



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 267 OF 2012

HEZRON RIOBA ACHIKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. This is a criminal appeal by **Hezron Rioba Achiki**, the appellant herein. He was charged **with robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars thereof were that on 12th day of October, 2011 at MAGERI sub location in Nyamira District within Nyamira County jointly while armed with dangerous weapons namely pangas and metal bars robbed HELLEN CHIRENGA cash Kshs. 100/- the property of the said Hellen Chirenga and immediately before or after the time of such robbery used actual violence to the said Hellen Chirenga. He denied the offence. The trial ensued before Senior Principal Magistrate's court at Nyamira in a Criminal Case No. 713 of 2011. From the evidence adduced the court convicted the accused, not with robbery with violence with which the accused had been charged but with **Grievous Harm, contrary to Section 234 of the Penal Code**. The complainant does not know who took Kshs. 100/=. There is no proof of theft of the money. Accordingly, the accused was sentenced to life imprisonment under **Section 234** thereof on 30th November, 2012.

2. The appellant being aggrieved and dissatisfied against both the conviction and sentence of life imprisonment, did appeal against both conviction and sentence. His grounds of appeal are as follows:

- 1) *The charge was defective because first, it was a charge of rape, second, charged to robbery with violence, third, and final, accused was convicted to Grievous Harm.*
- 2) *That the conviction and sentence were meted out on evidence of a single witness without warning herself that "mistakes of recognition of close relatives and friends are sometimes made".*
- 3) *Denied the accused of his constitutional right:*
 - a) *Information held by the state.*
 - b) *Information held by another person and require for the exercise or protection of any right or fundamental freedom.*

4) *Equality before the law means equal benefits the law and equal enjoyment of the benefits of the law, a severe sentence such as was meted on me is not commensurate with the gravity of the offence.*

3. The respondent opposes the appeal as follows:-

1) *Section 179(1) empowers the trial court to convict on an offence that the accused was not initially charged with. Section 179(2) an accused, person may be convicted, at the end, of less offence than the one he was charged with.*

2) *The complainant with a touch positively identified the accused she even asked him nini unamiuliza? This identification was corroborated by PW2 and PW3.*

3) *There is no evidence on record that the accused demanded some information held by the state which he needed for the defence of his case. This is a signet of his imagination or afterthought.*

4) *The appellant chopped off the complainant's left arm and maimed the right hand leaving her in serious disability. So the sentence of life imprisonment is adequate punishment and is legal as it is provided for by the law.*

5) *The appellant has not shown that the trial magistrate wrongly interpreted the law or applied wrong principles of the law in arriving at that sentence. The conviction is grounded in evidence. The court is urged to dismiss the appeal.*

4. As to whether there was sufficient evidence to support the conviction, this court, as this is the first appellate court, is enjoined to consider the entire evidence evaluate it and reach an independent conclusion bearing in mind that it neither heard nor saw the witness testify, see **Pandya vs- R. [1957] E.A.L and Okeno vs. R 1972 EK. 32.**

5. Having read the trial court proceedings and the evidence as adduced at the trial, and having evaluated the same, I reached an independent conclusion that the conviction and sentence was proper. Accordingly, I confirm the said conviction and sentence of the trial court. Therefore the appeal filed on 11th December, 2012 by the appellant be and is hereby dismissed.

Dated and delivered at KISII this 29th day of May 2015.

C.B. NAGILLAH,

JUDGE

In the presence of:-

- Appellant in person for the appellant
- (absent) for the respondent
- Samuel Omuga - Court Clerk.