IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 36 OF 2013

BETWEEN

EMMANUEL SHISIBO……..…...……..APPELLANT

AND

REPUBLIC……..……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kakamega Chitembwe & Thuranira, JJ,) dated 17th October 2012)

in

H. C. Cr. A. No. 203 of 2011)

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JUDGMENT OF THE COURT

The appellant, Emmanuel Shisibo, was charged before the Chief Magistrate's court at Maseno with two counts of the offence of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***.

The particulars of the offence in count one were that on the night of 25th and 26th January 2011, at [particulars withheld] Village, Esumeiya Location in Kakamega Central District within the former Western Province while armed with dangerous weapons namely, pangas, jointly with others not before the court robbed Japheth Wanjala Mutuli of Kshs 29,000/- and immediately before used actual violence on the complainant, ***J W M, PW 1 (J).***

The particulars of count two were that on the same night while armed with dangerous weapons the appellant robbed ***J S PW 3 (J)*** of Kshs. 26,000/- his mobile phone make Nokia valued at Kshs. 8,500/- and shop goods valued at Kshs. 20,000/-.

There was a third count of the offence of gang rape contrary to ***section 10*** of the ***Sexual Offences Act No 3 of 2006***, the particulars of which were that on the same night while in the company of others the appellant intentionally and unlawfully penetrated with their penises one after the other the vagina of ***R Oy , PW 2 (R)*** without her consent.

The brief facts are that whilst asleep in his house on the night of 25th and 26th January 2011, J was

suddenly awoken by a bang at the door. He got out of his bed to see what was happening, and found out that the assailants had switched off the light, and cut his right shoulder. As they demanded money, they tied his hands, ordered him to lie on his stomach, and he was pushed under the sofa. They robbed him of Kshs. 29,000/-. R also heard the bang at the door, and she saw the appellant enter the house and flash his torch. He raped her, and thereafter, together with the other suspects, forced her to take them to Joel's house where, under the guise of having been arrested by police, she was made to call him (J) out of his house to assist her.

When J heard R calling him, he opened the door and was confronted by three men who introduced themselves as police officers. He identified one of the assailants as the appellant whom he knew as Emmanuel. The appellant cut him with a panga, and robbed him of Kshs. 26,000/-, a Nokia 3151 and shop goods. The evidence of recognition of the appellant was corroborated by ***D S PW4 (D)*** J 's wife.

The appellant pleaded not guilty.

Upon consideration of the entire evidence, the learned trial magistrate having found that the charges against the appellant were proved to the required standard, convicted and sentenced him to death by law prescribed.

The appellant appealed to the High Court which upheld his convictions and sentence. The appellant was again aggrieved by the High Court's decision and lodged this appeal setting out three grounds of appeal which are that the High Court failed to analyse the evidence; that the burden of proof was shifted; and that the High Court laid undue emphasis on the prosecution's case without taking into account the appellant's defence.

Learned Counsel for the appellant, ***Mr. Indimuli,*** consolidated the grounds into one which was that, the High Court failed to evaluate the evidence. In this regard, counsel submitted that the offence of robbery with violence was not proved as the prosecution had not demonstrated that either J or J had been robbed. Further, that though it was alleged that R and J had recognized him, the evidence showed that the intensity of the light at the scene was not interrogated, and that the assailants had switched off the lights. Counsel further submitted that the prosecution did not controvert the appellant's alibi evidence. With regard to rape of R, counsel contended that there was no evidence to support the allegation.

Ms. Nyamosi, learned counsel Senior Assistant Deputy Public Prosecutor, opposed the appeal. Counsel submitted that the offence was proved beyond reasonable doubt and that all the ingredients were present. The gang of assailants, who comprised more than one, robbed the complainants of their money and shop items. On the question of the intensity of the light, counsel submitted that this may have been doubted, but, in this case 3 prosecution witnesses recognized the appellant, and their testimony was not at any time shaken. Regarding the rape of Repha, Counsel argued that there was medical evidence that proved that she was raped.

From the above, the issues for our consideration are whether the High Court evaluated the evidence in relation to the identification of the appellant; whether the appellant's alibi evidence was considered; whether it was proved that the complainants were robbed; and whether or not R was raped.

We have considered these submissions and carefully read the record of appeal. This being a second appeal, and by dint of ***Section 361(2)*** of the ***Criminal Procedure Code***, this Court can only address a point or points in law only. In the case of ***Karingo vs Republic (1982) KLR 213*** this Court stated,

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari C/O Karanja vs R (1956)17 EACA 146."***

On identification of the appellant, in evaluating this evidence the High Court enumerated it thus;

> ***"The evidence on record on identification is given by PW2 and PW3. It is the evidence of PW2 that she saw the appellant during the robbery incident in her house and that the appellant had a torch. It is her evidence that she used to see the appellant and she knew him. She saw him when he was raping her. The appellant was armed with a panga and a knife. Pw2 was dragged up to PW3's home and informed PW3 that she was under arrest. It was the evidence of PW1 that when the robbers entered the house they put off the light. According to PW 3 J S he identified the appellant that night and that it was the appellant who had cut him because he had identified him. PW3 knew the appellant as Emmanuel and he mentioned his name in his first report. From the evidence on record it is clear that PW2 and PW3 knew the appellant before the incident".***

From this excerpt, clearly, the High Court appreciated that R and J were the main prosecution witnesses who identified the appellant. It was demonstrated that R had sufficient time and opportunity to see the appellant with the light from his torch. Though the intensity of the light was not specified, when her prolonged encounter with him is taken into account, that is, as he raped her, and then forcefully took her to J's house so that they could rob him, it cannot be doubted that she was placed in a vantage position in which to positively identify and recognise him.

In tandem with this, J recognized the appellant as his neighbor. In identifying him he stated;

> ***"On close scrutiny…I managed to identify the accused. He was known to me. He lives within the area. I never knew he was a robber. He was already with a panga. The accused cut me because I identified him that night."***

We agree with the courts below that the evidence showed that this was a case of recognition, and not merely identification. Recognition is more satisfactory, more assuring and more reliable than identification of a stranger. See ***Anjononi vs Republic [1980] KLR 59.*** In addition, both J and his wife D mentioned the appellant's name as Emmanuel in a first report which lends further credence to their having identified him through recognition. In the case of ***Terekali & another vs Republic [1952] EA,*** a first report was considered a good test by which the truth and accuracy of a subsequent statement can be gauged.

In his defence, the appellant claimed to have been in his house on 25th January 2011, and that the police arrested him at 2 p.m.

When the High Court considered this evidence, it concluded that this amounted to an alibi, but was of view that since the appellant came from the same neighbourhood, it would have been possible for him to have committed the crime and returned to his home.

Contrary to this observation, the correct position is that, the charge sheet shows that he was arrested on the 26th January 2011, and not on 25th January 2011 as alleged. As a consequence, we disagree that an alibi defence was raised. Our view is that, given the arrest occurred the day after the robbery; an alibi defence could not be seen to arise.

Needless to say, on the whole, we are satisfied that the High Court evaluated all the evidence, taking into account the appellant's defence and rightly came to the conclusion like the trial court that, it was the appellant who robbed the complainants on the night in question, thereby rendering the conviction safe.

Mr. Indimuli next argued that the offence of robbery with violence was not proved, as the complainants did not prove that they were robbed. This issue was addressed by the High Court which concluded thus;

> ***"PW1 was robbed of Kshs. 29,000/= whole (sic) PW3 was robbed of Kshs. 26,000/=, a mobile phone and some shop goods. It would have been difficult to prove ownership of money. We are satisfied that the complainants were robbed of the items stated in the charge sheet and that the stolen items belonged to the complainants."***

When this finding is considered in light of J's evidence that he showed them Kshs. 29,000/- which he had

withdrawn inside a box, and R's evidence that she checked the box and found that the money had been stolen, together with J's evidence that he was also robbed of Kshs. 26,000/- a Nokia 3151, and shop goods, like the courts below, we too are satisfied that the complainants were robbed. As such this ground is unfounded.

On the charge of rape, we agree with Ms. Nyamosi that when Repha's evidence is considered alongside the medical evidence of ***A J M, PW 6,*** the clinical officer based at Kakamega General Hospital, there can be no question that the appellant raped her.

In the result, we find that the appeal lacks merit and is accordingly dismissed.

Orders accordingly.

Dated and delivered at Kisumu this 11th 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