**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A.)**

**CRIMINAL APPEAL NO. 323 OF 2011**

**BETWEEN**

**JAMES CHEGE WANJA .....1ST APPELLANT**

**JAMES MWANGI IRUNGU …….....2ND APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Nyeri*

*(Sergon & Wakiaga, JJ.) dated 16th December, 2011*

*in*

*H.C.CR A No. 131 of 2008*)

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**JUDGMENT OF THE COURT**

1. The appellants were jointly charged with the count of ***robbery with violence*** contrary to ***section 296 (2)*** of the ***Penal Code***, **Cap 63** of the ***Laws of Kenya***. The 2nd appellant, James Mwangi Irungu, was charged with an alternative count of ***rape*** contrary to ***Section 5 (1)*** of the ***Sexual Offences Act No. 3*** of ***206*** and a further count of ***indecent assault*** contrary to ***Section 11 (6)*** of the ***Sexual Offences Act***.
2. The trial magistrate found the appellants guilty and convicted them for the offence of robbery with violence and sentenced them to death. On the charge of rape, the 1st appellant was sentenced to 10 years imprisonment. We note that it was the 2nd appellant who was charged with rape and not the 1st appellant.
3. Dissatisfied with the conviction and sentence by the trial magistrate, the appellants lodged a first appeal before the High Court ***(Sergon &Wakiaga JJ.).*** upheld the lower courts findings on conviction and sentence, and dismissed the appeal.
4. The appellants lodged this second appeal and in a supplementary ground of appeal dated 10th July, 2013, the appellants contend that the honourable Judges did not subject the evidence to fresh and exhaustive examination and or failed reconsider the evidence in concluding whether the judgment

of the trial court should be upheld.

5. At the hearing of the appeal, learned counsel Kimunya appeared for the appellants while the State was represented by the Assistant Director of Public Prosecution Mr. Job Kaigai.
6. Counsel for the appellant emphasized that this appeal is on the ground that the Judges did not subject the evidence to fresh examination particularly on the identification and recognition of the appellants; that the honourable Judges perfunctorily evaluated the evidence. It was submitted that it was not clear from the trial court's judgment whether identification was based on visual recognition or voice identification and the Judges erred in not clarifying or evaluating this item of evidence. That the testimony of the complainant PW 1, HMI, was not exhaustively evaluated to determine if the alleged voice recognition was credible. It was submitted that whereas PW 1 testified that she was able to identify the appellants in an identification parade and PW 3 Alice Wangui Chege testified that an identification parade was conducted; the officer who conducted the parade was not called to testify. Counsel posed the question that if the complainant knew and recognized the appellants, there was no need for an identification parade. The fact that an identification parade was held means that the complainant did not know the appellants and it was an error to find that PW1 recognized the appellants.
7. For the appellant, it was submitted that the circumstances and conditions for positive identification and recognition did not exist at the time of the alleged offence. That the offence took place at 3.00 am in the night and the intensity of the source of light was not interrogated. Counsel submitted that it was the Prosecution's case that a torch light was available and it did reflect on the wall which enabled PW3 to identify the appellants; however, the nature of the wall in issue was not interrogated to ascertain if it could reflect a torch light; also none of the stolen items was recovered from the appellants despite the very short interval between the robbery at 3.00 am and the arrest of the appellants at 5.30 am in their respective houses.
8. In relation to the charge of rape, it was submitted that the Judges did not evaluate the evidence on record. It was submitted that from the charge sheet, it is the 2nd appellant, James Mwangi Irungu, who was charged with rape yet the judgment refers to the 1st appellant James Chege Wanja. Counsel for the appellant submitted that this is a demonstration that the Judges did not comprehensively evaluate the evidence on record. It was further submitted that the charge of rape was not proved to the required standard in that the trial magistrate and the learned Judges erred in relying on the medical report to find that PW1 HM was found to have male spermatozoa which spermatozoa was not traced to the appellants. Counsel submitted that the 1st and 2nd appellants were not medically examined to determine if the sperms found in PW1 belonged to any of them; the medical examination of the appellants was critical because PW1 testified that she was in bed with her husband at the time of the offence. Counsel for the appellant urged this Court to ask itself whose sperm was it.
9. The State opposed the appeal and submitted that the testimony by PW 1 was consistent and clear. That PW1 was not shaken in her evidence and she was able to describe in detail the role played by each of the appellants during the offence. It was submitted that this was a case of recognition which is supported by the testimony of PW1 HMI and PW 2 Loise Nyambura Chege. The State urged this Court to take into account that there are concurrent findings of fact by the two courts below.
10. This is a second appeal and as was emphasized in ***Chemangong vs Republic, (1984) KLR 213*** at page 219:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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 Karari s/o Karanja vs. Republic 17 EACA146)"***

11. The point of law in this case is whether the Judges sitting as the first appellate court properly evaluated the evidence on record and performed their duty. ***In OKENO V. R. [1972] EA 32 at p. 36*** the predecessor of this Court stated:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be***

***submitted to a fresh and exhaustive examination (PANDYA V. R. [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (SHANTILEL M. RUWAL V. R. [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see PETERS -V- SUNDAY POST [1958] EA 424.".***

12. In ***Suleiman Juma alias Tom – v- R, Criminal Appeal No. 181 of 2002 (Msa.),*** this Court stated that where the life of an individual is at stake, the prosecution must be extremely careful not to bring evidence that is less than watertight.
13. In the instant appeal, the issue of recognition and identification of the appellants is pertinent. PW1 HMI testified as follows in relation to the evidence on recognition and identification of the appellants:

> ***"I recall the night of 18th May, 2007, at 3.30 am. I was asleep. I was with my husband. We heard a dog barking. I heard a bang on the door. A voice called Irungu saying it is police officers. Irungu asked police officer from where. I recognized the voice as that of James Chege. I told them to produce police ID they declined. The same voice said we open quickly or they hit our heads. My husband went and opened the door. It was dark. We sat on the bed"***.

14. The first issue for us to consider is the issue of voice recognition as captured in the testimony of PW1**.** On voice recognition, in ***Karani vs. Republic, (1985) KLR 290,*** this Court held at page 293:

> ***"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification."***

15. The complainant, PW 1, testified that she recognized the voice of the 1st appellant (James Chege). PW 1 does not give the background or circumstances that led her to recognise the voice of the 1st appellant. PW 1 did not indicate a history of interaction with the 1st appellant to be able to demonstrate that she knows the 1st appellant's voice very well to rule out any possibility of mistaken identification. PW1 simply stated that she used to see the 1st appellant within *Ichichi* Market. PW1 did not indicate that prior to the night of the offence, she had been talking to the 1st appellant and was familiar with his voice. The judgment of the High Court does not subject the voice identification to test and analysis and this casts some doubt as to the veracity of voice identification. It is our considered view that the honourable Judges erred in failing to evaluate the pertinent issue of voice recognition.
16. We now consider the issue of visual identification. The relevant evidence is the testimony of PW1 who testified as follows:

> ***"The thugs entered the house. I met them at the sitting room door. Two men held me and took me to the bedroom. They started beating me. Men had entered the house. I identified two of the accused men. I saw James Mwangi when they found me at the sitting room. The torch was one. …They told me to remove my clothes in the kitchen. He told me to hold the kitchen seat and he had sexual intercourse with me from behind. It is James Mwangi Irungu who raped me. He had removed my pants. That time, my husband was held under the bed. The accused's torch was on. That is how I saw them… When the thugs entered the house, they flashed their torches on us but on our eyes. I saw the 2nd accused again when he was waiting for one of the thugs to finish raping me.***

***He was holding the torch on so that the other thug to see properly when he was raping me. I was holding a seat facing it and standing when the thugs were raping me. The 1st accused and the other thug took me to the bedroom, then to the kitchen where they touched my breasts and vagina before I was raped. At the ID parade, I held the 1st accused's hand as the person who raped me. I also identified the second accused as one of the thugs who robbed us".***

17. In cross-examination, PW 1 testified that it was only James Mwangi Irungu who raped her. The said James Mwangi Irungu is the second appellant while the honourable Judges convicted the 1st appellant James Chege Wanja for rape. There is inconsistency in the testimony of PW1 when in cross-examination she testifies that after the 2nd appellant had finished raping her, the 1st appellant came and also raped her. The contradiction in the testimony of PW1 was not explained and we note that from the record, the prosecution requested for this witness to be stood down as she was using a different set of statement from that in possession of the prosecutor.
18. PW 2, Loise Nyambura Chege, gave evidence on identification of the appellants and she stated as follows:

***"That on the night of 18th and 19th May, 2007, at around 3.00 am I was asleep. I was woken up by a knock on the window. A voice ordered me to open the window…I had lit my lantern. I opened the door. Then three men entered. They were flashing their torches direct to my eyes….That time I saw the 1st accused very well. When they were going out, I heard one of them call the name Chege and tell him we go. My statement says that I told the police I did not know the thugs but my daughter knew them. This is not true for I told the police I knew the thugs. I do not know why the police wrote like that".***

19. PW3, Alice Wangui Chege, testified that when the assailants came to her bedroom, the torch hit the wall and she was able to see the 2nd appellant.
20. We have considered the testimony of PW1, PW2 and PW3 in relation to the visual identification of the appellants. It is not in dispute that the alleged offence took place at night. The scene of crime for PW1 and PW 3 is the same while for PW2, the scene of crime is different. From the testimony of PW2, she allegedly identified the appellant from the name "*Chege*", she heard one of the assailants utter. She also testified that using her lantern lamp, she could identify the 1st appellant who is James Chege Wanja. PW2 does not give any evidence on identification touching on the 2nd appellant.
21. The issue for our consideration is whether the Judges evaluated the testimony of PW2 in relation to the identification of the 1st appellant. The learned Judges stated that the appellants were properly identified as there was enough time and light to enable PW1, PW2 and PW3 to identify the appellants. With respect, we do find that the Judges ignored a material fact that the scene of crime where PW1 and PW3 allege to have identified the appellants is a different scene from where PW2 allegedly identified the 1st appellant. PW 1 and PW 3 testified that the offence took place in their house while PW 2 testified of the offence and identification of the 1st appellant in her house. We are convinced that had the Judges considered this fact, they should have separately evaluated the evidence on identification of each appellant taking into account that the place of alleged identification by PW1 and PW3 was different from the place mentioned by PW 2. The Judges erred in making a generalized finding on identification when the scenes were different.
22. On the intensity of the torch light and the lantern lamp, it is our considered view that the Judges did not interrogate and evaluate the intensity of the light from the torch and the lantern lamp that PW1, PW2 and PW 3 alluded to. The time of the alleged offence was 3.30 am. No evidence was adduced to show where PW 2 was positioned in relation to the lantern which she said was on, how much light it produced and whether it was behind or before her when the assailants entered her house. If she opened the door to the assailants as she states, the lantern lamp would be behind PW2 and she would have obstructed the light that should have shone on the faces of her attackers to enable her identify or recognize them**.** (See ***Stephen Mbondola & 2 others, – v- R, Court of Appeal Mombasa Criminal Appeal No. 162 of 2000).***

23. The appellants contend that the circumstances for identification were not adequate as the nature of the light from the torch and its intensity was not evaluated. In ***Wamunga vs. Republic, (1989) KLR 424,*** this Court held at page 426 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 conviction."***

24. From the evidence adduced, we cannot help but note that no information was given as to the intensity and brightness of the light from the torch. This information was necessary to enable the court carefully test the recognition evidence. The evidence of identification at night must be tested with the greatest care using the guidelines in ***Republic - v- Turnbull, (1976) 3 All ER 549*** and must be absolutely watertight to justify conviction. **(See *Nzaro -v- Republic, 1991 KAR 212 and Kiarie - v- Republic, 1984 KLR 739*)**. In the case of ***Maitanyi -v- Republic 1986 KLR 198*,** this Court stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect.

25. Our evaluation of the evidence on record shows that in the present case, no inquiry was made by the learned Judges as to the nature of the alleged torch light or its intensity. No inquiry was made on the lantern lamp to determine its brightness and position in relation to PW2 and the assailants. No inquiry was made as to the intensity of light from the torch. In the absence of such inquiry, the evidence of recognition cannot be held to be free from error (See ***Simiyu & Another, –v- R, [2005] 1 KLR 192*)**. We further note the fact PW2 in her statement to the police did not give the names of the appellants as the robbers she identified. PW2 when asked in cross-examination why her statement to the police states that she did not know the appellants expressed surprise insisting that she mentioned the names to the police. The record shows that PW1, PW2 and PW3 constantly referred to the assailants as thugs and did not give the names of each of the appellants or their description to the police. If PW 1 and PW 3 knew the appellants, they ought to have given their names to the police. In ***Maitanyi -vs- Republic, (1986) KLR 198***, this Court held,

> ***"If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description."***

26. From the foregoing, we are convinced that there was no proper testing of the evidence of identification and recognition by the two lower courts. Had the evidence been thoroughly tested and analysed we cannot be sure that the lower courts would still have come to the same conclusion. We find that the appellants' conviction for the offence of robbery with violence and the 1st appellant's conviction for the offence of rape based on improper identification and recognition cannot be safely supported. The inconsistency in the testimony of PW1 as to whether one or two persons raped her was not resolved by the honourable Judges. There is sufficient doubt in our minds as to whether the appellants were properly identified and the benefit of doubt goes to the appellants.

27. Having expressed ourselves as above we find that this appeal has merit and we accordingly allow the same. We quash the conviction of the 1st and 2nd appellants for the offence of robbery with violence. We further quash the conviction of the 1st appellant for the charge of rape. We quash and set aside the sentences meted upon them. Both appellants are hereby set at liberty unless otherwise lawfully held.

***Dated and delivered at Nyeri this 31st day of March, 2014.***

***ALNASHIR VISRAM***

**……**

***JUDGE OF APPEAL***

***MARTHA KOOME***

**……**

***JUDGE OF APPEAL***

***OTIENO-ODEK***

**……**

***JUDGE OF APPEAL***

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**