REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO.53 OF 2015

LAWRENCE CHAMWANDA

SILAS ASAVA.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence from Senior Principal Magistrate's Court at Vihiga

in Criminal Case No.726 of 2013 (Hon S.N. Mwangi Ag.SRM) dated 31st January, 2014.)

JUDGMENT

1. This is a consolidated appeal for purposes of hearing. ***Lawrence Chamwada*** and ***Silas Asava*** filed separate appeals No.53 of 2015 and 54 of 2015 respectfully which were consolidated and ordered to proceed as ***Criminal Appeal No.53 of 2015***. Hence forth ***Lawrence Chamwanda*** and ***Silas Asava*** shall be referred to herein as 1st and 2nd appellants respectively.

2. The appellants were charged before Principal Magistrate's Court at Vihiga with two main counts and an alternative count. In count 1 the appellants were charged with robbery with violence contrary to ***section 296(2)*** of the penal Code Cap 63 Laws of Kenya. Particulars stated that on the night of 25th and 26th July, 2013, at *[particulars withheld]* in Vihiga County jointly with others not before court, while armed with offensive weapons, namely, pangas, robbed ***A M*** fourteen plates, four sufurias, one weighing machine, 6 kilograms of beans, all valued at Kshs.,10,000/-, the property of A M and at the time of such robbery, used actual violence to the said A M.

3. In count 2 the appellants were charged with gang rape contrary to ***section 10*** of the Sexual Offences Act No.3 of 2006, whose particulars stated that on the night of 25th and 26th July, 2016 at the same village, and location within Vihiga County, in association with others not before court, intentionally and unlawfully gang raped *[particulars withheld],* a woman aged 52 years. The appellants faced an alternative charge of indecent act on a woman contrary to ***section 11(1)*** of the same Act, particulars being that on the night of 25th and 26th July 2013, at the same village, location and county, wilfully and unlawfully caused their genital organs namely penis to make contact with the genital organ, namely, vagina, of *[particulars withheld]* a woman aged 52 years.

4. The appellants pleaded not guilty to both the main and alternative counts and after a trial in which the prosecution led 7 witnesses and sworn defence by the appellants who did not call witnesses, the trial

magistrate convicted the appellants on the main counts and sentenced them to death in respect of count 1 and left count 2 in abeyance.

5. Aggrieved by conviction and sentence, the appellants lodged an appeal to this court on the following grounds:-

> ***"1. THAT the trial magistrate erred in law and in fact when relying and basing her conviction while putting much reliance on the sole evidence of identification made by PW1 under difficult and uncondusive circumstances.***
>
> ***2. THAT the trial magistrate erred by not observing that the case was poorly investigated.***
>
> ***3. THAT the trial magistrate erred in law and in fact by relying on the circumstantial evidence thus the same was not proved as primary or secondary evidence.***
>
> ***4. THAT the trial magistrate erred in law and fact by failing to comply with section 324 as read with 329 of the CPC note adhered (sic)."***

6. The 2nd appellant on his part raised the following two grounds which were not in the 1st appellant's petition of Appeal.

> ***"1. THAT the trial magistrate erred in law and in fact when relying and basing her conviction while putting much reliance on the sole doctrine of recent possession under difficult and uncondusive circumstances.***
>
> ***2. THAT the trial magistrate erred by not observing that there was a need for a forensic examination report in order to clear some doubts in this case."***

7. When this appeal came up for hearing, the appellants who were unrepresented, relied on their written submissions while ***Mr Oroni***, learned counsel for the respondent, opposed the appeal orally. The first appellant filed written submissions as well as supplementary submissions which seem to be more comprehensive and expound on the original submissions.

8. In his supplementary submissions the 1st appellant attacked the prosecution evidence submitting that the complainant (PW1) never mentioned the identity of her attackers to the people who responded to her alarm namely PW2, who in turn called PW3 before they set to look for the assailants. According to him, they were arrested much later. Secondly, the first appellant submitted that the conditions prevailing at the time were not conducive for a positive identification, the offence having taken place at night. The only means of lighting was torches and intensity of light from the torches was not shown to have been sufficient to enable a positive identification. He further took issue with PW1's evidence saying that she did not say for how long she was with the attackers to enable her observe them given the events that took place during the robbery and given that the attack was abrupt. Thirdly, the 1st appellant submitted that he was not subjected to medical examination to directly connect him with the offence in count 2. That evidence would have been essential, he submitted.

9. The 1st appellant further submitted that the prosecution evidence was tainted with contradictions and inconsistencies and blamed the trial court for ignoring them. He submitted that PW1 testified that she was attacked at about 2.00 am and the assailants spent about two hours in the house. PW2 said he heard the screams at about the same time and that PW3 was called at that time which could not be possible because an alarm was raised after the assailants had left. He also submitted that witnesses contradicted themselves on where the appellants were arrested noting that whereas some said they were arrested 15-20m away, others said 1.00m away and another, at a funeral. The other contradiction was who between the 1st and 2nd appellant was found with beans. According to the 2nd appellant, PW1 said beans were found with 2nd appellant while PW2 said the 2nd appellant had the beans. He concluded that his was a case of a grudge where PW1 alleges that the 2nd appellant had robbed him on two other occasions.

In his submissions, the 2nd appellant took a similar view that there was no proper identification since the conditions were not conducive, that there was contradiction on the weapons the assailants had, in that whereas the charge sheet did not mention hammer, PW1 said the assailants had a hammer which amounted to contradiction, that PW1 did not give names or identities of her attackers immediately. The 2nd appellant also submitted that there was no DNA examination and maintained that in view of the conditions obtaining at the time of the attack, there was need for corroboration. He cited the case of ***Kiloni & others v Republic*** [1988] KLR on identification and ***Mikinyua Manyara & Said Abiri v Republic Criminal Appeal No.90 of 1985*** on the need for corroborating evidence in situations like the one he faced. The appellants therefore maintained that the prosecution did not prove its case against them beyond reasonable doubt and sought to have their appeal allowed.

10. ***Mr Oroni***, on his part opposed the appeal and supported the conviction and sentence. According to learned counsel, the prosecution evidence established the case against the appellants who were arrested and some stolen items recovered from them. According to learned counsel, evidence by PW7 also proved count 2, and that, the appellants' defence before the trial court did not shake the prosecution's case hence conviction and sentence were proper.

11. I have considered this appeal, submissions by both the appellants and the respondent as well as perused the record of proceedings before the trial court. This being a first appeal, it is the duty of this court to reconsider, re-evaluate and analyse the evidence adduced before the trial court and make its own independent conclusion on that evidence. The court should however bear in mind that it neither saw nor heard the witnesses testify and give due allowance for that. ***See Okeno v Republic*** [1972] EA 32.

12. PW1 testified that on the morning of 26th July, 2013 at about 2.00 am she was sleeping when three men armed with pangas broke into and entered the house. They beat her all over the body and cut her on the forehead. After she fell down, they stripped her naked and raped her in turns. The assailants had bright torches which they flashed around and with the help of light from the torches, PW1 was able to identify and recognise the two appellants and a third person. When they were done, they stole assorted items from the house and left. The complainant raised an alarm attracting neighbours who rushed to her rescue. She explained to PW2 what had happened and PW2 left with others to pursue the assailants. The assailants were arrested and some of the items recovered in the appellants' possession. PW1 told the court that she had identified the attackers because of the light and also because they were people from the neighbourhood and informed those who responded to her call for help the identity of her attackers.

13. PW2, ***G A***, told the court that on the material night he was sleeping when he heard screams. He went out and noticed that they were from PW1's house. He went to PW1's place and found other neighbours. On hearing what had happened, he called the village elder (PW3) who in turn called the Assistant Chief and Administration Police officers. They started pursuing the assailants and caught upon with the two appellants on the road. On searching them, they recovered beans and a panga from the 1st appellant. The complainant identified the items as those stolen from her and the appellants as the assailants.

14. PW3, ***V B O,*** testified that he was sleeping on the material morning when he received a call from PW2 informing him of the robbery incident at PW1's house. He rushed to the scene and found many people already there. PW1 was bleeding from the head. PW1 told them that she had identified her attackers and gave their details. PW3 and others went looking for the assailants. They caught up with the appellants. The 1st appellant had a bag which on inspection was found to contain beans. The 2nd appellant had a panga with blood stains. They took them to PW1's house and PW1 identified the beans, panga and the appellants as her assailants. He called the Assistant Chief who in turn informed the police. The appellants were later handed over to the police. The following day they went to the 2nd appellant's home and recovered 2 pangas, 4 sufurias, plates, cups and other utensils hidden in the compound.

15. PW4, ***Sgt Thomas Rioba*** testified that on 26th July, 2013, he was with colleagues when he received a call from his superior, ***Joseph Kigen*** instructing them to go to the scene and gave them a phone contact. They proceeded to the scene and found the appellants already apprehended by members of the public and re-arrested them. PW5 identified the bag which had beans as that stolen from their house.

16. PW5, a minor aged 16 years told the court that she was sleeping on that night when she heard people inside their house. When she called for her father, the 2nd appellant who had a bright torch and whom she identified from that light, ordered her to show them around the house. They ransacked the house and stole cloths and a travelling bag which she later identified after the appellants' arrest.

17. PW6, ***CPL William Juma***, testified that on 26th July, 2013 he received a call from his OCS regarding arrest of the appellants and the fact that they had been taken to hospital for treatment. PW6 went to hospital where he found the appellants. The complainant had also been admitted in hospital. She had injuries on the head and also told him that she had been gang raped. He took custody of the appellants and recorded statements from witnesses. Following further investigations, they went to the 2nd appellant's home and recovered some stolen items which were identified by the complainant and which he produced as exhibits. PW6 further told the court that his investigation revealed that the appellants had also attacked PW5's home and stole a travelling bag which he also produced as an exhibit. He issued the complainant with a P3 which was filled and returned. He then preferred the charges against the appellants.

18. PW7, ***Summy Chelule,*** a clinical officer testified that he examined PW1 who had two cut wounds on the left forehead, whip marks on the left hand, and bruised left leg around the thigh. She had difficulty in walking. Examination of the genitalia revealed a healed torn hymen, fresh visible rubbing with swelling on the vagina walls, and whitish viganal discharge. He concluded that the complainant had been raped and produced the P3 as an exhibit.

19. Both appellants gave sworn statements, in their defences. The 1st appellant testified that on the 25th July, 2013 he attended a funeral within the neighbourhood from 8.00 pm. Later he went out to smoke when a person he did not know and who was carrying a bag placed the bag down and disappeared. The 1st appellant was later confronted by some people. He told them that the bag was not his. However, he was assaulted and taken to an unknown place where more people assaulted him and later found himself at the police station. He said he was not aware of the charges.

20. The 2nd accused told the court that he went to the complainant's place on the evening of 25th July, 2013 looking for chang'aa for visitors, but left the money with the complainant on learning that police may be around. He went home to sleep. Later that night he heard a knock on the door and on opening, the village elder PW3, entered the house, identified himself and took the appellant to the complainant's house were the crowd started assaulting him. He denied that stolen goods were recovered from his home or that he committed the offence. He was handed over to the police and charged in court.

21. The appellants have attacked the learned magistrate for relying on the evidence of a single identifying witness. The learned trial magistrate considered the evidence and concluded that the only evidence on identification was that of the complainant and reminded herself not only of that danger but also of the fact that evidence of a single identifying witness if believed can form the basis of a conviction.

The learned magistrate concluded thus:-

> ***"The complainant has given very cogent and concise account of the events of that day (sic) and she remained unshaken under cross examination by the accused persons. More importantly, the accused persons were not strangers to the complainant who testified that she knew them by appearance having seen them around and that the 1st accused was a close neighbour while the second accused person used to live around 300-400 metres from her though in same*** *[particulars withheld]****. Therefore there is evidence of recognition ..."***

It is strite law that where the only evidence against an accused is evidence of identification or recognition, the trial court is enjoined to examine the evidence carefully and satisfy itself that the circumstances of identification were favourable and free from possibility of error before it can make it the basis of a conviction. (See ***Wamunga v Republic*** [1989] KLR 426.)

22. I have myself perused the record of proceedings and evidence of the prosecution. PW1 narrated what happened to her and that she was able to identify the two appellants as they robbed and raped her.

She mentioned them to the people who came to her rescue and when she testified, she was clear in her testimony that the 1st appellant was the one who cut her while the 2nd appellant was the first to rape her. Following the information she gave PW2 and PW3, the appellants were arrested that night and a panga and a bag containing stolen beans recovered from them. She was able to recognise them when they were taken to her house together and also the items as those stolen from her.

23. Secondly, the first appellant in his defence admitted that he was arrested that night although he denied being in possession of the stolen items. His defence was that he attended a funeral in the neighbourhood and when he went out to smoke, someone came and placed down a bag and was later confronted by a group of people, arrested and forced to carry the bag. He was taken to an unknown place and later handed over to police while unconscious. From his defence, it is clear that he was arrested where the bag with stolen beans was.

24. The second appellant on his part admitted that he had gone to the complainant's house looking for chang'aa, left the money with the complainant and went back to his house for fear of being arrested by the police. He was woken up by PW3 and taken to the complainant's house.

25. From their evidence, it is clear that the 1st appellant was arrested where the stolen items were found, while the 2nd appellant is not a stranger to the complainant and had infact visited the complainant's house that night although he alleged that it was earlier than 2.00 am. The evidence of PW5 also comes handy that she identified the 2nd appellant and that they stole her bag which was also recovered from the first appellant. It is therefore evident that the complainant identified her attackers who were also known to her.

26. The complainant gave the identity of her assailants and on the basis of that information, the appellants were arrested and stolen items recovered. This was in line with the holding in the case of ***Simiyu & Another v*** *Republic* [2005] 1 KLR 192 on the need to give a description of the attackers where the complainant alleges to have identified or recognised them. (***See Lessavay v Republic*** [1988] KLR 783), ***Francis Kariuki Njiru & 7 others v Republic 2001*** eKLR.)

27. The appellants were charged with robbery with violence contrary to ***section 296(2)*** of the Penal Code. The ingredients of the offence that the prosecution is required to prove, are, that the offender was armed or was in the company of one or more other people or he used violence against his victim. Where any of the above ingredients is established, the offence of robbery with violence will have been proved. This is because the ingredients are read distinjuctively and not conjunctively given the presence of the word "or".

28. In the case of ***Oluoch v Republic*** [1985] KLR the Court of Appeal held:-

> ***"Robbery with violence is committed*** *in any of the following circumstances;*
>
> *a) The offender is armed with any dangerous and offensive weapons or instrument; or*
>
> *b) The offender is in company of one or more person or persons; or*
>
> *c) at or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person." (emphasis)*

29. The Court of Appeal applied to same principle in the case of ***Daniel Muthoni M'arimi v Republic*** [2013] eKLR and stated that proof of any of the three elements of the offence of robbery with violence

would be enough to sustain a conviction under ***section 296(2)*** of the Penal code. The same court addressed this point in the case of ***Samson Nyandika Orwerwe v Republic*** [2014] eKLR while applying the principle in the ***Oluoch*** case (supra) and held:-

> ***"Applying these principles to the appeal before us, we are satisfied that the three elements were proved. The uncontraverted evidence of PW1 was that he was approached by two men who used personal violence on him. One kicked him and the other helped push him out of the car to where they tied him to a tree. He was found tied to this tree by PW2. PW1 had injuries on his hands and mouth as attested to by PW5 who confirmed that fact, and that the degree of injury was harm. It is therefore clear that the ingredients of the offence of robbery with violence were present."***

30. In the present appeal, the evidence of PW1 was that she was attacked by three men who were armed with pangas and used violence against her by cutting her on the forehead and beat her all over the body. Her evidence was corroborated by that of PW7, the clinical officer who found cuts on her forehead and whip marks on the body. The P3 confirmed those observations. There was sufficient evidence to establish the offence and the learned trial magistrate addressed herself on this point and I see no reason to differ with her findings.

31. The other reason why the trial court convicted the appellants was on the basis of the doctrine of recent possession because the appellants were found in possession of stolen property. Where a suspect is found with recently stolen property which is identified by the complainant to be his/hers and there is evidence that the property was recently stolen from the complainant, that can be a basis of a conviction for robbery with violence. On the issue of recent possession, the Court of Appeal stated in the case of ***Gedeon Meitekin Koyiet v Republic*** [2013] eKLR that the doctrine of recent possession is applicable if the prosecution proves:-

> ***"a) That the property was fund with the suspect,***
>
> ***b) That the property was positively identified by the complainant,***
>
> ***c) That the property was recently stolen from the complainant.***

In the case of ***Samson Nyandika Orwerwe*** (supra), the Court of Appeal applied the principle in ***Gideon Keyiet*** (supra) and stated:-

> ***"Our conclusion from these facts is that neither the trial court nor the first appellate court could be faulted for relying on the doctrine of recent possession in finding the appellant guilty. The motor vehicle had been recently stolen from PW1, and when it was recovered, the appellant was seen in it. It fell upon the appellant to offer an explanation as to what he was doing with the vehicle ..."***

32. The appellants denied that they were found with stolen items. However, the evidence of PW2 and PW3 was that they arrested the appellants on the road, searched them and recovered the stolen items and a panga. The 1st appellant admitted that he was arrested and the bag found near where he was although he said the bag was not his and did not know the name of the person who had left it but had seen him.

33. Upon examining the record of the trial court, I am satisfied that the appellants were arrested with stolen property and on that basis, the trial court was in order to apply the doctrine of recent possession. The appellants were arrested with stolen property and it is proved by evidence that the property had been stolen that morning and was identified by PW1 to be hers. That evidence is enough to sustain a connection.

34. The appellants were also charged with the offence of gang rape contrary to ***section 10*** of the Sexual Offences Act. ***Gang rape*** is committed when a person commits rape in association with another or others. Under ***section 3*** of the Act, a person commits rape where:-

a) He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs,

b) The other person does not consent to the penetration;

or

c) The consent is obtained by force or by means of threats

or intimidation of any kind."

35. Penetration on the other hand is defined by ***section 2*** of the Act as ***the partial or complete insertion of the genital organs of a person into the genital organs of another person.*** The evidence of PW1 was that she was sexually assaulted by the appellants who had sexual intercourse with her for about two hours. She also told the court that the assailants were three and the sexual assault was forceful. PW7, the clinical officer who examined PW1 testified that PW1 had whip marks, and cut wounds on her body. Genital examination revealed that she had been sexually assaulted and that there had been penetration.

36. The combination of the evidence of PW1 and PW7 established that she had been raped by more than one person which amounted to ***gang rape***. The evidence of PW1 that the appellants used force and the fact of the injuries on her, confirmed that her assailants used coercive force to achieve penetration and therefore the sexual intercourse was without her consent.

37. The learned trial magistrate addressed this issue in her judgment and similarly concluded that indeed there was gang rape. Having evaluated the evidence myself, I am satisfied that on the basis of the evidence on record, there was no other conclusion except that the complainant had been gang raped by the appellants.

38. The 2nd appellant has faulted the prosecution saying that there was no forensic evidence which was necessary in the circumstances of this case. The 2nd appellant's argument, if I understood him well, is that there should have been a medical examination on him to establish whether he was the sexual attacker on the complainant.

39. The complainant gave evidence that she identified her attackers. They were traced and arrested with stolen items which the complainant identified. She also identified the appellants as the people who robbed and gang raped her. That evidence established the identity of the assailants and the learned magistrate accepted that evidence.

40. I have reviewed the prosecution evidence and that of the defence and I am satisfied that the complainant was candid on who her sexual attackers were and for that reason there was no need for medical examination or forensic evidence to link the appellants as the sexual assailants. Furthermore, the law is now settled that rape or defilement is not probed by a DNA test or medical examination but by evidence of the victim, and that evidence could include circumstantial evidence. This position was stated in the case of ***Fappyton Mutuku Ngui v Republic*** [2014] eKLR. In that case, it had been argued for the appellant that there was no medical examination to link the appellant with the offence of defilement. The court stated:-

"In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who had defiled her."

41. In the case of ***Kassim Ali v Republic*** [2006] eKLR the court stated:-

"The absence of medical examination to support the fact of rape is not decisive as the fact of

rape can be proved by the oral evidence of a victim or by circumstantial evidence."

And in the case of ***Benjamin Mbugua Gitau v Republic*** [2011] eKLR, the Court of Appeal stated that there was no necessity of a DNA test as penetration which is the main element of the offence was proved.

42. Considering the totality of the evidence and taking guidance from the above decisions, I am satisfied that there was sufficient evidence as to who raped the complainant and for that reason there would have been no need for a forensic examination to prove the fact of gang rape and the assailants. That ground of appeal has no merit.

43. The other complaint raised by the appellants was that the trial court erred in relying on circumstantial evidence. In this case I do not think the court relied on circumstantial evidence. There was direct evidence connecting the appellants with the offences. The appellants were identified and on arrest, they were found in possession of stolen property. The property was identified by the complainant as hers. Under those circumstances, the court correctly applied the doctrine of recent possession to convict the appellants. I do not see any other circumstantial evidence that was relied on except the doctrine of recent possession. In any case, in law, a court can rely on circumstantial evidence to convict if it points to the guilt of the person and the inference of guilt and inculpatory facts are incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis than that of his guilt. (see ***Sawe v Republic*** [2003] KLR 364).

44. Lastly, the appellants complained that learned trial magistrate did not comply with ***sections 324*** and ***329*** of the Criminal Procedure Code. ***Section 329*** relates to mitigation before sentence. I note from the trial court's record that the appellants were accorded an opportunity to mitigate and did mitigate before they were sentenced. This complaint would have been meritorious if they were not afforded such an opportunity.

45. In the end I find that the appellants' appeal is devoid of merit and is hereby dismissed.

Dated and delivered at Kakamega this 26th day of September 2016.

E.C. MWITA

JUDGE