



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 14 OF 2015**

**ANTONY KEMBOI.....APELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An Appeal from the Judgment of the Senior Principal Magistrate Honourable S. MOKUA in Eldoret Criminal Case No. 186 of 2013, dated 30<sup>th</sup> January, 2015)***

**JUDGMENT**

1. The appellant was charged in two main counts with two different offences.

In Count 1, he was charged with the offence of robbery with violence contrary to *Section 296(2)* of the *Penal Code*. The particulars were that on the 9<sup>th</sup> day of January 2013 at [Particulars withheld] farm in Eldoret East District within Uasin Gishu County, jointly with others not before the court, the appellant robbed *M W* of a mobile phone make Nokia 1110, one torch and cash Kshs. 3,200 valued at Kshs.5,850 and immediately before the time of such robbery used actual violence to the said *M W*.

2. In the alternative, the appellant was charged with the offence of handling stolen property contrary to *Section 322(1) (2)* of the *Penal Code*. It was alleged that on the 10<sup>th</sup> day of January 2013 at [Particulars withheld] farm in Eldoret East District within Uasin Gishu County, otherwise than in the course of stealing, the appellant dishonestly retained one phone make Nokia 1110 and a torch knowing or having reason to believe them to be stolen properties.
3. In count 2, the appellant was charged with the offence of rape contrary to *Section 3(1) (a) (c)* as read with *Section 3 (3)* of the Sexual offences Act. The particulars were that on the 9<sup>th</sup> day of January, 2013 at [Particulars withheld] farm in Eldoret East District within Uasin Gishu County, the appellant caused his genital organ to penetrate the genital organ of *M W*.
4. After a full trial, the appellant was convicted in count 1 and count 2. With respect to count 1, he was sentenced to death. The sentence in count 2 was held in abeyance.
5. The appellant was aggrieved by his conviction and sentence. He proffered an appeal to the High Court. He initially filed his appeal in person but when he subsequently engaged legal counsel, a supplementary record of appeal was filed by his advocates *Ms. Rotuk & Company Advocates*.
6. In his petition of appeal, the appellant raised five grounds of appeal in which he basically complained that he was convicted on the basis of contradictory evidence which was not sufficient to sustain a conviction. He also claimed that crucial witnesses were not called to testify.
7. At the hearing of the appeal, the appellant was represented by learned counsel *Mr. Bittock* while learned prosecuting counsel *Ms. Busienei* represented the state.

In his submissions, *Mr. Bittock* invited the court to note that there was a variance between the charge sheet and the evidence adduced in court by prosecution witnesses; that the complainant's name differed with the name stated in the charge sheet; that the charge sheet implied that the complainant had been robbed by more than one person while the complainant testified that she was attacked and robbed by one person though this was contradicted by the evidence of PW3.

8. Counsel further submitted that crucial witnesses like the complainant's neighbours and a village elder whose suspicion led to the appellant's arrest were not called as witnesses; that the only evidence that linked the appellant to the commission of the offences was the recovery of a torch and a mobile phone which the complainant did not positively identify to be part of her property stolen during the robbery. He urged the court to allow the appeal.
9. The state contests the appeal. *Ms Busienei* in her rejoinder admitted that there was an error in describing the complainant in the charge sheet but that the rest of the evidence confirmed that her name was *M W* not *M W*. She further submitted that the appellant was properly convicted as the prosecution had proved every element of the offence beyond any reasonable doubt; that the torch and mobile phone recovered from the appellant were positively identified by the complainant to be her property stolen during the robbery and that there was medical evidence to confirm that the complainant was raped on the fateful night. She invited the court to dismiss the appeal for want of merit.
10. This is a first appeal to the High Court. I am alive to the duty of the first appellate court which is to re-evaluate and to consider afresh the evidence adduced before the trial court in order to make my own independent conclusions on whether the appellant's conviction in Count 1 and count 2 should be upheld.

See: *Okeno V Republic, 1972 EA 32; Soki V Republic (2004) 2 KLR 21.*

11. I have considered the grounds of appeal, the evidence on record, the judgment of the learned trial magistrate and the rival submissions made by *Mr. Bittock* for the appellant and *Ms Busienei* for the state.
12. I wish to first deal with *Mr. Bittock's* submission that there was doubt regarding the complainant's identity as the name she used to identify herself in her evidence was different from the name stated in the charge sheet.
13. It is important to note that the trial proceeded on the basis of a charge sheet that was substituted on 4<sup>th</sup> September, 2013. In the initial charge sheet filed in court on 11<sup>th</sup> January, 2013, the complainant's name in both counts was clearly indicated as *M W*. This description changed with regard to count 1 in the substituted charge sheet where she was described as *M W* but count 2 retained her correct name of *M W*. The rest of the evidence adduced during the trial confirms that the complainant's name was *M W*. I therefore agree with *Ms. Busienei's* submission that the indication of the complainant's name in count 1 as *M W* must have been a typographical error which did not occasion the appellant any prejudice. It is an error which is curable under *Section 382* of the *Criminal Procedure Code*.
14. Having considered the evidence on record and the submissions made by the parties, I find that the only issue that arises for my determination is whether the learned trial magistrate erred in his holding that the prosecution had proved beyond any reasonable doubt that the appellant is the person who attacked, raped and robbed the complainant of the items described in count 1.
15. After analysing the evidence of the complainant who testified as PW1 and the medical evidence in the P3 form, I have no doubt in my mind that the prosecution proved beyond any doubt that the offences of robbery with violence and rape were committed against the complainant on 9<sup>th</sup> January 2013 at about 3 a.m. There is evidence that after the offences were committed, the appellant was arrested on the following day at around 4 p.m by a combined force of police officers from Moiben police station and Mafuta Administration Police Post. The arresting officers testified as PW2, PW3 and PW4. He was arrested because a village elder had expressed to PW2 his suspicion that the appellant was the suspect. No basis for this suspicion was laid before the trial court as the said village elder was not availed as a witness.

16. Be that as it may, these three police officers testified that upon arresting the appellant, they recovered from him two Nokia mobile phones. One of them a Nokia 1200 was claimed by another person and though the appellant claimed ownership of the other phone, he was unable to activate it. On the following day, a torch was recovered from the appellant's house.
17. In convicting the appellant, the learned trial magistrate appreciated that the complainant had not identified her assailant and robber during the incident. It is clear from the judgment that the learned trial magistrate relied on the doctrine of recent possession to convict the appellant. He made a finding of fact that a torch and mobile phone stolen during the robbery were the ones that were recovered in the possession of the appellant a day after the same had been stolen and that therefore the appellant must be the person who perpetrated the two offences.
18. It is trite law that for the doctrine of recent possession to apply, three conditions must be present. First, the property must be found with the suspect; secondly, the property must be positively identified by the complainant and thirdly, the property must have been recently stolen from the complainant. See: *Gideon Koyiet V Republic, Court of Appeal, Criminal appeal No. 298 of 2012 (2013) eKLR; Martin Oduor Lango & 2 others V Republic, Court of Appeal Criminal No. 282 of 2012 (201) eKLR, Arum V Republic (2006) KLR 233.*
19. In this case, though there was evidence that a torch and a mobile phone were recovered from the appellant a day after the robbery, there was no evidence to prove beyond reasonable doubt that the items were part of the complainant's property stolen during the robbery.

PW1 in her evidence besides generally claiming ownership of the torch and mobile phone saying that they had been stolen during the robbery, did not point to any identification mark on any of the items that was unique to her that would have proved beyond doubt that indeed these items were stolen from her house during the robbery.

20. While PW2 claimed in his evidence that the mobile phone had a mark with the initials MW, PW3 and PW4 claimed that the phone had initials of MWN but the complainant did not refer to any such mark in her evidence. A torch and a Nokia mobile phone are common items which are easily available in the market and can be purchased and owned by anyone including the appellant. This is why proof of the complainant's ownership of the items beyond doubt was critical considering that the appellant had denied having committed the offence.
21. In view of the foregoing, it is my finding that the learned trial magistrate erred in failing to properly interrogate the evidence adduced by the prosecution and thereby failed to appreciate that the doctrine of recent possession did not apply in this case. The prosecution failed to prove that the torch and mobile phone recovered from the appellant were in fact part of the property stolen from the complainant at the time the offences were committed. This dealt a fatal blow to the prosecution's case as the said recovery was the only evidence that linked the appellant to the commission of the offences.
22. My analysis of the evidence on record has led me to the conclusion that the prosecution in this case failed to discharge its burden of proof. It failed to prove beyond any reasonable doubt that it is the appellant who violently robbed and raped the complainant as alleged in the charge sheet. The learned trial magistrate therefore erred in arriving at the wrong conclusion that the appellant's guilt in both counts had been proved beyond any reasonable doubt.
23. In the circumstances, I am satisfied that this appeal is merited. I consequently allow the appeal, quash the convictions in count 1 and count 2 and set aside the sentence imposed by the trial court. The appellant shall be set free forthwith unless otherwise lawfully held.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 29<sup>th</sup> day of July, 2016**

In the presence of:

The appellant

Ms. Mokuia for the state

Ms. Naomi Chonde – Court clerk