



**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL APPEAL NO. 44 OF 2013**

GIBSON KIPLANGAT YEGON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(From the convict and sentence of Hon. J.Ndururi, Principal Magistrate, Kericho dated 28th August 2013)*

**JUDGMENT**

The Appellant **GIBSON KIPLANGAT YEGON** was convicted on a charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** that on 2nd day of September 2012 at Nyagacho Market in Kericho District, jointly with another not before court, being armed with a dangerous weapon namely a knife, robbed **EUNICE CHEPKURUI** of her mobile phone make TECNO SN 868358006699840 valued at Kshs. 3,500, and at the time of such robbery threatened to use actual violence to the said **EUNICE CHEPKURUI** he denied the charge.

**EUNICE CHEPKURUI** (PW1) told the trial court that, on 02/09/12 at 8.00pm, she was walking to her house when she met the appellant who had previously beaten her and her cousin on 29th August 2012.

When she met him that September night at Mti Kubwa, she had actually gone to look for him as she had received information that he was within that area. He was ahead of her, and in the company of another. She had not seen him, he grabbed her by the neck and threatened her with a knife which he removed from his pocket. He then put his hand in her pocket and took away her phone, make TECNO. She screamed and the appellant fled along the road. Police officers who were on patrol arrived at the scene and tried to follow the person. They eventually found the appellant having been apprehended by members of the public along Kisumu road. The police recovered the knife and phone from the appellant. The appellant had already removed the sim card from the Tecno phone and inserted it in his phone. PW1 explained that she was able to identify the appellant with the aid of electricity light emanating from security lights at the shop along the road.

**PC POLYCARP ODHIAMBO** of Nyagacho Police Station told the trial court that on 02/09/12, he and other officers had agreed to meet PW1 so that she could help them in tracing two suspects known as Kiplangat and Pasta whom they did not know by appearance. This was as result of an earlier report made by PW1 that they had kidnapped her and one Lucy Chepkurui on the night of 29/08/12, raped and beat them. When they got to Mti Kubwa, PW1 said she would walk into a Changaa Den to see whether the suspects were there, leaving the police officers in the dark. Shortly, they heard her screaming and upon rushing to the scene, they met PW1 who was running. PW1 said she had met the two suspects as they were leaving the den and upon recognizing her, they drew knives and threatened to kill her. The pair who had attacked her fled and police tried to pursue them and were shown by members of the public the route

one of them took (who turned out to be the appellant) had used. Police fired in the air to scare them and the appellant ran towards Matobo. Police later got information that the appellant had been approached by members of the public, and a phone and knife were recovered from him. This evidence was corroborated by that of PW4 (Cpl Abdinur).

On cross-examination PW2 stated that there were very many people at the scene of the robbery and appellant identified the recovered phone as hers and she presented a receipt to prove ownership.

**SHADRACK NGETICH** (PW3) was walking along Kisumu road on 02/09/12 at about 9.30pm accompanied by Japheth Kigen and Gilbert Ngetich when he saw appellant trying to open the gate to a home whose owner was known to him. They apprehended him and recovered a knife and a phone from him. This is the same phone PW1 identified as hers.

**GILBERT MUTAI NGENO'S** (PW5) evidence corroborated that of PW3. PW4 **Cpl ABDINUR HUSSEIN** confirmed that the appellant was arrested about twenty minutes from the time of robbery. PW1 identified appellant upon being apprehended as the person who had raped her on 28th August 2012 and also robbed her on 2nd September, 2012.

In his unsworn defence, the appellant said he knew PW1 earlier as they had had a love affair, but differences arose. In August 2012, she made claims that he had raped her. He confirmed having met her in the month of September at a "shebeen." PW1 told him that since he was not ready to solve their differences, she would do something he would never forget. She then grabbed him and screamed – police and members of the public came, the appellant escaped but was apprehended by members of the public. He denied having the knife and phone at the time of his arrest.

In his Judgment, the trial magistrate held that PW1 recognised the appellant because it was not the first time she was encountering him – a month earlier, they had another encounter and that she had come to know the attackers as Pasta and Kiplangat and that is why she was looking for them. The trial magistrate was also satisfied that the scene of attack was well lit so she was able to see the appellant. On claims that PW1 was the appellant's girlfriend, the trial magistrate rejected this holding that PW1 had denied this as prior to 29th August 2012, she did not know the appellant, and that the appellant never challenged her on this.

The trial magistrate observed that the recovery of the knife and phone were made by total strangers who were not even aware that PW1 had been robbed of her phone. The appellant's defence was rejected, with the trial magistrate stating that the appellant did not give any explanation as to why he was along Kisumu road area yet he lived in Nyagacho, or why members of the public arrested him.

The appellant filed amended grounds of appeal in which he challenged the conviction on sentence saying that:-

- a. identification was not free from error and no identification parade was conducted.
- b. The evidence was contradictory.
- c. The charge was not proved beyond reasonable doubt.

In the written submissions, the appellant argued that PW1 gave contradictory evidence, initially claiming that she met the appellant when she was going to Lucy's house, then again saying she met him on her way to Mti Mkubwa. He termed the evidence by PW1 as unbelievable, wondering how a single lady would go on her own to look for a robber.

He also faulted the identification, saying despite claiming that the place was well lit, PW1 did not describe the appellant's manner of dress.

He also wonders that if by the time of his arrest he had removed PW1's sim card from her phone and placed it in his, then how is it that the same phone (presumably his) which PW3 used to make a call to PW4, was the same one handed over to police as the stolen one and infact identification as such by PW1.

In opposing the appeal, Lopokoyit on behalf of the state submitted that the evidence on record was overwhelming and that even after the appellant had fled away from the scene, he was intercepted by members of the public while on another limb of criminal mischief and PW1's property plus the knife he had used to threaten her were recovered.

He argued that identification was proper as PW1 had good opportunity to see the appellant, and this coupled with the recovery, adequately proved the charge.

As for the sentence, it is submitted that the sentence is legal both under the Penal Code and the Constitution.

Further that the defence was duly considered as clearly reflected in various portions of the judgment but properly rejected by the trial magistrate.

We have re-evaluated the evidence on record, and analysed the same against the arguments presented by the respective parties. Several issues in the evidence are of concern to us. PW1's evidence as to exactly where she met the appellant is a bit perplexing. She stated in her evidence in chief:

**“....I went to see my cousin in Nyagacho. My cousin is Lucy. On 2nd September, 2012 at 8.10pm, as I was going home from Lucy's house, I met with him. He grabbed me by the neck. I met with him at Mti Kubwa..... He was ahead of me....”**

On cross-examination she stated as follows:

**“Yes we met at Mti Kubwa. I was alone. We met on the road...”**

This contradicts what PW2 stated to the effect that

**“As we were walking towards Mti Kubwa, Eunice Pointed out to certain changaa den... she said she would walk in there to see whether the two suspects were there..... she told us that she had met with the two suspects leaving the changaa den and then they recognized her.”**

It is difficult to determine:-

- a. did PW1 meet her attackers along the road as she walked and they were ahead of her or
- b. did she meet them at the liquor den as they were leaving.
- c. If her evidence is to be believed and PW2's evidence disregarded, then if they were ahead of her, how was she able to see and recognize them? Was this a face to face meeting or was she following them from behind especially because of her statement that

**“...He was ahead of me. I had not seen him...”**

That issue was not resolved by the trial magistrate nor the Counsel who appeared on behalf of the respondent – its fatality is that it then leaves room for the possible credibility of what the appellant said in his defence that PW1 found him inside the liquor den.

PW1 stated that before the earlier rape incident in August 2012, she had not known the appellant. Then upon cross-examination she stated

**“You were already known because of the case of 29th August, 2012.”**

Who knew him? If she only encountered the appellant in August 2012 and had accompanied police to look for him in September 2012 then

- a. Who gave her the information regarding where to find the appellant?

- b. How did she get to know that the appellant was named Pasta or Kipkurui, which are the names she gives as persons who attacked her, and which are not entered as the appellants' names or aliases.

Following close to this is – if indeed the appellant was the person who had attacked her and Lucy, who she had just visited, then why didn't Lucy testify? Our perception is that leaving Lucy out was because had she been called as a witness, she would probably have given evidence to the prosecution case- we are founded by the decision in *Bukenya and 5 Others V. Uganda* 1972 EALR at pg. 354.

Then there is the 'arrest' of the appellant by independent strangers who were not residents of the plot appellant was apparently attempting to break into. None of those living on the plot testified but of greater significance is that according to the witness, the red phone they recovered from the appellant had been switched off – they switched it on, it did not demand a pin number and when they called the number, on the screen, it went to PW4's number. This then contradicts the evidence that the appellant had removed PW1's phone and placed it in his phone it would mean then that the phone which Shadrack, Gilbert and Japheth recovered and used, was not PW1's phone but appellants. It would also then mean, that the phone which they handed over to police was the appellants own phone and not the one PW1 eventually identified in court as her phone.

Our finding is that the evidence presented before the trial court had far too many loopholes, and unanswered questions, that could not sustain a conviction. Consequently, we hold that the conviction was unsafe and is quashed. The sentence is set aside and the appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Dated, signed and delivered in open court this 17th day of July, 2014.**

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**J.K.SERGON**

**JUDGE**

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**H.A.OMONDI**

**JUDGE**