



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT MERU)**

**(CORAM: NAMBUYE, KIAGE & SICHALE, JJA)**

**CRIMINAL APPEAL NO. 138 OF 2014**

**BETWEEN**

**DAVID GICHURU M'ARITHI.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Meru (Lesiit & Gikonyo, JJ ) dated 28<sup>th</sup> November, 2013*

in

H.C.CR.A NO. 58 OF 2012)

\*\*\*\*\*

**JUDGMENT OF THE COURT**

The appellant **David Gichuru M'Arithi** was arraigned in the Senior Principal Magistrates' court at Nkubu with two counts of robbery with violence contrary to **section 296(2)** of the Penal Code and Rape contrary to **section 3(1) (9) (b)** as read with **section 3(3)** of the Sexual Offences Act No.3 of 2006

The particulars of the offence in count 1 are that the appellant with another on the 10<sup>th</sup> day of January, 2009 at [particulars withheld] location in Imenti South District within the Eastern Province jointly while armed with dangerous weapons namely a gun and *a panga* robbed **LM** Kshs. 14,000.00 and nine mobile phones of unknown value and at or immediately before or immediately after such robbery threatened to use actual violence to the said **L M**.

Those in count 2 are that on the same date and place jointly while armed with the same weapons robbed **Philip Kiriank** Cash Kshs.5,500/= and a mobile phone Make Nokia 1300 worth Kshs.4,000/= and at or immediately before or immediately after such robbery used actual violence to the said **P K**.

In count 3, the particulars are that on the same date and place intentionally and unlawfully had sexual intercourse with **L M** with the consent of the said **L M** which consent was obtained by means of threats. In count 4 that on the same date and place intentionally and unlawfully had sexual intercourse with **E G**

with the consent of the said **E G** which consent was obtained by means of threats.

The appellant denied all the above offences prompting a trial in which the prosecution tendered evidence through six (6) witnesses. The appellant who was the sole witness in his defence gave sworn evidence.

The brief facts are that on the material day PW1 **L M** PW2, **P K** who are husband and wife and PW3 **C N** their daughter were asleep in their house with other children but in separate rooms when at about 11.30pm they heard a loud bang on their main door. PW1 switched on the electricity lights. She noticed two thugs had intruded on their home. One had a gun, while the other had a panga. PW1 retreated to their bed room and she and PW2 tried to hold their bed room door against the intruders. It was however hit and gave in. When the intruders got in, they made straight for PW2 and cut him several times and pushed him under the bed. PW1 was in the meantime watching all this. The thugs then turned to her and demanded money with threats of being killed. She showed them where her hand bag was. They took the money from her handbag and then demanded some more. PW2 then told her to give them the money in the brief case which she did.

At the end of it all, one whom she identified as the appellant took her to the visitors room where he raped her. She does not know how long the rape took place but it was long enough for the rapist to ejaculate. Thereafter they covered her and told her not to move.

Meanwhile PW3 who was in the children's room came out of their room to the corridor when she heard a loud bang. She saw the two intruders who were unmasked enter her parent's room. She heard the commotion there in. She heard them head to their room and she hid under the bed from where she observed them interrogate the children and then leave. The lights were on. When she assumed they had gone she came out from underneath the bed and that is when the intruders came back. One suggested to the companion that she be "sorted out" as the others had been sorted out but the man declined. They engaged her in a conversation over a phone and inquired from her if she had phoned anybody and she replied in the negative.

After the intruders left PW1 told her husband that she knew the assailants as they were from her parents home. The matter was reported to the police station where PW6 **Isaack Kiharo** booked the report. He (PW6) later on arranged for an identification parade conducted by the OCS wherein both PW1 and PW3 identified the appellant as one of the assailants.

In his sworn defence the appellant simply stated that the ceremony for a newly circumcised boy he had been taking care of was held on 10<sup>th</sup> January, 2010 but did not give the timing of that ceremony. The bulk of his testimony touched on the events of the day of his arrest, four days later.

When cross-examined he responded that he never heard PW1 and 2 say that they saw him in their home and that he had a gun. He said he never heard PW1 say that he raped her. Neither did he rape another outside the house. He denied taking phones from the complainants.

The learned trial magistrate **P.M. Mulwa** senior principal magistrate found the appellant guilty on all four counts and sentenced him to death. As for the offences of rape in counts 3 and 4 the appellant was sentenced to ten (10) years imprisonment on each, count. The sentences in counts 2,3 and 4 were ordered to be held in abeyance on account of the mandatory sentence of death in respect to count 1.

The appellant was aggrieved by that decision and he appealed to the High Court against them raising various grounds. In a judgment of **Lesiit & F. Gikonyo, JJ** of 28<sup>th</sup> November, 2013 the appellant's conviction and sentences on counts 1 and 2 were upheld but ordered the sentence in count 2 to be held in abeyance in view of the mandatory death sentence with regard to count 1. The learned Judges found the offence in count 4 not proved and acquitted the appellant of the same and set aside the sentence imposed, but affirmed both the conviction and the sentence in count 3.

The appellant is now before us on a second appeal raising nine (9) grounds in a home made memorandum of appeal. However, learned counsel for the appellant abandoned all the grounds save for grounds 1 and

6. These read:-

**1. That the learned Judges erred in law and fact in not finding that despite claims made by the complainant (PW1) that she was able to recognize the appellant, there was no names mentioned in the O.B. where the incident was first reported.**

**2. That the learned judges erred in law and fact in not finding that the parade made in respect of the appellant was not fair because the participants had no uniform hence enabling the complainant (sic) pick the appellant (sic) he was wearing dirty cloths (sic).**

In his submissions learned counsel **Kaumbi Kioga** urged that PW1's testimony in so far as she purported to pin the appellant at the scene of the robbery as the person who robbed her stood faulted on the ground that she did not give the name of the appellant to police as one of her assailants to have this recorded in the OB. It therefore followed that the appellant's identification in connection with the said robbery had not been thoroughly established.

As for ground 6, **Mr. Kioga** urged that the identification parade process also stood flawed because there is no demonstration that the parade members were of the same physique and clothing as it is on record that the appellant was the only one with dirty clothes which made him an easy pick by the complainant on the said parade.

In response to those **Mr. Kariuki Mugo** learned counsel for the respondent urged us to dismiss the appeal on the grounds that the prosecutions case was proved to the required threshold because the prevailing conditions at the time of the robbery were conducive to positive identification as the appellant spent time in the complainants' house both robbing and raping. The lights were on and the two courts below believed PW1 when she said that she recognized the appellant as a person she knew before.

As for the identification parade **Mr. Mugo** urged that this was not necessary as the appellant was well known to PW1 and he was also identified by PW2 and PW3. He asserted that all the elements of the offence of robbery with violence were present and the appellant's conviction and sentences were proper.

This is a second appeal and by dint of **section 361** of the Criminal Procedure Code this Court is restricted to address it itself on matters of law only. The Court has stated in numerous decisions that it will not interfere with the concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See **Chemagong versus Republic [1984] KLR 611**. See also **Karinga versus Republic [1982] KLR 213** at page 219 where this Court had this to say:-

***“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 unless 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 Kareri S/O Karanja verus Republic [1956] 17EACA 146)”***

We have given due consideration to the entire record before us in the light of the rival arguments set out above. In our view two issues of law arise for our consideration. First whether the appellant was positively identified in connection with the commission of the offences subject of this appeal. Second whether the holding of the identification parade was necessary in the circumstances of this appeal, and whether the said identification parade was properly conducted.

On identification the position in law is as was stated by this Court in the case of **Kariuki Njiru and 7 others versus Republic. Criminal Appeal No. 6 of 2001;**

***“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinize carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered....Among the factors the court is***

***required to consider is whether the eye witnesses gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.”***

In the circumstances of this appeal the trial magistrate observed:-

***“PW5 said she knew the 1<sup>st</sup> accused before then, as her cousin is married to his elder sister. There were electric lights which were on in the bedroom as she was able to see and recognize him. She told her husband about it and also the police. She clearly stated he is the one who had the gun, and is the one who raped her. I find her evidence credible for the given reasons.***

....

***PW3 and 5 corroborated PW1s’s evidence that 1<sup>st</sup> accused was among the assailants. The two never saw him at the chief’s office where he was arrested but were able to pick him at the identification parade. There were lights in the house and saw him long enough to be able to identify him....”***

The first appellate court in turn observed;

***“PW1 knew the appellant for 32 years and he was her relative she identified the appellant on the fateful night using the electric light in her bed room and also in the guest room. The evidence of PW3 shows that the two people who attacked the complainants did not have face masks. Their faces were open and could be seen. All the time the appellant and his co-assailants were asking for money and phones; and when he raped PW1, was sufficient for her to recognize the appellant. She also knew the appellant for 32 years.***

....

***We have stated that PW1 knew the appellant for 32 years and was her relative. She had enough time to recognize the appellants and there was electric lights which enabled her see and recognize the appellant. In the circumstances, there is no possibility of mistaken identify.***

....

***PW3 and PW5 also identified the appellant.***

.....

***All this evidence leads the court to only one inescapable conclusion; the appellant was one of the person who attacked them.***

.....

***Although PW2 said that the lights were not on, there is overwhelming evidence by PW1, PW3 and PW5 that the lights were on in the house especially the bedroom where the robbers and the rape took place. The seeming contradictions is thus reconciled and it does not create any doubt which may affect our decision.***

The two courts below thus made concurrent findings that the appellant was positively identified and placed at the scene of the offences.

In ***Daniel Kabiru Thiong’o versus Republic Nyeri CRA No. 131 of 2002 (UR)*** This Court gave the following caution:-

***“An invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there***

*are compelling reasons for doing so.”*

The Court went further in *Nelson Julius Irungu versus Republic CRA No.24 of 2008 (UR)* that: **“When it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses.**

Considering the above principles it is our finding that the two Court’s findings were sound as it is the trial court which had the opportunity to observe the demeanor of the witnesses and found them credible a position affirmed by the first appellate court. This was fortified by the evidence of PW1 which was believed by both courts below that she had known the appellant for 32 years and she immediately reported this to PW2 her husband. Although it did not come out clearly from the evidence of PW6 the police officer who received the incident report of as to whether the description of the assailants was booked in the OB, the issue of giving a description in the police OB did not feature either in the appellants cross-examination of the witnesses at the trial or as one of the complaints raised by him on his first appeal. It is being raised for the first time before us. We are duty bound to interrogate the veracity of the concurrent findings and since this was never raised before the two courts below, we must reject it as an afterthought. See *George Gikundi Munyi versus Republic Criminal Appeal No. 101 of 2011* where the Court observed thus:-

***“We cannot keep but note that the appellant never raised the aforementioned allegations in the two lower Courts. That being the case we find that the prosecution did not have an opportunity to offer an explanation for the said delay so as to enable the two lower courts to determine whether it was reasonable. This being a second appeal we are unable to determine from the raised whether the said delay was reasonable or not hence this ground must fail”***

The above finding aside there was concurrent findings that the assailants were unmasked, they engaged their victims in conversations face to face with the electric lights on. All these favoured positive identification of the appellant as one of the assailants. He was thus placed at the scene of the crime.

As for the identification parade evidence, we note from the record that neither the officer who conducted the said identification parade nor the identification parade form itself were tendered in evidence. The failure to do so notwithstanding both courts below made observations on it.

The trial magistrate stated;

***“Though she saw him at the chief’s office where he was held together with other two suspects which may appear to reduce the credibility of her identification of him at the identification parade, I have considered that even second accused was held with him at the place and she saw him. She however did not pick him (2<sup>nd</sup> accused) during the parade and did not claim at any given point that he was among the assailants. This facts show that the witness did not pick on the 1<sup>st</sup> accused because she had seen him arrested at the chief’s office but because she had seen and recognized him during the incident. It shows she was certain about what she spoke about and did not guess.***

.....

***The two never saw him at the chief’s office where he was arrested but were able to pick him at the identification parade.”***

The first appellate court observed;

***“PW3 picked the appellant from a parade of 10 people. She said she was able to pick him because he was wearing the same clothes he wore at the time of the incident. She has also mastered physical features of the appellant PW3 and PW5 were talking about the same incident and were satisfied that the appellant was one of the people who were at their house on the material day...”***

It is clear that what weighed most on the minds of the two courts below with regard to PW1's evidence was not picking out the appellant on the identification parade but because she had recognized him at the scene of the robbery as a person she had known for 32 years. It therefore follows that even if the evidence of the identification parade had been properly tendered in evidence it would not have been of any probative value to the prosecution's case. See **Kinyua & another versus Republic Criminal Appeal No.11 of 2013** wherein this Court ruled:-

***“In this case, it is not in dispute that the appellants were well known to the complainant hence this was a case of recognition as opposed to identification of a stranger. Therefore there was no need for the identification parades and the identification evidence therein was of no probative value. See this courts decision in Juma & another versus Republic [2003] KLR 380.”***

As for the testimony of PW3 and 5 who were strangers to the appellant theirs became dock identification, the moment the prosecution failed to tender the evidence of the parade officer as well as produce the parade forms. In **John Kamau Wamatu versus Republic CRA No.68 & 69 of 2008** the court ruled that the purpose of an identification parade is to test the correctness of a witness's identification of a suspect. It is however not wholly useless. See the case of **Muiruri & 2 others versus Republic [2002] KLR 274** wherein the Court ruled thus:-

***“A court might base a conviction on the evidence of dock identification if it is satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto the court warns itself of the possible danger of mistaken identification.”***

In the circumstances of this appeal from the concurrent findings of the two courts below with regard to the circumstances surrounding the appellant's identification, we find it was safe to rely on the evidence of PW3 and 5 of the identification of the appellant in the dock in the absence of evidence on the identification parade because there were prevailing circumstances at the scene that were conducive to positive identification of the appellant by these two witnesses.

The upshot of the above is that we find no merit in the appellants appeal. We dismiss it in its entirety.

Dated and Delivered at Nyeri this 17<sup>th</sup> day of December, 2015.

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUY REGISTRAR**