

Having considered the appeal in the light of the supporting grounds and the submissions by both sides, the duty of this court is to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses.

Briefly, the prosecution case was that the complainant, **A L. (PW1)** was at her home on the material night when two people went there, tied her up and eventually raped her before leaving. The two people were known to the complainant. They did not steal anything from her. They just had sex with her without her consent and left. They had guns and covered her mouth during the process. Being disabled, she attempted to call for help but nobody came to her help due to fear. People went to her help and assisted in following the footprints of the two offenders whom she saw during the ordeal and identified them as the two appellants.

The complainant contended that the presence of moonlight enabled her identify the two appellants one of whom was her cousin (i.e. the second appellant). She indicated that the footprints were traced upto a place called Nauyatira and into the house of the two appellants who were then apprehended and handed over to the police.

S E (PW2), was on the material night at about 3.00 a.m. awakened by a neighbour and alerted of screams emanating from the complainants homestead. He approached the homestead but did not move closer due to fear. He went to the home of one L and woke him up. The two proceeded to the complainant's homestead and only flashed their torches without moving closer. They were afraid of moving closer to the homestead. They returned there on the following morning at 7.30 a.m. accompanied by others. They noticed footprints on the ground and decided to track the offenders. The footprints led them to a place called Nakwakilela where E (PW2) abandoned the tracking team and went to attend to his work at a local market. He noted that the prints were those of shoes known as Kinyira or Akala. Later, he heard some noises at a livestock sale yard and on proceeding there found that the two appellants had been arrested wearing shoes whose prints resembled those traced from the complainant's homestead.

Wilson Kiprono Mutai (PW3), a clinical officer at Lokichar health centre examined the complainant and completed the necessary P3 form (P. Ex. 1) showing that the complainant was indeed raped.

P.C. Samuel Kabuchown Gathongo (PW4), received the necessary report and carried out investigations prior to preferring the present charge against the appellants who were allegedly identified as the culprits by the complainant and who had been rescued from lynching by a mob of people and handed over to the police.

P.C.Gathogo found that the complainant was a somehow disabled person aged about eighty (80) years who confirmed that she was attacked and raped inside her house at night.

In his defence, the first appellant (E) stated that he left home for Lokichar to fetch drugs for his goats. He arrived at Nalemsikou and entered a shop where he purchased drugs. Thereafter, a group of five people approached and greeted him. They asked him to remove his shoes and he did so. They examined the shoes and said that its prints looked like the prints they had seen. One of them disagreed but they decided to take him to the police while slapping him and taking away his items. He was taken to Lokichar police station where he was locked in the police cell and remained there upto the time he was arraigned in court. He denied the charge and indicated that he was charged alongside a person who was a stranger to him.

The second appellant (E) stated that he left home for Lokichar to look for sacks. He passed a village called Kamarese where he met a group of four (4) people who stopped and asked where he was going. They ordered him to remove his shoes and he did so. They examined the shoes and said that they (shoes) were not the shoes they were looking for. However, they apprehended and beat him up before taking him to Lokichar Police station where he was locked in the cells with a stranger. The two were later arraigned in court together. He (appellant two) denied the offence.

From all the foregoing evidence, it is apparent to this court that the fact that the complainant was attacked

and raped by two persons was not disputed. What was in dispute and fell for determination by the trial court was whether the two appellants were positively identified as the persons who committed the offence.

The learned trial magistrate in his judgment found that the two appellants were seen and identified by recognition by the complainant and that this was made possible by the presence of moonlight. However, in the opinion of this court, there was insufficient and perhaps incredible evidence to support the alleged identification of the two appellants by the complainant. It did not matter that the two appellants were previously known to the complainant. Evidence of identification especially by a single witness in the hours of darkness must always be treated with the greatest caution even in cases of identification by recognition. Herein, the learned trial magistrate failed to treat the complainant's sole evidence of identification with extra caution because if that had been done, then it would not have escaped the court's mind that the complainant was raped inside her house where there was no source of light and that the moonlight she alluded to was outside the house where the offence did not occur and where she was not taken by her assailants before, during or after the offence. Further, there was no indication that the complainant ever ventured outside the house at the time of the offence and prior to the escape of the assailants from the scene.

Even if it is accepted that there was moonlight penetrating into the house, there was no indication as to the intensity of the same such that it could be said that it provided favourable conditions for the positive identification of the assailants.

In sum, the alleged identification of the two appellants by the complainant was laden with uncertainty.

Contradiction and suspicion such that it could not be said to have been free from error or mistaken identity.

In the circumstances, this court must find and hereby finds that the two appellants were not positively identified as the persons who attacked and raped the complainant. Their arrest and arraignment in court was not justified as there was no evidence to show that the shoes that they were each wearing at the time of that arrest had any linkage with the shoes prints tracked from the complainant's homestead.

Besides, there was uncertainty with regard to how they were arrested. The complainant indicated that they were tracked into their own house while there was evidence from a witness (PW2) that they were found at a livestock sale yard.

Both appellants indicated that they were arrested at different places by groups of people and that they were strangers to each other. This fact was not disapproved by the prosecution in whatever manner.

All in all, the appellants' conviction by the trial court was neither safe nor proper and is hereby quashed with the result that the sentence imposed upon the two appellants is set aside. The two shall forthwith be released unless otherwise lawfully held.

Ordered accordingly.

[Delivered and signed this 13th day of May, 2014.]

J.R. KARANJA.

JUDGE.