REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.153 & 154 OF 2009

THOMAS OTIENO.....1ST APPELLANT

ANTHONY NDUATI..... 2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. M. A. Odero CM delivered on 30th March 2009 in Kibera CM Cr. Case No. 5612 of 2006)

JUDGMENT

The 1st Appellant (Thomas Otieno) and the 2nd Appellant (Anthony Nduati) were jointly charged in Count 1 with the offence of **robbery with violence** contrary to **Section 296(2) of the Penal Code.** The particulars of the offence were that on 13th September 2006 at [Particulars Withheld] Kileleshwa within Nairobi County, the Appellants, while armed with offensive weapons namely a club and a metal rod, robbed PM of cash Ksh.8,500/-, assorted shop goods valued at Ksh. 1,300/- and immediately before or immediately after the time of such robbery used actual violence against the said PM.

The 1st Appellant was charged in Count 2 with the offence of **rape** contrary to **Section 3** of the **Sexual Offences Act.** The particulars of the offence were that on 13th September 2006 at [Particulars Withheld] Kileleshwa within Nairobi County, the 1st Appellant unlawfully and intentionally committed a sexual act by inserting his penis into the vagina of CM, a woman aged twenty-three (23) years old without her consent. In the alternative charge, the 1st Appellant was charged with the offence of **committing an indecent act with an adult** contrary to **Section 11(A)** of the **Sexual Offences Act.** The particulars of the offence were that on 13th September 2006 at [Particulars Withheld] in Kileleshwa within Nairobi County the 1st Appellant committed an indecent act by placing his penis on the surface of the vagina of CM, a woman aged twenty-three (23) years old.

The 1st Appellant was charged in Count 3 with the offence of **sexual assault** contrary to **Section 5 (1)(a)(i)** of the **Sexual offences Act.** The particulars of the offence were that on 13th September 2006 at [Particulars Withheld] Kileleshwa within Nairobi County, the 1st Appellant unlawfully penetrated his penis into the anus of CM, an adult woman aged twenty-three (23) years. In the alternative charge, the 1st Appellant was charged with the offence of **committing an indecent act** with an adult contrary to **Section 11(A)** of the **Sexual Offences Act.** The particulars of the offence were that on 13th September 2006 at [Particulars Withheld] in Kileleshwa within Nairobi County the 1st Appellant committed an indecent act by placing his penis on the surface of the anus of CM, a woman aged twenty-three (23) years old.

The 2nd Appellant was charged in Count 4 with the offence of **rape** contrary to **Section 3** of the S**exual Offences Act.** The particulars of the offence were that on 13th September 2006 at [Particulars Withheld] in Kileleshwa within Nairobi County, the 2nd Appellant unlawfully and intentionally committed a sexual act by inserting his penis into the vagina of CM, a woman aged twenty-three (23) years old without her consent. In the alternative charge, the 2nd Appellant was charged with the offence of **committing an indecent act** with an adult contrary to Section 11(A) of the Sexual Offences Act. The particulars of the offence were that on 13th September 2006 at [Particulars Withheld] in Kileleshwa within Nairobi County the 2nd Appellant committed an indecent act by placing his penis on the surface of the vagina of CM, a woman aged twenty-three (23) years old.

The 2nd Appellant was charged in Count 5 with the offence of **sexual assault** contrary to Section **5 (1)(a)(i)** of the **Sexual offences Act.** The particulars of the offence were that on 13th September 2006 at [Particulars Withheld] Kileleshwa within Nairobi County, the 2nd Appellant unlawfully penetrated his penis into the anus of CM, an adult woman aged twenty-three (23) years. In the alternative charge, the 2nd Appellant was charged with the offence of **committing an indecent act with an adult** contrary to **Section 11(A)** of the **Sexual Offences**

Act. The particulars of the offence were that on 13th September 2006 at [Particulars Withheld] in Kileleshwa within Nairobi County the 2nd Appellant committed an indecent act by placing his penis on the surface of the anus of CM, a woman aged twenty-three (23) years old.

The 1st and 2nd Appellants were jointly charged in Count 6 with the offence of **kiosk breaking and committing a felony** contrary to **Section 306(a)** of the **Penal Code.** The particulars of the offence were that on 13th September 2006 at [Particulars Withheld] Kileleshwa within Nairobi County, the Appellants broke and entered into a Kiosk of one Elijah Muigai and committed a felony namely theft of assorted shop goods and two jackets all valued Ksh.30,000/-, the property of the said Elijah Muigai. In the alternative charge, the Appellants were charged with the offence of **handling stolen goods** contrary to **Section 322(2)** of the **Penal Code.** The particulars of the offence were that on 13th September 2006 at Mukoko Close Westlands in Nairobi County, otherwise than in the course of stealing, dishonestly retained assorted shop goods, a jacket and cash Ksh.6,540/- knowing or having reasons to believe them to be stolen goods.

When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, they were convicted as charged in Count 1, 3, 5 and 6. The Appellants were each sentenced to death in count one. The sentences in Count 1, 3, 5 and 6 were held in abeyance. The Appellants were aggrieved by their conviction and sentence and have each filed a separate appeal to this court.

In their petitions of appeal, the 1st and 2nd Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They faulted the trial court for relying on the evidence of identification in convicting them yet the circumstances favouring a positive identification were absent. They asserted that their arrest was unsafe. They were aggrieved that the trial court convicted them yet the prosecution failed to connect them to the stolen items. They took issue with their convictions stating that the prosecution had not proved their case to the required standard of proof beyond any reasonable doubt. They complained that the trial court failed to consider their respective defences in arriving at its decision.

The two separate appeals were consolidated and heard together as one for the purpose of this appeal. The Appellants presented to court written submission in support of their respective appeals. They urged this court to allow their respective appeals. Ms. Nyauncho for the State opposed the Appeals. She submitted that the Appellants broke into and robbed kiosks along Riverside Drive belonging to PW1, PW2 and PW3. The robbery took place at about 11.00 p.m. They seriously injured PW2. They also took PW1 to a bush and raped her. Learned State Counsel asserted that the evidence of PW1 and PW2 was corroborative. She averred that the stolen items were recovered in the Appellants' possession. The Appellants were arrested by PW4 and PW5. She submitted that the 1st Appellant was wearing a black jacket when he was arrested. PW2 testified that one of the assailants was tall and dark and was wearing a black jacket. The Appellants were positively identified. With regard to the sexual assault charge, Ms. Nyauncho submitted that the Government Analyst's evidence implicated the 1st Appellant. She asserted that the evidence of Dr. Kamau confirmed that the complainant was sexually assaulted. She stated that the Appellants' identification was safe since there was sufficient lighting at the scene. The Appellants were also arrested near the scene of the robbery. In the premises, she urged this court to dismiss the Appellants' respective appeals.

The facts of the case according to the prosecution are as follows: PW1 CM and PW2 PM are husband and wife. At the time of robbery, they lived together at their kiosk located along [Particulars Withheld]. On the fateful night of 13th September 2006, PW1 and PW2 were asleep in the kiosk. At about 11.30 p.m., they heard a bang at the door. PW2 woke up. The door was opened. He saw a tall dark man in a black jacket. The man had a flashlight. He hit him on his head with a metal rod. He fell down and lost consciousness. When PW1 woke up, she saw her husband lying on the floor. There were two men in the kiosk. One was tall and the other short. They were armed with a rungu and a metal rod. She stated that the 1st Appellant was carrying the rungu while the 2nd Appellant had the metal rod. They beat her and demanded money. She gave them Ksh.8,500/-. There was a security light outside the kiosk. The door was open. PW1 stated that she was able to see the two men. They dragged her out of the kiosk. They ordered her to look at them properly. They told her that they had killed her husband and they could therefore do whatever they wanted with her. They dragged her to a nearby bush. She was only wearing a petticoat which they removed. They ordered her to pass stool. They stuffed the feaces in her mouth. She was ordered to bend over and touch her toes. The 1st Appellant inserted his penis in her anus. He sexually assaulted her. When he was done, the 2nd Appellant inserted his penis into her anus and sexually assaulted her as well. They afterwards ran away. She took her petticoat and ran back to her kiosk. She found her husband on the floor bleeding from his head and nose. She raised an alarm. Police officers who were on patrol came to their aid. She informed them that they had been robbed by two men. They took cash Ksh.8,500/- and assorted packets of cigarettes. The police officers took them to Kenyatta National Hospital. PW1 and PW2 later recorded their statements at Kileleshwa Police Station. When the assailants were arrested, they were requested to go to the police station to identify the recovered items. PW1 identified several packets of cigarettes produced before court as the same ones that were stolen from the kiosk. She also identified the petticoat she was wearing that night.

PW3 Elijah Mungai was also a complainant. He owned a kiosk along Riverside Drive. On 13th September 2009, he went to open his kiosk at about 6.00 a.m. He found the padlock to the kiosk cut. The kiosk had been broken into. Several items had been stolen from the kiosk. He went to his neighbour's kiosk (PW2). He saw PW2 on the ground bleeding from his face. Police officers were at the scene. When the assailants were arrested, he was requested to go to Kileleshwa Police Station to identify some items that had been recovered. He identified several items that had been taken from his kiosk. He also identified his jacket that had been stolen from the kiosk. It was red and black in colour with a tear on the inner lining.

PW4 PC. Joseph Ondicho and PW5 PC. Michael Awiti were the arresting officers. On the material night, they were on patrol duties at Westlands area. They received a call informing them of a robbery at kiosks located along [Particulars Withheld]. At about 4.00 a.m., they were at the junction of Rhapta Road and Mkopo Close. Two men emerged from Mkopo Close. The two men checked the road to see if it was clear. One was carrying a paper bag while the other was carrying a bale of maize flour. PW4 and PW5 followed them. The two men spotted the car following them. They started running. The 1st Appellant ran ahead while the 2nd Appellant ran back in the direction they had come from. They chased the 2nd Appellant and managed to apprehend him. The 1st Appellant was arrested by watchmen in the neighborhood. They apprehended him and brought him to PW4 and PW5. They recovered the paper bag and bale of maize flour. The 1st Appellant was wearing a black jacket and a red jacket on top of the black one. He also had assorted packets of cigarettes and cash hidden in his clothes. They also recovered a rungu hidden in the bale of maize flour.

PW6 Inspector John Mwaniki investigated this case. He was on duty on the material night at Kileleshwa Police Station. At about 1.00 a.m.,

he received a radio call informing him of a robbery that occurred at kiosks located along [Particulars Withheld]. He rushed to the scene accompanied by another police officer. He found PW2 lying unconscious on the floor. He was bleeding from his head. His wife (PW1) was crying. She told him that two men broke into their kiosk. They beat up her husband and robbed them. They also sexually assaulted her. PW6 called for a vehicle which rushed them to hospital. He also alerted patrol officers to look out for the two assailants. At about 5.30 a.m., patrol officers informed him that they had arrested two suspects along Rhapta Road. He went there and arrested the two suspects together with the exhibits. He forwarded the Appellants' clothes, blood and saliva samples as well as PW1's petticoat to the Government Chemist for analysis. He afterwards charged the Appellants with the present offences.

PW7 Albert Gathuri Mwaniki, a Government Analyst examined the exhibits forwarded to him by the investigating officer. He stated that PW1's petticoat had semen stains from a person with a blood group A. The 1st Appellant's blood was found to be of blood group A. The 2nd Appellant belonged to blood group O. Dr. Zephania Kamau, PW8, a Police Surgeon examined PW1 and PW2 on 18th September 2006. They had received treatment at Kenyatta National Hospital. He stated that PW1's anus was tender. PW2's left frontal scalp was swollen. He had a haematoma below both eyes and on the right side of his nose. He estimated the injuries were five days old. He produced their respective P3 forms into evidence.

When the 1st Appellant was put on his defence, he gave an unsworn statement. He stated that he worked as a cleaner at Consolata Catholic Church. On 13th September 2009, he left his house for work at about 6.00 a.m. He was stopped by a police car near the roundabout at the Mall. PW4 and PW5 put him in the vehicle and took him to Kileleshwa Police Station. At the station, PW6 hit him with a baton. He sustained injuries. He received treatment from Kenyatta National Hospital. He was locked in the police cell for about twenty-two (22) days. He was charged on 6th October 2006 with the present offences. He denied being involved in the present robberies and the sexual assaults.

In his unsworn statement, the 2nd Appellant stated that he left his house at 5.00 a.m. on 13th September 2006. He was walking to work. As he approached Westlands, he met two policemen on foot. They asked him where he was going. They also asked for his national identification card. He only had an abstract. They asked him to sit down. A police vehicle came. They put him in the vehicle and took him to Kileleshwa Police Station. He was later charged on 6th October 2006 with the present offences. He denied the charges against him.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellants. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32).** In the present appeal, the issue for determination by this court is whether the prosecution established the Appellants' guilt with regard to the charges preferred against them and which they were convicted to the required standard of proof beyond any reasonable doubt.

It was evident from the facts of the case that the prosecution relied on direct evidence of identification and the doctrine of recent possession to secure the conviction of the Appellants in the **robbery with violence** charges. With regards to the evidence of identification, PW1 stated that she was able to identify the two assailants. The robbery took place at midnight. She stated that there were street lights along [Particulars Withheld]. The kiosk was located next to one of the electric poles. PW1 heard a loud bang. When she woke up, she saw two men. One was tall and the other was short. Her husband was lying on the ground bleeding. The door to the kiosk was opened. She stated that light emanating from the streetlight flooded the kiosk. She was therefore able to see the assailants. She stated that the assailants dragged her outside the kiosk. They asked her to look at them very carefully. She did. PW2 stated that he was able to identify one of the assailants who broke into the kiosk. He stated that the man was tall and dark. He was wearing a black jacket and a dark cap. He stated that the said assailant was the 1st Appellant. This court notes that the Appellants were not arrested at the scene of the robbery. The police did not conduct an identification parade so that PW1 and PW2 could identify their assailants. This court is of the view that PW1 had a good look at the assailants and was able to positively identify them. However, she did not know the assailants prior to the robbery. The police ought to have conducted an identification parade when the Appellants were arrested to ensure that their identification was watertight. PW1 and PW2's identification of the Appellants in court amounted to dock identification. For the above reasons, this court is of the opinion that the evidence of PW1 and PW2 on identification on its own cannot form a basis for the Appellants' conviction. The same would require other direct or circumstantial evidence to corroborate it. (see **Maitanyi –vs- Republic [1986] KLR 198 at Page 200).**

The Appellants were arrested at about 4.00 a.m., a few hours after the robbery incident. They were arrested along Mkopo Road which is not far from [Particulars Withheld], where the complainants' kiosks were located. PW4 and PW5 were the arresting officers. They were on patrol duty. They stated that they received a radio call informing them of a robbery that had occurred along [Particulars Withheld]. They laid an ambush at the junction of Rhapta road and Mkopo close. The area was well lit with light from the street lights. At about 4.00 a.m., two men appeared. One was carrying a plastic paper bag while the other was carrying a bale of maize flour. PW4 and PW5 started following them. When the assailants spotted them, they dropped their luggage and started running away. They ordered them to stop but they did not comply. PW4 and PW5 fired a gunshot in the air. They managed to apprehend the 2nd Appellant. Security guards in the neighborhood managed to arrest the 1st Appellant. They brought him to where PW4 and PW5 were. PW4 and PW5 took the paper bag and the bale of maize flour that the Appellants had dropped. They recovered a pair of red pliers hidden on the 2nd Appellant's waist. He also had a bundle of coins in his pocket. The 1st Appellant was wearing a black jacket and a second red and black jacket on top. He had several packets of assorted cigarettes in his pockets, as well as cash Ksh.6,300/-. They also recovered a rungu (club) hidden in the bale of maize flour. These items were later positively identified by PW2 and PW3 to be the ones that were robbed from their kiosks on the material night.

In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs R*** **[2006] eKLR**, the Court of Appeal held thus;

> ***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."***

PW1 and PW2 stated that the assailants stole assorted packets of cigarettes as well as cash Ksh.8,500/-. These items were among the items recovered from the Appellants when they were arrested. They were able to identify the cigarettes and cash as some of items that were stolen from their kiosks. There is no doubt that the Appellants were arrested in possession of the said items. The Appellants were arrested approximately four hours after the robbery occurred. They were arrested not too far from the scene of the robbery. The burden of proof in this case shifts to the Appellants to explain possession of the alleged stolen items. The Appellants failed to give an explanation of how they came to be in possession of the recovered items at the wee hours of the morning. It therefore follows that the doctrine of recent possession applies in this case.

In the present appeal, the ingredients of the offence of **robbery with violence** were established by the prosecution. The assailants were more than one at the time the robbery was committed. The Appellants were armed with a rungu and a metal rod which are considered dangerous and offensive weapons. Personal violence was occasioned on PW2 by the Appellants. Medical evidence adduced by PW8 corroborated PW1 and PW2's evidence. The Appellants' defence did not rebut the otherwise overwhelming evidence by the prosecution. The prosecution proved the Appellants' guilt with regard to the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** in count one to the required standard of proof beyond any reasonable doubt. Their Appellants' conviction on the charge in count one is hereby upheld.

The Appellants were separately charged in count 3 (1st Appellant) and count 5 (2nd Appellant) with the offence of **sexual assault** contrary to Section 5(1)(a)(i) of the

Sexual offences Act. The said Section provides as follows:

> **5. (1) Any person who unlawfully;**
>
> **(a) penetrates the genital organs of another person with:**
>
> **i. any part of the body of another or that person; or**
>
> **ii. …..**
>
> **is guilty of an offence named sexual assault."**

PW1 narrated to court how the Appellants dragged her out of the kiosk. They took her to a nearby kiosk. She stated that the area was well lit due to presence of security lights. The Appellants ordered her to look at them carefully. She obliged. They told her that since they had killed her husband, they were going to do whatever they wanted to her. They conversed amongst themselves and agreed to penetrate PW1's anus, since she had just had a baby, and could still be experiencing vaginal bleeding. They ordered her to pass stool. They stuffed the stool in her mouth. They ordered her to bend over. She stated that the 1st Appellant inserted his penis into her anus. He sexually assaulted her. After he was done, the 2nd Appellant inserted his penis into her anus and sexually assaulted her as well. Medical evidence adduced corroborated PW1's testimony with regard to the sexual assault. PW8 examined PW1 approximately four days after she was sexually assaulted. He stated that PW1's anus was tender upon examination.

PW1 gave a very emotional and detailed testimony. The trial court's record indicated that she broke down in tears while narrating to the trial court how she was sexually assaulted and humiliated by the Appellants. The Appellants sexually assaulted her during the robbery. PW1 identified the petticoat she was wearing on the material night that was produced before court. The same was stained with feaces and blood. It was forwarded to the Government Analyst (PW7) for analysis. PW7 stated that the petticoat had semen stains. From his analysis, he stated that the semen stains were from a person belonging to blood group A. The 1st Appellant was found to be of blood group A. Even though the evidence by PW7 did not implicate the 2nd Appellant, this court is of the opinion that PW1 was telling the truth. The same was observed by the trial court. The **Proviso** to **Section 124** of the **Evidence Act** applies. The 1st Appellant's conviction in count 3 is hereby affirmed. The 2nd Appellant's conviction in count 5 is similarly upheld.

The Appellants were jointly charged in count 6 with the offence of kiosk breaking and **committing a felony** contrary to **Section 306(a)** of the **Penal Cod**e. The Appellants were alleged to have broken into a kiosk belonging to Elijah Mungai and committed a felony namely theft of assorted shop goods and a jacket. PW3 testified that he came to his kiosk on the morning of 13th September 2006 and found that it had been broken into. The padlock had been broken. His kiosk was located next to PW1 and PW2's kiosk. Several grocery items had been stolen. He had also left a black and red jacket at the kiosk the previous day. The jacket was also stolen.

When the Appellants were arrested, PW2 was requested to go to Kileleshwa Police Station to identify the items recovered in the Appellants' possession. The 1st Appellant was arrested wearing PW3's jacket. He identified the same in court as it had a tear in the inner lining. The Appellants were also arrested in possession of several grocery items which PW3 identified as having been stolen from his kiosk. The grocery items included flour, royco, sugar, cooking fat, pens, handkerchiefs and several other items that would ordinarily be sold at a kiosk. PW3 identified the stated items at the police station. PW4 and PW5 confirmed that the items were recovered from the Appellants when they were arrested.

There is no doubt that the Appellants were arrested in possession of the said items. As stated earlier in this judgment, the Appellants were arrested few hours after the robbery occurred. They were arrested a short distance from the scene of the robbery. The Appellants failed to give any explanation of how they came to be in possession of the recovered items. It therefore follows that the doctrine of recent possession applies. In addition, the 2nd Appellant was arrested in possession of a red pair of pliers. This could only have been used by the Appellants to break the padlock on the kiosk door. The Appellants must have therefore broken into PW3's kiosk and stole the grocery items as well as his jacket which were all recovered in their possession. In the premises, this court upholds the Appellants' respective convictions with regard to the charge in count 6.

From the above analysis of the evidence, this court is of the view that the prosecution established the Appellants' guilt in respect of the charges in count 1, 3, 5 and 6 to the required standard of proof beyond any reasonable doubt. The Appellants' defence did not rebut the overwhelming and cogent prosecution evidence. The upshot of the above reasons is that the respective appeals lodged by the Appellants on conviction lacks merit and are hereby dismissed.

The Appellants were sentenced to death by the trial court with regard to the charges in Count 1. Following the recent decision of the **Supreme Court in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR,** this court has discretion to re-sentence the Appellants on the basis of severity of the offence. In the present appeal, PW1 and PW2 sustained serious injuries occasioned by the Appellants during the robbery. This court notes that the Appellants have been in lawfully custody for thirteen (13) years since their arrest and later conviction by the trial court. In the premises, this court sets aside the death sentence given by the trial court. The same is substituted with an order of this court sentencing the Appellants to each serve ten (10) years imprisonment with effect from today's date. This court has taken into consideration the period that the Appellants were in lawful custody both before their conviction and after their conviction by the trial court.

With regards to **sexual assault** charges in Count 3 and 5, the Appellants' respective sentences were held in abeyance. **Section 5** of the **Sexual Offences Act** provides for a minimum sentence of ten (10) years if one is convicted of the offence of **sexual assault.** In the premises, this court sentences each Appellant to serve a custodial sentence of ten (10) years imprisonment with effect from today's date.

In respect of the charge in Count 6, the Appellants' respective sentences were suspended as well. **Section 306** of the **Penal Code** provides for a sentence of seven (7) years imprisonment if one is convicted of the offence of **breaking into a building and committing a felony.** The Appellants are each sentenced to serve five (5) years in imprisonment.

The sentences in Count 1, Count 3, Count 5 and Count 6 are to run concurrently with effect from the date of this judgment. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF MAY 2019

L. KIMARU

JUDGE