IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, MUSINGA & KANTAI, JJ.A

CRIMINAL APPEAL NO. 94 OF 2011

BETWEEN

DENNIS MOTANYA MOKUA.....1ST APPELLANT

D M O.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a Conviction and Judgment of the High Court of Kenya

at Kisii (A. Makhandia & R. Nekoye, JJ.) on 24th February, 2011

in

H.C.C.A. No. 147 & 81 of 2009

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JUDGMENT OF THE COURT

The 1st appellant, **Dennis Motanya Mokua**, was the second accused at the trial while the 2nd appellant**, D M O**, was the 1st accused. Each was convicted for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code in count 1. The 1st appellant was sentenced to death while the 2nd appellant, who was found to be a minor, was ordered to be detained at the President's pleasure. The 1st appellant was also convicted for the offence of gang rape contrary to **section 10** of the Penal Code in count III and sentenced to fifteen (15) years' imprisonment.

Similarly, the 2nd appellant was convicted of the offence of gang rape in count II contrary to section 10 of the Penal Code and sentenced to three (3) years' imprisonment. Their respective appeals against conviction and sentence were dismissed by the High Court, save that the respective sentences in counts II and III were held in abeyance.

The evidence against the appellants was briefly as follows:

On the night of 23rd February 2009 at about 1.00 a.m. **R M**, the complainant, was walking to her house

from a bar. When she reached near her house she saw someone ahead of her and when she reached him, the person whom she later identified as the 2nd appellant held her by the throat, knocked her down and demanded money. The 2nd appellant called another person whom the complainant later identified as the 1st appellant. The 2nd appellant searched her and stole her two Nokia phones and cash shs. 700/-. Thereafter, she was taken outside a disused house and raped in turns by the two using condoms after which they left.

The complainant went to hospital in the morning and thereafter reported to police. PC Ahmed Rashid visited the scene and collected the used condoms. At about 9.00 a.m. the complainant went to the barber shop of Geoffrey Momanyi (Momanyi) and reported the robbery and rape to him. She also told Momanyi, a barber, to inform her if he heard of a phone being sold. Later at about 4.00 p.m. Momanyi went to play a game of pool and the 2nd appellant followed him and told him that he was selling a mobile phone and asked Momanyi to get him a customer. Momanyi took the phone and told the 2nd appellant to wait at his barber shop. Momanyi went to the complainant's house, showed her the phone and she confirmed that it belonged to her. Momanyi went back to his barber shop but he did not find the 2nd appellant whereupon he reported at the police station. PC Joseph Mwenda went to Momanyi's shop and recovered the phone and as he was returning to the police station it was reported that the person who was selling the phone was at Momanyi's shop. He went back there and found that the 2nd appellant had already been arrested by the members of public.

The 1st appellant was arrested on 3rd March 2009 in connection with another offence and when he was being taken to the police station, the complainant saw him and followed him to the police station where he identified him as one of the two people who had robbed and raped her.

The 1st appellant denied committing the offence and said that the charges were framed. The 2nd appellant stated that he was a standard seven pupil in a primary school and was 17 years old. He further stated that he was at home at the material time; that he did not have the phone; and that there was a family land dispute with Momanyi who was a neighbour.

The trial magistrate made a finding that there was light at the scene and that the complainant identified the appellants. The trial magistrate further made a finding that the prosecution evidence was consistent and credible and that the 2nd appellant had the phone at the time of arrest.

The High Court evaluated the evidence relating to the identification of the appellants at the scene and made a finding that the evidence was not satisfactory and concluded that the conviction could not be upheld on the basis of identification. However, the High Court upheld the conviction of the 1st appellant on the basis that he had been identified by his deformed hand which connected him with the offence. As regards the 2nd appellant, the High Court upheld the conviction on the basis of recent possession of the mobile phone.

As regards the appeal of the 1st appellant, Mr. Okenye, learned counsel for the appellants, submitted that there was no evidence to connect him with the offence and that many people could have deformed hands. Mr. Ogot, the learned Senior Assistant Director of Public Prosecutions, did not support the conviction of the 1st appellant.

The 1st appellant was convicted solely on the evidence of identification. The complainant merely said that there was light at the scene. The High Court evaluated the evidence and was not satisfied that there was satisfactory light and specifically held that the conviction could not be upheld on the basis of virtual identification. The 1st appellant was arrested in connection with another offence about seven days later. He was not arrested as a result of any description of him to police by the complainant. The complainant had seen him as he was being taken to the police station. It follows that her evidence of identification of the 1st appellant by deformed hand was not reliable. Further, the High Court misdirected itself by finding that the deformed hand connected the 1st appellant with the offence when it had already made a finding

that evidence of virtual identification was unreliable. We are satisfied that there was no concrete evidence to connect the 1st appellant with the offence and that the State Counsel has rightly conceded the appeal.

The 2nd appellant was found guilty solely on the doctrine of recent possession of the stolen mobile phone. It was submitted by Mr. Okenye that Momanyi was not a straight forward witness and his evidence should not have been relied on as the 2nd appellant was not found in possession of the phone. Mr. Okenye further submitted that since the 2nd appellant was a child, the conviction and sentence was illegal.

It is true that the fact of possession of the phone was based on the evidence of Momanyi. The trial magistrate considered his evidence and found it to be consistent and credible. The High Court evaluated the evidence of the complainant and Momanyi at length and believed their evidence that it was the 2nd appellant who took the phone to Momanyi and that the phone was identified by the complainant as one of the two phones stolen from her at the time of the robbery.

The High Court further made a finding that the 2nd appellant was in possession of the stolen phone hardly a day after the robbery. The 2nd appellant admitted that Momanyi was a neighbour. Although he claimed in his unsworn statement that there was a land dispute involving Momanyi, he did not cross-examine Momanyi about it and there was no concrete evidence of its existence. Momanyi testified that the 2nd appellant had sold another phone to him before. Momanyi not only reported about the phone to the complainant but also to the police. We find no reason for interfering with the concurrent finding by the two courts below which was based on credibility of witnesses that the 2nd appellant was in possession of the stolen phone and that he is the one who took it to Momanyi to find a buyer. There was sufficient and credible evidence that the 2nd appellant committed both offences.

Mr. Okenye submitted that the 2nd appellant being a child should have been sentenced under the **Children Act (Act No. 8 of 2001)**. The Act came in force on 1st March, 2002 long before the 2nd appellant committed the offence. **Section 189** of the Act provides that the word *"conviction"* and *"sentence"* should not be used in case of a child, that is, where the offender is under eighteen years of age and **section 191(1)** thereof provides methods of dealing with offenders under the age of 18 years which includes a discharge, probation order, committal to rehabilitation school or Borstal institution. Section 190(1) of the Act, proscribes the sentence of imprisonment and detention in a detention camp in respect of a child

Further, **by section 25(2)** of the Penal Code, a sentence of death cannot be imposed on a person who was under the age of 18 years at the time when the offence was committed and in lieu thereof, such person should be detained at the President's pleasure. However, section 191(1) of the Act which prescribes the methods of dealing with child offenders provides in part:

> ***"In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways…" (emphasis added)***

It is apparent that although the Act does not repeal section 25(2) of the Penal Code, the court has the discretion to deal with the child found guilty of a capital offence under section 191(1) of the Act notwithstanding the provisions of section 25(2) of the Penal Code. It is noteworthy, however, that section 191(1) is not mandatory and the court has the discretion to deal with the child in any other lawful manner as section 191(1) (c) specifically provides. It follows that section 25(2) of the Penal Code and section 191(1) of the Act are not mutually exclusive but rather complementary.

In this case the 2nd appellant told the trial magistrate that he was 17 years of age and the trial magistrate made a finding to that effect. The 2nd appellant was found guilty of capital robbery which carries a death sentence. The 2nd appellant was not sentenced to death as the High Court erroneously stated. Since

section 25(2) of the Penal Code and section 190(2) of the Act proscribes a death sentence where the offender is under 18 years of age, the court could have dealt with him as provided under section 25 (2) of the Penal Code or under section 191(1) of the Act, whichever was the appropriate method. The appellant was an adult by the time the High Court dealt with his appeal and he could not have been suitably dealt with under section 191(1) (a)-(k) of the Act. In the circumstances detention at the President's pleasure was the suitable method of dealing with the 2nd appellant. We confirm the detention as the correct method.

The sentence of imprisonment for rape in count 1 was unlawful. Moreover, imprisonment could not be carried out when the 2nd appellant was under detention during the President's pleasure. The appropriate sentence should have been an absolute discharge under section 35(a) of the Penal Code.

For those reasons, the appeal of the first appellant (Denis Motanya Mokua) is allowed in its entirety. The respective convictions for robbery and rape are quashed respectively and the respective sentences set aside. He shall be released forthwith unless otherwise lawfully held.

The appeal of the 2nd appellant, D M O, in both counts is dismissed save that the sentence of 3 years imprisonment in count III is set aside and in lieu thereof, the 2nd appellant is discharged absolutely under section 35(1) of the Penal Code.

Dated and delivered at Kisumu this 21st day of March 2014

E. M. GITHINJI

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. Ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR