



**IN THE COURT APPEAL**

**AT KISUMU**

**(CORAM: KOOME, SICHALE & KANTAL, J.J.A.)**

**CRIMINAL APPEAL NO. 143 OF 2015**

**BETWEEN**

**JOEL OPWALA WABURIRI.....1<sup>ST</sup> APPELLANT**

**MUSA SULEIMAN MUYA.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgment and sentence of the High Court of Kenya*

*at Kakamega (Sitati & Mrima, JJ.) dated 22<sup>nd</sup> July, 2015 in HC. CR.A. No. 25 of 2012)*

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**JUDGMENT OF THE COURT**

Some residents of Ekero Location in Mumias were terrorised on the night of the 27<sup>th</sup> and 28<sup>th</sup> March, 2011 when they were visited with robberies with violence and at least two women were raped. Following those events, 9 men were presented before the Principal Magistrate at Mumias charged with various offences. The appellants, **Joel Opwala Waburiri** and **Musa Suleiman Muya** were convicted while the other seven men were acquitted at the trial.

The offences the appellants were charged with were on count I to IV robbery with violence contrary to **section 296 (2) of the Penal Code**; particulars in count I being that on the said night at the said place jointly while armed with offensive weapons namely pangas, iron bars, axes and pistols they robbed **Peter Openda** of 4 mobile phones and a stove all valued at Shs.36,800 and immediately after the said robbery they used actual violence against the said person. Particulars in count II being that on the said night at the said place jointly while armed with the same offensive weapons they robbed **Salome Openda** of eye glasses, cash, a DVD, a pressure stove, 3 bags, 3 mobile phones, a motor vehicle registration mark KAB 995Z and immediately after the said robbery they used actual violence against her. Count III was similarly framed, particulars in count III being that on the said night at the said place jointly while similarly armed they robbed **Nelson Chitai Rapando** of cash and a mobile phone and immediately after the time of the robbery they used actual violence against the said person. Particulars in count IV being that on the said night at the said place while similarly armed they robbed **Benson Chitai Rapando** of one wallet containing cash, a mobile phone and a digital camera and immediately after the said robbery they used actual violence against the said person. The rest of the charges were against the persons who were acquitted at the trial and although it is not necessary to visit them here we observe that some of the charges related to gang rape against two women that night.

This is a second appeal and as has been held by this Court in various decisions such as **Njoroge v Republic [1982] KLR 388** and as provided by **section 361 (1) (a) Criminal Procedure Code** we are mandated to determine only points of law and accept concurrent findings of fact by the two courts below unless those findings are not backed by evidence or are based on misapprehension of the evidence or the two courts are shown demonstrably to have acted on wrong principles in making the findings that they reached.

We shall consider the record and the evidence to determine whether the two courts properly carried out their mandates in making findings of fact on the evidence by the trial court and the High Court on first appeal in re-appraising the evidence to make its own findings on the facts.

As we have stated, residents of Ekero Location in Mumias were terrorised on the night of 27<sup>th</sup> and 28<sup>th</sup> March, 2011. According to PW1 **Salome Nafula Openda (Mrs. Openda)**, a farmer at the said place she was in her house at about 8.45 p.m. when she received a phone call. Her house had apparently been sprayed with a chemical to make her sleep. She opened her door and saw some people outside who carried

guns and pangas. Although there were security lights around the compound and although she noticed that the people in the compound wore police uniforms she could not identify any of them during or after the incident. She was badly beaten and had to be hospitalized. Her child called Abigail was also badly beaten and injured and also had to be hospitalized. Her motor vehicle was stolen as was her money and some Compaq Discs and her motor vehicle was later recovered. The beating that she underwent was so bad that she practically lost her sight for a long time. Cross-examined by the trial court she said:

***“I have no evidence against any of the nine people before court. I did not identify them.”***

**Jared Shimenga (PW2 - Shimenga)** was a casual worker at Mrs. Openda's home. He was in the house preparing to sleep when thugs entered the compound and tied him and two security guards with ropes. He and the others were badly beaten by about seven people who wore jungle clothes. He was forcefully taken to the house of **Peter Maloba Openda (PW3 - Maloba)** where he was forced to make a phone call to Mrs. Openda alleging that Peter Maloba Openda was sick. That made Mrs. Openda open the house. He witnessed the thugs beat up Mrs. Openda but although there was light from electricity he could not identify any of the robbers. He managed to escape and hide in a cane plantation. He could not recognize any of the 9 suspects who were at the dock at the trial.

Maloba was in his house on the fateful day when he heard a knock at the door. It is recorded by the trial magistrate that upon hearing the knock Maloba just fainted and did not know what happened. He recovered after six days and found himself in hospital in Eldoret. Upon coming to he realized that he had injuries on the head which was stitched. He had been taken to various hospitals. Upon going back home on discharge from hospital he discovered that his house had been broken into; items stolen from there and his relatives including Mrs. Openda and a girl called Abigail had been attacked and injured. On the day of the incident he did not see anyone at all.

On the fateful night **Nelson Waitaba Rapando (PW4 - Waitaba)** was in his house when his attention was drawn by the loud barking of his dogs. He used his mobile phone to flash a light outside when he saw a number of people in the compound dressed in police uniform. The people had powerful torches and so the small torch on his phone was rendered useless. The people he saw, one who had a gun matched into his house and he was ordered to dress up. He was robbed of money and other items but his wife was lucky to escape to the dark night. He was thoroughly beaten. He identified one of the attackers but when he was called to an identification parade later he could not identify anybody. The robbers after attacking and robbing him left and locked his house from outside. He cried out for help and he was rescued by neighbours and taken to hospital. He testified that he knew most of the accused persons before the trial court as they were people he did business with. He did not give any description of any of the attackers to the police.

**Benson Rapando (PW5 - Rapando)** a photographer cum teacher was in his house at about 11 p.m. on the fateful night when he was ordered to open the house by people who identified themselves as police officers. When he opened the door he was confronted by 9 people who entered the house and forced him into the bedroom. He was robbed of his camera, a mobile phone and money. He was ordered to take the robbers to his brother Kennedy Rapando's house and both were subjected to acts of violence as they were being robbed. He was then ordered to take the robbers to the home of the area Assistant Chief (the chief was not called as a witness) where upon arrival he was ordered to pretend that he needed help from the government officer. When the Assistant Chief opened the house she was beaten up, her uniform confiscated; some of the thugs wore the said uniform and they forcefully removed the Assistant Chief from her house and the whole party of robbers, Rapando and the Assistant Chief proceeded to the main road and onto the house of a person called Wanjala. Wanjala was thoroughly beaten and when his wife cried out for help the whole company together with the witness and the Assistant Chief left and went to the house of a person called Mulanyi but there was nobody in the home. It is at that home that the Assistant Chief was raped in turns by the robbers. Although Rapando witnessed the rape ordeal, he could not identify who amongst the robbers participated in the rape. According to this witness another lady by the name **A (AAC - PW6)** was also raped in turns. It was this witness's further testimony that the ordeal that included robbery with violence and rape went on from 11 p.m to 4 a.m. When the rape ordeal was over he, A and others he did not name were locked in Mulanyi's home and left there. The Assistant Chief was taken away to an unknown place. They were later rescued by police and those injured taken to hospital. The whole incident was quite upsetting to him and in the process he was even being forced to take beer which he refused to take leading to more beating. When he was later called to an identification parade at Mumias Police Station he identified the 2<sup>nd</sup> appellant as one of those who had attacked him. According to him he later identified another of the accused who was acquitted at the trial. He knew most of the accused persons before the trial being people who were from his neighbourhood.

Cross examined by the 2<sup>nd</sup> appellant the witness stated that:

***“That its after further statements that I came to know you. Its at the parade I came to know you. Its you I did identify.”***

In re-examination by the court prosecutor the witness testified that he did not mention the name of the second appellant to the police when he made the report.

The next witness was **AAC (A - PW6)**. She dealt in Mpesa and also ran a chemist. She was asleep with her husband KC in their home when she heard noises in the compound. Her brother in law **BR (PW5)** knocked at the door. This made them open the door to the house and fellows who described themselves as police officers entered the house claiming that they were searching for stolen items. A and her husband were beaten up and robbed. She like the previous witnesses was ordered to accompany the robbers to the home of the Assistant Chief. She identified the first appellant as one of the robbers. She repeated the ordeal that was visited upon the Assistant Chief and the visit to Wanjala's home and when they finally reached Mulanyi's home she and the Assistant Chief were raped in turns. She identified some of those who raped her but they were those who were acquitted at the trial. During the whole ordeal she and others were forced to take alcohol and they were finally locked in a house where they were left by the robbers. Upon being rescued by police she and others were taken to hospital. Called to an identification parade later, she identified the 1<sup>st</sup> appellant as one of the assailants. She also identified the 2<sup>nd</sup> appellant at an identification parade. She knew some of the accused persons and as regards the 1<sup>st</sup> appellant she said that she knew him as a neighbour who even did business with her. In cross-examination by the 1<sup>st</sup> appellant she testified that she had not given his name or description when she reported the incident because she was in shock. Further, she did not give the appellants' names either to the police or to the clinical officer when she was examined. Cross examined by the 2<sup>nd</sup> appellant, she stated that she did not mention his name to police and she first saw the 2<sup>nd</sup> appellant in court.

In re-examination the witness stated that she felt threatened and did not give the names of her attackers to police and that it was after consulting a person she did not name that she gave names of her attackers to police later.

Inspector of Police **Daniel Kairu (PW7)** attached to Mumias Police Station conducted an identification parade on 3<sup>rd</sup> April, 2011 that involved the 2<sup>nd</sup> appellant. In his testimony he stated that **KR** identified the 2<sup>nd</sup> appellant by touching him at the parade. **NR** was unable to identify the 2<sup>nd</sup> appellant at the parade while **AC** identified the 2<sup>nd</sup> appellant by touching him. The 2<sup>nd</sup> appellant according to the testimony of this witness signed the parade form stating that he was satisfied with the way the parade was conducted.

**Police Constable Peter Mulanya** attached to Mumias Police Station was the investigations officer in the case before the trial court. He was in his office when the Officer Commanding Station Mumias (OCS) informed him that there had been a series of robberies on the night of the 27<sup>th</sup> and 28<sup>th</sup> March, 2011. He accompanied the O.C.S. to the scene. They visited a bar at Ekeru that had been robbed and also went to various homes including the home of Mrs. Openda (PW1). They also visited various hospitals where victims of robbery with violence had been admitted. He noted that the many victims of the violent robberies had serious injuries and some of them were not able to recount the events that had taken place. He recovered the motor vehicle stolen from Mrs. Openda and uniform outfit stolen from the Assistant Chief. He arrested the people who were eventually charged with the offences but when he visited the homes of the suspects he did not recover any of the stolen items. The arrest followed information received from a police informer. His investigations revealed that **AAC** and the Assistant Chief had been gang raped and the other witnesses violently assaulted.

Cross examined by the 1<sup>st</sup> appellant the witness stated that the 1<sup>st</sup> appellant's name had been given to him by informers but that witnesses who reported the incident did not mention the 1<sup>st</sup> appellant's name on making a report to police. Further that he did not record in the investigations diary that gang rape had taken place. Also that the complainants did not give any description of the assailants.

Cross examined by the 2<sup>nd</sup> appellant the witness denied that the 2<sup>nd</sup> appellant had been arrested on a charge of possessing bhang.

**Chief Inspector Shadrack Opiyo (PW9)** the OCS Mumias Police Station conducted an identification parade on one of the accused persons who was acquitted at the trial.

**Police Constable Alfred Rwabia Kiveso (PW10)** of Mumias Police Station who did investigations duties on 28<sup>th</sup> of February, 2011 at 8 p.m. received **AC (PW6)** who reported a robbery with violence case and rape on the night of 27<sup>th</sup>, 28<sup>th</sup> March, 2011 (these are the dates we see on the record. The dates cannot be correct as the report could not be made before the day the attack took place). He recorded a statement and visited various homes where robberies had taken place. He participated in arresting some of the suspects about 2 months after the incident (this did not include the appellants here).

**Isaac Mukhana (PW11)**, a Clinical Officer based at Makunga District Hospital testified that **AC** visited Makunga District Hospital on 27<sup>th</sup> June, 2011 after having been treated at St. Mary's Mission Hospital on 28<sup>th</sup> March, 2011. He testified that **A** had bodily injuries including rape. He produced P3 form in respect of **A**.

The Clinical Officer testified that **Peter Maloba Openda (PW3)** who had initially been treated at St. Mary's Mission Hospital had been attacked and rendered unconscious. Peter had compound fracture and deep cuts over the right side of the head. He also produced P3 Form in respect of Mrs. Openda who had been assaulted by unknown people and suffered bodily injuries. She had been injured with blunt objects. Also a P3 form in respect of **BR** who had been assaulted by people one of who he knew. He had been injured with a blunt object.

That was the evidence that was placed before the trial magistrate who on consideration decided that the appellants and their co-accused had a case to answer and placed them on the defence. As we have stated 7 of the accused persons were acquitted at the trial.

In his sworn defence the 1<sup>st</sup> appellant stated that his occupation was a shoe repairer and that on the 30<sup>th</sup> of March, 2011 he received information that police were looking for him. He presented himself to Mumias Police Station where he asked why he was being looked for. He was questioned and put in the cells and identification parades were conducted where people he knew before identified him. He denied the charge. In cross-examination he stated that he had heard of robberies that had taken place in the region but that he was home with his wife on the night the robberies took place. He wondered why complainants had not mentioned his name at the time when they made the reports yet they knew him.

The 2<sup>nd</sup> appellant in his sworn defence stated that he was a driver and that on 31<sup>st</sup> March, 2011 he was home in the evening when police forced their way into his home. Police who alleged that his name was Rashid told him that he was required at the police station. After a search of his house where nothing was recovered he was taken to the police station and then to court and charged with being in possession of bhang. He was granted bail but that on 1<sup>st</sup> of April, 2011 he went to visit a Police Constable Mulamu with whom he had a grudge because he had carried him on his motor vehicle but the police officer had failed to pay the fare. That it was out of the incident that he was arrested and charged for the various offences before the trial court. According to him when identification parades were conducted, police officers informed complainants to pick him out.

The trial court considered the prosecution case as presented and the sworn testimonies of the appellants and in a judgment delivered on 13<sup>th</sup> February, 2012 the appellants were convicted; the 1<sup>st</sup> appellant on counts 1, 2, 3 and 4 which all related to the offence of robbery with violence and the 2<sup>nd</sup> appellant was also convicted on the same counts 1, 2, 3 and 4. The appellants were dissatisfied with the findings and filed an appeal at the High Court of Kenya at Kakamega. In a judgment delivered by Sitati and Mrima, JJ. on 22<sup>nd</sup> July, 2015 the consolidated appeals were found to have no merit and were dismissed.

Those are the findings that have provoked this appeal which is premised on the Memorandum of Appeal filed on 14<sup>th</sup> May, 2019 on behalf of

the appellants by their lawyers **Omondi, Abande and Company Advocates** where four grounds of appeal are set out. It is said that the High Court erred in law and fact by failing to analyse and evaluate the evidence on record so as to arrive at an independent finding of fact and law being the first appellate court. It is also said that the High Court erred in upholding the trial magistrate on the finding that the appellants were properly identified considering the circumstances of the case. There is also an attack on the way the identification parades were conducted and finally it is said that the death sentence imposed upon the appellants is unconstitutional and the matter should be sent back for re-trial.

When the appeal came up for hearing before us **Mr. Justus Okoth** learned counsel appeared for the appellants while Prosecution Counsel **Mr. Muia Peter** appeared for the respondent. Both counsel had filed written submissions which we have considered.

Mr. Okoth in a highlight raised two main issues relating to the identification parades and the opposition of the death penalty imposed upon the appellants. On the first issue it was counsel's view that the parades were not conducted in accordance with the law; that the incidents took place in the night where there were many robbers and the issue of identification was important. According to counsel the procedure for carrying out a proper identification parade was not followed as it was not shown that the parade members were of similar height and complexion and that a disfigurement on one of the appellants was not concealed against the Force Standing Orders that govern how a proper identification parade should be conducted. Counsel pointed out that a police officer had admitted at the trial that one of the appellants was of smaller height than the parade members. Counsel cited the case of **Calvins Peter Omondi Omwayo v Republic [2010] eKLR** for the proposition that where a suspect had a scar and it was not concealed the parade had no evidential value. On the death penalty imposed, Mr. Okoth submitted that following the Supreme Court of Kenya decision in **Francis Muruatetu v Republic [2017] eKLR** the death penalty should not be imposed, the prosecution having submitted before the trial court that the appellants were first offenders. For all that we should allow the appeal.

In opposing the appeal, Mr. Muia submitted that the High Court had properly analysed the evidence and found, as did the trial court that the appellants were guilty of the offences. According to counsel, PW6 and PW7 properly identified the 1<sup>st</sup> appellant while PW5, PW6, and PW7 identified the 2<sup>nd</sup> appellant. On the death sentence imposed, it was counsel's submission that the death sentence is still lawful as part of the Laws of Kenya. Counsel pointed out that residents of the area in question had been subjected to a series of robberies terrorising a whole village and therefore the death sentence was called for. According to counsel, identification parades were properly conducted even though he admitted that marks and disfigurements on one of the appellants were not concealed.

We have considered the whole record and the submissions made.

As we had identified earlier in this judgment this is a second appeal and our duty is to consider issues of law arising in the matter. We find as an issue of law whether the appellants were properly identified to lead to a proper conviction in a criminal trial. The issue of the death sentence is also a legal issue.

We have gone through the evidence of various witnesses which we have reproduced in this judgment.

There is no doubt that residents of Ekeru location in Mumias were subjected to acts of terror on the night in question. They were brutalised; their properties stolen and even two women including A were subjected to gang rape leaving life long trauma from which it is difficult to recover.

Going through the evidence that we have recapped none of the witnesses called by the prosecution gave a description of the attackers to police when reports were made. As we have seen the whole ordeal took many hours; actually almost the whole night. Some of the witnesses after being robbed were abducted and taken to various homes where they were used to lure home owners to open so that they could also be terrorised and robbed.

It has been the law in criminal jurisprudence in this country as elsewhere that a witness should be asked to give description of the accused and the prosecution should then arrange for a fair identification parade. That was what was held by this Court as way back as 1987 in the case of **Gabriel Kamau Njoroge v Republic [1987] eKLR**. A fair identification parade cannot be conducted if the identifying witness has not on first report stated that he could identify the accused and or given a description of the accused -see **Roria v Republic [1967] EA 583**. The witness ability to identify the accused can only be tested after he has given such a description or stated he would recognize the accused - see the case of **Republic v Mohammed Bin Allui [1942] 9 EACA 72; Rex v Shabani Bin Donald [1940] 7 EACA 60**. In the old English case of **Republic v Turnbull [1976] 3 ALL ER 549** (which was cited by the trial magistrate) on the issue of identification it was stated that 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 the accused under observation? At what distance? In what light? Was the observation impeded in any way e.g. by passing traffic or a press of people. Had the witness ever seen the accused before? 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 him and the accused actual appearance?

So it has been held by this Court in many many cases that it is not asking too much that the witness is asked to give a description of the accused and the prosecution to arrange for a fair identification parade.

In the instant case probably because they were heavily brutalised by the attackers and probably fearing for repercussions if they gave description of the attackers to the police, the witnesses feared to do so and withheld the information they had on identity of the attackers to police and only gave the names later. This will however not do in a criminal prosecution. Some witnesses were called to identification parades but they had not given any description of the attackers and the resulting identification parades did not aid the prosecution case. One of the appellants had a visible growth on his head and there was no attempt to conceal it to enable the police mount a fair identification parade. Witnesses testified in court that their attackers were their neighbours but they did not give names or description to the police. We think that had the High Court considered these issues on reevaluation of the record the learned judges would have reached a different decision. The identification of the appellants at poorly organized identification parades which did not comply with Force Standing Orders rendered the identification worthless and without proper identification, the prosecution case had no legs at all.

Considering the whole matter we think that the conviction of the appellants was not safe. It is for this reason that we have reached the conclusion that the appeal has merit and hereby succeeds. We set aside the conviction of the appellants and quash the sentences imposed and order that the appellants shall be set free forthwith unless otherwise lawfully held.

**Dated and delivered at Kisumu this 21<sup>st</sup> day of November, 2019.**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**F. SICHALE**

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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**