THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMABAY

CRIMINAL APPEAL NO 52 OF 2016 (Consolidated with Criminal Appeal No 53 of 2016)

(From original Mbita PMC Criminal Case No.534 of 2014)

ELIUD ODHIAMBO NYANDWA……...…….1ST APPELLANT

MICHAEL OTIENO OJWAN'G...…...……...…….2ND APPELLANT

VERSUS

REPUBLIC ……..……..…….....RESPONDENT

JUDGMENT

1. **ELIUD ODHIAMBO NYANDWA** (the 1st appellant) and **MICHAEL OTIENO OJWANG'** (2nd appellant) were for offence of indecent act with an adult contrary to section 11A of Sexual Offences Act No.3 of 2016. They denied the charges and a plea of not guilty was entered for the appellant herein and 3 other accused. Upon hearing, the appellants were convicted and sentenced to serve ten years imprisonment.

2. **T N (PW1)** testified that on 10/11/2013 at about 9pm as she was sleeping in her house with her daughter, she heard people asking her to open the door claiming they were police officers. She kept quiet and lit a tin lamp to see who was knocking the door at that hour. They pushed the door which fell down and one person dragged her outside. Since she had lit a tin lamp, she saw the appellants herein. They took her outside and started beating her, she screamed but no one came to her aid as it was raining. They took her to the road and the 1st appellant (whom she did not know before) slapped her on the right side of the face and she fell down. The 2nd appellant also hit her on the back using a panga. The 1st appellant then removed her panty, pulled apart her right leg and placed his penis into her vagina without a condom, an act he did twice. The 2nd he appellant had slept with her once.

3. The pair then took her to a nearby bush where she was raped her by 8 different people, she was blind folded hence the only way she could tell they were 8 is through their penis that they each ordered her to hold and insert into her vagina. She woke up and found herself in the bush at about 3am, she could not walk so she crawled on her fours until she got to her neighbor, one **O**, house; she called out and he opened the door. The said neighbor took her in to his house and called for the chief who said he cannot come in at night.

4. As such, she slept at her neighbor's home and the next day her children's took her to the DO's office then **SUBA** district hospital where she was admitted for 3 days (She left the clothes she wore on the fateful day at **MAGUNGA** police station. It was her evidence that the rapists claimed that she disturbing them over a piece of land that belonged to her.

5. On cross examination, PW1 stated that she did not know the appellant prior to the fateful day and that she lit the tin lamp to identify the people who were knocking at her door. Moreover, when she left for the hospital she could not talk, she did not tell her children who raped her. When in **MBITA** she recorded a statement but she couldn't recall what she wrote because she was sick, but she recalled mentioning the 2nd appellant's name. She further stated that there was no identification parade but there were 4 people at the police station for identification. She stated that the appellant and 2nd accused dragged him at a distance of 300 – 400 metres. She confirmed that she was a widow who had been inherited but denied sleeping with her neighbor (**O**). She confirmed that she had a land dispute with the 2nd appellant's father but denied suggestions that she was using the alleged incident to settle scores.

6. Pw2 **(MAURICE OKOTH ODONGO)** a village elder, was instructed by the assistant chief to arrest the 1ST appellant alongside the others, he proceeded to arrest them and took them to the D.O's office. He arrested the 4th appellant on his way while the rest from their homestead. In cross examination he stated the appellant assisted him to arrest the other accused person and that he heard that the accused gang raped a woman.

7. PW3 **(M A)** a minor and a daughter to PW1 narrated how the appellants came to their home and dragged PW1 out. She went to the aid of PW1 but was slapped with a panga by the 2nd appellant and ordered to go back to their house. She was traumatized by the incident and since it was raining she could not call out for help. In addition she stated that there was moonlight which enabled her to clearly see the 1st appellant and the 2nd accused. She concludes by stating that the following day she found her mother at their neighbor's place and they took her to **SINDO** hospital where she was treated.

8. On cross examination, she stated that she only saw two men the appellant and the 2nd accused: she identified the 1st appellant with the aid of light from the tin lamp as he entered the house and dragged her mother outside. She identified the 2nd appellant with the aid of the moonlight as he was outside, and she had followed her mother. She had known the appellants even before the incident. However she did not witness her mother being gang raped as she had been chased away from the scene.

9.**PW4 ROSE ATIENO ANYANGO** (assistant chief **[particulars withheld**) knew the appellants as her subjects. She recalled on the 14/11/2013 when they arrested the 1st, 2nd and 3rd accused, and escorted them to the AP camp. She was with village elder and another man. In cross examination she explained that the 2nd appellant was not arrested as he was assisting them to arrest the rest.

10. **PW5 IP STEHEN KIBET** from **MAGUNGA** police station, he testified that on 15/11/2013 he received information from **SINDO** AP camp that the complainant narrated the whole incident to him and of difference is he testified that she told him that 3 people came to her house. He further interrogated pw3 who narrated the reasons that she could not call out for help and that she recognized the 3 suspects and PW1 mentioned the names of the people who raped her.

11. The prosecution failed to call the doctor and as such the magistrate found the offence of gang rape not proved as in his view evidence of doctor is crucial to prove penetration.

12. The 1st appellant's defence was that on the date in question he was in Kisii and did not even know the complainant. The 2nd appellant said on the date in question he was in **RONGO** where he had gone to look for a job. When he returned to his home the next day, the assistant chief requested him to help in arresting some people, and was only arrested when he came to court to testify in this case. He also confirmed that he had a dispute with the complainant.

13. The trial magistrate found that PW1 and PW3 were very clear on the occurrence of incident and was not contradictory at any point on what happened in their house. He was satisfied that the source of light available was sufficient for the two witnesses to positively identify the appellants. He dismissed their alibi defence saying they did not call any witness to corroborate the evidence, while PW1's evidence was corroborated.

14. The trial court held that the evidence of pw1 was quite clear that the appellant and the 4th accused inserted their penis in her vagina but the charge of gang rape failed because no doctor was called. However their act of using their penises to touch the private part of pw1 was not contradicted thus they were guilty of committing indecent act with an adult contrary to section 11A of Sexual Offences Act.

15. The appellant was aggrieved by the judgment of the learned magistrate contested the findings to the effect that:

- The trial magistrate failed to note that the offence created under section 11A of the Sexual Offences Act excludes penetration-yet the evidence revealed several acts of penetration. Further that once the charge of rape was dismissed then there was no basis for convicting on the alternative charge of indecent act as the ingredients were not proved
- The appellants also argued that they were not identified properly as the prevailing conditions and circumstances were not favourable.
- They protested the sentenced passed saying it was too harsh for the alleged offence.

16. On the other hand the prosecutor filed a cross petition contending that the magistrate did not appreciate section 124 of the Evidence Act and once he made a finding that the complainant was truthful about her ordeal, then there was no need for medical evidence, and the appellants ought to have been convicted for gang rape. Section 124 of the Evidence Act states that:

> **" provided where in 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 alleged victim and proceed to convict the accused person if , for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth"**

17. At the hearing of the appeal **MR G.S OKOTH** submitted on behalf of the appellants that the evidence adduced at the trial was only geared at proving that the complainant had been raped not just touched. While conceding that when one is raped it would be assumed that indecent touching took place, counsel insists that the intention had to be proved.

18. Counsel also argued that as regards the cross-petition, the provisions of **section 124 of the Evidence Act** must be read as one and not pick a single proviso-this means that corroboration is a mandatory must and where there is exception the courts must be satisfied that the victim is telling the truth.

19. In opposing the appeal **MR OLUOCH** submitted that the evidence exhibited several acts of penetration. He further pointed out that the trial magistrate grossly misdirected himself concerning the necessity for medical reports in the several related offences.

On this limb **MR OLUOCH** submitted that the proviso to section 124 of the Evidence Act is clear that the court can convict an accused in a sexual offence based only on the evidence of the victim alone, if the court believes the witness is telling the truth.

He argued that his means the moment the trial magistrate concluded that the witness was telling the truth then it was erroneous to find that the charge of rape could not stand on account of lack of medical evidence. However **MR OKOTH** maintained that the trial court did not make a finding that there had been penetration; rather the trial magistrate only made an observation that PW1 had alleged several acts of penetration.

On this limb I can do no better than refer to section **3 (1) (a)** and **(b)** of the **Sexual Offences Act** which defines Rape as intentionally committing an act which causes penetration with his or her genital organs without the consent of the victim; or where such consent is forcefully obtained by threat or intimidation. The Act at **section 2** defines penetration as partial or complete insertion of one's genital organs into the genital organs of another. Can this proved by a mere statement that a witness makes? I think not, and I cannot fault the trial magistrate for the observation he made that in the absence of medical evidence to prove penetration then the closest the evidence got to was that the persons caused their body parts to

come into contact with the complainant's genitals.

20. **Motive: MR OKOTH** further contended that since there was no evidence establishing rape, the only rational explanation to infer is that the allegations were motivated by malice on the part of the complainant due to an existing land dispute which was in court. In this regard counsel referred to the fact that the 2nd appellant was actually engaged by the security agents in tracing and arresting the other offenders, which was inconsistent with the conduct of a man with a guilty mind. **MR OLUOCH** in response submitted that the motive was a two edged sword-either the complainant was trying to fix the 2nd appellant because of the existing land dispute **OR** the appellant was out to subdue the complainant by executing the most heinous and brutal attack on her. He argued that the latter was more likely.

21.The 2nd appellant's situation is a little curious-there is nothing to suggest that he had gone into hiding after the incident. When information was given to the security agents at the first instance, he was not mentioned, and infact he was used to assist in arresting the other accused persons. It seems he had been even included as a prosecution witness, and was only arrested because as PW1 confirmed in court-she refused to take part in the trial if he was not arrested and charged. If he was among her attackers, then how is it that both she and her daughter did not mention his name to the security agents at the first instance, and he only seems to have been an afterthought after the matter was already in court for trial? Could there be some truth in what he claimed that this was just a way for PW1 to get even with him over the land dispute? He further argued that the evidence on identification was buttressed by the evidence of the investigating officer who stated the complainant mentioned the appellants' names. I take note that the investigating officer simply said:

> **"She mentioned the names of the people who raped her"**

He did not specify the names and on cross examination he explained that although PW1 said many people went to her home, she was only able to identify three, and the daughter also only identified three. Could these be the three names which were given to him by the assistant chief as **BIM GEMBE, JOHN OKINY OLATA** and **ELIUD NYAWADE**? Indeed the investigating officer also confirmed that he only first arrested three people. However in an odd twist the witness then stated that PW1 had also mentioned the 2nd appellant. I think given the pattern of evidence regarding the 2nd appellant, he should have been given the benefit of doubt.

22. **Identification: MR OKOTH** submitted that the opportunity for identification was insufficient as the tin lamp went off as soon as the door was opened, thus engulfing the room in darken ss. He pointed out that it has been held several times that the type of light referred to by the witnesses is not adequate for identification. He faulted the moonlight identification saying since it was raining then that compromised the opportunity for positive identification. He also lamented that the 2nd appellant's alibi defence was not considered.

In response to this **MR OLUOCH** submitted that PW1 saw the 1st appellant with the aid of the tin lamp, and recognised him as a neighbor. She also saw and recognised the 2nd appellant as her village-mate. Further that the incident lasted from 11.30pm to 3.00am and this gave her ample opportunity to see them. He also pointed out that PW1's evidence on corroboration was supported by the evidence of PW3 who was with her all the time ad was able to see the appellants with the aid of the tin lamp and moonlight.

Both PW1 and PW3 were very clear regarding the manner in which they got to see and identify the 1st appellant. He entered into the house when the tin lamp was already burning-much as this source of light is belittled as some rudimentary source, it actually does offer light that can enable one to see another person. Its reliability only becomes difficult if for instance someone or an object is placed before it to interfere with one's view. In the present situation there was nothing to suggest that sort of thing.

The first appellant got into the house then as he was dragging PW1 out, the lamp went off. I am persuaded that by that time the witnesses had seen and identified him. However with regard to the 2nd appellant PW1 did not say how she was able to see him, and PW3 did not describe the size of the moon or

its brilliance so as to determine whether it offered ample opportunity for identification. I therefore find that the opportunity to identify the 2nd appellant was not adequately established.

23. **Sentence:** Counsel also urged this court to reduce the sentence, saying that the offence attracts a 5 year sentence and the 10 year sentence was manifestly harsh and erroneous. **Section 11A** provides that:-

> "anyone who commits an indecent act with an adult is guilty of an offence and is to liable to imprisonment for a term **not exceeding five years**; or to a fine not exceeding fifty thousand shillings; or both."

24. Obviously from the cited provision I need not say more-the law provides an upper limit on the sentence and the 10 year sentence meted was in excess of what is legally provided. The sentence was illegal.

25. The upshot is that the 1st appellant's conviction was safe and the appeal fails on that limb. However the sentence was excessive and illegal-it is set aside and substituted with a 5 year sentence which shall run from the date of conviction.

26. The conviction against the 2nd appellant was not safe and it is quashed. The sentence is set aside and he shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 17th day of August,2017 at Homa Bay

H. A. OMONDI

JUDGE