On the night of 31.12.2011 and 01.01.2012, the family of J A was asleep in their house, part of which they operated as a kiosk. J A testified as PW3 while his wife M G A who operated the kiosk testified as PW2. The A's were in the house with their 14 year old daughter R O who testified as PW1. At about 2.00am a group of more than six men among them the appellants forced their way into the house after breaking down the door using a huge stone. The attackers were armed with rungas and pangas and had many very bright torches which they flashed around as they asked for money

and stuffed an assortment of shop goods into bags which they later carried away.

9. During the attack, the robbers tied J A onto the bed as they undressed and gang raped M and the daughter R. Eventually the dogs started barking and being afraid that they would be caught, they took off, leaving the A's in shock and pain.

10. After the robbers left, R untied her father and mother, M took a whistle and the three of them went outside the house, blowing the whistle and asking for help.

11. During the robbery, R was hit with the flat side of a panga on her back several times and also stole M's phone. One of the robbers placed a panga on M's neck, threatening to kill her if she did not produce money.

12. After the robbers left, J A's mother and a neighbour called Catherine came out in response to the screams. These two ladies were however not called as witnesses; but Catherine telephoned the village elder who in turn informed the Assistant Chief of Igoe Sub-location one Henry Chunguli Lodenyo who testified as PW4. From the record, J A, M and R said they clearly recognized the appellants as having been among the robbers and also gave their names with the first report.

13. Later, both M and R went to the police and reported the incident. They were issued with P3forms and referred to the hospital for treatment. Charles Leparmoriso a Clinical Officer attached to Vihiga District Hospital treated them. The clinical Officer testified as PW6 while Number 75709 CPL William Juma of Mbale Police Station testified as PW6. CPL Juma took over the conduct of the case after the investigating officer, Cpl Gati had been transferred.

#### The Defence Case

14. At the close of the prosecution case, the appellants were found to have a case to answer and accordingly placed on their defence. They each elected to give sworn testimony. Douglas Ambasi Ilavuna testified of how on 06.01.2012 at about 10.00pm while he was asleep in his house, the Assistant Chief Henry Chunguli Lodenyo, PW4 knocked on his house and asked him to open. On opening the door, he saw three men who entered and carried out a search, after which he was ordered to dress up and lock the house. He was taken to Mbale Police Station where his finger prints were taken before he was locked up in cells. On 09.01.2012, he was removed from the cells and on 10.01.2012 he was arraigned before court. He denied the charge levelled against him.

15. During cross examination, he admitted he knew M G and was her customer. He also stated that on 31.12.2011, he saw her at her shop at about 6.00pm where he had gone to buy items. He added that the complainant's testimony against him was a frame –up.

16. Hillary Sindiji Chukunsia testified that he was arrested from his house at about 8.30pm as just as he was preparing to go to bed. He stated that the assistant Chief, one Henry was one of the people who went to arrest him. After his house was searched, he was ordered to accompany the search team to Mbale Police Station where a report had already been made. After three days in police custody, he was taken to Vihiga Police Station and on 10.01.2012, he was charged in court. He denied the charge and stated that his arrest was associated with some alleged threats he had made to someone.

17. During cross examination, the second appellant denied going to the complainant's shop on 31.12.2011, though he conceded that he knew her. He also testified that on 31.12.2011, he had gone to see his mother at Ahero.

#### **Submissions**

18. Counsel for the appellant filed written submissions dated 26.09.2016. He also gave highlights of the said submissions during the hearing of the appeal on 20.12.2016. Counsel urged this court to allow the appeal quash the conviction and set aside the sentence.

19. In response, Mr. Jamsumba for the respondent vehemently opposed the appeal and submitted that there was sufficient evidence on record to link the appellants to the crime committed against the complainant and her daughter, regarding the appellant's defences, counsel submitted that there was no substance in the said defences. He also submitted that there was no mention of any grudge between the witnesses and the appellants that would have formed a basis for the witnesses to give false testimony against the appellants. He urged the court to dismiss the appeal.

### **Issues for Determination.**

20. Since the alleged offence took place at night, one of the issues which this court must deal with to its satisfaction is one of identification of the appellants. The second issue is whether the prosecution's evidence proves beyond any reasonable doubt as set out under Section 296(2) of the Penal Code. I shall now proceed to deal with the twin issues.

### **Were the appellant's properly identified/recognized during the robbery**

21. The issue of identification is central in determining whether or not an accused person is guilty and it is particularly so when the identification which is disputed by the accused is made under difficult circumstances. In the case of **Wamunga – vs – Republic [1989] KLR 424**, the appellant and five others were arrested and charged with nine counts of robbery. It transpired during trial that the appellant was identified under torch light. Though his appeal to the Court of Appeal was dismissed, he contended during the second appeal that the offence having taken place at night and the only available form of lighting was torch light. Then his identification as one of the assailants was unreliable. Upon hearing the appeal, which was allowed the Court of Appeal held, inter alia, that:-

1.) Where the only evidence against 9 defendants 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 a conviction.

2.) Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.

22. Also see the case of **R-vs Turnbull [1976] 3ALL CR 549,[1976] 3 WRR 445 and Abdallah bin Wendo & Another – vs – R[1953] 20 EACA 166.**

23. In the instant case, the learned trial Magistrate made the following findings on identification of the appellants;-

“ I have considered the evidence of PW1, PW2 and PW3 the evidence of the said witnesses is very consistent, all the witnesses positively identified the two accused person and others not in court as the people who broke into their house, and robbed them violently, PW1 has stated clearly how the second accused placed a panga on her head and also hit her with the panga as he asked her where the father had kept the money, she has also stated how the two accused persons defiled her, in presence of her father PW3, who corroborated this evidence.

PW1 has confirmed that she knew the accused persons very well, prior to the attack, she has even stated that she knew them by their voices, she states that she used to see them coming to the shop and while they were passing by the road, she also states that night she positively identified the accused persons by the torch light which they were using.”

24. I have myself reconsidered the evidence of both PW1 and PW2 and have come to the conclusion that the findings by the learned trial Magistrate were well founded. PW2 named all the people of her evidence in chief she stated;-

“ ..... I identified all of them very well. I also saw them by light of the torches. All of them had

torches which were very bright, were big torches”

25. Earlier on in her testimony, PW2 stated that there were six attackers in all identified by her as Jamhuri Douglas, Hillary Sindiji and another called Jack who is still at large. She said that it was the second appellant Hillary Sindiji who asked her where she wanted to escape to and that Hilary wore a red jacket and cap. While Douglas also had a jacket. Much further into her evidence in chief, PW2 stated that the ordeal took about one hour as the attackers flashed their torches about looked the shop and raped her. PW2 also stated that when the dogs started barking, the group decided to leave but Hilary was left behind for about ten minutes before he left carrying 20Kg of beans with him. Regarding Douglas, PW2 stated that at about 6.00pm on 31.12.2011, he had gone to her shop, peeped, called her but did not buy anything. She also told the court that Douglas also raped her after Hilary had removed her skirt and T-shirt.

26. PW1 R O had the following to say on how she recognized the appellants. “The people who came in had torches. Two men came into my bedroom. It was Hilary and Jamhuri (2<sup>nd</sup> and 3<sup>rd</sup> accused person). Both came into the room, both wore caps and the second accused Hilary spoke to me .....I gave him my mother’s phone.... And he asked me for money.” She also said that Hilary raped her near the bed where her father lay. PW2 further states; - “I also saw Ambasi that night. I knew his voice because they all could come to being goods at our shop. I knew their voices all of them. Ambasi said “Mfanye haraka”. Further in her testimony in chief, PW1 stated;- Hilary comes from the village I have known him for long. I see him all over at the road, market and outside out shop. At times I do sell at the shop. He also comes to our shop to buy many times. That evening at 5.00pm, I found him at the kiosk window. I have known him for a long time.

27. It is thus clear to me from the evidence on record that the two appellants were at the scene of crime. They were each seen by PW1 and PW2 who knew both of them well. The two appellants were frequent customers at PW2’s shop and Douglas was seen by both PW1 and PW2 at the shop between 5.00pm and 6.00pm on 31.12.2011. The four witnesses knew the voices of the two appellants very well. The appellants who hailed from the same village were well known to both PW1 and PW2, and they each spoke to the witnesses during the ordeal. The torches were described as very big with bright lights which the assailants were flashing all over as they took shop goods and asked to be given money or shown where the money was. I have no reason to depart from findings of the learned trial Magistrate on the issue of identification. I find no contradiction in the testimonies of both PW1 and PW2. In any event even PW3 J A stated: “I could see them move up and down.” He also said, “I identified them while inside the house. It was crowd, a group of people. They had weapons like pangas and torches which they used to light the room.....I identified the voice of Douglas first accused (pointed) the said. “There is money here. I know the first accused very well, he is a neighbour. They did not wear any masks. The second accused person wore a cap. I identified the second accused by his voice. He said, “The work we same for is not yet over”, even the second accused person was very well known to me before.” PW1, PW2 and PW3 testified that they gave the names of the appellants to the police when the witnesses went to record their statements. PW2 stated she told the Assistant Chief she had identified the assailants and that is how the two appellants were arrested.

### **Whether the ingredients of robbery with violence were proved**

28. Under Section 296(2) of the Penal Code, the ingredients for the offence of robbery with violence are any of the following circumstances namely if;-

- The offender is armed with any dangerous or offensive weapon or instrument, or
- The offenders is in company with one or more other person or person; or
- 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.

29. In the instant case, there is evidence that the appellants were in a group of six people, they were armed with pangas and they struck PW1 several times on her back using the flat side of the panga. There is also evidence that the two appellants raped and defiled both PW2 and PW1. Rape or defilement during a

robbery is what I consider as other form of personal violence. I have carefully read through the evidence of PW2 who testified how Hilary removed her clothes and took her to the corridor of the house where she was gang raped in turns. For purposes of a conviction, the prosecution needed to prove only one of the above mentioned circumstances. I am therefore satisfied that the offence of robbery with violence was proved beyond any reasonable doubt and I so find. I hasten to add that the evidence on record about the participation of the appellants in the crime was not and is not circumstantial. It is direct evidence by PW1, PW2 and PW3.

30. I have taken a fresh look at the defences of the appellants during the trial and note that those defences failed to dislodge the very strong evidence adduced by the prosecution against the appellants. The defences are of no evidential value to the appellant's case. Their alleged alibi defences were torn apart by very solid evidence adduced by the prosecution. There is no evidence of bias against the appellants by PW1, PW2 and PW3. The record does not show any suggestion of bias by the said witnesses.

**Conclusion.**

31. Bearing the above findings in mind, I see no merit in the appellants' appeals on both conviction and sentence. The two appeals are dismissed in their entirety. Right of Appeal to Court of Appeal within 14 days.

Orders accordingly.

**Judgment delivered, dated and signed in open court here at Kakamega this 16<sup>th</sup> day of March, 2017**

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

Mr. Munyendo holding brief for Mochere (present) for Appellants

Mr. Ngetich(present).....for respondent

Polycap.....Court Assistant