



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: MARAGA, MUSINGA & GATEMBU, JJA.)**

**CRIMINAL APPEAL NO. 282 OF 2011**

**BETWEEN**

**SIMON MZEE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from a judgment of the High Court of Kenya at Kitale,*

*(Koome, J.) dated 28th November, 2011.*

*in*

*H.C.C.R.A. NO. 8 OF 2010)*

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**JUDGMENT OF THE COURT**

1. The appellant was charged and convicted of the offence of incest contrary to **section 20 (1)** of the **Sexual Offences Act, 2006**. He was sentenced to 20 years' imprisonment. His appeal to the High Court was unsuccessful, hence this second appeal.
2. This being a second appeal, by dint of **section 361 (1)** of the **Criminal Procedure Code**, the Court's jurisdiction is limited to matters of law only, unless it is shown that there was misdirection in the consideration of the facts, or that the conclusions arrived at could not be reached by a reasonable tribunal, or that the High Court, as the first appellate court, abdicated its duty of analysing and re-appraising the evidence to reach its own conclusion. See **ALEXANDER LIKOYE MULIKA V REPUBLIC [2015] eKLR**.
3. The brief facts of the case were that on 12th August, 2008 at about 8.00 p. m., at a village in Turkana Central, a woman, who we shall refer to as **A. L, PW 1**, was sleeping alone in her hut when suddenly a man opened the door. The record does not show that there was any light at all in the hut. The man held the woman's neck and proceeded to have sex with her. PW 1 said that throughout the ordeal there was no verbal communication between her and the assailant.
4. When the assailant left, PW 1 reported the incident to some unidentified young men. She alleged that it was her son, the appellant, who had sexually assaulted her. PW 1 went and slept in the house of a

neighbour known as **Lokai Moe**, who was not called as a witness.

5. The young men to whom PW 1 had reported the incident arrested the appellant and locked him up in the house of a person by the name **Ipem**, who was also not summoned as a prosecution witness.

6. On the following day the appellant was taken to Lodwar Police Station and PW 1 also went there and recorded her complaint.

According to **P. C. Michael Wachira, PW 3**, the complainant told him that the appellant, who appeared drunk, forcefully entered her house and demanded for food and thereafter forced her to have sex with him. She screamed for help and even managed to arrest the appellant as he was leaving her house.

7. **Michael Samuel, PW 2**, a Clinical Officer at Lodwar District Hospital, examined PW 1 on 13th August, 2008 and concluded that she had been sexually assaulted and infected with gonorrhoea. The appellant was not medically examined to determine whether he had the same sexually transmitted disease.

8. The appellant, in his defence under oath, stated that on 14th August, 2008 he sold three goats to raise money for treatment of his sick child. PW 1 asked him why he had sold the goats without her permission and following that misunderstanding, PW 1 caused him to be arrested and escorted to Lodwar Police Station.

In Cross-examination, the appellant said that PW 1 was his step mother.

9. In his self drawn memorandum of appeal, the appellant argued that the prosecution evidence was inconsistent, that there was no conclusive evidence that he was the one who had sexually assaulted PW 1, and that the conviction was improper. During the hearing of the appeal he did not make any oral submissions but relied on his written submissions.

10. **Miss Karanja**, learned prosecution counsel for the respondent, opposed the appeal. She however conceded that the complainant did not testify as to how she was able to recognise the appellant since there was no light in her house at the material time and there was no verbal communication between the two.

11. We have carefully considered the record of appeal. The appellant's conviction was mainly based on the evidence of a single witness who neither saw the appellant nor heard his voice. The offence was committed at about 8.00p.m. when it was admittedly dark. The record does not show that there was any source of light. The complainant also stated:

***“There was no communication between me and the accused person.”*** That notwithstanding, she said she was able to identify her assailant as the appellant but did not state how.

12. There is a plethora of authorities that reiterate that although a fact may be proved by the testimony of a single witness, there is need to test with the greatest care the identification evidence of such a witness, especially when it is shown that the conditions favouring a positive identification were difficult. One such authority is **MARUBE & ANOTHER V REPUBLIC**, [1986] KLR 356.

13. In upholding the appellant's conviction, the first appellate court stated, ***inter alia***:

***“The learned trial magistrate, who saw and heard the complainant testify, believed that she was a truthful witness.”***

The learned judge then proceeded to cite the provisions of **section 124** of the **Evidence Act** which provides:

***“124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to***

***be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

In **REPUBLIC V OYIER**, [1985] KLR 353, this Court held that a first appellate court should not interfere with findings by the lower court which were based on the credibility of witnesses unless no reasonable tribunal could make such findings or it was shown that there existed errors of law. We do not think that there was any legal basis in holding that

PW 1 recognised the appellant on the material night. It is not possible to recognise a person at night unless there is some light or the person said to have been recognised speaks and the voice is duly recognised by one who is familiar with it.

In the absence of light and/or voice of the appellant, we are unable to find that the alleged recognition of the appellant by the complainant was free from the possibility of error.

14. The trial magistrate, after summarising the prosecution evidence and that of the appellant, without any analysis of the complainant's evidence, simply stated:

***“PW 1 was consistent in her evidence and recognised the accused person who is the son during the sexual intercourse act.”***

15. The trial court did not state that it was satisfied that PW 1 was telling the truth, it merely stated that she was consistent in her evidence. One can be consistent yet mistaken at the same time. In the English case of **R V TURNBULL** [1977]

Q. B. 224, the court held, *inter alia*:

***“There is a special risk of mistake inherent in evidence of visual identification. Therefore, whenever the case against the accused depends wholly or substantially on the correctness of one or more visual identifications which are alleged to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of identification. In addition he should instruct them as to the reasons for the need for such warning, and refer to the possibility that a mistaken witness may be a convincing one and that a number of identifying witnesses could all be mistaken.”***

16. We think that there was material inconsistency in the evidence of PW 1. In weighing the consistency of evidence of a witness a court must consider not only what that particular witness stated in his/her examination in chief and cross-examination but also what the witness recorded in his/her statement to the police or told another witness regarding the issue before the court.

17. According to PW 3, the complainant told him that on the material night the appellant, who appeared drunk, forcefully entered her house, demanded for food and thereafter forced her to have sex with him. That statement implies that PW 1 saw the appellant on the material night and perceived that he was drunk. But that is not all, she said that he talked to her when he demanded for food, meaning that she heard and recognised his voice. That is in sharp contrast to what PW 1 herself told the trial court; that she neither saw nor verbally communicated with the appellant.

18. There was also inconsistency as to how the appellant was arrested. PW 1 told the trial court after the appellant left her house she informed some young men and neighbours what the appellant had done to her and they mounted a search for the appellant and arrested him. On the other hand, she told PW 3 that she was the one who apprehended the appellant as he was leaving her house.

It is noteworthy that there was no independent evidence as to how the appellant was arrested. There were also important potential witnesses who ought to have been called by the prosecution but were not summoned.

19. The prosecution did not subject the appellant to any medical examination to determine whether he had gonorrhoea like the complainant, although that by itself would not have been conclusive evidence whether it was the appellant who had sexually assaulted the complainant and thus passed on the venereal disease to her.

20. In view of the foregoing, the appellant's conviction was unsafe. Consequently, we allow this appeal, quash the conviction and set aside the sentence that was handed down by the trial court. The appellant is set at liberty unless otherwise lawfully held. This judgment is delivered under **rule 32 (2)** of the **Court Of Appeal Rules**, the Hon. Mr. Justice Gatembu Kairu having declined to sign it.

***DATED AT ELDORET THIS 25TH DAY OF JUNE, 2015***

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**