IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, VISRAM & G.B.M. KARIUKI, JJ.A.)

CRIMINAL APPEAL NO. 39 OF 2015

BETWEEN

JOHN MUNENE GITIYE..... 1ST APPELLANT

JOHN MUTUMA RUKUNGA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

***(Appeal against conviction/judgment of the High Court of Kenya, at Meru (Makau & Gikonyo, JJ) delivered on the 25th day of July 2013 at Nakuru in* HC. CR. A. NO. 9 OF 2011)**

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JUDGMENT OF THE COURT

1. This is a second appeal by John Munene Gitiye, the 1st appellant and John Mutuma Rukunya, the 2nd appellant, against the judgment of the High Court of Kenya sitting in Meru (Makau J) delivered in Meru in Criminal Appeal No.9 of 2011 on 28th November 2013 dismissing the appellants' appeal against conviction and sentence contained in the judgment of the Senior Resident Magistrate at Tigania (Hon. M. T. Kariuki) delivered in Criminal Case No.67 of 2010 in Tigania.

2. As required by section 361 of the Criminal Procedure Code, a second appeal is required to be on points of law only. The section states -

> ***"361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –***
>
> ***a. on a matter of fact, and severity of sentence is a matter of fact; or***
>
> ***b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."***

3. The background to this appeal as reflected by the record of appeal shows that both appellants were charged, tried and convicted in the Senior Resident Magistrate Court at Tigania (in Counts 1 and 3 of the charge sheet) with robbery with violence contrary to Section 296 (2) of the Penal Code, Chapter 63 of the

Laws of Kenya and for gang rape contrary to section 10 of the Sexual Offences Act No.3 of 2006. They were sentenced to death on the 1st count and to imprisonment for 20 years on the 3rd count.

4. The particulars of the offences in the 1st and 3rd counts in the charge sheet stated as follows –

> ***"Count 1:***
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> ***OFFENCE: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE:***
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> ***On the 3rd day of November 2009 at [partculars withheld] in Tigania East District within Eastern Province, jointly with others not before court while armed with offensive weapons namely a rifle and pangas robbed A N C of two mobile phones made motorolla C-117, Nokia and clothes all valued at Ksh.6,500/= and cash Ksh.600/= and at or immediately after the time of such robbery used actual violence to the said A N N."***
>
> ***"Count III:***
>
> ***OFFENCE: GANG RAPE CONTRARY TO SECTION 10 OF THE SEXUAL OFFENCES ACT NO.3 OF 2006:***
>
> ***On the 3rd day of November 2009 at partculars withheld] in Tigania East District, within Eastern Province, in association intentionally and unlawfully caused penis to penetrate the vagina of A N N."***

5. The High Court found in its judgment that the prosecution had discharged its burden of proof beyond reasonable doubt. It found that the evidence of the prosecution witnesses numbers 1 and 2 (PW1 & PW2) was cogent and that the witnesses saw and recognized the appellants. The High Court found no merit in the defences proffered by the appellants.

6. Having considered and re-evaluated the evidence, the High Court reached the conclusion that the appellants were the members of the gang of robbers who robbed and raped the complainant named in the charge sheet and participated in the robbery. Accordingly, the High Court dismissed the appellants' appeal on the ground that it had no merit. The High Court delivered itself as follows in this regard –

> ***"We have no doubt in our minds that the perpetrators of the rape were the two Appellants and another person, whom we have already found were positively identified by the complainant.***
>
> ***Having considered and re-evaluated the whole evidence we have no doubt in our minds that the two appellants were the members of the gang or robbers who robbed and raped the 1st complainant and that they actually participated in the robbery that took place on the material night. We are of considered opinion that the conviction is safe and well deserved.***
>
> ***We accordingly dismiss the appeal since the same has no merits. In the same breathe we hereby uphold the conviction.***
>
> ***On the sentence we note the appellants were sentenced to suffer death and serve 20 years imprisonment if their death sentence is not carried out soon. We note the trial court was in error in not putting the 20 years sentence in abeyance. We uphold the conviction and the sentence, but keep the 20 years sentence in abeyance."***

7. When the appeal came up for hearing before us, learned counsel Mr. Mutunga appeared for both appellants while the prosecution counsel (PCI), Mr. A. M. Musyoka, appeared for the State.

8. Mr. Mutunga relied on two grounds only in the appeal. First, he challenged the conviction on the

ground that there was no evidence of recognition. Secondly, he contended that the High Court erred in rejecting the appellants' defences and in relying on the evidence of PW2 which had been discredited by the court.

9. On his part, Mr. Musyoka, the learned prosecuting counsel, opposed the appeal and contended that the courts below relied on evidence of PW1 and PW2 which was cogent and proved the offences on which the appellants were convicted. He submitted that the evidence showed that PWI clearly saw the appellants and that there was no possibility of error in the recognition of the appellants.

10. We have duly considered the submissions of both counsel and carefully perused the record of appeal. The two issues of law raised in this appeal relate to recognition of the appellants and evaluation of evidence. These are the issues of law which we are enjoined to consider in this second appeal.

11. The record of appeal shows that the star witnesses in the trial were PW1 and PW2. PW1 in her evidence stated, amongst other things,

> ***"I am a teacher at particulars withheld. On 3/11/2009 at 4.00 a.m. I was asleep in my home when robbers invaded my home. I was asleep when robbers invaded my home. I came to know them later. They knocked my door and demanded that I open the door but I refused.***
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> ***My son who was sleeping in another house screamed and the robbers fired a gun and I opened the door fearing they had shot my son dead. The robbers entered my house and others stood on the door way.***
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> ***They pointed a gun at me and said they wanted my head. I tried to beg them not to harm me. I gave them my two mobile phones, Ksh.630/= in cash and that were in a purse. As they were struggling for the money I counted six robbers in total.***
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> ***They told me to enter the house and lie on the seat. They demanded that I remove all my clothes. I told them that I could not remove all my clothes as I was sick. They told me that I would die if I did not remove all my clothes. I removed my panty. Mutuma Rukunga was the first to lie on me. He raped me. After he was done, John Munene entered me and after he was done, one Kirinyu entered and raped me. The other three refused and said it was already morning.***
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> ***"One Paul Kaithya had a torch and was standing there when the three robbers raped me. He provided light for them. The others stole my husband's clothes, a radio, shoes, all valued at Shs.6,500/=. After the robbers left I proceeded with my children to Tigania Police Station where I reported the matter. I was given a letter referring me to hospital.***
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> ***I went to Miathene District Hospital where I was treated. On 7/11/2009 I went to the police station and was given police officers who accompanied me to my home. They found shoes that Mutuma had left behind after he wore my son's shoes.***
>
> ***They also collected a catridge at the scene. On 12/12/2009 I was telephoned by neighbours and informed that the robbers who had attacked me were hiding at a certain place. I proceeded to the assistant chief's office at 6.00 a.m. I passed the information to him. He summoned his officers and some village elders and we proceeded to their hiding place. We found John Munene and Kirinyu who fled. After John Munene was arrested one of my stolen mobile phones were (sic) motorolla C117 was recovered from his right side trouser pocket. We escorted him to Tigania Police Station.***
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> ***On 15/01/2010 I was informed by my friends that Mutuma Rukunga had been found at Muthara market. I proceeded there and reported to the chief of Muthara location. I gave him the warrant we went to where he was hiding and arrested him.***

We escorted him to Tigania police station. I identified the accused from the torch light. Their faces were very close to me as they raped me and my eyes were wide open. The person who was holding the torch was standing next to me and would hit my head with a stick whenever I resisted the rapists' advances.

I knew the accused persons even before the incident as they were my neighbours. I had informed members of the community policing about the suspects who had robbed and raped me. I had also given them copies of the warrants I had been given at Tigania Police Station for the suspects' arrest. I recorded the names of the people who had robbed and raped me at Tigania police station when I reported.

I can see one of the phones that was stolen from me.

A silver black colour motorolla mobile phone make C117 identified and marked MFI 1. I have a receipt for it. Same identified and marked MFI 2. It is in the names of my late husband. It was bought on 4/4/2007.The serial No. 35222701/48102."

I was issued a P3 form at the police station. Same identified and marked MFI 3. I have known the accused persons since their childhood. I also taught them in school.

12. In cross-examination by the 1st appellant, she stated –

"I have known you since childhood. I taught you in school. I saw your face when you were on top of me. I could see you from the torch light of the person who was standing next to us. The torch light was illuminating us. I did not close my eyes. I was not in shock anymore when you penetrated me. I did not imagine that it was you. I mentioned your name to the police. The chief, two elders and a police man recovered the phone from you. They were witnesses you are lying. I did not bribe the chief to frame you. I reported that I had been robbed Ksh.630 cash. It is in the O.B. I reported that I had been robbed two mobile phones, a nokia and a motorolla.

That report is in the O.B. only the motorolla was recovered. I went to hospital alone. I could not take you to hospital because you appeared to have enjoyed yourselves while I was in pain. The other three who did not rape me are the ones who stole clothes. Your interest was to rape me."

13. PW1 also stated in examination in chief

"... The chief, two elders, and a policeman recovered the phone from you (1st appellant).

"I can see the phone that was stolen from me... A silver/black colour motorolla mobile phone C117 (MFI 1). I have a receipt for it (MFI 2). It is in the names of my husband. It was brought on 4th April 2007. The serial Number is 35222701/48102..."

14. In his evidence, PW2 testified that he was the son of PW1 and was sleeping at 4.00 a.m. on 3.11.2009 when the robbers struck. He heard his mother's house being broken into. The robbers fired a gun. PW2 opened. They entered and stole a radio and shoes. In cross-examination by the 1st appellant, PW2 stated –

"***I saw you. I recognized you because you shone your torch on Mutuma as he wore my shoes. Both of you were armed with a gun. The shoes were left at our home. I saw you leaving them there.***

There are many shoes at our home. They are not our shoes. We did not bring the shoes from our home to frame you. I knew the shoes belonged to Mutuma. My mother told me she had been robbed of her phone. I followed what she told me. I did not know it's number because it

belonged to my mother. I knew it was a motorolla but did not know the number. You were caught with it (motorolla); I was present during your arrest. I am telling the truth. You were also caught with clothes. I recognized you. My mother told me the things you robbed her.

15. In cross-examination by the 2nd appellant PW2 stated –

"You were caught with my mother's things. You stole my shoes. You were found wearing them...."

"I have known you since I was a child. You stole my mother's shoes. You were found wearing them. I do not know where you kept them.

16. Solomon Kubai Mugwika (PW5) testified how the chief of ***partculars withheld]***, got a report of robbery and rape from A N N (PW1) and how, on tip off, he enlisted the help of administration police officer Makasi and effected the arrest of the 1st appellant on 12th December 2009 at Mula location. In his evidence, Solomon Kubai told the trial court that the 1st appellant's companion fled to avoid arrest. It was Solomon Kubai's evidence that the 2nd appellant was found in possession of a metallic motorolla mobile phone No.C117 and was escorted to Tigania Police Station as members of the public bayed for his blood.

17. Police Constable Kipkoech (PW6) while on duty at Tigania police station on 3rd November 2009 at 9.50 a.m. received a report from A N. He had recorded in the Occurrences Book the robbery and rape incident and what was stolen from A N N. The witness caused a P3 Form of the latter to be completed at Miathene District Hospital where PWI was examined and treated by Geoffrey Muriithi, a clinical officer, (PW7) who testified that PWI had bruises on the thighs and that she had been raped. The P3 form was signed by PW7 who produced it as exhibit No.3.

18. In defence, the 1st appellant alleged in his sworn statement that he had been framed. He admitted that the motorolla mobile phone had been recovered from his pocket but denied it was the chief who did it. He said that it was the investigating officer. He alleged that the motorolla mobile phone was planted on him. It was his defence that the chief and the investigating officer framed him because he had refused to sign for the transfer of his land to go to his father's brother.

19. On his part, the 2nd appellant, in his sworn statement alleged that he was at a place called Muthara market when the area chief arrested him. He admitted that PWI was a neighbor at home. He told the court that on 3rd November 20019, when the robbery took place, he was in Rwanda area and that the person in whose company he was died a long time ago. The evidence of A N N (PWI) shows that the latter knew the appellants prior to the robbery and rape ordeal on 3rd November 2009. She was a teacher and had taught the appellants as her students. Indeed, this was not denied by the appellants. During the incident that night, she used the torch light to identify them. But this was hardly satisfactory as the trial court found. But during the rape ordeal, she said that she observed the faces of the 1st and 2nd appellants as well as the face of one Kirinyu, as they gang raped her. The 1st appellant was also found in possession of PWI's mobile phone, motorolla C117. The evidence of recognition was corroborated by PW2 who also recognized the appellants as two of the members of the gang that robbed and raped PWI. The 1st appellant did not refute the fact that the motorolla mobile phone was found in his pocket. His claim was that it was planted on him. The trial court observed the witnesses as they testified. In her judgment, the trial magistrate observed –

"the facts on record which are not at all disputed show that the accused (i.e. the two appellants) are well known to the 1st complainant (PWI). She (PW1) was once their teacher when they were pupils at particulars withheld. The two accused also happen to come from the same neighbourhood as that of the complainants. Thus, even a small amount of light would have been enough for the complainant to recognize them. The evidence on record that the accused (i.e. appellants) never disputed (the facts) shows that one Keithya had a torch which was on and

was standing next to the accused (appellants) as they took turns on her." That being the case, there was sufficient light though not directly illuminating the accuseds' faces but was enough for the complainant to recognize them. The precision with which she narrated the sequence of events leaves the court with no doubt that the accused (appellants) committed the offences charged."

20. In the impugned judgment of the High Court (Makau & Gikonyo JJ) the court evaluated the evidence and appreciated that the evidence of recognition of the appellants was given by PWI and PW2 and that it was at night. The court also examined, as it was required to do, the circumstances in which the recognition took place. It focused on the nature of the light, its source, the distance at which recognition was made in relation to the light, and whether the circumstances were conducive to positive recognition.

21. The two issues for our consideration in this appeal are whether the High Court gave the appellants a retrial by properly re-evaluating the evidence adduced in the trial court, and whether the evidence established beyond reasonable doubt that the appellants were recognized and committed the two offences on which they were convicted and sentenced. We have carefully perused the record and are satisfied that the High Court examined with circumspection the evidence to determine whether the appellants were two of the members of the gang that robbed and raped PWI. The evidence tendered against the appellants was of recognition and the doctrine of recent possession of property recently stolen was applied.

22. This appeal being against a criminal conviction, the law is and has always been that the prosecution must prove that the accused, now appellants, were guilty beyond reasonable doubt. The onus for such proof always reposes on the prosecution. There is no onus on the accused to establish his innocence and where the evidence does raise a reasonable doubt, the benefit of doubt must go to the accused.

23. On the evidence of recognition, we start with a word of caution. Evidence of visual identification by recognition or identification is capable of meting out injustice. The ability of people to see correctly will vary from individual to individual as will the circumstances in which identification or recognition takes place. Witnesses may describe events with accuracy; they may also be inaccurate; they may also be mistaken, or even deliberately untruthful, and their observation may be inaccurate and memory may fail them. It is accepted that even the most honest of witness can be mistaken when it comes to identification (see **Kamau v. Republic** [1975] EA 139). It is for this reason that conviction should only ensue when proof is beyond peradventure that a witness was properly identified. In **Jeremiah Kiiru Nyambura v. R** [2011] eKLR this court stated that in **Wamunga v. Republic** [1989] KLR 424 (KSU CA Cr. Appeal No.20 of 1984) (unreported) it stated that in relation to reliance on visual identification in criminal cases, caution must be exercised because a person may be genuine in his identification of a suspect by way of recognition, but be mistaken, and hence the need for care before such evidence is relied on without other evidence to sustain a conviction. It was said by this court in the case of **Anjononi & Others v. Republic** [1980] KLR 59 that the evidence of recognition is better than that of identification because, in recognition, the witness knows the suspect and his evidence relates to recollection as opposed to observation of a stranger while in the latter case, the observation relates to a stranger.

24. In **Anjononi & Others v. Republic** (supra), this Court (per Madan JA) stated-

"the recognition of the appellants by Wanyoni and Joice to whom they were previously well known personally, the first appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the appellants kept flashing about Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyoni reported their names to the owner of the farm where he worked. He also later, on the same night, gave the names of the three appellants to the police as the robbers who had robbed him."

25. In this appeal, A N, the complainant, (PWI) knew the appellants who were once her students. The robbery and rape ordeal did not occur in a flash. According to her, the rapists raped her in turns. Though it was dark, one of the rapists kept the torch on to illuminate the area where they raped the complainant. Though the intensity of the torch light was not stated, PWI stated it was bright enough for her to see the

rapists who were very close to her. She knew them. She recognized them. At the earliest opportunity after the ordeal, she disclosed their identities to the police and in her statement. During the arrest of the appellants, she confirmed they were the rapists. If there was any doubt about the evidence of recognition, PW2, the son of PW1, also gave evidence that he saw the appellants with the help of torch light which the robbers had. He knew the 2nd appellant who stole his shoes and left it behind. PW2 told the 2nd appellant in cross-examination that he knew him since he, PW2, was a child. When he was arrested, the 2nd appellant was wearing PW2's shoes which he had stolen on the 3rd of November 2009.

26. If there was any lingering doubt about the evidence of recognition by PWI and PW2, the fact that the 1st appellant was found in possession of PWI's mobile phone and the 2nd appellant was found in possession of PW2's shoes ought to eliminate that doubt. The doctrine of recent possession in relation to the mobile phone was powerful. CROSS ON EVIDENCE, 5th Edn, page 49 (now 9th Edn page 38) states that –

> ***"if someone is found in possession of goods soon after they have been missed, and he fails to give credible explanation of the manner in which he came by them, the jury are justified in inferring that he was either the thief or else guilty of dishonestly handling the goods, knowing or believing them to have been stolen... The absence of an explanation is equally significant whether the case is being considered as one of theft or handling, but it has come into particular prominence in connection with the latter because persons found in possession of stolen goods are apt to say that they acquired them innocently from someone else. Where the only evidence is that the defendant on a charge of handling was in possession of stolen goods, a jury may infer guilty knowledge or belief (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue. For the doctrine of recent possession to apply, it must be proved that the appellant had control of the suspected item and hence its possession.***
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> ***Archbold 2002 on Criminal Pleading, Evidence & Practice (Sweet & Maxwell) opines that recent possession as a rule is no more than the application of common sense and it is submitted that where it is proved that premises have been entered and property stolen therefrom and that very soon after the entry the defendant was found in possession of the property, it is open to the jury to convict him of burglary, and the jury should be so directed: R V. Loughlin, 35 Cr. App. R. 68, CCA. It is patently clear that for one to be said to have possession of an item, one must have knowledge that it exists and power or control over it. Possession can be actual or constructive. Black's Law Dictionary defines "actual possession" as "physical occupancy or control over property" and "constructive possession" as "control or dominion" over a property without actual possession or custody of it..."***

27. In this appeal, the Motorola mobile was found in possession of the 1st appellant who had control over it; it was conclusively proved to be the property of PW1; it had been stolen from PWI a short period prior to the discovery of 1st appellant's possession of it; there were no co-existing circumstances which pointed to any other person as having been in possession; the 1st appellant had no explanation as to how he came by it; that 1st appellant therefore failed to rebut the presumption that he had stolen it from PWI and was one of the robbers and rapists on the night of 3rd November 2009.

28. In our view, taking into account that the appellants were persons known to PW1 for a long time and the fact that PW1 observed them keenly during the rape ordeal and at a close range, and notwithstanding the fact that the intensity of the light from the torch kept on by one of the rapists during the ordeal was not indicated save that PW1 could see the rapists well through it, we are fortified by the fact that the evidence of recognition as opposed to identification was more reliable. It was also corroborated by the evidence of PW2 and reinforced by the doctrine of recent possession. We are satisfied that there was no mistake as to the identity of either appellant and that there was no error in their recognition. They are two of the members of the gang that robbed and raped the complainant. We find no merit in the appeal. We accordingly dismiss it.

Dated and delivered at Nyeri this 5th day of April, *2017*.

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR