



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM:MAKHANDIA, OUKO, & M'INOTI, J.J.A.)

CRIMINAL APPEAL Nos. 20 & 21 OF 2014

BETWEEN

RICKY KITETA MWEMA1ST APPELLANT

ALBERT KITONYI NZWII2ND APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Muya & Kasango,JJ.) dated 27th November, 2013

in

H.C.C.R.A. No.140 of 2012)

JUDGMENT OF THE COURT

Before the two courts below the question for determination was whether both appellants in the instant appeal were positively identified as part of the 3-man gang that robbed and raped the complainant on the night of 3rd July 2010. According to the complainant who lived in a flat below that occupied by the 2nd appellant’s aunt, the robbers gained access to her flat at 3 a.m. through the door leading to the balcony. She was alone with her 9 and 6 year old children, the husband, a traffic police officer having travelled out of town. She woke up when she felt a metallic object pressed against her throat and was ordered to keep quiet. She instead screamed and struggled with one member of the gang towards the living room. When they got to the living room she managed to turn on the lights briefly before the robber turned them off again and began to rape her. Before they were turned off she had seen the person she was struggling with and who had raped her. That person was, however not charged. The complainant also confirmed that as they struggled and with the help of the light she noticed two members of the gang in the balcony. According to her the two men on her balcony were the appellants.

After the complainant was raped and robbed of a mobile phone and Kshs.5,000, the three suspects fled as the complainant continued screaming, attracting neighbours. She explained that she had recognized the three attackers during the robbery; and that she had previously seen the 2nd appellant visiting her neighbour in the flat for about 3 months. She recalled that in the course of the robbery a member of the

gang informed her that they had received part payment of Kshs.70,000 from a Taita neighbour with instructions to kill her.

The scene was visited by police officers who had been called by some neighbours. The officers who went to the scene were PW2, P.C. Patrick Murira, PW6, P.C. David Kingori and PW8, Ag. I. P. Castle Peter Katiin. The combined effect of their testimony was that they established that robbery had been committed by three suspects; that the complainant was also raped; that she alleged that she was able to see two of the robbers, apart from the one who raped her; that a few days later through the efforts of the complainant's husband, one P.C. Mutua and his informer, the 1st appellant and two other suspects were arrested; that two of the suspects were released as there was no evidence linking them to the robbery; that the same P. C. Mutua, led the police several days later on 26th July, 2010 to a bar where the 2nd appellant and another suspect were arrested; that all the suspects were paraded for the purpose of identification; and that the complainant was only able to identify the 1st appellant and another member of the parade, Said Juma who was not a suspect. The 2nd appellant and the other persons who had been arrested on an informer's tip-off were not identified.

While those others were set at liberty, the appellants were charged that they, jointly with another person not before court, while armed with an iron bar robbed the complainant of a mobile phone and cash in the sum of Kshs.5,000, and that they used actual violence on the complainant in the course of the robbery.

At the trial the prosecution relied on the evidence of the complainant, the police officers, a neighbour to the complainant and a doctor. The neighbour, PW7 Charity Tsau Kadula was the aunt of the 2nd appellant who he visited or lived with in the flat. In her testimony she recalled the complainant waking her up to report the robbery; that the complainant specifically told her that she did not know any of the robbers. A few days upon the complainant's husband returning he issued a threat to the witness claiming she knew about the robbery. Because she feared for her life, knowing that he was a police officer, she reported the threats to the police station and recorded a statement. The witness also maintained that the complainant did not tell her that the 2nd appellant was part of the gang of robbers. Although PW5 Dr. Lawrence Ngone who examined the complainant concluded that she was raped, the investing officer explained that he could not charge any of the appellants with rape because the suspect who committed the actual act of rape had not been arrested.

The appellants testified on oath denying involvement in the robbery, and raised the defence of *alibi*. They called witnesses to buttress that defence. The two appellants knew one another and lived only 4 meters from each other. On the night of the robbery the two maintained they were watching the 2010 World Cup match between Ghana and Uruguay in their respective homes, with the 1st appellant in the company of his mother and the 2nd appellant with his aunt and the aunt's husband. After the match, which ended after midnight they slept. They both heard the screams which they later learnt were coming from the complainant's house; that they were subsequently, but on different days arrested, subjected to an identification parade and ultimately charged. A third independent witness called by the appellants, DW4, Frank Mwawazi Walongoa explained how the complainant's husband confronted him, alleging that he was the Taita neighbour who had paid the gang Kshs.70,000 to rob and rape the complainant. He then threatened the witness with unspecified consequences. The witness reported the threats to the police.

The learned trial Magistrate isolated the single point of identification for determination. In his view the appellants were positively identified by the complainant with the aid of the light in the living room; that the two were known to the complainant prior to the date of the robbery; and that she was able to pick them out at the parade. He observed that from the complainant's demeanour she was a truthful witness; and that the appellants' alibi defence were an afterthought. With that the appellants were convicted and sentenced to death.

The appellants' first appeal to the High Court was dismissed with the learned Judges (Kasango and Muya, JJ.) upholding the conviction and sentence imposed by the trial court. They reiterated that the complainant was able to positively recognize the appellant seven though the conditions for such recognition were difficult bearing in mind that it was at night. They were, however satisfied that, with the

aid of the lights, and in view of the fact that the appellants were known to the complainant, the identification was free of any error, hence the ease with which she was able to pick them out at the parade; and that the defence of *alibi* were indeed an afterthought.

The appellants now bring this second appeal complaining that the evidence of identification was not properly scrutinized; and that their respective defences were improperly rejected. These were the only two grounds argued by Mr. Ngumbau, learned counsel for the appellants, consolidating the six grounds proffered in the Memorandum of Appeal drawn by the appellants in person. Counsel urged us to allow the appeal relying on the decisions in Maitany v R(1986) KLR 198 and Wamunga v R(1989) KLR 424 on the identification when conditions are not favourable.

Mr. Yamina, learned counsel for the respondent conceded the appeal and drew our attention to the fact that before the High Court, the State similarly conceded the 2nd appellant's appeal but the learned Judges overruled the concession. Counsel for his part conceded the entire appeal on the basis that both courts below erred in finding that the appellants were identified when it was clear that they were not; that the parade was flawed, with the same members being used in all the three parades.

We reiterate what the Court said in Samuel Kimenju & 2 others v R Criminal Appeal No.44 of 2014, that we are not bound to allow the appeal simply because it is not opposed. The court has a duty to make an independent decision on the matters raised for determination.

We are guided by **section 361 (2)** of the Criminal Procedure Code and case law on our primary role on second appeal, to consider only points of law and not to interfere with concurrent findings of fact by the two courts below unless based on no evidence. See Karingo v R (1982) KLR 213. The robbery took place at 3 a.m. When the complainant realized there were intruders in her house, she was asleep with the lights off and the room was therefore in darkness. It was her evidence that in the process of struggling with a member of the gang she turned on the light in the living room and saw the three suspects; that the suspect who raped her was the only one who entered the house; that in the course of struggling with that suspect and during the rape she was able to see him well. It was also her evidence that the suspect quickly turned off the light; and that she had seen the two appellants in the balcony to her house before the lights were switched off.

In the conditions described above, can it be said that the identification of the appellants was free from any error, bearing in mind the fact that she was a lone witness? A fact in a trial, by dint of **section 143** of the Evidence Act may be proved by the testimony of a single witness. However the trial court is enjoined to treat such evidence with the greatest care if the evidence relates to identification especially when it is admitted that the conditions favouring a correct identification were difficult. See Abdalla Bin Wendo v R, (1954) EACA 187.

How was the complainant able, immediately upon suddenly being woken up to an attack by robbers, with the lights off, amid struggle with one of the robber, to see two others in the balcony with the aid of light that she turned on in the living room and promptly turned off? These were difficult conditions. That perhaps explained her initial reaction and the inconsistency on what she told those she met immediately after the robbery. For instance she told PW2 P.C. Patrick Murira that she could identify the people who attacked and robbed her; that one of them used to visit her neighbour. P.C. Patrick Murira was in the company of PW6, P.C. David Kingori, who for his part insisted that when they got to the scene the complainant was in shock and could not speak; that she only talked in hospital; and that even then she told the witness that ***“she did not know the persons but she later got to know them...she told me the persons were new faces to her.”*** To the Investigating Officer, PW8, Ag. I. P. Castle Peter Katiin, the complainant said she knew the 2nd appellant very well but never mentioned that he was part of the robbers. She said absolutely nothing about the 1st appellant. Finally, after the robbers fled the complainant went to the neighbour's house where she reported the incident to PW7, Charity Tsau Kadula who happened to be the 2nd appellant's aunt. She told her that she did not know the people who attacked, raped and robbed her. She also did not tell the witness that her (the witness's) nephew, the 2nd appellant, had just attacked her. If indeed the 2nd appellant was involved one would have expected the complainant

to insist that PW7 and DW3 to immediately avail him.

The investigations appear to have picked up in earnest when the complainant's husband, P.C. Mutua returned to town. Several people were randomly arrested in what appeared to be a trial and error exercise, spearheaded by him and based on some leads given by unnamed informer. Apart from the appellants, Pascal Okumu and Bernard Owino were also arrested as suspects but released. At the identification parade conducted by PW3, I.P. Kilonzo for the four suspects, it is alleged that the complainant only identified the 1st appellant and one more person, Saidi Juma who was just one of the 8 members of the parade and who was not a suspect in any case but a member of the public. The 2nd appellant was not identified at all, though the two courts below erroneously proceeded on the basis that the complainant had picked both appellants in the identification parade. Yet throughout her testimony the complainant never mentioned the 1st appellant; never indicated whether she knew him prior to the attack. If anything all through, the complainant maintained that at the scene she recognized the 2nd appellant who was a neighbour's nephew. But in the parade she missed him. The parade was also irregular for the use of the same members for each parade. It is a requirement of **chapter 46**, Forces Standing Orders that, as much as possible members of the parade should have similar features as the suspect, and they should change at every turn. It can only be a fantastic coincidence to have four suspects with similar features to justify the same members for each parade.

Had the learned Judges re-evaluated the evidence, they would have concluded that the complainant through her husband was engaged in guesswork, and a wild goose chase, picking out people in error, issuing threats to PW7, the suspects and DW4. There was no evidence as to how long the light in the living room remained on, before it was turned off, how bright it was or even the distance between the living room and the balcony where it was alleged the appellants were. With respect learned counsel for the respondent properly conceded this appeal. The appellants' alibi was never displaced or rebutted at all.

In the end the appeal must succeed. It is accordingly allowed, the conviction quashed and death sentence imposed set aside. The appellants shall be set at liberty forthwith unless for any other lawful cause they are detained.

Dated and delivered at Malindi this 15th day of July, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR