REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

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

CRIMINAL APPEAL NO. 59 OF 2011

BETWEEN

JAMES TINEGA OMWENGA …..……. APPELLANT

AND

REPUBLIC…….....……...…… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Maraga &

Emukule, JJ.) dated 12th March, 2010

in

H.C.CR.A NO. 22 OF 2010)

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JUDGMENT OF THE COURT

1. ***James Tinega Omwenga,*** the appellant was charged with one count of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code,*** Chapter 63, Laws of Kenya; one count of rape contrary to ***Section 3(1)(A)*** of the ***Sexual Offences Act No. 3 of 2006*** and an alternative count of indecent assault on a female contrary to ***Section 5(1)(B)*** of the ***Sexual Offences Act*** in the Senior Resident Magistrate's Court at Narok.
2. The particulars of the first count were that on 7th November, 2006 in Narok District within Rift Valley Province, the appellant while armed with an unknown offensive weapon robbed MWL of cash Kshs. 8,000/=, 3 litres of milk, 2 loaves of bread, tea leaves, carrots, a half kilo of meat, rubber shoes, shoe brush, National Identity Card, paraffin and tomatoes all valued at Kshs. 9,474/= and at or immediately before or immediately after the time of such robbery injured the said MWL. The particulars of the offence of rape were that on the above mentioned date and place the appellant unlawfully had carnal knowledge of MWL without her consent. The particulars of the alternative charge were that on the above mentioned date and place the appellant indecently assaulted MWL by touching her private parts.
3. The appellant pleaded not guilty to all charges. The prosecution called a total of 6 witnesses. It was the prosecution's case that on 7th November, 2006 at around 5:30 p.m on her way home to

[Particulars withheld], PW1, MWL (M), passed by her daughter's house, PW 3, ML (M) and gave her some items. M escorted her mother up to Narok Teachers College. M continued walking home and when she was about 500 metres from her house she felt someone hold her from behind and take her bag; she was pulled into a bush that was nearby. M testified that the assailant held her by her hands; it was 6:00 p.m and she was able to see him very clearly. The assailant took her bag and went to hide it; M screamed and tried to ran away but the robber came back and pushed her down to the ground. The robber threatened to kill M if she continued screaming and covered her mouth with a cloth. M gave evidence that the robber lifted her skirt to her shoulders, removed both her under pants and his and proceeded to have carnal knowledge of her for about half an hour. Thereafter, the robber hit M four times with the sharp object he was armed with until she lost consciousness.

4. M's children become concerned when she had not arrived home by 7:00 p.m and one of her children, S, called M and inquired whether M was with her. M informed S that she had escorted their mother over an hour ago. M's children decided to seek the assistance of their neighbour, PW2, Ntiyoine Ole Narikae (Ntiyoine), in searching for their mother. M also went to look for her. Ntiyoine testified that he searched for M together with her children along the area near Narok Teachers Training College. Near the road, Ntiyoine saw a bloody headscarf and called M's children who identified the same as belonging to their mother. Thinking that their mother was dead, the children screamed attracting PW6, PC Joseph Muguti (PC Joseph), who was nearby. They continued looking for M and found her at around 9:00 p.m in a bush lying in a pool of blood. She was taken to hospital where she was admitted for seven days.
5. After being discharged from hospital, M reported the incident to the police. She stated that she was able to identify the attacker because it was not dark and that he was light in colour and had a scar on the left side of the head. She further testified that the bag which was stolen contained Kshs. 8,000/= 3 litres of milk, 2 loaves of bread, tea leaves, meat and kerosene. She also testified that she had never seen the assailant prior to the incident. PW5, Jackline Chepleting (Jackline), a clinical officer, gave evidence that M was examined on 7th November, 2011 and she filled in the P3 form on even date. After examining M, she found that she was bleeding from the head and her left hand was broken. She also found that M's vagina had bruises, presence of spermatozoa and blood stained discharge on her vagina. Jackline concluded that M had been raped.
6. PW4, Nelco Mokoyo Obuya (Nelco), a mason who worked at Kipangas quarry, testified that on 10th October, 2006 the area chief had convened a meeting with all the persons working in the quarry and informed them that a woman had been attacked and raped in the area. The area chief asked the people in attendance to unite and arrest the attacker who was described as being chocolate in complexion and had brown teeth. He testified that the appellant who used to work in the area did not attend the meeting and showed up after the meeting ended. Thereafter, the area chief convened another meeting on 24th November, 2006 where he indicated that he knew the attacker was one of the persons working in the quarry and threatened to close the quarry if the person was not handed over to the police. The chief told them that the attacker was known as 'mwenda pole.' Nelco saw the appellant in the company of two other men near silent bar; he told his colleagues that the appellant was the man referred to as 'mwenda pole'; however they were not able to apprehend him. Thereafter, on the same day, at around 7:00 p.m one Peter called Nelco and informed him that he had seen the appellant at Tony Cinema. Nelco in the company of two other men went to Tony Cinema and found the appellant buying maize; they followed him and arrested him near the market. Nelco testified that they informed the appellant that he was a suspect in rape incident and took him to the police station.
7. PC Joseph conducted an identification parade and M identified the appellant as the robber who attacked her on the material day. The appellant was arraigned and charged in court.
8. In his defence, the appellant gave a sworn statement. He denied committing any of the offences he was charged with. He testified that on 26th November, 2006 he went to Majengo to visit his in law; he left his in law and went to the market where he used to take tea; the owner of the kiosk called him into the kitchen and informed him that men who were armed with clubs had been looking for him; they had been sent by the area chief to beat him up and take him to the police station. The appellant went to the police station at around 7:00 p.m. and reported what he had been told and he went towards the market. Before he could get to the market three men who he knew arrested him and took him to the police station. Subsequently, he was charged with the

aforementioned offences.

9. The trial court being convinced that the prosecution had proved its case convicted the appellant of the offence of robbery with violence and rape. He was sentenced to death in respect of the offence of robbery with violence and 20 years imprisonment for rape. The trial court ordered the sentence for rape to be held in abeyance. Aggrieved with the decision of the trial court the appellant filed an appeal in the High Court. The High Court (Maraga & Emukule, JJ.) vide a judgment dated 12th March, 2010 dismissed the appeal. It is that decision that has provoked this second appeal. The appeal is based on the following grounds:-

- ***The learned Judges erred in law by relying on the evidence of direct identification which was not clear.***

- ***The learned Judges erred in law by relying on evidence of corroboration which did not have anything to do with the appellant.***

- ***The learned Judge erred in law by relying on hearsay evidence which is not admissible.***

10. Mr. Ombati, learned counsel for the appellant, submitted that the evidence of identification was not safe to warrant the appellant's conviction. This was because M did not positively identify the appellant as her attacker because she said in the identification parade that he looked like the attacker. He argued that the evidence given by Ntiyoine and M did not corroborate the evidence on identification. Mr. Ombati contended that the evidence of PW4, Nelco, was hearsay because he heard about the appellant allegedly from the chief and gave his name; M never gave any information to the chief and the chief did not testify. He urged us to allow the appeal.
11. Mr. Chirchir, Senior Prosecution Counsel, in opposing the appeal submitted that the evidence was clear and M gave the description of her attacker. He maintained that the chief was not called as a witness because the case against the appellant was clear. Mr. Chirchir argued that the circumstances that prevailed during the incident were favourable for positive identification because the incident took place for about half an hour.
12. We have considered the record, submissions by counsel and the law. This is a second appeal and by dint of ***Section 361*** of the ***Criminal Procedure Code,*** Chapter 75, Laws of Kenya, the jurisdiction of this Court is confined to matters of law only. In ***Chemagong -vs- Republic (1984) KLR 213*** at page 219 this Court held,

> ***"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)"***

13. We are of the considered view that the crux of this appeal is whether the evidence on identification was proper and safe to warrant the conviction of the appellant. This because from the evidence on record no one witnessed the incident and it is only M who testified that she was able to identify her attacker. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. In ***Wamunga -vs- Republic (1989) KLR 424,*** this Court held,

> ***"It is trite law that where the only evidence against a defendant is evidence on 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."***

14. Both lower courts made concurrent findings of fact on the issue of identification. They found that the appellant was positively identified as the assailant. A court must always satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. See this Court's decision in ***John Njoroge Mwangi -vs- Republic- Criminal Appeal No. 55 of 2007.*** In ***Abdulla Bim Wendo & Another -vs- Reg (1953) 20 EACA 166,*** it was held that**,**

> ***"Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known the conditions favouring a correct identification were difficult."***

See also ***Roria -vs- Republic (1967) EA 583 and Ogeto -vs- Republic (2004) 2 KLR 14.***

15. In this case, it is not in dispute that M was attacked at around 6:00 p.m and that she was brutally assaulted. We are of the view that the circumstances that prevailed during the incident were difficult due to the brutality involved. We find that it was necessary for the two lower courts to test the evidence of identification with the greatest care. We find that the two lower courts did not correctly test the identification evidence. We say so because firstly, it was the prosecution's case that the incident took place at around 6:00 p.m in a thicket. Therefore, what was the intensity of light and/or degree of visibility in the thicket? The answer to the said question was imperative in determining whether the identification of the appellant was free from error and there wasn't a case of mistaken identity. The prosecution did not tender any evidence as to the intensity of the light in the thicket. Based on the foregoing we are unable to determine whether there was sufficient light at the scene to afford a positive identification of the assailant. In ***Maitanyi -vs- Republic (1986) KLR 198***, this Court in, holding that an inquiry as to the intensity of light is essential in testing the accuracy of evidence of identification held,

> *"**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 light available. What sort of light, its size and it 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 unknown because they were not inquired into....' See Wanjohi & Others -vs- Republic (1989) KLR 415."***

16. Secondly, because M lost consciousness after the attack, it was necessary to consider whether she was able to give the description of the attacker to the police before the arrest was affected. This would also have tested the accuracy of the appellant's identification. We cannot help but note that the description allegedly given by M in her initial report differed with the description she gave in her evidence in court. PC Joseph testified that the only description given by M of the assailant in her initial report was that he was a brown person while M testified that she was able to identify the appellant because she had noted during the attack that he was light in colour and had a scar on the left side of his head. Why did M omit in her initial report to indicate that her assailant had a scar? Could it be that she was not very sure of the description of her assailant? Could it be that she only noticed that the appellant had a scar when she participated in the identification parade? We are of the considered view that due to the foregoing, doubt is raised on whether M was able to get an accurate impression of her attacker's physical attributes. In ***Maitanyi -vs- Republic (supra)***, this Court held,

> *"**There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not***

identify or recognize the person, then a later identification or recognition must be suspect, unless explained."

17. On the issue of the identification parade we concur with the following findings of the High Court:-

> ***" The 6th witness was PW6 (PC Joseph Muguti) who was both the investigating officer; and also the officer who conducted the identification parade. According to the Force Standing Orders Chapter 46 (Guide to criminal investigation) revised ed. 2001 (1962), Section 6(iv) (b) the police officer in charge of the case, although he/she may be present; will not conduct the parade. In this case the identification parade was conducted by an officer who was in charge of the case. He was the investigating officer. Section 6 (v) (m) provides that,***
>
> ***"the parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened and nullified."***
>
> ***The conduct of the identification parade by the officer in charge of the case (the investigating officer) was certainly in breach of Section 6(iv)(b) of the Force standing orders and thus lessened the value of the evidence ….."***

18. Based on the foregoing, we agree with the learned Judges (Maraga & Emukule, JJ.) that there was need for the identification evidence to be corroborated. We however disagree with the learned Judges findings that M's direct evidence on identification offered the corroboration to the identification parade that was conducted. This is because the purpose of an identification parade is to test the correctness of the identification of an accused person by a witness who did not know him prior to the incident. Therefore, the identification parade conducted by PC Joseph was to test the correctness the identification of the appellant by M based on the description she had given of the attacker in her initial report. The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless. In the case of ***Njoroge -vs- Republic (1987) KLR 19***, this Court stated:-

"Dock identification is worthless the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade".

See also this Court's decision in ***Mbui John Mwavita -vs- Republic- Criminal Appeal No. 338 of 2008.*** Having found that there was doubt as to whether M was able to get an accurate impression of the assailant's physical attributes and that the identification parade was not properly conducted, we are of the view that there was need of further independent evidence to corroborate the identification of the appellant.

19. We find that the evidence of Nelco cannot amount as corroborating the identification evidence. This is because firstly, he testified that in the first meeting convened by the chief, the chief described the robber as being of chocolate complexion and that he had brown teeth. Where did the area chief get this description? This description was in total variance with the description M alleged to have given to the police. Further, Nelco testified that he did not suspect anyone even after being given the said description. Secondly, Nelco testified that the chief convened a second meeting and gave them a further description of the suspect as 'mwenda pole'. Where and when did the area chief get this further description of the suspect? Nelco testified that after the chief referred to the suspect as 'mwenda pole' he realized it was the appellant who he knew very well. If Nelco knew the appellant very well why was he not able to recognize that the description given by the chief in the first meeting matched the appellant? How did Nelco know that the appellant was

referred to as 'mwenda pole'?; Was it a nick name for the appellant? No evidence was tendered by the prosecution to answer the aforementioned questions. We also have doubt as to the accuracy of the evidence given by this witness because it was clearly obtained under duress. Nelco testified that the chief threatened to close the quarry if the assailant was not apprehended. It is after the said threat that Nelco identified the appellant as the suspect. We find that the evidence on identification was not positive and free from error to warrant the conviction of the appellant.

20. Based on the evidence on record, we find that the only thing that connects the appellant to the offence is suspicion. Nelco testified that the conduct of the appellant pointed to his guilt because he avoided attending both meetings which had been convened by the chief. It is trite law that suspicion alone cannot be the basis for inferring guilt. In ***Mary Wanjiku Gichira -vs- Republic- Criminal Appeal No. 17 of 1998***, this Court held,

> ***"Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence."***

See also this Court's decision in ***Sawe -vs- Republic (2003) KLR 364.***

21. The upshot of the foregoing is that we find the appeal has merit and allow the same.
22. We order that the appellant be hereby set at liberty unless otherwise lawfully held.

Dated and delivered at Nakuru this 20th day of March, 2014.

ALNASHIR VISRAM

….....

JUDGE OF APPEAL

MARTHA KOOME

….....

JUDGE OF APPEAL

J. OTIENO-ODEK

….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR