



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 280 AND 280 OF 2011**

**(CONSOLIDATED)**

*(An appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Vihiga in Criminal Case No. 912 of 2009 [L. K. O. ONYINA, SRM] dated 9th December, 2011)*

EVANS INGARA OKODE ..... 1<sup>ST</sup> APPELLANT

EDWIN EMUHAYA ALIKULA ..... 2<sup>ND</sup> APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

**JUDGMENT**

The two appeals herein were consolidated and heard together as they arose from the same trial in the subordinate court. The appeals were registered in this court under the same number, that is, 280 of 2011. The 2nd Appellant, Edwin Emuhaya Alikula was represented on appeal by Wesutsa & Co. advocates.

The two appellants were charged in the subordinate court jointly with another with two counts of robbery with violence contrary to **Section 296 (2)** of the Penal Code, and one count of indecent act contrary to **Section 68** of the **Sexual Offences Act No. 3 of 2006**. Each appellant was separately charged with handling stolen goods contrary to Section 322 (2) of the Penal Code.

The particulars of count I were that on 6th of February 2008 at [particulars withheld] within Hamisi District of the Western Province jointly while armed with dangerous weapons namely pangas, rungus and iron bars robbed B A of a mobile phone make Nokia valued at Kshs.4,500/= and her cash Kshs.3,250/= and at the time of such robbery assaulted the said B A. The particulars of count II were that on the same day, time and place jointly while armed with dangerous weapons namely pangas, rungus and iron bar robbed Cephias Imasia of his Nokia mobile phone model 2300 valued at Kshs.2000/= and at the time of such robbery threatened to use actual violence to the said Cephias Imasia. The particulars of count III were that on the same date and place stripped B A naked and touched her private parts.

The 1st appellant Evans Engara Okode was separately charged in the alternative with handling stolen goods contrary to **Section 322 (2)** of the Penal Code. The particulars of the charge were that on the same day and place otherwise than in the course of stealing dishonestly took the retention of a Nokia model 1600 knowing or having reason to believe it to be stolen goods. Edwin Emuhaya Alikula, the 2nd appellant was also charged in the alternative with handling stolen goods contrary to **Section 322 (2)** of the Penal Code. The particulars of the charge were that on the same day and place otherwise in the course of

stealing dishonestly undertook the retention of a mobile phone Nokia model 2300 knowing or having reasons to believe it to be stolen goods.

After a full trial, the two appellants herein were found guilty of the main counts I, II and III and convicted. They were acquitted on the respective alternative charges. The co-accused was acquitted. Each of the appellants was sentenced to suffer death as provided by law on count I. The sentences on counts II and III were held in abeyance.

Being dissatisfied with the decision of the trial court they have appealed to this court. The 1st appellant filed written submissions in person. The 2nd appellant filed written submissions through his advocate.

At the hearing of the appeals, Counsel for the 2nd appellant did not appear. However, the 2<sup>nd</sup> appellant urged the court to proceed with the hearing of his appeal. Both appellants relied on the written submissions filed. We have perused the same.

The learned Prosecuting Counsel, Mr. Oroni opposed the appeals. Counsel relied on the evidence of PW1, and the assistant chief PW2, who assisted in arresting the appellants and making recoveries. Counsel emphasized that PW3 who was complainant in count II knew the two appellants before and gave evidence that both loaded tomatoes on his pick-up vehicle a few minutes before the incident.

The facts of the case are that on 6th February 2008 PW1 B A O had bought tomatoes at Eldoret which she was transporting to Kisumu for sale. She loaded the tomatoes crates into a pick-up. It broke down on the way. As around 10.00 p.m., another pick-up appeared. This was at a place called Serem on the Eldoret-Kisumu road. The driver of the second pick-up PW3 accepted to assist her and the crates of tomatoes were loaded onto the pick-up. The pick-up then moved a short distance but was not able to go uphill. The driver stopped the vehicle and asked PW1 to assist in putting stones behind the tyres for the vehicle not to roll backwards. Suddenly, in the darkness three people appeared. They were wearing coats and caps. They assaulted them, took the Nokia phone of PW1 and took her money Kshs.5,000/=. They beat up PW1, took her into a nearby forest and removed all her clothes. One of them demanded to have sexual intercourse with her but another persuaded him not to do so. They however inserted their hands into her vagina. She screamed and they took her back to the road. On arrival at the road, she screamed and the people around the area, including the assistant chief PW2, came to the scene.

In the meantime, the driver of the pick-up who was PW3 and the complainant in count II, tried to run away. According to this witness, when he asked for assistance to place stones behind the pick-up wheels, Amuhaya and Ingara, the appellants came to assist. Together with another person called Ayodi they went to look for stones. In a short while however, they came back and hit him with a slasher. Amuhaya produced a panga and demanded the phone. He gave him his Nokia 3100. He got scared when the assailants started assaulting PW1 and demanding money.

He found a chance to escape. He passed through a tea plantation knocking on doors of homes thereby as the attackers chased him. He ultimately crossed a river and knocked at a door where someone was kind enough to open.

When they went back to the scene with this good samaritan, they found that many people had already gathered. They then reported the incident at Serem police station but the police failed to come. The assistant-chief Nahashon PW2 came and helped them seek assistance at Shamakhokho Administration Police Camp. Together with the assistant-chief, administration police officers and members of public, they went looking for the assailants. They arrested Ingara and proceeded to the home of Amuhaya and a phone was recovered therefrom. PW1's phone was recovered from Ingara. Alex, the accused who was acquitted, was later arrested by police at Kapsabet while hiding. The appellants were then charged with the offences.

When put on their defences, the appellants gave sworn testimony. They denied committing the offences. The 1st appellant stated that he was sick around that time. He was arrested at home for no good

reason. He did not have the mobile phone allegedly taken from him. The 2nd appellant, Edwin Amuhaya denied the charge also. He said he was a boda-boda operator. On that day, he was asleep in his house. People knocked at round 11.00 p.m. When he inquired, he was informed that the chief wanted to see him. He came out, and was put in administration vehicle. He denied recovery of a mobile phone from him.

Faced with this evidence, the learned trial magistrate found that the prosecution had proved its case against the appellants beyond reasonable doubt. The court thus convicted them and sentenced them to suffer death. The co-accused was acquitted. Therefrom arose the two appeals.

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

We have re-evaluated the evidence on record. The circumstances of the identification of the appellants were difficult because all the witnesses confirmed that it was dark that night. Though PW3 claimed to have recognised the two appellants, the trial court disbelieved the evidence of identification or recognition. We agree with the findings of the trial court on the issue of identification or recognition.

The appellants were convicted on the application of the doctrine of recent possession of stolen goods. They were said to have been found in possession of respective mobile phones. One of them was said to have been found with some tomatoes.

The application of the doctrine of recent possession was considered in the case of **Maina & Others vs Republic [1986] KLR 301.** The doctrine states that if an offence has been committed and certain property stolen and very shortly afterwards a man is found in possession of that property, that is evidence from which the court can infer that he is the thief or robber.

In our present case, the evidence connecting the appellants with the recovery of the mobile phones and tomatoes is wanting. The items were said to have been recovered by administration police officers who were not called to testify. The evidence tendered in court by the assistant chief PW2 on the recovery of the said items is therefore secondary or hearsay evidence. Hearsay evidence cannot establish a fact in a criminal case. It is not evidence at all. In effect, there was no evidence that the said items were recovered in the possession of the appellants. In effect, the doctrine of recent possession did not apply to this case. The conviction herein based on the doctrine of recent possession is unsafe. It is not sustainable.

Having re-evaluated all the evidence on record, we are of the view that the appeals have merits. We allow the appeals, quash the convictions and set aside the sentences imposed. We order that the each of the appellants be set at liberty forthwith unless otherwise lawfully held.

*Dated and delivered at Kakamega this 11<sup>th</sup> day of February, 2014*

**SAID J. CHITEMBWE**

**GEORGE DULU**

**JUDGE**

**JUDGE**