IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 158 OF 2014

BETWEEN

ERIC ODUOR ODHIAMBO.....1ST APPELLANT

FREDRICK OCHIENG OMOLO.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kisumu (Ali Aroni & Chemitei, JJ.) dated 14th February, 2012

in

H.C.CR.A. NO. 41 OF 2011)

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JUDGMENT OF THE COURT

[1] The appeal herein arises from the judgment of the High Court (**Ali Aroni & Chemitei, JJ**) in which the High Court dismissed an appeal lodged by the appellants against their conviction and sentence by the Senior Resident Magistrate's Court at Ukwala, for charges of robbery with violence, and rape.

[2] The two appellants were jointly charged before the Senior Resident Magistrate's Court (SRM) Ukwala with two counts, the first count being that on the nights of 5th and 6th September, 2010 at around 2.00 a.m in Ugenya district within Nyanza Province, jointly with others not before Court while armed with pangas and rungus, they robbed **RRO** (R) of cash Kshs. 16,000/- a radio, and assorted clothes all valued at Kshs. 19,000/- and used actual violence on the said R.

[3] In the second count, the appellants were charged with gang rape contrary to **Section 10** of the **Sexual Offences Act** No. 3 of 2006. It was alleged that on the nights of 5th and 6th September, 2010 at around 2.00 a.m. in Ugenya district within Nyanza Province, the two appellants while in the company of each other, each intentionally and unlawfully penetrated his penis one, after the other, into the vagina of **PA** (P) without her consent.

[4] During the trial, the 1st and 2nd appellants were the 1st and 2nd accused respectively. Rosline who was the complainant in the robbery charge testified that on the material night, at around 3.00 a.m. she was asleep when she heard the dog barking. Her door was then suddenly broken and three men carrying torches entered the house. The men tied her eyes and hands, then pushed her under the bed, and commanded her to keep silent threatening to cut her with a *panga* if she made any noise. The men then robbed her of cash, a radio and assorted household goods, after which they proceeded to accost her children (including P) who were asleep in an outside kitchen. R was unable to identify any of her assailants at the trial.

[5] In her evidence, **PA** (P) who was the complainant in the rape charge, testified that she was asleep in the kitchen with her siblings, when she was woken up by a dog barking and the door to the kitchen being kicked. Someone ordered them to open the door and P's younger brother opened the door upon which the 1st appellant entered the room while holding a torch. She recognized the 1st appellant as she used to see him within the area. She testified that the 1st appellant ordered her to lie on her stomach, tied her hands with a rope, slapped her thighs with a *panga* and proceeded to rape her. Thereafter the 2nd appellant also came into the kitchen and raped her. She said she saw the 2nd appellant as the light from the torch was bright enough for her to see him. A third person also raped P after which they stole Kshs. 300/-

from her and Kshs. 300/- from her brother and left

[6] Howard Okeyo, a clinical officer, testified that he examined P the next day after the rape, and observed that she had a painful lower abdominal wall, a painful vaginal wall and pain in her labia and majora. He concluded that there was forceful entry of the vagina by a blunt object and prepared and produced a P3 form.

[7] Another important witness was PAO who is a daughter in law to R. She was also asleep in her house in the same homestead, when she was accosted and forced to open the door to her house, and a man who had a torch and a panga, entered the house. The man ordered her to lie down, and when she resisted the man took her to the kitchen where she found the children and noted that their hands were tied. She noted that one of the men was in the process of raping p. She testified that she could not identify any of the men as the torchlight was directed to her face.

[8] The robbery and rape were reported to **PC Joseph Oyugi** (PC Oyugi) of Sigomere Police Post, who visited the homestead. He testified that he was at the police station, on the 6th September, 2010, when p identified the two appellants as having participated in raping her. PC Oyugi caused the appellants who were already under arrest to be charged with the offences. PC Oyugi confirmed that none of the stolen items were recovered.

[9] Each appellant gave an unsworn statement, in which each denied having committed the robbery or rape. Each appellant testified that on the material day, they were both asleep in their respective houses when policemen went to both houses, searched the houses and took them to Sigomere Police Post where they were charged with the two offences.

[10] Following their conviction both appellants were sentenced to death for the offence of robbery with violence and to life imprisonment for the offence of rape, but the trial court ordered the sentence in regard to the offence of rape to be "suspended pending the execution of the death sentence."

[11] Both appellants appealed to the High Court against the judgment of the trial court, and the appeals were consolidated. The main grounds raised in the appeal were: that the charge sheet was defective, that the appellants' identification was not satisfactory as it was based on the evidence of a single witness, in circumstances that were not favourable for a positive identification; and that the evidence adduced by the prosecution was not sufficient to sustain a conviction.

[12] Upon hearing the appeal, the High Court dismissed both the appellants' appeal against conviction holding that the charges against the appellants were proper; that the appellants were properly identified by P who knew them before; that there was therefore no need for an identification parade; and that the evidence of P that she was raped was corroborated by the evidence of Howard who found physical evidence on P, consistent with forceful entry of her vagina by a blunt object. With regard to the sentence, the learned Judges of the High Court allowed the appeal against sentence, set aside the sentence imposed upon the appellants on both counts, and substituted thereto a sentence of 15 years imprisonment on each appellant for the robbery charge, and a sentence of 15 years imprisonment on each appellant for the rape charge, with both sentences ordered to run concurrently.

[13] The appellants were dissatisfied with that judgment and have now lodged this second appeal. The 1st appellant died before the appeal was heard and the appeal against him therefore abated under **Rule 69 (1) (a)** of the **Court of Appeal Rules, 2010**.

[14] In a supplementary memorandum of appeal filed through an advocate Kouko Cecile Wilson on 6th September, 2018 the appellant raised 11 grounds of appeal that can be clustered into three groups. Namely, the adequacy of the identification of the appellants; proof of the charges against the appellants; and the illegality of the death sentence imposed in regard to the offence of robbery with violence.

[15] At the hearing, Mr. Amuga who held brief for Mr. Kouko highlighted the submissions. He faulted the identification of the appellants maintaining that the 2nd appellant was only identified by P after she saw him at the police station and not through a properly conducted identification parade; and that the identification was only by one witness hence not proper. Mr. Amuga further urged that the prosecution failed to prove all the elements of the offence as none of the witnesses placed the 2nd appellant at the scene of crime nor did P link him to the two crimes he was charged with. He therefore urged the Court to allow the appeal.

[16] Mr. Ketoo who appeared for the respondent, opposed the appeal. Mr. Ketoo made oral submissions, in which he argued that the offences of gang rape and robbery with violence were proved as P testified that she was able to recognize the 2nd appellant from the light emanating from a torch, and that the 2nd appellant and his companions were armed with dangerous weapons hence guilty of the offence of robbery with violence. On the offence of gang rape, counsel submitted that the evidence of Phylis supported that of Pthat she was raped by more than one person, and since the act was non-consensual, the offence was proved. Mr. Ketoo therefore urged the Court to dismiss the appeal.

[17] This being a second appeal, the mandate of this Court is to address matters of law only. As was stated in ***Karingo -vs- R*** **(1982) KLR 213 at p. 219:**

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari s/o Karanja -vs- R (1956) 17 EACA 146)"***

[18] The issues of law that commends itself to us in this appeal are whether the appellant was positively identified; whether there was sufficient evidence to support the finding that the case against the appellant was proved to the required standard and whether the sentence imposed on the appellant was unconstitutional.

[19] In regard to the issue of identification, the conviction of the 2nd appellant on both the charge of robbery with violence and that of gang rape was anchored on the evidence of one witness, that is P. This Court has on various occasions, reminded itself of the parameters to consider while convicting an accused based on a single identifying witness.

[20] In ***Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166,*** it was held that,

> ***"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known the conditions favouring a correct identification were difficult."***

[21] Similarly in **Wamunga Vs Republic (1989) KLR 426** this Court stated as follows:

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

[22] P on whose evidence the trial court relied testified in part as follows:

> ***"Accused 1 entered and had a torch. He entered and I was able to recognize him. I used to see him within the centre. They then told us to lie on the stomach and nobody should scream…He then removed my clothes and the pant. He then raped me by force. Then the 2nd one came and raped me again. When he came, I could see accused 2 enter because the torch was bright."*** *(emphasis provided)*

[23] On cross examination by the 2nd appellant, P remained adamant that 2nd appellant was the perpetrator of the crimes and stated thus:

> ***"When you entered, I was not tied on the eyes. Accused 1 had the torch and I was able to use it to see you clearly."***

[24] It is clear that the conviction of the 2nd appellant was based on visual identification by P. P picked out the 2nd appellant at the police station from a group of men who were being escorted to the toilet. The men had been arrested and held at the police station on suspicion of committing burglary and stealing. P claimed to have known the 1st appellant before as she used to see him at the center. The issue is whether in the absence of an identification parade, the identification of the 2nd appellant by P was positive and safe to rely upon.

[25] In this regard the High Court rendered itself as follows:

> ***"We therefore believe strongly that the appellants were people well known to the complainants. It has been argued by the appellants that no identification parade was conducted. We hold that since the appellants were people well known by the complainants there was no need to carry out the identification parade."***

[26] We find that this was a misdirection as the evidence adduced before the trial court did not support this conclusion. P did not testify that both appellants were known to her before. Her evidence in this regard was clearly in reference to the 1st appellant who entered the kitchen first and in respect of whom she stated:

> ***"He entered and I was able to recognize him. I used to see him within the centre"***

[27] While P stated that she saw the 2nd appellant using the torch the 1st appellant had, she did not at any time in her evidence in chief or cross examination state that the 2nd appellant was known to her before the rape ordeal, or that she recognized him. Her evidence of recognition was in regard to the 1st appellant. Moreover, an examination of the first page of the P3 form confirms that P only knew one of her assailants. This is clear from the report made by P as recorded on the P3 form that she was raped by ***"one known and two unknown persons."***

[28] The evidence of R was consistent with that of P to the extent that P identified the 1st and 2nd appellant whom she saw at the police station as her assailants. R's reaction to the identification was shock because she knew the two persons who were identified as she used to see them in the locality. R did not confirm that P had informed her of the identity of her assailants before she identified them at the police station. Indeed, R would not have been shocked by the identification if P had informed her who the assailants were.

[29] With respect the learned Judges of the High Court were wrong to brush aside the need for an identification parade. Given the unfavorable circumstances in which P saw her assailants, an identification parade would have tested and provided credibility to the identification by P. Moreover, the manner in which P is purported to have identified the 1st and 2nd appellants was suspicious as it is not clear who had arrested the appellants and in what circumstances. P in her evidence stated:

> ***"Next day my mother went to record her statement and in the evening the police came there and arrested 4 people at Sigomere. I was then called at the police station and I identified two of them."***

[30] The impression one gets is that the 1st and 2nd appellant were arrested in connection with the report that R had made at the police

station, and P was called to the police station after the arrest of the appellants to identify them as she claimed to have recognized one of them. Therefore, a proper identification parade ought to have been held instead of the appellants being carelessly exposed to the witness.

[31] Of importance is the caution in ***Anjononi & Others vs Republic (1976-80) 1 KLR 1566***, that although recognition of an assailant is more satisfactory than identification of a stranger, the possibility of someone making a genuine mistake even in recognition of someone known to him particularly in circumstances that are not favourable for identification cannot be ruled out, and therefore there is need to test and weigh the evidence of identification.

[32] It is evident that the 2nd appellant's conviction was grounded on the purported recognition by P at night in circumstances that were very stressful. Though she purported to have identified the 2nd appellant at the police station by recognition, we find for reasons that we have stated that this identification was not safe to rely upon. As there was no other evidence implicating the 2nd appellant, we come to the conclusion that the 2nd appellant's conviction cannot be sustained. Accordingly, we allow this appeal, quash the 2nd appellant's conviction on both counts and set aside the sentences imposed upon him. The 2nd appellant shall be forthwith set free unless otherwise lawfully held.

Dated and delivered at Kisumu this 27th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR