



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL NO: 173 OF 2011

(Appeal arising from the Judgment of E.K MAKORI PM in Mumias PM's court vide Criminal Case No. 1268 of 2009)

ADNAS KHAYEMBA..... APPELLANT

VRS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant was charged with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. He was also charged with a count of gang rape, an alternative charge of indecent assault and another alternative charge of handling stolen goods contrary to **Section 322(2)** of the **Penal Code**.

The appellant was convicted of the two counts of robbery with violence as well as in the alternative charge of handling stolen property. The appellant was also convicted of the count of gang rape. The appellant grounds of appeal are that he pleaded on guilty to the charges, the exhibits that were recovered were not in his possession, his alibi defence was not considered, crucial witnesses were not called, then prosecution evidence was not sufficient to sustain the charges, that the conditions at the scene of crime were not conducive for proper identification and that there was no identification parade that was conducted. During the hearing of the case the appellant submitted that the complainant alledged to have been raped and the condoms that were used were recovered yet the appellant was not taken for medical examination. The landlord where the items were recovered was not called to testify and yet there was no evidence that he was living in that house.

Mr. Oroni, State Counsel, opposed the appeal counsels submitted that the appellant was well known to the complainant and there was light from a lantern lamp that was not put off. The appellant was positively identified.

The record of the trial court shows that 8 witnesses testified.

P.W.1 was I N M. She was a nurse at [particulars withheld] hospital Mumias. Her evidence is that on the 9th of December 2009 at about 9.00 p.m she was at home with her house help and her son. People knocked the door and claimed to be police officers. One of the window panes was broken and a pistol was shown to her. She opened the door and saw 5 people entering the house. She was able to identify the appellant. They demanded money and she gave them Kshs 17,000.00 from her wallet. She was stripped naked and pushed to her bedroom and raped by two people. One of the rapists used a condom and the packet of the condoms was later recovered in her house. The other robbers were busy ransacking her house. P.W.1 managed to sneak out and went to her neighbours. Her husband was not at home and was notified. The police came to the scene and she was taken to hospital for treatment. On the 12/12/09 she

was informed that a suspect had been arrested and some items recovered. She went to the police station and identified a Nokia mobile phone that belonged to her son. It is P.W.1's further evidence that during the robbery there were two lantern lamps that were on. P.W. 1 did not know the appellant.

P.W. 2 Y W is the wife of P.W. 1. On the 9/12/09 at about 9.15 p.m. he left his house after he had dropped some shopping. He was later called and informed that some robbers had broken into his house. He went home and found his son and the housegirl. His wife was missing. He inquired at the neighbour's house and saw P.W.1 covered in a lasso. P.W.1 informed him what had happened and he rushed her to St. Mary's Hospital. On the 12/12/09 he was informed that some items had been recovered and he went to the police station to check the items. He was able to identify his son's mobile phone.

P.W.3 IS M S. She is P.W.1's house help. Her evidence is that on the 9/12/09 at about 9.30 p.m she was with P.W.1 when people who claimed to be police officers entered into the house. They had a pistol. Four robbers pushed P.W.1 into her bedroom while three remained in the sitting room. P.W. 3 was hit with a hacksaw and later raped by two of the robbers.

The robbers later realized that P.W.1 had escaped and they left in a hurry. The police went to the scene and she was taken to hospital.

P.W.4 A M and P.W. 5 P M are P.W.1's neighbours. P.W.4 was woken up by P.W. 1 and she saw P.W.1 who was naked. P.W.4 had no phone and they went to P.W.5 who called P.W.2 and informed him about the incident. P.W. 6 H N is the son of P.W.1 who was at home on the 9/12/09. His evidence is that he was with P.W.1 and P.W.3 when the robbers entered their house. He was robbed of his mobile phone. Police went to the scene. He later identified his mobile phone at the police station. The phone had cracks and one of the buttons was defective.

P.W.7 , CORP. BENJAMIN CHELANGA was based at the Mumias Police Station. He was informed about the robbery by P.W. 2 on the night of 9/12/09. He went to the scene and later conducted investigations. It is his evidence that the complainant informed him that they could identify the robbers and one of them had a red T shirt and a half jungle jacket. On the 12/12/09 a robbery case was reported at the station and a girl by the name S M informed them that she could identify one of the robbers as he used to eat at the hotel where she normally went for lunch. They went to the hotel and the appellant was arrested. Upon searching him a mobilephone was recovered. The phone was later identified to be that of P.W.6. When the appellant was arrested P.W.1 identified him as the person who raped her. P.W. 7 also testified that the appellant took them to Lusumu area and they recovered a notebook belonging to S together with other stolen items. The items were recovered in a house that was for the appellant's co accused who was acquitted. They also recovered a jungle jacket from that house.

It is the evidence of P.W.7 that there was no identification parade and that the appellant was found in possession of three mobile phones that had been stolen. The other stolen items related to a different criminal case but the appellant was also involved in that other case. P.W.8 DR. JACOB ODHIAMBO was based at Mumias District Hospital he produced the P3 form for the complainant.

The appellant was put on his defence. In his sworn testimony he stated that he does casual work and sells merchandise. On the 12/12/09 he was at the market where normally sells his goods. A customer gave him Kshs.500.00 and he went to look for change. He reached a place where people were playing cards and the police went there and he was arrested. He was later charged in court with the offence. He denied that he was arrested at a hotel.

The main issue for deliberation is whether the appellant was positively identified as one of the robbers who robbed the complainant and whether the prosecution proved its case beyond reasonable doubt. The appellant contends that the circumstances of the offence were not conducive for positive identification. It is the evidence of P.W.1 and P.W.3 that there was lantern lamp that was not put off during robbery. The prosecution evidence shows that there were more than five robbers during the incident. It is also clear that P.W.1 was pushed into her bedroom where she was raped by two of the robbers. According to P.W.1 she was able to identify the appellant as one of those who raped her. It is not clear whether there was

lantern lamp in the bedroom to enable P.W.1 positively identify the appellant.

The investigating officer was recalled for cross examination. It is his evidence that he did not conduct an identification parade because the complainant could not appropriately identify the assailants well. This is contrary to his earlier evidence where he testified that the complainant was able to identify the robbers. Given the prosecution evidence it is clear that the appellant was identified at the dock. I do find that the evidence of identification is not convincing. There was need for an identification parade which could have proved the prosecution case that the complainant was able to identify the robbers. It is not clear why the investigating officer did not find it fit to conduct the parade.

It is the evidence of P.W.7 that when they arrested the appellant they recovered three mobile phones with him. One of the phones was positively identified to be that of H N (P.W.6). The owner of the phone positively identified it and described its features. I am satisfied that the appellant was found in possession of the stolen phone. The defence evidence does not cast doubt on the fact that the appellant was arrested inside a hotel and that the stolen phone was recovered from him. The other two phones were exhibits in another criminal case. The offence occurred on the 9/12/09. The appellant was arrested on the 12/12/09. This was a period of three days. Taking into account the fact that the stolen item is a phone which can be easily passed over or bought from the robber I do find that the doctrine of recent possession does not apply to this particular case. I do hold that the appellant who was not one of the robbers but was found in possession of stolen property.

In the end we do find that the appeal is merited on the count of the conviction on robbery with violence. That conviction is set aside. The appellant is found guilty of the alternative charge to count vi of the charge which is handling stolen goods contrary to Section 322 of the Penal Code and shall be convicted accordingly. The death sentence is set aside. The appellant is sentenced to serve ten (10) years imprisonment for the offence of handling stolen goods. The sentence shall run from the date of conviction by the trial court.

Dated, Signed and Delivered at Kakamega this 19th day of March 2014.

SAID J. CHITEMBWE

GEORGE DULU

JUDGE

JUDGE