



**THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, MUSINGA, GATEMBU, JJ. A)**

**CRIMINAL APPEAL NO. 72 OF 2014**

**BETWEEN**

**GIDEON JOHNSON LIBOYWA .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a conviction and or Judgment of the High Court of Kenya at Kakamega, (Chitembwe, J.) dated 28<sup>th</sup> May, 2014*

**in**

**Kisumu H.C.CRA 230 OF 2011)**

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**JUDGMENT OF THE COURT**

1. The appellant, Gideon Johnson Liboywa, alongside 5 other accused persons, were charged and tried before the Resident Magistrate’s Court at Vihiga for two offences. The first offence was robbery with violence contrary to section 296(2) of the Penal Code in respect of which they were all acquitted. The second offence was gang rape contrary to section 10 of the Sexual Offences Act for which the appellant, alone, was convicted and sentenced to a prison term of 20 years.
2. The appellant appealed to the High Court. That appeal was dismissed as that court was satisfied that the prosecution had proved its case against the appellant to the required standard.
3. The appellant has, in this second appeal, challenged his conviction asserting that the circumstances under which the alleged offence was committed were not conducive for positive identification and that he is a victim of mistaken identification. He complains that had the High Court properly discharged its duty of independently reviewing, evaluating and analyzing the evidence, it would have come to the conclusion that the conviction was not safe and allowed his appeal.
4. Expounding on those complaints before us, learned counsel for the appellant, Mr. M. M. Omondi, submitted that it is instructive that the appellant’s 5 co-accused persons were all acquitted on both counts on account of the inconsistency and weaknesses of the prosecution case; that only two witnesses purported to have identified the appellant; that the complainant, PW5, on whose evidence the trial court heavily relied in convicting the appellant, could have been mistaken as to the identity of her assailant; that

there was no reason the trial court should have believed the testimony of PW5 when there was no corroboration; that in the circumstances an identification parade should have been conducted, absent which, the conviction is not safe. With that, counsel urged us to allow the appeal.

5. Opposing the appeal, learned Prosecution Counsel, Mr. E. Ketoo, submitted that whilst the trial court correctly acquitted the appellant and his co accused for the offence of robbery with violence as the prosecution case in that regard was weak, the appellant's conviction for the offence of gang rape is well founded; that the victim, PW5, recognized the appellant; that the incident took long enough and there was ample light from the bright torches that enabled PW5 to identify the appellant; that the medical evidence presented by PW9 established that the offence of rape was indeed committed; and that in light of section 124 of the Evidence Act, the trial court proceeded on the correct legal basis in convicting the appellant based on the evidence of PW5.

6. We have considered the appeal and the submissions by counsel. Under *section 361(1) of the Criminal Procedure Code*, our mandate on a second appeal, such as this one, is restricted to questions of law. [See **M 'Riungu vs. R [1983] KLR455**].

7. Based on the appellant's memorandum of appeal and the submissions by counsel as set out above, the only question that arises in this appeal is whether the appellant was properly convicted for the offence of gang rape, having regard to the circumstances under which the offence was committed and under which he was allegedly identified. What then are those circumstances?

8. During the night of 31<sup>st</sup> August and 1<sup>st</sup> September 2007 at about midnight, PW1, Jackton Nekosi Otwoma, a 78 year old man, his wife, Anna Asachi Otwoma (PW2), and their grandchildren, Harrison Odera Oricho (PW4) and JO (PW5), were all asleep in the house of PW1 in Muchela village, Esava sub location in Lwanda Division, when the house was broken into. On hearing the noise generated by the break in, PW 4 and PW5, moved to the grandparents' bedroom from their respective bedrooms where they had been sleeping. A group of people, armed with torches, pangas, heavy metals, and rungus entered the house and onto the grandparents' bedroom. There, the assailants beat up PW1 seriously injuring him as they demanded money and ransacked the house looking for money and other items. He stated that as a result of the beating, he lost a lot of blood and his eye sight got impaired and when he was escorted from the witness box to the dock he said he could not see well and was not able to identify Gideon Obonyo in the dock.

9. According to PW1, the attackers had torches and he identified one of them called "Obunyo". He went on to say that "he is the one who was asking me for money and he is my neighbour, he is called Gideon Obonyo."

10. The assailants also beat up PW1's wife, PW2. According to her, as her husband was being beaten by the attackers, she heard him say, "*Gideon why are you killing me. What have I done to you?*" She stated further that when the police arrived at the scene, her husband said "Gideon Luoywa" assaulted him. When cross-examined by the appellant, she said, "You are the only Gedion I know. You used to be our neighbour because you inherited a wife in the neighbourhood whose husband had died. You lived in that neighbourhood for many years and you even used to come to our house to work for us to do casual jobs."

11. According to both PW2 and PW4, the assailants pulled PW5 from the bedroom into the bathroom. PW2 followed them to the bathroom but was assaulted and told to go back. PW4 also went to the bathroom where the assailants stayed with his sister, PW5, "for thirty minutes" and that "they were raping my sister" and they chased him away. PW4's evidence was that he did not identify any of the attackers "because they were assaulting me and flushing torches on my face."

12. PW5's evidence was that the assailants took her from her grandparents bedroom to a room to search for money; that one of the assailants "came and started pulling me"; that she struggled with him and:

***"...concentrated on his face so that I could know whom it was that was pulling me. His torch was flushing on him as he pulled me. It beamed on his face. Then as we were still struggling, my***

*grandmother was pulling the other side and his cap fell down. When his cap fell, I recognized him as a person who had come to inherit a neighbor whose husband had died. That person died. That person was called Gideon. He is the one who came from another village to inherit the widow. When my grandmother left me Gideon pulled me and took me to bathroom. There were others following him from behind whom I could not know. We reached the bathroom. He tore my underpant after he tore my biker. He placed me against the wall then turned off the torch. So I did not know who between Gideon and the others were the first to rape me. I just felt them urinating on me some bad smelling urine inside. In that room I heard four different voices. They were raping me in turns the four of them. It took about one hour when I was with them in the bathroom. There was nothing I could do because they overpowered me. ”*

13. Later in her testimony, PW5 told the trial court, in reference to the appellant, that:

*“...the one who inherited a widow is Gideon. I see him in court. His (sic) that one. (Points at 1<sup>st</sup> accused). He is the one who pulled me. I identified him because his cap fell off and he lived near our home and I used to see him quite often. I know him quite well. I am not confusing him with anybody else. ”*

14. Under cross-examination by the appellant, PW5 was categorical that she knew the appellant; that his name is Gideon; that she saw him; that he was wearing a cap that fell; that she had seen him before tilling her grandmothers land; that he pulled her to the bathroom where four people raped her; and that it was the appellant “who started tearing [her] clothes before the torch was switched off.”

15. Given the evidence placed before the trial court, we think that the finding by the trial court that the appellant was one of the assailants who broke into PW1’s house and raped PW5 is well founded.

16. Counsel for the appellant suggested that it is inconsistent for the trial court to have acquitted the appellant on the charge of robbery with violence and to have convicted him for the offence of gang rape, considering that both offences were part of the same transaction. It might appear so. But it is not so. The only reason the appellant escaped conviction for robbery with violence was on account of inconsistencies between the particulars of the charge relating to what was stolen and the evidence tendered on what was stolen. The trial court put it this way;

*“With regard to count number one, the only credible evidence touches only the first accused, but, because of the inconsistencies of the evidence of PW 1 and PW 8 touching on the details of what was allegedly robbed from PW 1 vis- à-vis the particulars of offence to count number one aforesaid, that charge is not proved beyond reasonable doubt against the first accused as required, for the reasons already stated herein.”*

17. In our view therefore, there is undoubtedly credible evidence on the basis of which the appellant was convicted. The trial court found PW5 to be a reliable witness. Her evidence, on its own, was sufficient to convict the appellant, having regard to **Section 124 of the Evidence Act**. In this case there was more than just her evidence. Her grandfather also identified the appellant as the person who pulled the complainant and medical evidence corroborated that of the complainant that she was sexually assaulted. We would only be entitled to interfere with the decision of the two courts “if it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion.” That is not the case here.

18. The appeal fails and is hereby dismissed.

Orders accordingly.

**Dated and delivered at Kisumu this 29<sup>th</sup> day of July, 2016.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

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

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**DEPUTY REGISTRAR**