



IN THE COURT OF APPEAL

AT KISUMU

(CORAM): MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 46 OF 2011

BETWEEN

K G O.....1ST APPELLANT

GEOFFREY GUTO MACHIRA.....2ND APPELLANT

AND

REPUBLICRESPONDENT

*(Appeal from judgment of the High Court of Kenya at Kisii Makhandia (as he then was) and Sitati, J)
dated 24th February 2011,*

in

H.C.C.R.A No. 162 and 163 of 2009)

JUDGMENT OF THE COURT

The appellants, K G O and Geoffrey Guto Michira, were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that on the night of 12th and 13th of March, 2009 at [particulars withheld]of Masaba District within the former Nyanza Province they jointly with others not before the court, violently robbed JM (PW 1) of a mobile phone, radios, a lamp, sewing machine, loudspeaker and assorted household goods all worth Kshs. 55,200/-.

They also individually faced counts of gang rape of PW 1 and NKO (PW 2), and alternative charges of handling stolen property.

The appellants pleaded not guilty to the charges.

The brief facts were that, on the night of 12th and 13th March 2009 at about 9.30 pm, while PW 1 was warming herself by the fire, and PW 2 was studying by the light of a pressure lamp, the main door of their house was burst open, and 3 people with pangas and sticks, two of whom are the appellants herein, entered. The 1st appellant was tall and black, and was wearing a red and white striped T-shirt, and the

2nd appellant was black and short and was wearing a jacket. Neither had covered their face. The complainants began to scream, but were ordered to keep quiet.

The 1st appellant beat PW 1 on the back with the side of a panga and demanded money. Thereafter he dragged her into her bedroom where she was forced to give him her mobile phone and Kshs. 3000/-. He then raped her, and was followed by the 2nd appellant who also raped her.

After slapping and demanding cash from her, the 2nd appellant, whom PW 2 recognized as K G, took her to her bedroom, ordered her to remove her clothes, after which he defiled her. The other two assailants were to follow suit. Thereafter, the three robbers left the house taking with them the pressure lamp, and several items including bed sheets, radios, a sewing machine and a loudspeaker.

It was not until the next day that the complainants reported the robbery to PW 2's grandfather and the chief, following which they were examined and treated by **Joel Ingore (PW 4)** at Masaba District Hospital. On 19th March, 2009 they reported the robbery to the police.

Simon Mosioma, (PW 5) the Assistant Chief, who was accompanied by **Mogaka Makori (PW 6)**, the Chief, went to the appellant's houses on 10th April 2009 where they recovered a loudspeaker from the 1st appellant and a sewing machine from the 2nd appellant which items were identified by PW1.

In his defence, the 1st appellant denied committing the offence and stated that on the night of 12th and 13th March 2009, he was at home where he lives with two other persons.

The 2nd appellant also denied having committed the robbery and stated that he was arrested on 11th March 2009. He also denied that any stolen items were recovered from him.

Upon consideration of the entire evidence, the learned trial magistrate found that the charges against the appellants were proved to the required standard and convicted and sentenced them to death as by law prescribed. Dissatisfied with the decision, the appellants appealed to the High Court which dismissed the appeal and upheld the trial court's decision.

The appellants were further aggrieved by the High Court's decision and lodged this appeal setting out four grounds of appeal which were, that the appellants were not properly identified; that the stolen items allegedly found in the appellants' possession were not identified by the complainant, that the High Court failed to appreciate that the doctrine of recent possession was not applicable to the circumstances of the case; that the circumstantial evidence relied upon by the prosecution was insufficient to secure a conviction; that the appellants' defence were not taken into account; and finally that the High Court failed to evaluate the evidence and arrive at its own conclusion.

Learned counsel for the appellants, **Mr. Onsongo**, filed written submissions on 26th September 2016, which he adopted and relied upon. In the consolidated grounds, it was argued that had the High Court analyzed the evidence, it would have found that there were inconsistencies and contradictions in that, the victims of the robbery and rape did not mention the names of either of the appellants to the Chief or to the Assistant Chief or to the police; that the evidence was contradictory on the distance between the victims' houses and the appellants' houses; that the appellants' houses were not searched on the material night; that there were contradictions between the date of the robbery, and the date it was reported and the recoveries made.

The next issue was that the appellants were not properly identified, as the attack was sudden, and the brightness and position of the only source of light was not ascertained; and no indication was provided by the witnesses as to the length of time the robbery and rape took.

Counsel also took issue with the application of the doctrine of recent possession by the lower courts. It was argued that the period between the robbery and recovery was lengthy, and that it took an informer

and not the complainants to disclose where the stolen items were to be recovered; that there was no evidence of exclusive access, occupation or possession of the houses in which the stolen items were alleged to have been recovered, and finally that the appellants' evidence was disregarded.

On her part **Ms. Khaemba**, learned counsel for the State, opposed the appeal. Counsel submitted that the appellants were identified with the assistance of a pressure lamp. PW1 and PW2 identified and recognized the appellants, more particularly since the 1st appellant was their relative. Furthermore, the appellants were in the house for over 30 minutes, during which they robbed and raped both women.

With respect to the stolen items, a loud speaker was recovered from the 1st appellant's house, while a sewing machine was recovered from the 2nd appellant's house. The appellants were unable to explain how the stolen items came to be in their possession. Counsel further submitted that the appellants' defence was taken into account, and the alibi evidence was found to be worthless.

We have considered the grounds of appeal, the submissions by both counsel and carefully read the record of appeal. The issues for our determination are whether the appellants were properly identified; whether the doctrine of recent possession was applicable to the circumstances of the case; whether the appellants' defence was taken into account; and whether the High Court re-evaluated the evidence.

This being a second appeal, only matters of law fall for the consideration of this Court – See **section 361 (1)** of the **Criminal Procedure Code** and ***Njoroge vs Republic [1982] KLR 33***.

On the question of identification, it was argued that the light was insufficient for the complainants to have identified the appellants. In this regard, the trial court stated;

“From the evidence I do note (sic) that the accused’s were not persons unknown to the complainants. It was stated, and actually admitted in cross examination that the 1st accused is a relative to the complainants and they stay about 2 kms apart. At the time of the attack the complainants also did recognize the attackers because of the light that was in the room at the time. At no point was the lamp put off or drawled neither was any of the accused masked. Listening to PW1 and PW2, I was convinced by their demeanor that they were able to positively recognize the attackers”.

The High Court observed that though the question of the intensity of the light emitted from the pressure lamp was not canvassed, the light was bright enough to enable PW 2 study. The court had this to say:

“Given that the pressure lamp was throughout the incident not put off, and the robbers came into close proximity with the witnesses as they dragged them to their respective rooms, ending up in raping them, and the fact that they were persons well known to them, we are satisfied that the recognition of the appellants by these two victims cannot be faulted.”

From the evidence, it is clear that this is a case of identification through recognition that is ***“...more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”*** See ***Anjononi & others vs Republic [1980] KLR***.

Both courts below were satisfied that the appellants were known to and were recognized by the complainants. The 1st appellant was recognized by PW1 and PW2 as a relative and a neighbor who resided in the complainants' neighbourhood. PW 2 recognized the 2nd appellant as a person who also lived in their neighbourhood who she had seen on other occasions. She testified that both appellants had raped her.

As observed by the courts below, from the time the assailants broke into the house, demanded money and valuables from the complainants, and sequentially raped them meant that they were in the house long enough for both complainants to see and recognize them with light from the pressure lamp.

From the facts, we are left with no doubt that the conditions and circumstances were conducive for identification of the appellants by way of recognition. The complainants identified the appellants with the aid of a pressure lamp that at the time was providing PW 2 with sufficient light to enable her to study. It remained on throughout the ordeal, and according to PW 1, it was only when the appellants had left taking the lamp with them that the room became dark.

It cannot also be doubted that, the robbery and rape brought the appellants into close proximity with the complainants, that further enabled the complainants to see and recognize them. In addition, PW 2 also testified that she gave the appellants' names to her grandfather, the Chief and the Assistant Chief, and later to the police.

Accordingly, we are satisfied that, the appellants were properly identified as the assailants who robbed and raped the complainants on the night in question, as a result of which this ground fails.

The appellants have faulted the courts below for erroneous application of the doctrine of recent possession to the circumstances of this case. In this regard, the High Court stated thus;

“During the arrest of the appellants, recoveries of the items stolen from PW1 were made. In respect of the 1st appellant a loudspeaker was recovered. In respect of the 2nd appellant a swan sewing machine was recovered. These items were positively identified by PW 1 from the initials “OI” she had inscribed on them. The initials stood for her husband’s name, O I. She had also inscribed on the swan sewing machine, the mobile telephone number of her husband [particulars withheld]. The recovery was made hardly a month after the robbery. The recoveries were made from the house of the appellants and in their presence. They never claimed ownership or gave any explanation as to how they came by the said items. In essence this is commonly referred to as the doctrine of recent possession. By this doctrine a strong but rebuttable presumption arises that, the appellants who were found with the said items were the same people who must have stolen them from PW1 during the robbery. See Ruhi –vs- Republic (1985) KLR 373. The appellants made no attempt at all to rebut that presumption or explain their possession. In our view therefore the trial court was right in invoking the doctrine in order to convict the appellants”.

Some of the stolen items were discovered in the appellants' houses, and they did not provide any plausible explanation as to how they came to be in their possession, we are satisfied that the doctrine was applicable to the circumstances of this case. We do not consider, in the circumstance of this case, that the three week period between the time of the robbery and the date of recovery of the stolen items as unduly lengthy. As was seen in the case of ***Samuel Munune Matu vs Republic, Criminal Appeal No. 108 of 2003 at Nyeri (unreported)***, this Court applied the doctrine of recent possession to circumstances where the stolen goods were recovered from the house of the appellant about three weeks after the robbery.

In addition, though the 1st appellant sought to dispel the application of the doctrine by attempting to shift the burden of possession to two other persons he purported to live with, there is nothing in his defence to show that, such explanation was with reference to the stolen items, or that the stolen items were in the possession of persons other than himself. In any event, when this evidence is considered together with his having been identified as one of the robbers who attacked and raped the complainants on the material night, we are satisfied that the courts below cannot be faulted for applying the doctrine of recent possession. Accordingly, this ground lacks merit.

We do not agree that the appellants' defence was not taken into account, as, when the courts below analysed the evidence of identification of the appellants through recognition, together with the recovery of the loudspeaker and swan sewing machine, they found that it far outweighed and dislodged the appellants' defence and alibi. We also consider that any contradictions or discrepancies were immaterial, and were curable under **section 382** of the **Criminal Procedure Code**. Accordingly, we agree with the courts below, that the only conclusion that could be reached is that it was the appellants who robbed and raped the complainants on the night in question.

In sum, we find that the appellants' appeal is without merit, and we order that the same be and is hereby dismissed.

It is so ordered.

DATED and delivered at Kisumu this 30th day of March, 2017.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR