



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & MURGOR J.J.A)

CRIMINAL APPEAL NO. 76 OF 2015

BERNARD WAFULA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kitale (S.M. Muketi, J) dated 16th December 2011,

in

HCCRA Case No. 58 of 2008)

JUDGMENT OF THE COURT

This is a second appeal from a conviction and sentence of *Bernard Wafula, the appellant*, for the offence of rape contrary to *section 140* of the *Penal Code*. The particulars were **that on 29th May 2009, in the former Rift Valley Province, the appellant intentionally and unlawfully had carnal knowledge of TK, the complainant, without her consent.**

He also faced an alternative count of indecent assault contrary to *section 144 (4)* of the *Penal Code*, the particulars of which were that on the same day and place he indecently assaulted her by touching her private parts.

The facts in brief are that, at about 7 p.m. T was running to Mama Juliana's home going to collect milk, when she met a man whom she did not know. He greeted her, and as she continued running he caught her dress. She demanded to know who he was, but he slapped her, and attempted to strangle her. He then dragged her into a maize plantation, undressed her and raped her. She started to lose consciousness, but she found an opportunity to escape, leaving him with her sweater. She managed to return home and inform her husband. A search ensued to find the assailant.

The next day, one Waullah informed her that a suspect had been arrested whom she should identify. She identified the appellant who she said was tall, dark and was wearing a checked shirt and a track suit trousers. The appellant was then taken to the police station and charged with the offence.

The appellant denied the offence, and stated that, he was in a house drinking *busaa*, when one person demanded his tin. The person drank his tin of *busaa* and when he demanded to know why, the person told him not to question him as he (the appellant) was a stranger in the area. He was beaten up and then taken

to Kachibora Police Station and subsequently charged in court. **PC Joseph Chemjor (PW 4)** attached to Kitale Police station stated that the appellant was arrested by members of the public and the complainant. The members of the public were not called to testify.

The appellant was aggrieved by the decision of the trial court, and appealed to the High Court which upheld the conviction and sentence.

The appellant is still aggrieved and has appealed to this Court. In his grounds and written submissions he has complained that the prosecution's case comprised of contradictory evidence; and that he was not positively identified as this was a case of identification and not recognition.

Mr. Mulati, Senior Principal Prosecution Counsel conceded the appeal for reasons that the appellant was not positively identified by the complainant. Counsel further submitted that one Mr. Waula informed the complainant that the appellant had been traced and that she should go and identify him, but that he was not called as a witness, and neither were any members of the public who were said to have arrested him. Finally, counsel submitted that the complainant's sweater was found at Yonkine's premises, and not with the appellant, thereby bringing into question his identity.

We have carefully considered the submissions and the record of appeal. This being a second appeal, only matters of law may be considered – **see section 361(1)(a)** of the **Criminal Procedure Code**.

We have considered the record of appeal, the submissions and the applicable law and consider that the issues we are required to address are whether the appellant was properly identified, and whether the prosecution proved its case.

On the question of identification of the appellant, the trial court found that the appellant was not known to T, but concluded that since it was dusk and there was moonlight, she was able to see and identify him. The court further found that she had described him as tall and dark, and that he wore short sleeved checked shirt and a track suit trousers. When the High Court reevaluated the evidence, it reached the same conclusion.

The conviction in this case was based on the evidence of a single visual identification witness. In the case of **Abdulla Bin Wendo & Another vs Republic (1953) 20 EACA 166**, the Court there addressed the manner in which the evidence of a single identifying witness should be treated and stated thus;

“Subject to 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 the conditions favouring a correct identification were difficult.”

In **Maitanyi -vs- Republic (1986) KLR 198**, this Court further observed in holding that an inquiry as to the intensity of light is essential in testing the accuracy of evidence of identification when it stated;

“The strange fact is that many witnesses do not properly identify another person even in daylight... It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into....’ See Wanjohi & Others -vs- Republic (1989) KLR 415.”

The incident in this case took place at 7 p.m. when T was alone. She stated that it was dusk when she met the appellant, and there was moonlight. After the appellant slapped her, he held her by the throat and dragged her into a maize plantation. He continued pressing her throat until she was about to lose consciousness. She then goes on to say that ***“...I started to remove my pant. He noted and started to remove it himself. I got a chance to escape leaving him with a sweater.”***

From this evidence we are not able to ascertain T's ability to see the appellant, particularly as their meeting before the appellant slapped her was brief, and the rest of the incident took place in the maize plantation. We are not certain how possible it was for her to properly observe the appellant while being strangled, and nearly lost consciousness. Our view is that, the prevailing conditions made identification of the appellant virtually impossible.

When this is considered along with her next encounter with the appellant whilst he was being arbitrarily detained, and prior to his arrest by the police, it is possible that it was at that time that T noted his physique and the clothing he was wearing. It is this description that was given to the police when he was arrested, and the description that led to his conviction.

We find this identification to be most unprocedural and highly irregular. This is because it is apparent that T did not know the appellant, and therefore, this was not a case of identification by recognition. T identified the appellant after the incident when her neighbor one Waullah called her to identify a suspect. It is not known where he was detained, who had detained him and for what reason, or why the police had not arrested him, or called her to an identification parade. Waullah did not testify, and neither did any other member of the public involved in the arrest.

Given the irregularities in identifying the appellant, such identification was questionable, and we find that the courts below should not have relied on this evidence to arrive at a conviction.

This leads us to consider whether the sweater allegedly left with the appellant provided sufficient corroborative value to support the evidence of identification. Even though by virtue of **section 124** of the **Evidence Act**, corroboration is not necessary in sexual offences such as this, we consider it necessary to interrogate the facts surrounding recovery of the sweater, and whether they pointed to the appellant as the rapist.

According to T, when the appellant was arrested, he stated that he had her sweater and that "people" escorted him and came back with her sweater. When T was later recalled to testify, she stated;

"My sweater was recovered in another person's home called Yonkine. I was not present when it was recovered."

Regarding the recovery of the sweater, the trial court had this to say;

"Accused took the members of the public to where he had allegedly taken the sweater. It was recovered. PW 1 had already identified the accused before he took the members of the public to where the sweater was recovered."

We find it remarkable that none of the people who escorted the appellant to the location of the sweater and witnessed its recovery was called to testify. Without evidence to show how and with whom the sweater was discovered, we find the allegation that the appellant was found with the sweater unbelievable and unreliable, and did not in any way corroborate T's evidence on identification.

Having arrived at the conclusion that the evidence of identification was inconclusive having been contrived in difficult circumstances, and found that the appellant's description obtained after the incident was inadmissible, and there was no evidence to show that the appellant was in possession of her sweater, we can find no nexus between the appellant and the offence in question. As such, the conviction was rendered unsafe, and we find that we must interfere with the decision of the courts below.

In sum, we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Eldoret this 28th day of October, 2016.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR