REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCCRA NOS. 204 & 205 OF 2011

BENARD IGUNZA MWENESI ….....1ST APPELLANT

DAVID LIBABU KEVOYE ….....…...2ND APPEALLANT

VERSUS

REPUBLIC ….....…….....……RESPONDENT

(From the original conviction and sentence of L. O. Onyina SRM, at Vihiga Court, Criminal Case No. 863 of 2009)

JUDGEMENT

The appellants herein Benard Igunza Mwenesi and David Libabu Kevoye filed their respective appeals nos. 204/2011 and 205/2011 which were consolidated and heard as one.

The appellants were charged before the SRM's Court Vihiga with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Particulars of the offence are that on the night of 25th/26th June 2009 at [particulars withheld] in Vihiga District within Western Province, jointly with others not before court while armed with offensive weapons namely; pangas, rungus and sharp torches robbed off J I of her mobile phone make Motorolla C118, one Sony radio cassette, one Sonitec radio, one TV set make great wall, and one DVD make Royal Tech, 15 CDs, one car battery, five hens and cash money Ksh 3,000/= all valued at Kshs 22,450/= and immediately before or immediately after the time of such robbery, used actual violence on the said J I.

On count 2, the appellants are charged with gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. Particulars of the offence are that on the night of 25th and 26th June 2009 at [particulars withheld] in Vihiga District within Western Province, willfully and unlawfully gang raped J I by causing penetration of their genital organs into the genital organ of the said J I.

The prosecution called 5 witnesses. The evidence was that on the night of 25th/26th June 2009, the complainant was asleep in her house when four robbers struck. She was awoken from her sleep by one who touched her shoulder. They proceeded to rob her of items in charge sheet and also gang raped her. She was able to identify two of them as the appellants herein had torches and shone the torches on one another. She told court that the two were previously known to her as they come from the same area and

are her customers in her shop. She reported the incident to the police and gave the description and names of the robbers she identified who were later arrested. She was also treated at the hospital and issued with a P3 form which was filled and was produced in court by PW4. PW1 told court that she had no grudge with the 2 appellants and knew them by name as they are from her home area 500 m away. She said that the torches were bright enough and were beamed on the appellant by their colleagues and she saw them.

PW2 the village elder said he visited complainant on the morning after the attack and she informed him that she had been robbed by Benard Igunza, David Libabu and another who took off. The complainant gave him the names and he informed the Assistant Chief and they made plans to arrest the appellants. He was present when appellants were arrested. PW3 is the one who arrested the appellants after complainant reported the incident. She mentioned the two appellants by names and they arranged and arrested them.

The last witness was the investigating officer. He narrated to court how he investigated this case and charged appellants accordingly. Put on their defence, the appellants denied the charges. 1st appellant said he was arrested on 18.6.2009 as he purportedly for damaging a bicycle. On the issue of rape and robbery, he says he didn't do it. 2nd appellant says the offence was planted on him by the village elder as he refused to go and work for the village elder's relatives.

The trial magistrate heard this case and based on the same, he found that the evidence pointed towards the offence of robbery. He indicated that there was evidence of recognition as complainant had even given details of people who raped her and this is part of her P3 form produced by PW4. The learned magistrate found appellants guilty and convicted them and sentenced them to death.

The appellants have now appealed before this court on the grounds that:-

1. **There was no evidence of proper recognition.**
2. **That the condition prevailing at time of robbery were not conducive for identification.**
3. **Essential witness was missing.**
4. **There were contradiction in prosecution's case.**

On issue of identification, the appellants have argued that they were not recognized as this was never made in her initial report. This fact is not true because the complainant categorically stated that she was robbed and raped by people known to her. Even as she visited the hospital in the morning after the ordeal, she told the medical officer who attended to her that she was raped by people she knew and she stated their names which were recorded in the P3 form.

The appellants were previously known to the complainant as village mates and they shopped at her shop. There was no previous known disagreement between them to warrant her plant the offence on them. The 2nd appellant stated that the village elder is the one who had a problem with him but there is no indication that complainant had a problem with appellants. The issue of the identification being improper is not therefore true and we make a finding that there was proper identification or recognition.

On issue of light at the scene, the complainant has explained that the assailants had torches which they beamed on one another. The intensity of the light was ample and conducive for her to see the assailants who stayed with her for about one hour as they stole and raped her. We therefore find that the prevailing conditions at alleged scene of crime were enough and there was no mistaken identity.

On crucial evidence missing, there is no law that all witnesses must give evidence. It was the prosecution's case and they chose to call the witnesses to strengthen their case which they succeeded in doing.

On issue of contradictions, we do not find any material contradictions in prosecution's evidence. The evidence is corroborated and we find that the trial magistrate directed himself to the evidence and reached a proper conclusion. The appeal lacks merit and we dismiss it accordingly. The conviction and sentence is therefore confirmed.

DATED THIS 11TH DAY OF DECEMBER 2013

SAID J. CHITEMBWE **HELLEN S. WASILWA**

JUDGE **JUDGE**