IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 22 OF 2013

BETWEEN

DZOMBO MATAZA …..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(An appeal against conviction and sentence of the High Court of Kenya at Mombasa (Ibrahim & Ojwang, JJ.) dated 1st March, 2011

in

H.C.Cr.A.No. 166 of 2008)

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JUDGMENT OF THE COURT

On 25th February, 2004 at about 9.30 p.m., **L Z M**, (PW1) retired to bed in his house at [particulars withheld] village, Kwale County. He was soon thereafter joined by his wife. His daughter **Z** and niece **F I** (PW2) also retired to bed but in a separate room. At about 2 am two people forced their way into his bedroom. They had torches and one of them was armed with a panga. They ordered PW1 and his wife to lie down and give them the radio and Kshs.1,000/-. Whereas his wife took refuge under the bed PW1 was ordered to face the wall. He was in possession of Kshs.900/- out of Kshs.1,000/- examination fees he had received earlier on from **[Particulars withheld] Primary School** where he was a teacher. The duo then took the amount, a solar panel as well as PW1's watch valued Kshs.300/-. In the meantime, one of them ordered the other to get "*that girl from there*." The girl being referred to here was PW2. The order was complied with and soon thereafter they left with PW2 whilst locking the door of the house from outside. PW1 was unable to identify any of the intruders in the house. Once gone, PW1 screamed and his brother's children who were sleeping in another house came and unlocked the door for him. Freed, PW1 immediately summoned neighbours and relatives who started looking for PW2 to no avail. It was not until 4 a.m. that she re-surfaced in the company of a village elder and a cousin one, **N.**

According to PW2, who was a tailoring student, once the duo forced her out of the house, they ordered her to accompany them to a place she did not know. As they trudged on in a single file, a cap fell off the head of one of them but was held by a tree branch. The one with the torch directed his torchlight to the tree branch to enable the other to retrieve his cap. In the process the torch-light also fell on the face of the

owner of the cap. It was then that it occurred to PW2, that infact that person was the appellant whom she had known for over three or so months. Indeed he was a neighbour. Sensing that PW2 could have recognised him, the appellant there and then asked PW2 whether she knew him. Fearing what could transpire if she answered in the affirmative, PW2 feigned ignorance.

After about 3 kilometres of walking, they entered a forest and she was ordered to remove her lesso, biker and underpants. She complied and the duo then indulged in raping her in turns. Satisfied, the duo then left. During the episode PW2 had even a better view of the appellant as his accomplice with the torch kept on shining his torch at him as he went about the uncouth undertaking. Immediately they left, PW2 put on her clothes and retraced her way home. On reaching, she immediately declared to her uncle (PW1) that she had been raped by the appellant with another man whom she apparently did not know or identify. PW1 knew the appellant as well. Apparently, the appellant had a bad reputation in the neighbourhood. He had according to PW1 been chased away from the village and his house burnt down on account of his bad behaviour. Both PW1 and PW2 then proceeded to Mackinon police station and reported the occurrence and gave the name of the appellant to the police as one of the perpetrators of the crimes. The report was received by **P.C. Jeremiah Mliwa** (PW4) and having recorded their statements issued PW2 with P3 form. D**r Mwakio** of **Samburu Health Centre** examined PW2 on 22nd March, 2004 for purposes of filing the P3 form. He noted and observed lower abdominal tenderness, labia majora was reddish and swollen, bruises on vagina opening with tenderness and vaginal discharge that had pus cells with bacterial infection. He concluded that there was possible forcible penetration. He then filled and signed the P3 form which was tendered in evidence by J**oan Warungu** (PW5).

Back at home, PW1 mobilised people to look for the appellant but he was never found. Apparently he had disappeared and/or gone underground. It was not until 6th March, 2005 that he resurfaced at a funeral in the home of one **Hemaris,** an uncle of PW2. At about 11 p.m., **P.C. Daniel Imbugua** (PW3) who was providing security at Hemaris home heard some commotion and on checking saw some group of people assaulting a person. It was the appellant who was being assaulted by the crowd on the allegation that sometime back he had robbed and raped some people in the village. He rescued the appellant and later took him to Samburu Police Station where he was locked up. Following further investigations, the appellant was then arraigned before the Senior Resident Magistrate's Court at Voi, on 21st March, 2005 with one count of robbery with violence contrary to **section 296(2)** of the Penal Code and a second count of rape contrary to **section 140** of the Penal Code.

The particulars of the 1st count were that:-

> *"... On the night of 25th/26th February, 2004 at [Particulars withheld] village Mwatate location in Kwale District within Coast Province, jointly with others not before court being armed with dangerous weapons namely pangas robbed Lennox Zuma Majele of one radio cassette make Sony, one solar panel, one wrist watch make Rado quartz, and cash 900/- all to the total value of Kshs.66,000/- and immediately before or immediately after the time of such robbery threatened to cut the said Lennox Zuma Majele with pangas."*

As for the 2nd count, the particulars given were that:-

> "... On the night of 25th/26th February, 2004 at [Particulars withheld] village, Mwatate location, in Kwale district within Coast Province in turns with others not before court had carnal knowledge of F I without her consent."

The appellant denied both charges and in his unsworn statement of defence claimed that on 3rd March, 2005 at 8 p.m., he went for a funeral at[Particulars withheld]. He accidentally poured some liquor belonging to another person and a fight ensued. They were then arrested by a police officer. After 3 hours his protagonist was released. He was not so lucky as he was taken to Taru police station and thence to court. He was then charged with offences he knew nothing about. In a judgment delivered on 29th December, 2005, **Honourable K. Muneeni**, the then Senior Resident Magistrate determined thus:-

"... All prosecution witnesses credible. Accused no credible witness. I warn myself of the danger of relying on the evidence of a single witness to convict the accused. However, I find that the evidence concrete and safe to rely on … I find that the accused committed both offences as alleged. I find him guilty as charged. I convict him under section 215 of the Criminal Procedure Code ..."

Upon such conviction, the trial court sentenced the appellant to death in respect of count one and 14 years imprisonment plus hard labour in respect of the second count.

Aggrieved by the conviction and sentences aforesaid the appellant lodged an appeal to the High Court. The appeal was canvassed before **Ibrahim** and **Ojwang, JJ.** (as they then were) and in judgment dated 1st March, 2011 they dismissed the appeal holding:-

> ***"... Evidence shows that, those who broke into PW1's house on the material night were not total strangers; they knew the particular girl they wanted to take out for sexual gratification; they stole, and they were armed; they used threats as they stole; they forced PW2 into the bush, and they raped her. At two crucial fortuitous moments, PW2 saw the faces of her tormentors, and one of them was from the neighbourhood, and was a familiar face – the appellant herein. We find and hold that the appellant herein, on the material date, committed the acts specified in the first and second charge. We dismiss the appeal, uphold the conviction; and affirm the sentences as imposed; save that the term of imprisonment imposed shall rest in abeyance, pending execution of sentence in respect of the first count of the charge ..."***

Undettered with this set back, the appellant has now approached this Court on a second and perhaps last appeal. In his home-made grounds of appeal, the appellant faults the dismissal of his appeal by the two Judges of the High Court on the grounds that his identification was unsafe to find a conviction, the prosecution case was riddled with contradictions thereby making the conviction and sentence unsafe, crucial witnesses were not called by the prosecution, that the rape charge was not proved and lastly, failure to consider his defence which was reasonable and had cast doubt on the prosecution case.

The appeal was canvassed before us on 15th January, 2014. Urging the appeal, **Mr Obaga**, learned counsel for the appellant whilst adopting the grounds of appeal as filed by the appellant submitted that this was a case of identification by a single witness in difficult conditions. It may well have been a case of mistaken identity. There was no inquiry as to size of the torch, the distance between PW2 and the attackers and time taken by PW2 to observe the appellant that would have enabled PW2 to positively identify the appellant. That no police identification parade was conducted nor was evidence led as to the voice identification of the appellant. That the appellant pointed out detailed contradictions in the evidence led during the trial. However, the judgment did not address those contradictions. Had those contradictions been analysed, they would have created doubts as to the credibility of the evidence of PW2. No reasons had been given for the rejection of the appellant's defence. Finally, counsel submitted that the investigations officer was not called as a witness. He is the one who would have told the court how he investigated the case and the state of the *locus in quo*. The absence of that evidence, according to counsel greatly prejudiced the appellant.

Opposing the appeal, **Mr Oyiembo**, learned Assistant Deputy Public Prosecutor submitted that the crux of this appeal was the issue of identification. Indeed both courts below attended to the issue with the seriousness that it deserved. The trial court even went further and warned itself of the need to tread carefully on the evidence of identification of the appellant, more so since it involved a single witness. That PW2 had occasion to see the appellant twice. There was therefore no doubt at all that the identification of the appellant by PW2 was beyond reproach. Contrary to submissions by the appellant, his defence was carefully considered by the two courts below which found that it did not cast doubts at all on the strong prosecution case.

As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see **Okeno v Republic (1972) E.A. 32.** By dint of the provisions of **section 361(1)(a)** of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact

unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong. We do not discern such misgivings in this appeal.

So what are the issues of law that emerge in this appeal. We can only see one, identification. The other issues such as contradictions in the prosecution case, failure to conduct police identification parade, as well as failure to call some witnesses are factual matters. The case for the appellant was that the circumstances obtaining at the scene and the harrowing experience PW2 went through during the rape could not have favoured positive identification. That PW2 must have been petrified and therefore impaired by fear rendering positive identification of the appellant doubtful. In those circumstances, she could not probably have identified the appellant and even if she did, possibility of mistaken identity could not be wholly ruled out. On the part of the respondent, the position it took was that the situation obtaining made for positive identification of the appellant. PW2 knew him and saw him twice with the assistance of the torchlight from his accomplice therefore making the possibility of mistaken identity zero.

We have anxiously considered the recorded evidence together with the appellant's defence, the judgment of both the trial and the first appellate court, submissions of both counsel and the law. The main issue of law in this appeal as already stated is identification of the appellant whether visually or by recognition. It is not in dispute that the offences were committed very early in the morning of 26th February, 2004, at 2 a.m. to be precise. It was therefore at night. It is also not in dispute that the only witness who allegedly identified the appellant was PW2. It is also not in dispute again that the only source of light at the time was light from a torch held by appellant's accomplice. The uncontested evidence on record is that following the robbery in the house of PW1, PW2 was frog marched from the house into a bush 3 kilometres away where she was repeatedly raped by the duo. On the way and at the scene of rape, two fortitious events happened. First, the appellant's cap fell from his head. His accomplice aided him to retrieve it by illuminating the place with his torch which illumination also fell on the appellant's face and PW2 was clearly able to see and identify/recognise the appellant. Secondly, during the rape, the appellant's accomplice again illuminated the locus in quo with the same torch, which illumination again fell on the face of the appellant affording PW2 yet another opportunity to observe the appellant sufficiently to be able to identify/recognise him. There is no doubt that during these encounters the appellant and PW2 were in close proximity. How else could PW2 have realised that the appellant was a person she knew very well as he was a neighbour in [Particulars withheld] village. That said, both courts appreciated that this was evidence of a single witness under rather difficult conditions. Guiding principles to invoke by courts when considering such identification were summed up about 60 years ago in the celebrated case of **Abdalla Bin Wendoh & Another v Regina (1953) EACA 166**. Those principles have held sway since then with little or no variation and or addition at all. In that case, the predecessor to this Court held:-

> *"... Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances other evidence circumstantial or direct pointing to guilt is needed."*

And in the case of **Roria v Republic (1967) E.A. 583** this Court expressed its uneasiness with convictions turning on the identification of a culprit by a single witness. It rendered itself thus:-

> *"A conviction resting entirely on identity invariably causes a degree of uneasiness, as Lord Gardner, LC said recently in the house of Lords in the course of a debate on section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts;*
>
> > **'There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity.'**

That danger is of-course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this Court to satisfy itself that in all circumstances it is safer to act on such identification ..."

These two decisions were the subject of consideration by this Court once again in the case of **Matainyi v Republic (1986) KLR 198**. In this case, this Court went further and set out the kind of evidence the court required to consider before it could safely convict a suspect upon the evidence of a single witness under unfavourable conditions. The Court rendered itself thus:-

"In this case there is no other evidence circumstantial or direct. The decision must turn on the need for testing with greatest care the evidence of this single witness. Is that what the courts below really did? It must be emphasised that what is being tested is primarily the impression received by the single witness at the time of the incident. Otherwise, if there was no light at all, identification would have been impossible. As the strength of the light improves, to great brightness, so the chances of a true impression being received improves. That may sound too obvious to be said, but 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 the light available. What sort of light, its size and it (sic) 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 known because they were not inquired into. In days gone by there would have been a careful inquiry into these matters by the committing magistrate, state counsel and defence counsel .... There is a second line of inquiry which ought to be made and that is whether the complainant was able to give such description or identification of his or her assailants to those who came to the complainant's aid, or to the police ..."

These concerns were similarly revisited by this Court differently constituted in the case of **Wamunga v Republic (1989) KLR 424**. The Court had this to say in the case:-

"Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a greater extent on the correctness of one or more identifications of the accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification … It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conclusion ..."

The single thread that runs through all these decisions is the need for the courts to consider the evidence of a single witness on identification under difficult conditions with greatest care and circumspection. However, it should be noted that the cases do not address identification by way of recognition whose considerations are slightly different from identification by a stranger as we shall readily see. However, whether the identifying witness is a stranger to the suspect or is a person known to the witness, it is vital that the witness sees that person first before he can identify or recognise him. In other words, whether a stranger or not there must exist conditions such as presence of light that would aid or enable the witness to identify or recognise the suspect, particularly if the offence is committed during the ungodly hours of the night.

How did the two courts below acquit themselves on this issue of identification? This is what the trial court said:-

"... Evidence of a single witness must be treated cautiously. See ***Abdullah Bin Wendoh & Another vs Republic (1953) 20 EALA*** *(sic) and* ***Ronic*** *(sic)* ***v Republic (1967) E.A. 5 & 3*** *(sic). Were there circumstances forming (sic) her positive identification of the accused? She saw the accused's face two times. On the way to the bushes when his cap fell. His colleague shone (sic)*

some torchlight on him to enable him pick up the cap. During the ordeal, she saw the faces of both men. At one point the colleague shone some torch light on the accused. Thirdly, she knew the accused before. He was a neighbour at [Particulars withheld] (sic)"

As for the High Court, this is how it delivered itself on the issue:-

"Evidence shows that, those who broke into PW1's house on the material night were not total strangers; they knew the particular girl they wanted to take out for sexual gratification; they stole, and they were armed, they used threats as they stole; they forced PW2 into the bush, and they raped her. At two fortuitous moments, PW2 saw the faces of her tormentors, and one of them was from the neighbourhood, and was a familiar face – the appellant herein ..."

From the foregoing it is clear that the conviction of the appellant turned on both evidence of visual identification as well as recognition. Both courts were satisfied that with the aid of the torchlight PW2 had been able to identify/recognise the appellant. These are concurrent findings that we need not disturb since no basis has been laid to enable us do so.

However, much as there was no inquiry as to how bright the torchlight was, its position relative to the appellant and the period of time that the appellant was exposed to PW2, it is quite apparent from the evidence on record that the torch emitted bright light. For how else would the appellant have seen his cap which had fallen from his head if the illumination provided by the torchlight was not bright or was feeble. During the rape encounter, the accomplice of the appellant for whatever reason again directed his torchlight at the appellant. It would have served no purpose at all if the torchlight did not illuminate sufficient light to enable the accomplice of the appellant to see what he was looking for. It is also instructive that after the appellant had recovered his cap with the assistance of the torch light provided by his accomplice, he immediately asked PW2 whether she knew him. Why would he pose this question if he was not suspicious that probably, PW2 had recognised him with the help of the torch-light from his accomplice. To arose such suspicion that PW2 could have seen him, the appellant must have appreciated the strength and brightness of the torchlight. From the evidence, the appellant and his colleague were not disguised at all as to make their identification or recognition difficult. Again from the evidence, we note that PW2, the appellant and his accomplice walked close to 3 km in a single file, with PW2 in the middle. They must therefore have been together for a considerable period of time and in very close proximity, making their identification and recognition much easier. They were even much closer during the rape. For a person well known to PW2, such close proximity could only have made it easier for her to identify and recognise the appellant. The fact of PW2's identification and recognition of the appellant is further boosted by the fact that soon after getting home safely following the sordid act in the wee hours of the morning, PW2 immediately mentioned to PW1 and the village elder, N that she had been raped by the appellant. Again at the police station she gave out the name of the appellant as the culprit who had deflowered her. It goes without saying that whether or not a witness reported to another person or to the police immediately after the episode that he could identify the assailant are matters of great importance be it in a case of a total stranger or a person known to him. The evidence also shows that soon after the episode, the appellant went underground. Despite concerted efforts by PW1, PW2 and the police to track him down, they were unable to locate and arrest him until he resurfaced at a funeral a year or so after the incident. Assuming that the appellant was innocent as he wanted both courts below to believe, why did he suddenly disappear from the neighbourhood. This act cannot attest to the innocence of the appellant at all.

Besides visual identification of the appellant, PW2 also recognised him as a neighbour. However, and as already stated elsewhere in this judgment there is a difference in the standard of evidence required in cases of identification by a stranger and of a person who is recognised by the single witness. In the case of **Anjononi & others v Republic (1980) KLR 59**, this Court stated:-

"Being night time the conditions for identification of a robber in this case were not favourable. This was, however a case of recognition, not identification of assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction

between recognition and identification in SOIRE OLE GETAYA vs REPUBLIC (UR)"

In our view, the totality of the evidence, the consistency of PW2 and the confirmation of material facts of the evidence by PW1, PW3 and PW4 lead to only one inevitable conclusion and that is that PW2 could not have been mistaken in the identification or recognition of the appellant. The fact that PW2 knew the appellant and/or that he came from the neighbourhood was not disputed. There is credible evidence that PW2 had enough time to recognise a neighbour in the form of the appellant, did so, and immediately gave PW1, village elder and the police the name of the appellant. We cannot therefore fault both courts in their analysis of the evidence that was before them on the issue of identification/recognition. Indeed even the trial court went further as it should and warned itself of the dangers of resting a conviction solely on the evidence of a single identifying/recognising witness.

Lastly, we are also in agreement with the two courts below in their inference that those who raped PW2 were the same people who had committed a robbery on PW1. As correctly stated by the High Court, the evidence showed that the occurrence of events leading to the two charges were so integrally connected and formed one set of contemporaneous transactions. Once the courts came to that conclusion, it followed logically, that the same evidence which proved one charge, also went into proving the other. Evidence is galore that PW2 was raped. She said so and her evidence was corroborated by PW5, the clinical officer who examined her soon thereafter. The people who raped her are the very same people who after robbing PW1 in his house, forced her out of the very house and subsequently raped her in turns. The inference is therefore irresistible.

As is clear, for reasons stated above, we are of the firm view that on full consideration, this appeal lacks merit. It is accordingly dismissed in its entirety.

Dated and delivered at Mombasa this 20th day of February, 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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.

DEPUTY REGISTRAR