



REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL NO. 1 OF 2014

BETWEEN

ELISHA MAIYA OMULAMA.....1ST APPELLANT

CHARLES OMBOKO ANEMBA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. S. N. Mwangi dated 20th December 2013 at the Senior Principal Magistrates Court at Vihiga in Criminal Case No. 503 of 2013)

JUDGMENT

1. The appellants, **ELISHA MAIYA OMULAMA** and **CHARLES OMBOKO ANEMBA** were charged and convicted with the offence of robbery with violence and gang rape before the trial court. Count I against them was one of robbery with violence contrary to **section 295** as read with **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on the night of 20th December 2012 at [particulars withheld] in Vihiga District, they, jointly armed with dangerous weapons namely pangas robbed **J M** of cash Kshs. 10,000/-, M-pesa balance of Kshs. 2,500/-, two Nokia mobile phones, two Samsung mobile phones and a laptop all valued at Kshs. 80,750/- and immediately before such robbery, they threatened actual violence to the said **J M**.
2. n Count II, they were charged with gang rape contrary to **section 10** of the **Sexual Offences Act, 2006**. The particulars of the offence were that on the night of 20th December 2012 at [particulars withheld] in Vihiga County, they jointly and unlawfully caused their genital organs namely their penis to penetrate the vagina of **B D** without her consent.
3. The appellants were sentenced to death on Count I but the sentencing on Count II was held in abeyance. They have now appealed against conviction and sentence. In their respective petitions of appeal and written submissions in support of this appeal, the appellants contended that the evidence of identification was doubtful, uncorroborated and could not support a conviction. They pointed out that the nature of light at the time of the incident was insufficient to identify the assailants. They further stated that there was no evidence that in the first report the complainants gave a description of the said assailants. The appellants also discredited the identification parade on the ground that it was carried out in contravention of the *Force Standing Orders*. The 1st appellant also submitted that the Safaricom statement which purported to connect him to the offence did not meet the standard of proof required.
4. The respondent opposed the appeal on the ground that the appellants were properly identified as the assailants as there was sufficient light in the room where the incident took place coupled with the fact that

the assailants and witnesses interacted with the complainants for a sufficient amount of time. Counsel for the respondent, Mr Ng'etich further submitted that all the conditions obtaining were favourable for positive identification. He also submitted that the identification parade was carried out in accordance with the **Force Standing Orders**.

5. As this is the first appeal, I am enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether I should uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify (see **Okeno v Republic [1972] EA 32**).

6. On 20th December 2012 at about 3.00am, J M (PW 1) was asleep in her house when she suddenly woke up and was shocked to see two people in her bedroom armed with pangas and torches. She testified that the torches were bright enough and when they came in, they also switched on the bedroom light so she was able to see them. They took her mobile phone which was next to the bed and was forced to give them her M-pesa Personal Identification Number (PIN). One of the assailants, whom she identified as DW 1, shouted that she had a balance of Kshs. 2,500/- and was going to transfer the money leaving her with Kshs. 100/-. As they ransacked her bedroom, they started demanding money. They found her handbag and took her money. As the DW 1 continued to ransack the house, DW 2 went to the bedroom of PW 1's daughter, B D (PW 2).

7. PW 2 recalled that as she was sleeping in her bedroom when she was awoken by someone hitting the door. Suddenly someone shining a torch on her face, ordered her to get up and go to her mother's bedroom. She went there and found another assailant with PW 1. She was ordered to get into her mother's bed and cover herself. She could hear the assailants demanding money from PW 1 and asking for her M-pesa PIN number. They also demanded the laptop which PW 1 told them was in the next bedroom. PW 2 recalled that as the assailants were ransacking the bedroom, she was able to see them as they were using bright torches. One of the assailants asked her for money and she told him she only had Kshs. 25/- in her bedroom. He took her to the bedroom and gave him her mobile phone. He also ordered her to remove her clothes but she told him that they should go back to the PW 1's room so that she could give him the money.

8. When PW 2 was taken back to PW 1's bedroom, DW 1 cut her pant and skirt, forcibly parted her legs and had sexual intercourse with her. She testified that DW 1 cut her thigh with a panga when trying to force himself on her. She recalled that DW 1 had a scar on the left side of the head which she saw with the torch. Thereafter, DW 2 also forced his penis into her vagina and proceeded to have sexual intercourse. She testified that she could see him clearly.

9. PW 1 recalled that when PW 2 was brought back to her bedroom, DW 1 switched on the light for about one minute then switched it off. She testified that she witnessed the assailants rape PW 2 and even continued to ransack the house thereafter. She told the court that the assailants were there for about an hour and she was able to identify both assailants. She told the court that DW 1 had a scar on his forehead while DW 2 had a scar on one of his hands. Before the assailants left, they covered PW 1 and PW 2 with a blanket. After a while and sensing that the assailants had left they got up, found the back door open and went outside. PW 1 reported the incident to the mother in law. At daybreak they went to report the incident at Vihiga Police Station. PW 2 was directed to Vihiga District Hospital where she was treated, examined and counselled.

10. Sammy Chelule (PW 3), a Clinical Officer at Vihiga District Hospital testified that he saw PW 1 on the morning of 21st December 2012 after she had been sent there by the Commanding Officer of Vihiga Police Station. She was complaining of pain after having been hit on the lower back side with the flat side of the panga. He examined her and noted that she had pain on the scapular region with visible bruises which were tender to touch. The lower lumbar region was painful with visible reddening, bruises and slight swelling. He assessed the nature of the injuries as harm and gave her medication. He opined that the probable weapon was a blunt object. He prepared the P3 form and signed it.

11. He also examined PW 2 who informed him that she had been raped by two men. Her skirt and panty had been cut into pieces. She had been hit by the flat side of a panga and had sustained bruises on the left

thigh. She had a visible bruise which had reddened on the thigh but there was no visible cut wound. When he examined her private parts, there was fresh inflammation on both labia which were swollen although there were no visible tears or lacerations. The cervix was intact and when urinalysis was done, no spermatozoa were seen and nothing abnormal detected in the urine. He also filled her P3 form and the PRC form.

12. Corporal Reuben Meli (PW 6) from Vihiga Police Station recalled that on 20th December 2012 at around 10.00am, he was instructed to investigate the complaint by PW 1 and PW 2 that they had been robbed and PW 2 raped. Since they were still at the station, he interrogated them and took their statements. He issued them with P3 forms and referred them to Vihiga District Hospital. PW 6 recalled that PW 1 and PW 2 told him that they could identify the assailants as one assailant had a scar on the face and the other had a scar on the hand.

13. Since PW 1 told him that she had been forced to transfer some money to one of the assailants, he investigated the transaction with Safaricom and discovered that on 20th December 2012, Kshs. 2,400/- was transferred from PW 1's phone to DW 1. Inspector Molo Shamala (PW 4) from Safaricom testified that he examined phone records of transaction between PW 1's phone number and that of the appellant and found that on 20th December 2012 at around 3.45am, PW 1's phone sent Kshs. 2,400/- to the phone registered in the name of DW 1.

14. The appellants were arrested by Senior Sergeant Bosco Kisaa (PW 4). He told the court that he was investigating other robberies in the area when he arrested DW 2 on 3rd June 2013 and DW 1 on 4th June 2013. He took both of them to Vihiga Police Station where they were subjected to an identification parade conducted by Chief Inspector Judith Nyongesa (PW 5). Both appellants were identified by PW 1 and PW 2 and subsequently charged.

15. In his unsworn statement, DW 1 denied the charges against him. He recalled that on 5th June 2012, he had gone to visit his in-law and had left his motorbike with someone he later heard was arrested. As he was coming to Vihiga, he was arrested by a police officer and put inside a police vehicle where he found DW 1 and told not to talk to him. At the police station, he found other suspects who had been found in possession of stolen items including mobile phones. He told the court that his national identity card got lost and it was possible that someone else registered the line under his name.

16. DW 2 gave sworn testimony and denied the offences. He told the court that on 4th June 2013, he was at Luanda market when a lady asked him if he knew DW 1. He told her that he knew DW 1 as a motorbike rider and as an in-law since he was married to his sister. He was arrested at Luanda and taken to Vihiga Police Station. After his arrest, he took police officers to DW 1's house but they did not find him there.

17. Before I consider the substance of the appeal, it is worth noting that the prosecution must prove the elements of the offence of robbery. The Court of Appeal in the case of **Ganzi & 2 Others v Republic [2005] 1 KLR 52** elaborated them as follows:-

The offence of robbery with violence under section 296(2) of the Penal Code is committed in any of the following circumstances namely:-

(a) The offender is armed with any dangerous or offensive weapon or instrument; or

(b) The offender is in company with one or more other person or persons; or

(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.

18. The word "or" contained in **section 296(2)** above must be read disjunctively so that the prosecution need only prove that the stealing, which is the central element of robbery, took place in either of the

circumstances that are set out in the subsection (see *Odhiambo and Another v Republic* [2005]2 KLR 176 and *Johana Ndung'u v Republic Criminal Appeal No. 116 of 1995(UR)*). In the case of *Dima Denge Dima & Others v Republic CA Criminal Appeal No. 300 (UR)* the Court of Appeal held that:

The elements of the offence under section 296(2) are three in number and they are to be read, not conjunctively, but disjunctively. One element is enough to found a conviction.

19. I find and hold that the offence of robbery with violence was proved through the clear and credible testimony of PW 1 and PW 2. On the material night, two assailants entered PW 1's home armed with pangas with which they assaulted PW 1 and PW 2. The fact of assault was corroborated by the medical evidence of PW 3. The assailants ransacked the house and stole mobile phones and other items particularised in the charge sheet.

20. Gang rape is provided for under **section 10** of the **Sexual Offences Act** which states;

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

21. The essential element of gang rape is rape committed in association with two or more persons. The ingredients of rape which the prosecution must prove are set out in **section 3(1)** of the **Sexual Offences Act**, which provides that;

A person commits the offence termed rape if –

(a) He or she intentionally or unlawfully commits an act which causes penetration with his or genital organs.

(b) The other person does not consent to the penetration; or

(c) The consent is obtained by force or by means of threats or intimidation of any kind.

22. The evidence to support this charge was also straight forward. PW 1 gave clear and credible testimony that each assailant penetrated her vagina with his penis. The act of penetration was through the use of force and under threat of violence as each of the men were armed with pangas and in circumstances which she feared for her life. PW 1's testimony was corroborated by that of PW 2 who witnessed the whole ordeal. The medical evidence of PW 3 was clear that there was penetration. Finally, PW 1 testified that she was 18 years old hence an adult. Since the act was committed by both assailants acting together to create an environment of fear and violence, PW 2 could not have given her consent. I therefore find and hold that the prosecution proved the offence of gang rape.

23. The central issue before the trial court and before this court is whether the appellants were the assailants. This question revolves around identification of persons, particularly strangers, in difficult circumstances. On this issue the trial magistrate directed herself on the law by citing several decisions; *Anjononi v Republic* [1980] KLR 54, *Regina v Turnbull* [1976] 3 ALL ER 549, *Maitanyi v Republic* [1986] 2 KLR 75, *Karanja & Another v Republic* [2004]2 KLR 140 and *Wanjohi & Others v Republic* [1989] KLR 415. These decisions hold that evidence of identification must be weighed with greatest care and establish the circumstances of identification and if the incident took place at night as in this case, the court must inquire into the nature of lighting, its brightness or intensity, whether the witnesses view was impeded, the size of the room, the distance of from the light and the time spent with the assailant. This is not an exhaustive list and the court must examine all circumstances and weigh the evidence in order to determine whether the identification is free from error. In addition, the court ought to inquire whether the witness was able to give some description or identification of the assailant to the police or to other persons in order to aid in identification of the assailant. This description and when it was made enables

the court to weigh all the evidence in order to come to the conclusion as to whether the identification is free from error.

24. With these general principles in mind, the testimony of PW 1 is that the assailants arrived in the house with bright torches with which she was able to see. She also recalled that at some point DW 1 switched the light on and off and she was able to see them. Likewise, PW 2 testified that she was able to see the assailants because they had bright torches. Both DW 1 and DW 2 used these torches to ransack the house. They talked with both PW 1 and PW 2 and in the small confined space of a bedroom with both witnesses and given the time the assailants were in the house; I am satisfied that the conditions of identification were free from the possibility of error. Given the very close interaction and contact and also the time spent with the assailants, PW 1 and PW 2 were able to identify specific features of the assailants. Both described DW 1 as having a scar on the face and DW 2 as having a scar on the hand.

25. Since the witnesses were able to describe their assailants, who were strangers, the police subjected the appellants to an identification parade after they were arrested. PW 5 conducted two separate parades for each appellant. The identification parades were carried out in compliance with the ***Force Standing Orders***. Both PW 1 and PW 2 identified the appellants by the features they had earlier described. In cross-examination, PW 5 told the court that PW 2 requested DW 2 to remove his clothes and she identified him by the scars he had on his hands and chest.

26. The sum total of the evidence of PW 1 and PW 2 is that they were able to identify the appellants individually on the material night as their assailants. As I have outlined above, the circumstances obtaining were favourable to positive identification and they were able to recall the appellants' specific features which they not only described to the police but by which they identified the appellants at the identification parade.

27. Since the trial magistrate did not consider the evidence of the M-pesa transaction connecting DW 1 to the incident, it is not necessary to deal with that line of evidence in this appeal. Suffice to say that the evidence of identification was clear and pointed to the appellants without any need for further corroboration.

28. The trial magistrate convicted the appellants on both counts but only sentenced them on the first count. Even though the sentence for the second count was held in abeyance due to the death sentence imposed on the first count, the trial magistrate had a duty to impose a sentence on the first count which would then be held in abeyance.

29. The minimum sentence prescribed under **section 10** of the ***Sexual Offences Act***, is 15 years' imprisonment which may be enhanced to life imprisonment. The appellants' act was deliberate and accompanied by violence. I therefore sentence each appellant to a term of 20 years' imprisonment on Count II. The sentence shall now be held in abeyance in view of the death sentence imposed on Count I.

30. I affirm the conviction and sentence save for the variation I have made on the sentence for Count II, the appeal is dismissed.

SIGNED AT KISUMU

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KAKAMEGA this 13th day of October, 2017.

R. N. SITATI

JUDGE

Appellants in person.

Mr Ng'etich, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.