IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: GITHINJI, OKWENGU & KANTAI, JJA]

CRIMINAL APPEAL NO. 53 OF 2015

BETWEEN

PETER MATIVO KILAKA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya

at Nairobi (Mbogholi & Achode, JJ) dated 15th April, 2014

In

HC. CRA. NO. 104 OF 2010

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JUDGMENT OF THE COURT

The day of 17th January, 2008 had started very well for **Daniel Mutinda Mutisya** (P.W.1) (**Mutisya**), his wife **Joyce Nthenya Mutinda** (P.W.2) (**Nthenya**) and their in-law **Jane Syombua**, all of Ithanga Village in the then Masinga District. They spent the day visiting a friend and in the early evening they met another friend called **Maingi** who requested Mutisya to accompany him to a local bar for refreshments. Mutisya took his wife Nthenya and his in-law Syombua to a hotel and he joined Maingi at a bar where they took some beers. He thereafter received information that his wife and in-law had preceded them and he should find them in Ndithini Shopping Centre. He walked there, joined them and as they were walking home at around 7.00 p.m., they observed a motor cycle which had three people approach them. This motor cycle stopped where they were and two of the passengers alighted. One of them stood in front of Nthenya and blocked her path. Mutisya intervened telling the intruder that the lady was his wife. He was punched with a fist and other people joined in to beat him up more. As he fled for his life, the person who had blocked Nthenya's path followed him and hit him with a stone which led to his falling down and losing consciousness.

Meanwhile Nthenya had observed that one of the people who had alighted from the motor cycle was a person she knew by the name **Muide** and she also recognized the appellant who told her that he was a police officer. She sat down and when the attack on her husband was going on, she held on to the appellant to try to save her husband. The attack was ferocious and she freed herself to try to escape. As she did so, she heard her husband screaming in a bush saying that he was dying. She screamed for help which attracted the appellant and others to where she was. The appellant held her by the hand and they started walking and along the way, he took her to a farm of oranges where he forced her to undress and proceeded to rape her. When he was finished, he led her by the hand back to the road where they were joined by another who was a co-accused before the trial court. They walked to a house which they reached at about 11.00 p.m. and according to her, although the house was not lit, there was bright moonlight illuminating the house and the surroundings. In the house there was yet another man and the appellant and the two others used matchbox light to examine documents including Mutisya's National Identity Card and Electors Card which he had taken from Mutisya alongside a wallet. The appellant raped her again in the house and ordered the co-accused to also rape her which he did.

The appellant and the other rapist retired to another room to sleep and left the third man with Nthenya. He was supposed to rape her as well. He had a conversation with her which led him not to rape her but he made her to fondle him, which, when she did, pleased him and he decided to assist her to escape. He handed over her clothes to her and showed her the way to a police post which was not far from the house they were in. The police were of no help when she got there but she was assisted by a stranger who gave her a place to sleep. She was woken up at 5.00 a.m. and the stranger, herself, an uncle whose residence they passed by on their way to the place where the attack had taken place plus others including a police officer visited the scene. They collected her black pant which she had left where the first rape took place but

Mutisya was not there. On going back to the house where the second ordeal had taken place, she was able to identify a panga which the 1st appellant had placed on her neck and bows and arrows and an axe which had all been used to threaten her. This were all produced in court as part of the evidence.

Going back to the scene of attack, Mutisya had identified the appellant as one of the attackers who had blocked his wife's path and had hit him with the stone leading him to lose consciousness.

Nthenya was taken to Thika Hospital for treatment where she met her husband Mutisya who was being treated for serious injuries. Mustisya testified that the appellant took his wallet at the scene which contained cash Kshs 5,800/= and a National Identification Card and an Electors Card.The National Identification Card and an Electors Card amongst other items were produced into evidence by **No. 40026 P.C. Elijah Ngetich** (P.W.7) who had taken over investigations from another officer who had been sent on transfer. Mutisya and Nthenya were issued with P.3 forms after medical examinations and **Doctor Kamau** (P.W.4), a medical officer at Thika Hospital produced the forms testifying that on Mutisya, he had been injured on the left side of the head using a blunt object and in respect of Nthenya, she had been injured on the head but he could not tell whether she had been raped as it was not possible to find bruises or injuries in a rape victim after one week when the examination was conducted.

No. 231278 Chief Inspector **George Machatha** (P.W.3) of Yatta Police Station conducted identification parades where Mutisya and Nthenya identified the appellant as one of the attackers.

Daniel Kioo Mbithi (P.W.6) was the Assistant Chief of the relevant area and he assisted in the arrest of the appellant upon receiving report of the attack that had taken place. He stated in cross-examination that upon arresting the appellant he recovered Mutisya's National Identity Card from him.

That was the substance of the prosecution case that was placed before the trial court which upon analysis found that the appellant and his two co-accused had a case to answer.

We shall not speak to the case for the co-accused. The one who helped Nthenya to escape was acquitted while the other rapist was found to be a minor when he committed the offence and was committed to a Youth Correction Centre upon conviction.

In his defence the appellant denied committing the offence stating that on the material day he engaged with a mechanic in repairing a vehicle that had broken down. When the repair work was through they went to a drinking den and as they were drinking traditional brew the place was surrounded by many people. Some revellers ran away, but he and a few remained in the house. Assistant Chief Mbithi entered the drinking den and arrested him and eight (8) others. He was taken to Ndithini Police Post where he was locked up. According to him, some of those arrested gave bribes and were released but because he had no money of his own, he was taken to Yatta Police Station where an identification parade was conducted; that he faulted the findings of the parade. He was later taken to court and charged.

The trial magistrate considered the case by the prosecution and defence offered by the appellant and found that the prosecution had proved the first count against the appellant which was robbery with violence contrary to Section 296(2) of the Penal Code particulars in the charge sheet being that on the 17th day of January, 2008, along Ndithini Location of Yatta District, jointly with others not before court while armed with dangerous weapons, they had robbed Mutisya of a wallet containing Identification Card, Electors Card, a Sim Card and cash Kshs 5,800/= and that immediately before or after the time of such robbery, they used actual violence to Mutisya. The appellant was convicted on this count and sentenced to death.

The appellant and one co-accused were convicted on count two for the offence of rape contrary to Section 3(1) of the Sexual Offences Act No. 3 of 2006, particulars being that on the said date, at Malumani Village, they intentionally and unlawfully did an act which caused penetration with the genitals of Joyce Nthenya Mutinda. Sentence on the rape charge was deferred in respect of the appellant.

Those findings did not find favour with the appellant who filed Criminal Appeal No. 104 of 2010 at the High Court of Kenya, Nairobi. The appeal was heard and in a judgment delivered on 15th April, 2014, **Mbogholi Msagha** and **L.A. Achode, JJ** found no merit in the appeal which they dismissed. The appellant was still dissatisfied and filed this appeal which is premised on a Supplementary Memorandum of Appeal filed in court on 4th October, 2018 where four grounds of appeal are set out. It is said that the Judges on first appeal failed to adequately consider the law on visual identification, previous knowledge of the appellant by witnesses vis-a-vis identification parade. It is also said that the Judges erred in relying on evidence that did not meet the legal standards; that some witnesses were not called and that the Judges erred in not finding that the prosecution evidence was contradictory on identification and they should have allowed the appeal.

Miss Marygoretti Chepseba, learned counsel for the appellant in urging the appeal also relied on homemade grounds of appeal filed on 24th June, 2014. It is said in those grounds that the Judges of the High Court should have found that the identification of the appellant was made in difficulty circumstances; that the High Court did not resolve the issue of names given by prosecution witnesses; that the High Court was wrong to admit inadmissible evidence; that the appellant's constitutional rights had been breached; that Section 200 of the Criminal Procedure Code had not been adhered to; and that there was a breach of Section 169 of the Criminal Procedure Code.

In submissions before us, it was Miss Chepseba's case that the High Court had erred in not finding that identification was not proper. Although there was evidence of moonlight, it was counsel's submission that the same was not sufficient for proper identification. Counsel wondered why the appellant who was known to both Mutisya and Nthenya was not arrested immediately but was arrested after about one month. Counsel cited the case of **Abdalla Bin Wendoh & Another vs. Republic [1953] 20 EACA 116** for the proposition that possibility of mistaken identity in the case before the trial court could not be discounted. According to counsel, Nthenya was traumatized by all the things that had happened that night and could have gotten confused as she was even threatened with death. Counsel also faulted the holding of an identification parade where Mutisya had indicated that he knew the appellant before.

In opposing the appeal, **Mr. Moses O'mirera, Senior Assistant Director of Public Prosecutions (**SADPP) submitted that the attack and

robbery was continuous from 7.00 p.m. to 3.00 a.m. According to counsel, Mutisya stated that he identified the appellant as one of the attackers and, further, that Nthenya was taken to a house where she underwent a rape ordeal by the appellant and a co-accused. Counsel further submitted that there was evidence of bright moonlight that enabled Mutisya and Nthenya to observe the attackers. Further that Nthenya had testified that on reaching the house, the appellant and the two others were using matchbox light to illuminate the room to enable them read documents which had been stolen from Mutisya, and Nthenya had the opportunity to observe the people in the house.

According to learned state counsel, the person who was the second accused had implicated the appellant and because there was need for corroboration in such circumstances where there was evidence of an accomplice, it was proper to hold the identification parade for such corroboration. On failure to call some witnesses it was learned counsel's submission that it was not necessary to call all witnesses in support of the prosecution case.

In a brief reply it was Miss Chepseba's submission that a single circumstance creating doubt on the part of an accused person is sufficient in a criminal trial for the accused person to be acquitted.

We have considered the record of appeal, the grounds of appeal raised, submissions made in support and in opposition to this appeal. We have also considered the relevant law.

This is a second appeal and our mandate is set out in Section 361 of the Criminal Procedure Code which requires us to consider only issues of law and not matters of fact which have been considered by the trial court and re-evaluated on the first appeal. We are to avoid the temptation of going into a consideration of facts. This is what this Court has held in various judicial pronouncements such as the case of **M'Riungu vs. Republic[1983] KLR 455** where the following passage appears at page 456:

"Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v Glyneed Distributors Ltd (t/a MBS Fastenings – The Times of March, 30, 1983)".

Are there issues of law raised before us in this appeal?

We recognize as an issue of law, the issue of identification-whether the appellant was properly identified as the person who attacked Mutisya and Nthenya and raped Nthenya as per the charge sheet. Another issue of law raised is whether the evidence tendered in support of the prosecution case satisfies the legal standard required in a criminal case. Another is whether material witnesses were not called. Another issue is whether there was breach of the provisions of Sections 169 and 200 of the Criminal Procedure Code.

On the issue of identification, Mutisya testified before the trial court that of the two people who alighted from the motor cycle, he was only able to identify one of them, the appellant who was the 1st accused at the trial court. He stated that the appellant blocked his wife's path and when he confronted the appellant telling him that Nthenya was his wife, the appellant punched him and continued beating him even when he tried to escape. In the attempt to escape the appellant overtook him

"I only identified Peter. I then managed to run away and Peter chased me. He managed to catch me and passed in front of me and he hit me on the head and I fell. …."

Nthenya, on the issue of identification, stated that when two people alighted from a motor cycle:

"One of the men came and held my hand. It is the 1st accused who asked if I knew him. He said he was a police officer".

She further testified that the appellant took her to the bush and raped her after which he held her by the hand and led her to a house where the rape ordeal continued. She escaped from that house at about 3.00 a.m.

The High Court on first appeal noted that none of the attackers camouflaged themselves and they did not blindfold Nthenya during the ordeal. The High Court was satisfied that in the circumstances where the appellant walked on the road with Nthenya, where they even met with people who he talked to, Nthenya could not be mistaken in her identification of the appellant.

It is true that identification of a suspect in a case such as the one that was before the trial court was of paramount importance. The trial court had to satisfy itself that there was no possibility of mistaken identity in a case like that one where the robbery took place at night. The importance of identification was recognized in the case of **Roria vs. Republic [1967] EA 583** where it was observed that evidence of identification must be scrutinized carefully and with extreme caution and that:

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDNER, L.C said recently in the House of Lords in the course of a debate on s.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

"There may be a case in which identity is in question, and if any innocent people are convicted today, I should think that in nine cases out of ten - if there are as many as ten- it is in a question of identity."

That danger is, of course, greater when the only evidence against an 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 this Court to satisfy itself that in all circumstances, it is safe to act on such identification. In Abdala bin Wendo and Another vs. Republic (1) this Court reversed the finding of the trial Judge on a question of identification and said this (20 E.A.C.A. at p.* 168):**

"Subject to certain 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 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 be 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"

Both Mutisya and Nthenya testified that although there were no lights, there was bright moonlight that enabled them to see the appellant. Nthenya further testified that the appellant, after the first rape incident led her by the hand for some distance on a road until they reached a house. By then the appellant had been joined by another and they found yet another man in the house. The three men engaged in an exercise of identifying documents which had been stolen from Mutisya which were in a wallet. She further testified that the curtains of the room where they were, were ripped off by the attackers letting in moonlight. Also that the attackers were striking matchbox sticks to enable them scrutinize the said documents. She was able to see their faces. The High Court found that there was other independent evidence through P.W.6 (the Assistant Chief) who recovered the items that were stolen from Mutisya which he found with the appellant when he arrested him.

Although we agree with learned counsel for the appellant that there was no need to conduct an identification parade where the witnesses knew the appellant before, nothing much turns on this. Mutisya saw the appellant during the attack which attack took some time; a person he knew before. Nthenya was with the appellant from 7.00 p.m. upto 3.00 a.m and the appellant did not at any time cover his face or conceal it in any way. He engaged with her, raped her twice, first in the bush and, again, in the house and he even instructed others to rape her. In the circumstances, there was no possibility of mistaken identity particularly where Nthenya had spent all that time with the appellant. We reject that ground of appeal.

The appellant further complains that the case was not proved to the required standard. We have perused the evidence as presented by the prosecution and agree with both courts below that the case against the appellant was proved beyond reasonable doubt. Both Mutisya and Nthenya gave cogent evidence and there was also the support evidence of the Assistant Chief who recovered Mutisya's stolen items like national identification card from the appellant.

On whether material witnesses were not called, we note that material witnesses were called. Mutisya and his wife Nthenya identified the appellant as one of the attackers. The Assistant Chief recovered Mutisya's stolen items in possession of the appellant. Medical evidence was called to prove that both Mutisya and Nthenya had been injured. As there is no requirement in law for any number of witnesses to be called, there is no merit in this ground. Section 143 of the Evidence Act provides that no particular number of witnesses shall be required for the proof of any fact. That principle was discussed by this Court in the case of **Milton Kabuliti and 4 others vrs. Rep. [2015] eKLR** where it was stated that:

"The role of the courts when confronted with such complaints is as was set down in Bukenya and others versus Uganda [1972] E.A 549 wherein the predecessor of this court, the Court of Appeal for Eastern Africa laid down the following cardinal principles, first, that*, "the prosecution must make available all witnesses to establish the truth even if their evidence may be inconsistent and second," that the court also has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case"; third, where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution"* .

We have examined the record and we do not see any breach of these principles as all essential witnesses were called to prove the case.

Section 169 of the Criminal Procedure Code on content of judgments requires that judgments be written by or under the direction of the presiding officer of the court in the language of the court and should contain the point or points for determination and the reasons for the decisions and shall be dated and signed by the presiding officer when pronouncing it. There are other requirements in that section. We have perused the judgment of the High Court and found that it complies with contents of judgment.

The last complaint by the appellant is in regard to the provisions of Section 200 of the Criminal Procedure Code. That section sets out the procedure to be followed where a magistrate who has partly heard a matter is transferred or in unable to continue with the case and the case is taken over by a succeeding magistrate. An accused person in such a case should be informed of his rights which include summoning witnesses who have already testified in the case to testify again.

We have perused the record and noted that the case had been partly heard by **A.K. Kaniaru**, Principal Magistrate who partly took the evidence of Mutisya. The case was then taken over by **L.W. Gicheha**, Senior Resident Magistrate who on 17th July, 2009 explained to the appellant and his co-accused the rights donated by Section 200 CPC. The appellant is recorded to have stated:

"1st accused - matter to proceed from where it stopped".

The magistrate then ordered that the matter proceeds as requested by the appellant. There is complete compliance with the requirements of the said section. There is no merit in this complaint.

In the premises, there is no merit in this appeal which we accordingly dismiss.

DATED & Delivered at Nairobi this 8th day of March, 2019.

E. GITHINJI

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR