**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NOS. 214, 215 AND 215 OF 2012**

**(CONSOLIDATED)**

**BETWEEN**

**JUSTINE MOMANYI..... 1ST APPELLANT**

**DANCAN NYAKUNDI …..... 2ND APPELLANT**

**PHILIP ARASA …..... 3RD APPELLANT**

**AND**

**REPUBLIC …..... RESPONDENT**

***(Being an appeal from original conviction and sentence of the SPM's Court at***

***Nyamira CRC No.725 of 2011 by Hon. J. Wanjala, SPM, dated 11th September 2012)***

**JUDGMENT**

1. The Appellants DANCAN NYAKUNDI, PHILIP ARASA and JUSTIN MOMANYI were charged together with others with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. On Count II they were charged with the offence of gang rape.

2. The charge sheet was subsequently amended to include an alternative charge of handling stolen property contrary to **Section 322 (1)** of the **Penal Code**.

3. They all pleaded not guilty to the charges, were tried and convicted of the alternative charge of handling stolen property and sentenced to serve seven (7) years imprisonment with hard labour.

4. Being dissatisfied with both conviction and sentence, they each filed appeals and raised the following identified grounds of appeal:-

a. T*he sentence imposed was manifestly harsh and excessive.*

1. When the appeals came up for hearing before us we consolidated them for purposes of hearing and all the appellants who were not represented filed written submissions which they relied upon while Mr. Majale appeared for the state and opposed the appeals.

**SUBMISSIONS**

2. It was submitted by the appellants that the prosecution case was not proved beyond reasonable doubt and that the evidence was full of contradictions. It was submitted that there was contradiction as to when the complainant (PW1) was attacked.

3. On behalf of the 1st appellant it was submitted that there was contradiction between PW1 and PW3 and that the owner of the house where the goods were found was not called to testify.

4. On behalf of the 2nd appellant it was submitted that his defence was not taken into account and that there was contradiction between PW1, PW3, PW4 and PW5 as to where and how he was arrested and the items recovered while on behalf of the 3rd appellant it was submitted that there was contradiction as to where he was arrested at and items recovered.

5. Mr. Majale for the state submitted that whereas the appellants were convicted of the offence of handling stolen property, all the elements of robbery with violence contrary to **Section 296 (2)** were satisfied. He submitted that the 1st appellant was arrested by the Area Assistant Chief PW3 and he is the one who led to the arrest of the 2nd and 3rd appellants where stolen property were recovered.

6. He further submitted that since PW1 was able to identify the 1st and 2nd appellants as among the people who raped her in the course of robbery and that the doctrine of recent possession is applicable herein, there is no doubt that the appellants were the ones who robbed PW1 on the material day. He therefore submitted that the state was able to prove beyond reasonable doubt the charge of robbery with violence and therefore urged the court having warned the appellants to find them guilty of the charge of robbery with violence and sentence the same to death as provided for in law.

7. This being a first appeal, we are required to re-evaluate the evidence tendered before the trial court to come to our own conclusion though taking into account the fact that we did not unlike the trial court have the advantage of seeing and hearing witnesses.

8. On behalf of the prosecution, PW1 H N A testified that on 29th September 2011 she was asleep in her house with her 5 years old child at night when she saw people flashing torch light armed with pruning knife in her bed room. They asked for money and her phone which she gave them. She saw them taking her kiosk goods from the house while three of them remained behind raping her in turns before leaving with blankets, sheets, TV, cushions, shoes and other items.

9. After they left, she went to the neighbour's house and in the morning reported to the Area Assistant Chief who referred her to Nyamira police station upon which she was referred to the hospital. It was her evidence that she did not know the names of those who had attacked her. After two weeks she was told by the Assistant Chief PW2 to go and identify some items which had been recovered and was able to identify sofa set covers and 2 kg cattle salt. She was told by PW3 that the person who had the items had ran away.

10. After a further two (2) weeks she was informed of the arrest of the 1st appellant who upon being beaten by the police gave the names of the other appellants and from the 2nd appellant a TV and DVD and a suit case were recovered. The 1st appellant led them to the 2nd and 3rd appellants who were subsequently arrested and items recovered from them. It was her evidence that she did not identify anybody who attacked her.

11. PW2 Sofia Kenari produced a P3 form in which her findings on examination that there was no injury on the vaginal or cervix including labia majora and minora without any discharge. She formed an opinion that there was no evidence of rape.

12. PW3 James Nyambega testified that on 7th October 2011 he received information that there were

some items hidden in the house of one Peter Gesora and Nyabuto where the 1st appellant was the caretaker which items were identified by the complainant (PW1) as hers. The 1st appellant was thereafter arrested.

13. PW4 PC Isaac Kiplangat received the appellants together with items identified by the complainant as having stolen from her place while PW5 Chief Inspector James Yali received the appellants at the police station together with the recovered items.

14. PW6 APC Joel Rioba testified on how he arrested the 1st appellant who upon interrogation mentioned the other appellants which led to their arrest and recovery of the stolen items.

15. When put on their defence, the 1st appellant gave sworn evidence and denied the offence stating that he was a mechanic in Nakuru. 2Nd appellant stated that he was a boda boda rider and that on 12th October 2011 his door was knocked and when he opened he found police who entered into and searched his house and took away his two amplifiers and one radio card memory. He was locked in the police cell from 13th to 17th October 2011 when he was charged with the offence appealed against.

16. The 3rd appellant testified that on 12th October 2011 he heard a knock at his door and when he opened he saw policemen who searched his house and took away his cellphone Nokia 5253. He stayed in the station for five days before he was charged formally.

17. In convicting the appellants for the offence of handling stolen property, the trial court had this to say:-

> **"I am satisfied that the exhibits produced in court belong to the complainant. The complainant did not know the accused persons' names. The first person is the one who led to the arrest of A2, A3, A4 and A6 and led to the recovery of the exhibits.....**
>
> **Nobody apart from the complainant claimed ownership of the seat covers and the salt.**
>
> **….After A1 was interrogated he mentioned A2, A3, A4 and A5 and they were also arrested after they were found with items that the complainant identified as her.**
>
> **…..... The evidence on record shows that the accused persons were arrested after recovery of the things the complainant identified to be hers. Therefore the evidence is basically about handling stolen goods."**

18. We have therefore identified the following issues for determination:-

a. *Whether the prosecution proved its case beyond reasonable doubt on the charge of robbery with violence.*
b. *Whether the offence of handling stolen property was proved.*
c. *Whether the sentence given was excessive.*

1. On the offence of robbery with violence there is no direct evidence linking the appellants with the attack on PW1. In her evidence she stated that she did not identify any of those who robbed her and raped her in turns. She only identified the 1st appellant as one of those who had attacked her after he had been arrested and items recovered and there is therefore a possibility of mistaken identity since no identification parade was conducted.

2. Since it is the arrest of the 1st appellant which led to the arrest of the other appellants and having noted from the evidence tendered that the complainant did not identify any of the attackers at the

time of the robbery, their dock identification by the complainant was therefore not sufficient to sustain a conviction on the charged of robbery with violence.

3. On the issue of the doctrine of recent possession we note that the goods were recovered from the appellants' possession in circumstances that does not point to them being the robbers. The goods which were found in possession of the 1st appellant were found in the house of one Peter Gesora. There is no evidence that it is only the 1st appellant who had access to the said house. This also applies to the 2nd and 3rd appellants.

4. We have also noted that the appellants only appealed against conviction and sentence of the offence of handling stolen goods and since the state did not cross appeal against their acquittal even if we are wrong in our holding as regards the finding on robbery with violence it is our considered opinion that there was no appeal against the acquittal of the appellants by the state and would therefore not interfere with the trial court's finding.

5. On the alternative charge of handling stolen goods, the evidence tendered proved the prosecution case on the same beyond reasonable doubt. All the items stolen were recovered from the appellants and they did not offer any account as to how they came into possession of the same. PW1 positively identified her goods which were stolen from her house.

6. We therefore find that the appellants' conviction on the alternative charge of handling stolen goods was safe and would therefore dismiss the appeal on conviction.

7. On the issue of sentence we note that the same is discretionary and an appellate court would only interfere with the exercise of discretion if the same was not exercised judicious or if the sentence given is unlawful. We have noted that under **Section 322 (2)** of the **Penal Code** a person who is convicted of the offence of handling stolen goods is liable to imprisonment with hard labour for a term not exceeding fourteen years.

8. We are therefore of the considered view that the trial court can not be faulted in exercising her discretion herein and that the sentence given to the appellants is not excessive.

9. We therefore find no merit on the appellants' appeal against sentence which we hereby dismiss.

10. In the final analysis, we find no merit on the appeal herein and therefore dismiss the same and confirm the trial court's judgment.

**Delivered, dated and signed on this 28th day of May 2015.**

**J. WAKIAGA** **C.B. NAGILLAH**

**JUDGE** **JUDGE**

**In the presence of**:

In person for Appellants.

Miss Boyon for Respondent.