REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEALS NO. 98 & 97 OF 2011

(An appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Butali in Criminal Case No. 1240 of 2010

[S. N. ABUYA, SRM] dated 10th June, 2011)

B K S……...…….. 1ST APPELLANT

MICAH SIMIYU NALIANYA ……..…… 2ND APPELLANT

VERSUS

REPUBLIC ….....……..…….. RESPONDENT

JUDGMENT

The two appeals were consolidated and heard together as they arose from the same trial.

The appellants and 2 others were jointly charged in the subordinate court with robbery with robbery violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge were that on the 13th September, 2010 at around 1 a.m. at ***[particulars withheld]*** village, Matsakha sub-location, Kakamega North District within Western Province jointly with others not before court robbed M M of a mobile phone (Nokia), 2 radios, DVD machine, bicycle, two car batteries and utensils all valued at Kshs.26,000/= and at or immediately before or immediately after the time of such robbery beat the said M M. Count II was for gang rape contrary to section 7 of the Sexual offences Act, No. 3 of 2006. The particulars of the offence were that on the same day, time and place jointly with others not before court intentionally and unlawfully inserted their genital organs namely penis to the genital organ namely vagina of M M without her consent. Count III was also for gang rape contrary to section 7 of the Sexual Offences Act No. 3 of 2006. The particulars were that on the same day and place jointly with others not before court intentionally and unlawfully inserted their genital organs namely penis to the genital organ namely vagina of C N without her consent.

They denied the charges. After a full trial, the appellants were convicted of the offence of robbery with violence. They were also convicted of gang rape under count II. Micah the 2nd appellant was convicted of ordinary rape under count III. The two were sentenced to suffer death as provided by law for robbery with violence. The sentences on the other counts were left in abeyance.

Being dissatisfied with the decision of the trial court, the two have appealed to this court. They filed separate appeals listing several grounds of appeal. In short, their grounds of appeal are that the magistrate passed an inhuman and unethical and degrading sentence in violation of the Constitution of Kenya 2010. That the magistrate erred in convicting them on weak evidence for the offence of robbery

with violence contrary to Section 296 (2) of the Penal Code. That the magistrate applied wrong principles in convicting them. That no medical evidence was tendered to confirm that the complainants were raped. That the trial magistrate rejected their defences which had created reasonable doubt on the prosecution case without cogent reasons.

The appellants also filed written submissions, which we have perused. At the hearing of the appeal, the 1st appellant Benson stated that he was not positively identified. The 2nd appellant, Micah stated that he was arrested on 9th December in possession of music CDs as he was a musician. He submitted that it was Beatrice Khavere who implicated him, though she was not brought to court to testify.

The learned Prosecuting Counsel Ms Opiyo opposed the appeals. Counsel submitted that the charges were read to the appellant in Kiswahili language which they understood. The 1st appellant Benson was properly identified by PW1 who was his previous employer. PW3 also said that he went to his house and found the motor vehicle battery. He also went to house of the 2nd appellant Micah where they found items belonging to the complainant such as table clothes. In counsel's view, the prosecution had proved its case against the appellants beyond reasonable doubt.

The prosecution evidence in brief is that on the 13th of September, 2010 PW1 M M was asleep in her house at ***[particulars withheld]*** village. She was in the house with a girl of 17 years C N, PW2. They slept in different bedrooms. At around 1.00 a.m., they heard noise. People were knocking at the door. Those people were saying that they were policemen and they wanted to arrest a son of PW1 by the name I W. PW1 rose from her bed and opened the door. The intruders took her handbag and removed Kshs.500/= therein. They also took her Nokia phone 6020, a torch and a hurricane lamp. They tied her hands and told her to take them to where her son was. She took them to the room where PW2 was asleep with a child. They then proceeded to the room where her son I slept and opened the door, tied him with a cloth and brought him to her bed. They left the two on the bed, and took away a radio cassette Sony, a radio make Sonitex 30BC, a DVD machine, two car batteries, utensils, a bicycle, wall nets and table clothes. They packed the items in suitcases. They then undressed PW1. Two of them slept with her and ordered her son also to sleep with her.

As this happened, one member of the gang knocked at the bedroom of C N PW2. He pushed the door, threatened her with a panga and forcefully had sexual intercourse with her. The same person went to the sitting room and after a short while came back and raped her a second time. According to PW2, the person who raped her was the 2nd appellant. She recognised him as a person she had known before as they had regularly met in church. The intruders then left.

After this incident, PW1 phoned her husband who called the area District Commissioner. This was early in the morning after the assailants had left.

Following the report, the District Commissioner, sent policemen to the scene. The police came at around 10.00 a.m. After investigations, the appellants were arrested in November, 2010. The police found some table clothes in the house of the 2nd appellant. He was not at home then. Only his wife was present. The police recovered a battery from the house of the 1st appellant. Some other two people were arrested in connection with the incident. The four were charged and tried together.

When put on their defences, the 1st appellant who was the 2nd accused at the trial gave sworn testimony. He said that on 25th November, 2010 at 11.00 p.m. he was woken up by knocks on his door. When he opened the door, he was told to sit down by policemen. A search was conducted and nothing was recovered. He saw his former employer PW1 whom he had previously worked for a year. According to him, PW1 framed him because he had refused her sexual advances when he used to work for her. He denied the charges.

The 2nd appellant, also gave a sworn testimony in his defence. He said that he was a musician. On 9th December 2010, as he was proceeding from his home to Webuye, he met a person and asked him to clean his CDs. He later went home and found a police vehicle. The police told him that he was a dealer in illicit alcohol. They put him in the motor vehicle and took him to Malava police station. He stated that

he did not know PW1. He stated that he was known to PW2 who was a neighbour. He said that she was a liar. He denied committing the offence.

Faced with this evidence, the learned trial magistrate found that the prosecution had proved their case beyond any reasonable doubt against the two appellants, convicted and sentenced them as stated earlier in this judgment. Therefrom arose this appeal.

This is a first appeal. As a first appellate court, we are duty bound to re-evaluate all the evidence on record and come to our own conclusions and inferences – see ***Okeno –vs- Republic [1972] EA 32***.

The appellants contend that the death sentence imposed on them is degrading, inhuman and violates the provisions of the Constitution of Kenya 2010. We do not think so. The Constitution and statutes still retain the death sentence. It cannot therefore be said that the sentence of death imposed herein is degrading or inhuman. We dismiss that complaint.

The conviction of both appellants is predicated on evidence of visual identification and the doctrine of recent possession of stolen goods. We will start with identification. The eye witnesses PW1 and PW2 claim to have known the appellants before. It is trite that even in situations where recognition is alleged, the court has to exercise great care to ensure that such recognition is not mistaken, before convicting on such evidence. In ***Eria Sebwato -vs- R. [1960] EA 174*** the court emphasized this point when it stated as follows -

> ***"That this accused, well known to the complainant should go with seven other men to commit an organized robbery in a house where he was well known seems to me to be inexplicable. He must have known he was bound to be recognized, and in my view, cast doubt in the evidence of the complainant and his wife."***

With regard to the 1st appellant, the evidence of PW1 was that he had worked for her. He admitted the same in his defence. However, the evidence of PW1 did not give the details of how and in what circumstances she identified or recognized the 1st appellant as one of the people who committed the offences. No evidence was tendered in court with regard to the intensity of light when the identification or recognition of the 1st appellant was made. No evidence was tendered regarding the nature of light used. No evidence was tendered on how close PW1 was to the 1st appellant, when he was so recognized or identified. In addition, the complainant, PW1 did not mention to anybody after the incident that she had identified or recognized the 1st appellant at the scene. We conclude that the evidence on record does not establish that the 1st appellant was recognized or identified as one of the people who committed the offences.

PW1 did not state in evidence that she mentioned to anybody after the incident, that she was able to identify any of the appellants. She stated that she was told about the identity of the 2nd appellant by PW2. She only mentioned this appellant after some things were said to have been found in his house. PW2, on the other hand, stated at the hearing that she identified or recognized the 2nd appellant as one of the robbers, and the one who raped her. She did not however state whether there was any light in the room and what type of light it was that enabled her to identify or recognise the 2nd appellant. The 2nd appellant was therefore not positively identified as a member of the group of criminals on that night.

The other factor which connected the appellants to the crimes is the application of the doctrine of recent possession of stolen goods. This doctrine provides that if a theft occurs, and shortly thereafter, a person is found in possession of the stolen items, then in the absence of a convincing explanation from the person, he is presumed to be the thief. See ***Maina & 3 Others –vs- Republic [1986] KLR 301***.

The robbery occurred in September 2010. Some of the alleged stolen items were said to have been found in the houses of the appellants in December 2010. A battery was said to be found in the house of the 1st appellant. Table clothes were said to have been found in the house of the 2nd appellant. When these items were allegedly found, none of the two appellants was present. No evidence was tendered to show that the appellants or any of them had exclusive possession or control of the premises where the

items were so found. In our view, the fact of possession of the robbed items by the appellants was not proved by the prosecution. On this account also, we are of the view that the conviction of the appellants cannot be sustained.

The evidence on record does not establish that the appellants participated in the robbery and rape. The prosecution failed to discharge their burden to prove them guilty beyond reasonable doubt. The convictions are not safe. They have to be quashed.

Consequently, we find merits in the appeals. We allow both appeals. We quash the conviction and set aside the sentences. We order that the two appellants be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 6th day of December, 2013

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SAID J. CHITEMBWE **GEORGE DULU**

JUDGE **JUDGE**