REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.14 OF 2019

(From original conviction and sentence in criminal case No.829 of 2014 of the Principal Magistrate's court at Mbita)

ERIC ONYANGO OYUNGO.....1ST APPELLANT

NICHOLAS ODIWUOR ARWA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

[1] The two appellants, **Eric Onyango Oyungo** (appellant one) and **Nicholas Odiwuor Arwa** (appellant two) appeared before the Senior Resident Magistrate at Mbita charged with gang rape, contrary to Section 10 of the sexual offences act and in the alternative with an indecent act with an adult, contrary to **Section 11 (A)** of the **Sexual Offences Act**.

[2] The particulars of the charges were that on the 13th November 2014 in Mbita within Homa Bay County, the appellants intentionally and unlawfully separately caused their male sexual organs to penetrate the female sexual organ of LAN without her consent or they intentionally and unlawfully committed an indecent act with her by touching her sexual organ and breasts against her will.

[3] The charges as framed consisted of four counts i.e. each main count for each accused and each alternative count for each accused. The appellants denied all the counts and after a full trial were each convicted on the main count and sentenced to twenty (20) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellants preferred this appeal on the basis of their joint grounds of appeal contained in the petition of appeal filed herein on 23rd May 2019.

[4] In essence, the appellants contend that their conviction by the trial court was against the weight of the evidence as the prosecution evidence of identification was insufficient and uncorroborated and that essential witnesses were not availed to testify. They also complain that their right to a fair trial was violated and that their defence was disregarded by the trial court despite its cogency.

[5] At the hearing of the appeal the appellants appeared in person through video link due to the Covid 19 pandemic and relied on their joint written submissions in support of their case.

Mr. A.O. Oluoch, Learned senior Assistant Deputy Public Prosecutor (S/ADPP) appeared for the state/respondent and relied on his written submissions in opposing the appeal.

[6] Having considered the appeal on the basis of the supporting grounds and those in opposition thereto and on the basis of the rival submissions by the parties, and after re-visiting the evidence in its totality as required of a first appellate court, this court is satisfied that the ingredients of the main counts respecting the appellants were fully established and proved by the evidence led by the complainant **LA (PW1)** and the Clinical officer, **David Kihara Matheri (PW4)**, who produced the necessary treatment notes (Exhibit 1) and P3 form (P. exhibit 2) showing that the complainant was indeed sexually assaulted.

[7] The fact that the complainant was confronted by two men who then forcefully had carnal knowledge of her was clear indication that the act was not consensual and this amounted to a criminal act of rape. And since the act was perpetrated consequently by two men it amounted to gang rape in terms of **section 10** of the **Sexual Offences Act**.

[8] The provision states that:-

"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 fifteen years but which may be enhanced to imprisonment for life".

[9] The issue which fell for determination by the trial court was essentially the identity of the two men who gang raped the complainant as there was no denial whatsoever that the offence was indeed committed.

Both appellants denied responsibility for the offence and indicated that they were separately arrested and charged without good cause or on the basis of mere suspicion.

[10] The prosecution evidence of identification pointed an accusing finger at the two appellants and was led by the complainant (**PW1**) and two fishermen i.e. **Duncan Odondi** (**PW2**) and **Enock Achodhe** (**PW3**).

The arresting and investigations officer, **Cpl. Fredrick** (**PW5**) indicated that the first accused (**Nicholas**) was arrested at the scene immediately after or during the act, but this allegation was discredited by his own evidence in cross examination when he said that they looked for the first accused overnight after he had allegedly committed the offence.

[11] If the officer (PW5) and colleagues looked for the first accused the whole night after his alleged involvement in the offence, then there was no way that he could have been caught at the scene while in the act or immediately after committing it. The officer (PW5) could not therefore say or purport to have identified the first accused and indeed the second accused as the culprits. His evidence was restricted to arresting the appellants as suspects for the offence and arraigning them in court.

[12] As for the complaint given that the offence occurred in the hours of darkness while she was heading home from a local bar at about 1.00 a.m., it was most likely than not that she was unable to see and physically or visually identify her two tormentors.

She implied as much in her evidence meaning that her alleged identification of the appellants was dock identification prompted by the fact that they were the persons who were suspected, arrested and charged with the offence.

[13] Such dock identification is most unreliable without credible corroboration by way of other direct or indirect evidence.

The evidence by the two fishermen (**PW2** and **PW3**) could not offer such corroboration as it was also unreliable since none of them could explain the exact circumstances under which they saw and identified the appellants as the culprits in the hours of darkness which in most cases provide unfavourable conditions for identification of an offender.

[14] It was not enough that Duncan (**PW2**) had a torch. He did not say how (if at all) the torch assisted him to identify the offenders or any one of them.

Similarly, it was not enough that Enock (PW3) also had a torch.

The mere possession of a torch during the night without stating how it assisted in the identification of an offender counts for nothing in establishing or proving positive identification of a suspect.

[15] Therefore, the entire prosecution evidence of identification against the appellant was unreliable and most suspect such that the finding by the trial court that they were positively identified as those who offended the complainant was erroneous as it was not supported by cogent and credible evidence in that regard.

It is this court's finding that the conviction of the two appellants by the trial court was thus improper and unsafe and is hereby quashed.

[16] Consequently, the appellants' grounds of appeal are hereby sustained and the sentence of twenty (20) years imprisonment imposed against them by the trial court is set aside. They shall forthwith be set at liberty unless otherwise lawfully detained.

Ordered accordingly.

J.R. KARANJAH

JUDGE

[Delivered and signed this 1st day of October, 2020].