



**IN THE COURT OF APPEAL OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL 297 OF 2009**

**DENNIS SAINA NDIEMA .....1<sup>ST</sup> APPELLANT**

**JOSEPH BARASA SERUT ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Bungoma*

*(Muchemi & Chitembwe, JJ.) dated 17<sup>th</sup> June, 2009*

**in**

**H.C.C.R.A. NO. 91 OF 2007)**

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**JUDGMENT OF THE COURT**

**DENNIS SAINA NDIEMA** and **JOSEPH BARASA SERUT**, the appellants, were on 19<sup>th</sup> September, 2007 convicted by the Principal Magistrate at Bungoma of robbery with violence contrary to **section 296 (2)** of the Penal Code and sentenced to death. Their first appeal to the High Court of Kenya at Bungoma was dismissed on 17<sup>th</sup> June, 2009 by Muchemi and Chitembwe, JJ. and hence this appeal.

The complainant, **Simiyu Wafula (PW1)**, is a small businessman dealing in the buying and selling of maize within Kapkateny Location of Mt. Elgon District. On the material day at about 12 noon he was ferrying maize on a donkey to the local market when he met a group of about twenty people some of whom were armed with assorted weapons including guns. The group accosted him and demanded money. When PW1 hesitated, they got hold of him, searched his pockets and removed his cell phone, Motorola 116 and cash Shs.1,500. It is his testimony that the two appellants were the persons who held him and searched his body. He told the trial court that the appellant Dennis was armed with a knife while Serut was holding a stick. After the attack the group ran away in different directions.

The robbery was reported to the police on the same day. About a week later, PW1 spotted the appellant Dennis at Kapkateny Market. It was about 3 p.m. Dennis went inside a hair salon and asked the barber therein to charge a cell phone battery for him and then left. As soon as Dennis came out of the salon, PW1 went inside the salon and he saw his cell phone being charged. He identified it by means of the markings he had engraved on the battery. He rushed to inform the police who accompanied PW1 into the hair salon and waited for the appellant, Dennis. As soon as Dennis entered the salon the police bounced on him and arrested him. The appellant Serut was arrested outside near the hair salon and he was said to have been drunk and moving aimlessly within the market.

In his defence, the appellant Dennis denied robbing PW1 nor even being at the scene of the robbery. He stated that he never took PW1's cell phone to the hair salon and he vehemently denied that he was in possession of it. Serut averred that he was not involved in the offence charged. He asserted that he was arrested for nothing.

The conviction of the appellant was based on the evidence of their identification by PW1 and of

possession of PW1's cell phone by Dennis.

The appellants in their grounds of appeal and in the forceful submissions of their counsel, Mrs. Kimathi, have faulted the concurrent findings of fact by the two courts below.

We will first consider the issue of possession. Dennis was arrested so soon as he entered the salon. The salon owner **Danson Sonit (PW2)** was not positively so sure of the person who actually took the cell phone to him. Had the police been a bit patient and not hasty, they would have waited for Dennis to collect the cell phone and this would have squarely connected him with the cell phone in that he would have been found in actual physical possession of it. Serut cannot at the stage in which he was arrested be deemed to have had any actual connection at all with the cell phone. In short there is no evidence to connect Serut with the possession of cell phone. Further, the prosecution did not establish any connection between the two appellants. In the circumstances, the application of the doctrine of recent possession is inappropriate.

Mrs. Kimathi further argued that the identification of the appellants by PW1 was unreliable in that he severally contradicted himself in his cross-examination. We would agree as the record is clear on this.

On our own analysis of the entire evidence on record we think that the conviction of the appellants is unsafe and unsatisfactory.

The appeal is allowed, the conviction of each appellant is quashed and the sentences set aside. The appellants shall be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Eldoret this 16<sup>th</sup> day of April, 2010.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**J.G. NYAMU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**