



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**CORAM: MARAGA, OUKO & J. MOHAMMED, JJ.A.**  
**CRIMINAL APPEAL NO. 195 OF 2007**

**BETWEEN**

**PETER KERERA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(An appeal from the Judgment of the High Court of Kenya at Nairobi (Lesiit, J) dated 13th  
December, 2006**

**in**

**HCCR.A NO. 297 OF 2005)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

**Background**

The appellant, **PETER KERERA** was charged before the Chief Magistrate's Court at Kibera with three counts of robbery with violence contrary to **Section 296 (2) of the Penal Code** and one count of the offence of indecent assault on a female contrary to **Section 144 (1) of the Penal Code**. The court having considered the evidence before it and the law found that the appellant was not guilty of robbery with violence but was guilty of the offence of indecent assault and sentenced him to twenty [20] years imprisonment.

Aggrieved by that conviction and sentence, the appellant appealed to the High Court. The prosecution conceded the appeal against sentence on the ground that the appellant was a first offender and the offence was not aggravated. The High Court, however, found that the appellant had been properly convicted and sentenced by the trial court. Accordingly, the High Court dismissed the appeal, upheld the conviction and affirmed the sentence imposed by the trial court.

Aggrieved by that dismissal, the appellant has preferred this appeal.

In his appeal, the appellant who was unrepresented has challenged the decision of the High Court on

several grounds as captured in the grounds of appeal filed on 29th December, 2006. These grounds can be summarized as follows:

1. *The first report did not disclose the identity of the alleged culprit.*
2. *The conviction based on identification was erroneous.*
3. *The prosecution case was not proved beyond reasonable doubt.*
4. *Due consideration was not given to the defence.*
5. *The sentence meted out was harsh and excessive.*

### **Submissions**

When the appeal came up before us, the appellant urged the Court to rely on his aforesaid grounds of appeal.

Mr Kivihya, learned counsel for the State, submitted that this appeal is premised on the issue of identification; that PW1's evidence showed that she knew the appellant and immediately he spoke, she recognized his voice. Further, that PW1 had known the appellant for five years and that she knew his voice very well; that as PW1 testified, the appellant was in her bedroom during which they spoke for a long time. Further, that PW3 conducted the

identification parade at which PW1 easily identified the appellant.

In reply, the appellant maintained that he was framed up, although he conceded that he used to collect garbage from PW1's house.

### **Analysis and determination**

This is a second appeal and by dint of **Section 361 (1) (a) of the Criminal Procedure Code**, this Court has jurisdiction to consider only matters of law. It is trite law that a second appellate court cannot interfere with the concurrent findings of the two courts below unless such findings are based on

no evidence. This Court stated this principle in ***KARINGO V R, [1982] KLR 213 at page 219*** in the following words:

***“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.”***

We have carefully considered the record of appeal, the rival submissions by either side, principles of case law and we proceed to make our determination as hereunder.

As the determination of this appeal turns mainly on the question of identification, a brief summary of the prosecution evidence is imperative.

PW1, *L F L K*, testified that on 19th April, 2004 at about 2.30 am, she was asleep in her bedroom with her cousin Elizabeth at their family home in Kileleshwa, Nairobi. She woke up to noises and saw a man standing next to the window inside her room. She screamed and felt something placed on her head and the man who had been standing near the window uncovered her. Two other men came into the room. In total, there were three assailants who had two torches. One of the men placed his hands on her buttocks and asked her if she wanted them to kill her. She recognized her assailant as the appellant as he used to collect garbage from their home twice a week for a period of five years. The men tied her with a *lesso* and also tied Elizabeth.

PW1 further testified that the appellant pulled down PW1's shorts and put his fingers into her vagina and asked her whether she was a virgin. The appellant had a torch and informed her that he wanted to rape her but their boss had refused him to do so. He put two fingers in her vagina and one finger in her anus. She screamed and another assailant told the appellant that he would shoot him if he raped PW1. The appellant also touched Elizabeth's breasts and vagina.

PW1 testified that the appellant was in her room for about seven minutes and that whenever he collected garbage from their house she always greeted him. She testified that the voice she heard on the material night was definitely that of the person who collected garbage from their house, in this case, the appellant. After the assailants left their house, PW1 reported the matter to the police and she informed them that she identified one of the assailants. On 21st April, 2004, she was requested to identify the assailants in an identification parade. She testified that she recognized and pointed out the appellant as the man who had indecently assaulted her and her cousin Elizabeth.

On cross examination by the appellant, PW1 testified that she knew the appellant well as he worked for the company that was contracted to collect garbage from their home; that she was the one who paid him for the services he rendered and that when he lit his torch during the ordeal she saw his face and that she also recognized the appellant from his eyes and beard.

In re-examination, PW1 testified that the appellant shone a bright torch at her; that she could see his face and that of his fellow assailant who had a cap on and that the appellant had not concealed his face.

PW3, PC Otieno Ogwa, testified that he was attached to Kileleshwa Police Station and that on 22nd April, 2004, between 9.25 am and 9.40 am, when PC Tom Ayola, PW4, informed him that he was investigating a robbery case and required an identity parade to be carried out. PW3 carried out the identification parade and PW1 identified the appellant. PW1 informed PW3 that the appellant used to collect garbage from their house. The appellant confirmed that he was satisfied with the conduct of the identification parade and signed the requisite certificate.

PW4 testified that he was based at Kileleshwa Police Station; that on 19th April, 2004, at about 5.30 am, he received information regarding a robbery taking place at Kieni Estate in Kileleshwa; that he went to the scene of crime accompanied by Inspector Otieno where PW1 informed them that she had been indecently assaulted and that she recognized one of the robbers as one of the men who used to collect garbage from their house.

The appellant was placed on his defence. He gave sworn evidence and called no witnesses. He testified that he worked as a driver with a transport company and that on 21st April, 2004, he went to collect garbage with his colleagues. The appellant testified that they were requested by police officers to help with investigations and spent the night at the Police Station.

The following day, they took part in an identification parade and a woman pointed him out. Two other identification parades were carried out and no one else identified him. He confirmed that the identification parade had been properly carried out; that he used to collect garbage during the day and was not on duty on the night of the robbery.

After perusing the record, we find that, consistent with her duty as spelt out by this Court in a long line of cases including *OKENO V R, [1972] EA 32*, the learned Judge of the High Court conducted a thorough and exhaustive re-appraisal and assessment of the evidence as summarized above.

Proper identification of an accused person is crucial if his conviction is to be sustained. In this regard we are guided by the case of *FRANCIS KARIUKI & OTHERS V R, CR.A NO. 6 OF 2001*, where this Court held:

***"... The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from possibility of error. The***

***surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.***

In the appeal before us, we note that PW1 maintained that she recognised the appellant both by appearance and voice as her assailant and informed the police officers at the earliest opportunity.

The High Court relied on the case of ***CHOGE V R, 1985 KLR 1*** where it was held that:

***“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused’s voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.”***

The learned Judge stated in her judgment:

***“I have considered that the complainant had opportunity to talk with the appellants on two occasions that night. The appellant actually held long conversations with the complainant. The complainant knew the appellant before quite well. She said she paid him money monthly for the garbage collection. The appellant also stated so to PW3 during the identification parade that the complainant knew him well. The conversations were long so that the complainant heard the appellant speaking several words. I do find that the words spoken by the appellant to the complainant were sufficient for the complainant to hear and recognized his voice being a person who she had known for five years. I have no doubt that the learned trial magistrate came to the correct finding that the complainant had identified the appellant through recognition of especially his voice.”***

In the instant case, we reiterate that the appellant was identified by voice and physical recognition by PW1. Recognition is more reliable than identification of

a stranger. As this Court stated in case of ***ANJONONI V R, KLR 1 [1976-1980] at 1566 to 1568*** this is because:

***“... 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.”***

Although the conviction was based on the evidence of a single witness, we are satisfied that both the trial court and the High Court properly directed themselves on the question of identification of the appellant. Both courts made concurrent findings of fact that the appellant was known to PW1 for several years before the day of the attack.

We reiterate what the court in ***MAITANYI V R, [1986] KLR 198*** said in this regard:

***“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 greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”***

Further, in ***CHILA V R, (1967) EA 722*** the court held:

***“The law of East Africa on corroboration in sexual cases is as follows. The Judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but***

***having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.”***

The proviso to **Section 124 of the Evidence Act** provides as follows:

***“Provided that where 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 child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”***

Accordingly, there is no need for corroboration of the victim’s evidence and the trial court can convict if it is satisfied that the victim is a witness of truth. In the present case the trial magistrate noted in her judgment that:

***“PW1 struck me in court in that her demeanour portrayed consistence and truth. She was like a lone ranger. She actually said she recognised the accused person among the 3 robbers in their house when the accused spoke. She struck me as honest when she described how the accused person touched her vagina by inserting his fingers and talking vulgar (sic) stopping short of raping her at his bosses order to stop. I cannot close my ears to PW1’s cry for justice.”***

The trial court found that PW1’s demeanour portrayed consistence and truthfulness. The trial court warned itself of the danger of convicting based on the evidence of a single witness and tested PW1’s evidence with the greatest care.

The two courts below cannot be faulted for finding as they did. The cogent and consistent evidence from PW2 regarding the indecent assault dispels any doubt as to the correctness of the identification by recognition of the appellant as the person who assaulted her. We, therefore, dismiss this ground of appeal.

The second ground is that the prosecution case was not proved beyond reasonable doubt. The charge proven against the appellant is that of indecent assault of female contrary to **section 144(1) of the Penal Code**. The said section provides:

***“Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment with hard labour for twenty-one years.”***

This Court held in the case of ***GITAU V R, C.R.A. NO. 140 OF 1982*** that:

***“An assault accompanied by utterances suggestive of sexual intercourse is an indecent assault, as also an assault by touching, for example, the breasts or private parts of a female without being accompanied by utterances suggestive of sexual intercourse. The simple issue usually is whether the assault was intentional and whether it was indecent.”***

***“Indecent assault”*** is not defined in the Penal Code, however the insertion by the appellant of his fingers into the complainant’s vagina amounts to an indecent act. Applying the law above to the facts in this case, it can be concluded that the Appellant’s action of putting his fingers into PW1’s vagina and anus amounted to indecent assault.

Whatever differences there may have been in the prosecution case, consisting of minor discrepancies and inconsistencies, they were not of a material nature and did not dilute or weaken the probative value of the evidence on record. We, therefore, dismiss the appeal against conviction.

On the issue of severity of the sentence meted out by the trial court and upheld by the High Court, this Court in ***FRANCIS MBURUGU MUCHENA V R, [2011] eKLR*** stated:

***“By dint of the provisions of section 361 (1) of the Criminal Procedure Code, this Court has jurisdiction to hear appeals only on issues of law. However, it lacks the jurisdiction to entertain an appeal on a question of fact which includes severity of sentence, which under the law is regarded as a question of fact except where the sentence has been enhanced by the High Court or the subordinate court had no power to pass the sentence.”***

We find that in the circumstances of this appeal, the question of severity of sentence is purely one of fact and does not fall for consideration by this Court.

The upshot of our assessment is that this appeal is devoid of merit and is hereby dismissed in its entirety.

**Dated and delivered at Nairobi this 25th day of July, 2014.**

D. K. MARAGA

-----

JUDGE OF APPEAL

W. OUKO

-----

JUDGE OF APPEAL

J. MOHAMMED

-----

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR