**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 233 OF 2009**

***(From original conviction and sentence in Criminal Case No.71 2008 of the Principal Magistrate's court at NAROK – A.G. KIBIRU, SM)***

**SALIM ABDALLAM LETEIPA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Salim Abdalla Leteipa was convicted of the offence of Robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to death. The appellant is dissatisfied with both the conviction and sentence and filed this appeal. The grounds upon which he preferred the appeal are found in his petition of appeal. The grounds are that the magistrate erred in basing his conviction on identification by recognition; that the magistrate erred in basing the conviction on the doctrine of recent possession and yet the exhibits were not properly identified and lastly that the prosecution evidence did not dislodge his defence. At the hearing of the appeal, the appellant further submitted that no identification parade was ever conducted. He also said that it was alleged only one of his ears had a hole yet both ears had holes. He also said that the arresting officer also investigating his case and yet he had a grudge against him as he had arrested him severally.

The appeal was opposed by Mr. Nyakundi who appeared for the State. He urged that the appellant was properly identified because there were bright security lights at the scene and he struggled with the complainant in the process of snatching her bag. He further submitted that the complainant reported to police on the same night, gave the appellants description and the next day, it is the complainant who spotted the appellant, called police who arrested the appellant and there was no need to conduct an identification parade.

As to recent possession, counsel urged that upon arrest, the appellant was found in possession of the complainant's items which she positively identified and the appellant was unable to explain how he came to be in possession.

The brief facts of the prosecution case are as follows: On 5/2/08 at about 8.30 p.m. Agness Wambui Kenana (PW1) was in company of Regina Muthoni Muiruri (PW2). They were walking from work. PW1 was carrying a red handbag and a paper bag. In the handbag was a black wallet, ID Card, ATM Card, Kshs.25,000/-, Nivea powder, scissors and other beauty items, Kshs.6,000/- she was keeping for a friend,

Kshs.4,500/-, Safaricom Cards worth Kshs.800/-, Kshs.2,000/- from sales at the salon and a finger ring. In the paper bag, was a kitenge skirt suit, a mobile phone charger, sonitex radio. PW1 recalled that while outside their gate, they met 3 people coming from the opposite direction. On approaching them, the three split so that one went to the other side. As they passed each other the person who came to her side got hold of the paper bag and handbag and PW2 who was slightly ahead of her screamed. people who were nearby came towards them but the one who had held the bags drew a sword and the people ran. PW1 on seeing the sword released the bags and the person ran away with them. Both PW1 and PW2 said that there were security lights at the scene and they were able to identify the appellant who is the person who snatched PW1's bags, had covered his head with a masai shuka (sheet), but when struggling with PW1 over the bags, the sheet fell into his shoulder and PW1 was able to see that his ears were pierced, he wore a red jacket and boots like that of police. PW1 said she was able to see the person who attacked her because they faced each other as they struggled and there were bright security lights at the scene (gate). She reported the robbery to Narok Police Station, and was accompanied by police to look for the assailants on that night but did not get them. The next day, she was called by persons she had described the assailant to and found the appellant at a bar, called police who arrested him, took him to the Police Station where a search was undertaken and in his pockets, was found the complainant's things which included a PNU's key holder, Nivea container with powder inside, a ring, Kshs.1,300/- and in the green bag, he had a pair of boots, jacket which he had won at the time of attack. The items which PW1 identified as hers were produced as exhibits 1 and 2.

It is the appellant's contention that he was not properly identified. Both PW1 and PW2 who were together at the time of attack testified that there were security lights at the gate of the plot where the attack took place. Both of them said that the security lights were bright. PW1 also said that they struggled over her bags with the appellant for a while and at that time, they faced each other. Both witnesses also said that they saw the appellant's ears were pierced (had holes). The witnesses never said that only one ear was pierced and in any event, there would have been no time for them to examine the ears in detail to see whether or not the holes in the ears were similar. The two witnesses vividly recounted how the appellant's head had been covered by a masai (shuka/sheet) but during the scuffle with complaint over the bags, the masai shuka fell to the shoulders exposing his head. They also described the appellant's manner of dress, a red jacket and boots. The witnesses' evidence was not shaken during cross examination by the appellant and we are satisfied that the lower court arrived at the correct finding that the appellant was properly identified and there is no contradiction in the prosecution evidence as regards identification.

The appellant took issue with the distance between PW1 and PW2 at the time of attack. PW1 did not specifically state how far PW2 was. She merely said PW2 had moved ahead at the time of attack but looked back and screamed on seeing what was happening to the complainant. PW2 said PW1 was slightly behind her or about 2 metres. We do not find any contradiction in this evidence because no measurements were taken to ascertain exactly where each one of then was. Besides, they were under attack and the 2 metres or paces are a mere estimation which demonstrates that they were not far from each other. We find no contradiction that would weaken the prosecution case.

The appellant questioned why an identification parade was not conducted. PW1 recalled that she had sent out word about the attack and some people then called her the next day to go and see if the person fitted the description and she went to the club in the company of police who remained outside the club, she went in, saw the appellant and then called the police. It is PW1 who identified the appellant and led police to his arrest. Identification parade was therefore unnecessary. Maybe a parade would have been necessary for PW2 who found the appellant already arrested and at the Police Station. It may have been necessary to conduct a parade. However, we find the failure by the police to conduct a parade for PW2 to identify the robber was not fatal.

PW1, PW2 and PW3 testified that upon arrest, the appellant was taken to the police station where he was searched and was found with some items stolen from PW1 the previous day i.e. her office and house keys, nevea powder, PW2's ring and cash Kshs.1,300/-. In his defence he denies having been found with any of the things but that he was framed. Though he claimed that PW3 had a grudge with him for having arrested him in another case in which he had just been released, the appellant never disclosed though not bound to do so, when he was arrested, where, the case number or in which court he was tried. PW3

denied knowing the appellant or arresting him before. Besides, we have the evidence of PW1 and PW2 who identified him at the scene of crime and the next day he was found in possession of complainant's stolen goods as well as his property which was returned to him. We find the testimonies of the prosecution evidence were convincing and there was no good reason disclosed to warrant PW3 frame the appellant with these charges. We do find that the robbery having taken place on 6/5/2007 at 8.30 p.m. and the recovery of some of them on 7/5/2007 at about 9.00 p.m., about 12 hours apart the magistrate properly invoked the doctrine of recent possession, because not much time had transpired for the goods to change hands. The finding of the appellant with some of the stolen goods corroborates the evidence of PW1 and 2 on the occurrence of the robbery. The lower court correctly observed that the appellant never alleged any frame up by PW1 and 2 and there is no basis for them to have framed the appellant, being a stranger to them.

After evaluating the prosecution evidence and defence afresh, we come to the conclusion that the lower court properly found that the appellant was properly identified by PW1 and 2 and on the next morning he was found in possession of some of the items that PW1 was robbed of. We are satisfied that the magistrate correctly came to the conclusion that it is the appellant who robbed PW1. The conviction is safe. The sentence of death was lawful and we hereby confirm the conviction and sentence. The appeal is therefore dismissed.

**DATED and DELIVERED this 14th day of February, 2011.**

**R.P.V. WENDOH**
**JUDGE**

**W. OUKO**
**JUDGE**

**PRESENT:**
The appellant present in person.
Mr. Omwega for the State.
Kennedy – Court Clerk.