REPUBLIC OF KEN YA

IN THE HIGH COURT OF KENYA

AT KISI

CRIMINAL APPEAL NOS. 147 OF 2009 & 81 OF 2010

(Consolidated)

BETWEEN

DENNIS MOTANYA MOKUA ……..…….. 1ST APPELLANT
DOUGLAS MOGERE OMARI ……..……..…… 2ND APPELLANT

VERSUS

REPUBLIC ……..…….…… RESPONDENT

(Being an appeal from original conviction and sentence in Keroka SRM's criminal case No.301 of 2009 by Hon. Mr. Were, SRM dated 02/07/2009)

JUDGMENT

1. This appeal emanates from the conviction and sentence by Mr. J. Were, Senior Resident Magistrate at Keroka dated 2nd July, 2009 in Keroka SRM's criminal case number 301 of 2009. The second appellant herein **Douglas Mogere Omari** was the first accused in the magistrate's court while the first appellant herein, **Dennis Motanya Mokua**, was the second accused before the magistrate's court.

2. The two appellants faced three (3) counts. In the first count, the two were charged with robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the offence being that on the night of 22nd and 23rd February 2009 at Keroka township in Masaba District within Nyanza province, jointly while armed with dangerous weapon to wit a knife robbed **M.R.O** her two mobile phones make NOKIA 1110 and NOKIA 1200 and cash Kshs.700/= all valued at Kshs.8200/= and immediately before or immediately after the time of the said robbery used actual violence to the said **M.R.O**.

3. In the alternative to the first count, the second appellant herein was charged with handling stolen goods contrary to **section 322 (2)** of the **Penal Code.** The particulars being that on the 23rd of February 2009 at Keroka township in Masaba District within Nyanza Province, otherwise than in the course of stealing dishonestly retained one mobile phone make NOKIA 1110 knowing or having reason to believe it be stolen good (s).

4. In count 2, the second appellant was charged with gang rape contrary to **section 10** of the **Sexual Offences Act, 2006,** the particulars being that on the night of 22nd and 23rd February 2009 at Keroka township in Masaba District within Nyanza Province in association with another raped M.R.O.

5. In count 3, the first appellant was charged with gang rape contrary to **section 10** of the **Sexual Offences Act, 2006** the particulars being that on the night of 22nd and 23rd February 2009 at Keroka township in Masaba District within Nyanza Province in associating with another raped **M.R.O**.

6. Pleas of not guilty were entered on all the counts and the matter thus proceeded to hearing before the Senior Resident Magistrate court at Keroka. The prosecution called 5 witnesses. The facts of the case emerge from the evidence.

7. PW1 was **R.M**. She testified that on the 23rd February, 2009 at about 1.00 a.m. she was heading to her house from Markaremia Bar which was nearby, when she saw someone ahead of her, coming from the opposite direction. As they met, the person held her by the neck, pushed her to the ground and demanded to be given cash. When she said she had no cash, her assailant summoned others saying "Mwita we go for her head" but the other people said they would not go for PW1's head. It was at that point that PW1's assailants searched her pockets and took her 2 Nokia Mobile phones and Kshs. 700 in cash. As one of the assailants searched her pockets, the second assailant who was armed with a knife held her.

8. PW1 also testified that after her phones and cash had been taken, her assailants told her they would make love to her and despite her telling them that she was HIV positive, they told her they would use condoms. PW1 testified that she was dragged to a deserted building and while one of the assailants held her, the first appellant herein wore a condom and then raped her. After the first appellant had had his turn raping PW1, the second appellant did the same in the same fashion and the two then left.

9. In her further testimony, PW1 stated that she went to Masaba District Hospital the following day at about 9.00 a.m. as she also sensitized a nearby kiosk operator about her stolen phone. PW1 testified that the hospital confirmed that she was not infected with any STD and afterwards, she went and reported the matter to police who issued her with a P3 form.

10. PW1 also told the court that she was able to identify her attackers because there were lights at the scene although she did not know their names. PW1 also stated that the whole incident took about 30 minutes. PW1 further stated that the following day, she was shown a phone by the kiosk operator which phone PW1 identified as hers. On the third day, the second appellant herein was arrested and that she was able to recognize him. PW1 also stated that she was able to identify her phone because of the cracked screen and a loose corner which she used to hold in place using a rubber band. PW1 also stated that she was able to identify the first appellant, Motanya because of the latter's handicapped left hand, and that he was a person she had seen many times during her 15 year stay at Keroka.

11. In response to questions put to her by the 2nd appellant, PW1 stated that she told the police on the day she made her first report that she could identify her assailants, if she saw them. PW1 also stated in answer to question put to her by the 1st appellant that it was this appellant who used his deformed hand to hold her neck and that this same appellant covered her mouth, making it difficult for her to scream for help.

12. PW2 was Geoffrey Momanyi, a 'kinyozi' at a kiosk near Masaba District Hospital. His testimony was that between 8-9 a.m. on 23rd February, 2009, PW1 went to his kiosk and narrated to him how she had been gang-raped and her phones and cash stolen from her the previous night. PW2 stated that at about 4.00 p.m., the second appellant Mogere, informed him that he had a phone to sell and asked PW2 to find a buyer for him. PW2 stated that as the second appellant waited at the kinyonzi, he rushed and informed PW1 about the phone that was being offered for sale by the second appellant. On returning to the kiosk, he found the second appellant had vanished. PW2 stated that he knew the second appellant well because he had worked at the same kinyonzi for a week. PW2 identified PW1's phone – **MF1-2**.

13. PW2 also stated during cross examination that the second appellant had indeed asked him to find a customer for the phone as he had done on a number of other occasions in the past though PW2 also knew that the second appellant never issued receipts for the purchases of the phones made from the second appellant in the past.

14. PW3 was No. 79249 Police Constable Ahmed Rashid, based at Keroka C.I.D. He testified to having received a report from PW1, on the 23rd February, 2009 concerning the attack on PW1 the previous night. PW3 stated he took PW1 to the hospital for treatment. He also stated that PW1 informed him that she could identify her assailants if she saw them especially one who had a deformed right hand. PW3 stated further that he visited the scene of the alleged crime and recovered a box of condoms used and one piece of unused condom.

15. PW3 also stated that he took PW1 back to hospital on 3rd March, 2009 when the P3 form was filled. He testified that when PW1 saw the first appellant at the police station, though arrested in connection with a different offence, PW1 was able to identify the first appellant. PW3 also confirmed that the first appellant had a deformed hand. PW3 produced the soiled clothes which PW1 stated she was wearing on the night of the attack. He also testified that out of the packet of 3 condoms, 2 were used while 1 remained unused.

16. During cross-examination, PW3 stated that he did not indicate all the recoveries when making his statement. It was also his testimony that he did not take the suspects to hospital because they had used condoms when they raped PW1. He also testified that the first appellant had many cases pending against him.

17. PW4 was Joel Ongaro, a Clinical Officer at Masaba District Hospital. PW4 stated that he examined PW1 after she complained that she had been gang-raped by 2 people. This was some 4 days after the incident. PW4 stated that PW1 was put on antibiotics and advised her to continue with ARV's because she was found to be HIV positive. PW4 also testified that from the medical examination, he had concluded that there was penetration into PW1's vagina.

18. In further evidence, PW4 stated that PW1 had informed him that she could identify her assailants. He also confirmed that he did not examine PW1's assailants.

19.PW5 was No. 57231, Police Constable Joseph Mwenda. It was PW5 who received a report on the 23rd February, 2009 of the recovered phone which was stolen from PW1 the previous night. The person from whom the phone was recovered was arrested by members of the public. That person was the second appellant. PW5 also stated that before the recovery, PW1 had told him that she had lost her phones to the people who had gang raped her and further that PW1 had indicated to PW5 that she could identify the assailant who had a deformed hand.

20. Each of the 2 appellants gave unsworn testimony. The first appellant Dennis Motanya Mokua, as accused 2 stated that he was 19 years old and worked as a casual labourer in the construction industry, apart from selling eggs. His testimony was that he knew nothing about the offences with which he was charged and that PW1 had told lies to the court; and that she had framed him together with P.C. Rashid (PW3) because of a grudge between the said police officer and the first appellant. The first appellant denied any knowledge of the second appellant and further denied that they were together on the night of the alleged attack upon PW1.

21. The second appellant, Douglas Mogere Omari stated that he was aged 17 years a pupil at Amabuko Primary School. He testified further that though PW1 alleged to have lost 2 phones to her assailants, nothing was recovered from him when he was arrested. The second appellant alleged that he was at home on the night of the alleged crime and that indeed when he was arrested, PW1 denied ever knowing him and that it was only after being directed by police that PW1 changed her story and claimed to know and identify the second appellant. The second appellant also alleged that Geoffrey Momanyi (PW2) testified against the said second appellant because of a long-standing dispute between the 2 of them who are neighbours.

22. In his judgment, the trial magistrate found that the prosecution had proved its case beyond any reasonable doubt on the robbery with violence charge and convicted both appellants of the same. The trial magistrate based his finding on identification of the appellants by PW1 both at the time of commission of the offence and also upon their arrest. The two appellants were also convicted on counts 2

and 3 respectively.

23. Having found that the 2nd appellant was a minor, the trial court ordered that he be held at the President's pleasure, while the first appellant was sentenced to death on count 1 and to 3 years imprisonment on count 3; while he was sentenced to serve 15 years imprisonment on count 4.

24. We must point out at this juncture that from the charge sheet there is no count 4 (iv). What the trial magistrate may have construed to be count 2 must be the alternative charge to count 1.

25. Being aggrieved by the conviction and sentence the appellants filed their respective appeals. The first appellant raised the following grounds of appeal:-

1. That the learned trial magistrate erred in law and facts in judging (sic) **and recording that the prosecution had proved this case beyond any reasonable doubt against me at the end of my trial your lordship.**

2. That the learned trial magistrate misdirected himself grossly in failing to scrutinize the evidence and facts of this matter and make a finding that the investigation of this claim of robbery was done in a very unconventional manner hence rendering the whole trial an anullity your lordship.

3. That the sentence of death herein is overly harsh and excessive in the foregoing your lordship.

26. The second appellant, on his part, raised the following grounds of appeal:-

1. That the learned trial magistrate erred in law and facts in applying the doctrine of recent possession on me the appellant without evaluating that such doctrine could not apply where the appellant was not found in the actual possession and or where possession by I the appellant was not satisfactory (sic) **proven.**

2. That the learned trial magistrate erred in law and facts in finding the evidence of recovery (sic) **from error and doubt without inquiring into the prosecution failure to tender the evidence.**

3. That the learned trial magistrate gravely erred in both law and facts in convicting and sentencing I the appellant in (sic) **the basis of identification without properly evaluating that there was no lights for positive identification.**

4. That the learned trial magistrate seriously erred in law and facts in convicting me on the basis of contradictory doubtful and flimsy evidence of the prosecution evidence (sic) **especially the evidence of the clinical officer.**

5. That the learned trial magistrate erred in law and facts in rejecting my defence without proper evaluation thereby shifting the burden of prove on me the appellant.

27. Each of the appellants has urged this court to allow their respective appeals and to set each one of them free unless otherwise lawfully held.

28. At the hearing of this appeal each of the appellants put in their written submissions, both of which were lengthy and written in style. The first appellant set down 6 grounds of appeal which he coalesced into 3 main grounds.

29. The first appellant's main bone of contention against the judgment of the lower court centres around identification of her assailants by PW1. The first appellant's main argument is that the circumstances under which PW1 was allegedly robbed and raped were difficult, especially because PW1 stated that she was taken to a deserted building where she was raped without indicating whether there was any light at or in the said building and even if there was light, no evidence was given as to the intensity of such

light. The first appellant therefore submitted that it would have been difficult for PW1 to identify her attackers whom she did not know before under such circumstances. The first appellant contended that the case against him was fueled by a dispute that existed between himself and the police officer.

30. The first appellant also submitted that the evidence in support of count 2 of the charge was wanting in that PW1 did not mention her attackers to both the police and the clinical officer (PW4). The first appellant also submitted that his case was one of mistaken identity since PW1 seemed to be looking for anyone young man who had a deformity in his hand so as to pin him down as one of the assailants.

31. Finally, the first appellant contended that in the absence of an identification parade the prosecution evidence fell short of establishing a nexus between the first appellant and the alleged crimes. He submitted that the trial court failed to consider his defence in contravention of the provisions of **section 169 (1)** of the **Criminal Procedure Code (CPC)**, a failure that resulted in miscarriage of justice. The first appellant urged this court to allow his appeal and to set him free forthwith.

32. The second appellant raised 5 grounds of appeal. He argued grounds 1 and 2 together; grounds 3 and 4 together and ground 5 by itself. The first ground was on identification. The second appellant also argued that the circumstances under which he is alleged to have been identified as one of PW1's attackers were difficult. He also contended that PW1 never gave her report immediately to the police implicating the suspected assailants. The second appellant also contended that he was not found in possession of any of the itemsallegedly stolen from PW1.

33. Secondly, the second appellant contended that the prosecution did not adduce watertight evidence to tie him to the alleged crime and that if indeed he was one of the perpetrators of the alleged crime, he should have been taken for medical examination to corroborate the evidence of the condoms recovered at the scene (the two used and one unused condoms were produced in evidence).

34. Finally, the second appellant also complained that the trial court did not consider the second appellant's unsworn testimony, and that as a result thereof the trial court made erroneous findings as far as the second appellant's participation in the alleged crime was concerned. The second appellant urged the court to allow his appeal by quashing the conviction and setting aside all the sentences imposed upon the said second appellant.

35. In response, Mr. Mutuku, Senior Principal State Counsel urged the court to find that the conviction of the two appellants was well founded on all the 3 counts. Mr. Mutuku submitted that the facts of the case spoke for themselves, and that on the morning after the night PW1 was assaulted by the two appellants, the 2nd appellant was found in possession of one of PW1's stolen Nokia Phones, namely Nokia 1200. Counsel also submitted that PW1 was able to identify her attackers on that same day that the Nokia phone was discovered. Mr. Mutuku also submitted that though PW1 did not disclose the source of light, she was adamant about the identity of her attackers, one of whom was said to have a deformed hand. It was further submitted that the fact that the first appellant was even confirmed in court to have a deformed hand gave credence to PW1's testimony about the people who had attacked her. Counsel also submitted that the fact that the second appellant was found in possession of PW1's stolen mobile phone confirmed beyond any reasonable doubt that the said second appellant was in the group that robbed PW1. Counsel urged court to find that the doctrine of recent possession was properly applied by the trial court in convicting the second appellant as charged.

36. This court has now carefully reconsidered and evaluated the evidence afresh as is required of a first appellate court. See **OKENO –VS- REPUBLIC [1972] EA 32.** We have also considered in detail the submissions made by each of the two appellants and those of the state counsel. From an analysis of all the above, it is not in doubt that the alleged incident took place in the night at about 1.00 a.m. while the complainant, PW1, was walking home from work. She said she was near her house when she was accosted by persons who demanded cash from her. It is thus clear that the issue of identification of PW1's attackers is at the centre of the convictions handed down to the two appellants by the trial court. It is even more critical because the only identifying witness is the complainant, PW1.

37. The following is what PW1 said in part of her testimony touching on the identity of her assailants:-

> **"I recognized the assailants. There were some lights at the scene and that is how I recognized them. There are lights there. I had seen them before but I did not know their names. I was with them for about 30 minutes."**

38. In answer to questions put to her by the first appellant herein, PW1 stated, ***inter alia***, as follows:-

> **"I screamed once and then you covered my mouth and I couldn't scream again. You used your deformed hand to hold my neck. You held my neck and pulled me and then the 1st accused was beating me. As you raped me, the 1st accused was patrolling nearby."**

39. In his judgment, the trial court said PW1 properly and clearly identified the two appellants as her attackers and proceeded to convict them on count 1 of the charge.

40. We have ourselves examined the evidence on record. Our finding is that the intensity of the light which PW1 said was there is not clearly given. It is also not clear to us where the light was – was it along the path, at the deserted building or where was it? Or was it moonlight? In the circumstances, we are of the opinion that the light which PW1 said helped her to identify or recognize the appellants was inadequately described. If that was all the evidence available in this case, we would not uphold the convictions of the trial court.

41. There is however other evidence which would tend to closely link each of the 2 appellants with the offences with which they were charged. The first piece of evidence concerns the first appellant. In her testimony both in evidence in chief and during cross examination, PW1 maintained that the first person who accosted her and held her by the neck had a deformed hand. That it was that same hand that covered PW1's mouth as he raped her. PW1 also mentioned to PW3 No. 79249, Police Constable Ahmed Rashid, and PW4, Joel Ongaro, a clinical Officer and to PW5, No. 57231 police Constable Joseph Mwenda, that one of her assailants had a deformed hand. We therefore find that PW1 was consistent in her testimony that one of her assailants, the first appellant herein had a deformed hand. The court finds that if there was any discrepancy as to whether the deformity was in the right or left hand was immaterial. The court saw the deformity. The first appellant's contention that he was beaten by the police is a story that this court cannot accept. We are therefore fully satisfied that on the strength of PW1's evidence that the first appellant had a deformed hand was sufficient evidence to create a nexus between the first appellant and the crime.

42. What about the second appellant? The evidence on record is that the second appellant was found in possession of one of the Nokia Phones 1200 stolen from PW1 on the night of the attack. PW1 testified that on her way to Masaba Hospital after daybreak on 23rd February, 2009, she asked Geoffrey Momanyi, PW2, to be on the lookout for anyone coming to his kiosk offering a phone to sell. And as sure as day, on that same day at about 4.00 p.m. the second appellant approached PW2 and asked him to look for a customer for a phone that the 2nd appellant said he had for sale. PW2 said that the second appellant let him (PW2) see the phone and that on examining the phone, it fitted the description given by PW1 of one of the phones that had been stolen from her the previous night.

43. PW2 stated that the 2nd appellant had offered a phone for sale on another occasion. PW5 stated that on the same 23rd February, 2009 in the evening, PW1 reported to him that one of PW1's stolen phones had been recovered and that it was charging at the 'kinyozi'. PW5 made some fake arrangements to buy the phone from the second appellant. PW5 also stated that on interrogation, the second appellant admitted that the phone was his and that he was only looking for a market on behalf of the first appellant herein.

44. From all the above evidence, we can discern a thread running through the evidence of PW1, PW2 and

PW5 confirming that indeed PW1 lost her phones during the attack, that she asked PW2 to be on the lookout for anyone coming to charge a phone that fitted the description of either of her 2 phones, and that PW5, as a fictitious buyer, confirmed that the second accused is the one who was found in possession of the said phone just some hours after the same was stolen from PW1.

45. The doctrine of recent possession is now well developed in our judicial system. In the case of **Matu – vs- Republic [2004] 1 KLR 510**, the appellant was convicted in a subordinate court for the offence of robbery with violence and sentenced to death. His appeal to the High Court was dismissed and he then appealed to the Court of Appeal. The question for determination was whether the evidence in the court below had established that the appellant was among the gang that had raided the complainant's kiosk, killed the watchman and stolen some goods therefrom.

46. Part of the evidence during the trial was that certain of the stolen items were traced to and found in the appellant's house. It was held, ***inter alia***, that:-

> **"… the doctrine of recent possession, where it is proved that premises have been broken into and that certain property has been stolen therefrom and that very shortly afterwards, a person is found in possession of that property, that is certainly evidence from which it can be inferred that the person is the housebreaker or shop breaker."**

47. In the instant case, the second appellant was found in possession of one of the phones stolen from PW1 on the night of 22nd/23rd February 2009. This was hardly a day after the incident, the second appellant said that the phone belonged to the first appellant whom this court has already connected with the attack on PW1. It was therefore reasonable for the trial court to infer, and this court also infers, that the second appellant was one of the 2 persons who attacked PW1, robbed her of her 2 mobile phones and Kshs.700/= in cash.

48. The final question for determination by this court is whether the prosecution proved any of the ingredients for the offence of robbery with violence under **section 296 (2)** of the **Penal Code.** The ingredients are the following:-

(a) The offender must be armed with a dangerous weapon; or
(b) The offender is in company with one or more other person or persons; or
(c) At, or immediately before or immediately after the time of the robbery, the offender wounds or beats, strikes or uses any other personal violence to any person.

49. In the instant case, we have established that the two appellants were in the company of one another when they stole the two mobile phones and Kshs.700/= in cash from PW1. In addition to the theft, they proceeded and raped PW1 in turns and used condoms which were recovered at the scene of the crime. There is therefore no doubt in our minds that the trial court was properly guided in finding each of the 2 appellants guilty of the first count and sentencing each one of them to death.

50. We note however, that count 2 was an alternative to the first count. The evidence of recovery of the mobile phone from the second appellant is the evidence that has connected him to the offence of robbery with violence. A conviction on that alternative count was thus erroneous.

51. From what we have said above, we find that the convictions on counts 2 and 3 of the charge were well founded and we see no reason to interfere with the same save that having sentenced each of the 2 appellants to death on the count 1, the sentences on counts 2 and 3 should have been held in abeyance.

52. The upshot of what we have said above is that this appeal by the 2 appellants has no merit. The same is dismissed on both conviction and sentence in respect of count 1. The convictions on counts 2 and 3 are upheld, but we order that the sentences imposed by the trial court on each of the 2 appellants in respect of counts 2 and 3 shall be held in abeyance.

53. It is so ordered.

Dated and delivered at Kisii this 24th day of February, 2011.

ASIKE MAKHANDIA
JUDGE.

RUTH NEKOYE SITATI
JUDGE.

In the presence of:
1st & 2nd Appellants present in person
Mr. Mutai (present) for Respondent
Mr. Bibu (present) Court Clerk