



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRIMINAL APPEAL NO.82 OF 2010

(Appeal arising from original KML SRM CR. NO.442 OF 2009)

LEONARD KIBOI

NAIBEI.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Leonard Kiboi Naibei was charged and convicted of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death by Senior Resident Magistrate Kimilili. He appealed against the judgment of the Senior Resident Magistrate.

The grounds relied on in the petition are lack of proper identification, defective charge sheet and lack of sufficient evidence to sustain a conviction.

The appeal was opposed by the state. Mr. Ogoti the State Counsel submitted that the offence took place at 6.00 a.m. PW1 saw the Appellant emerging from a bush holding a panga. He immediately attacked her with it by cutting her on the hand severing her small finger seriously. PW1 was knocked down during the attack. Her daughter PW2 answered her distress call and rushed to the scene. PW2 identified the torch stolen by the Appellant after recovery. PW5 and PW6 were police officers on patrol duties at the material time when they met with the Appellant running away from the scene and arrested him. PW1 identified the Appellant in a parade the following day. The Appellant was alone but used violence on PW1. The doctor confirmed the injury. The state argued that the evidence was watertight.

The Appellant raised the issue of contradiction of the names of PW1 as they appear in the charge sheet and given in her testimony. The charge sheet gives the names of complainant as Rael Benson while the witness in her testimony gave her name as Rachael Wawaita before the court. Her physical appearance in court and her testimony on how she was attacked by the Appellant was clear. There was no doubt that the person attacked by the Appellant was PW1 who gave her name as Rachel Wawaita. The complainant appeared personally in court and testified on how she was attacked by the Appellant. There was no doubt

that the person attacked by the Appellant was PW1 who called herself Rachel Wawaita. The name on the charge sheet is the one the police got from the complainant when she reported the incident. PW3 the husband of the complainant gave his name as Benson Waita. I take judicial notice that most married women use their husband's name as their second or third name. It was therefore in order for PW1 to call herself Rachel Wawaita. The name "**Rael**" on the charge sheet could have been a clerical error by the police officer who framed the charge. This is a very minor discrepancy and does not make the charge sheet defective. The charge sheet contains all the ingredients of the offence and all other material particulars. It is therefore not defective.

On identification, PW1 described how she was attacked, identified the Appellant in the parade and identified her stolen spotlight to the police who recovered it from the Appellant immediately after the robbery. PW5 found the Appellant under arrest a few minutes after the robbery. He had a blood stained panga after cutting the complainant with it. Her finger fell off after the assault. The blood stained panga explained the injury on the complainant. The recovery of the spotlight was recent. The doctrine of recent recovery applies herein since the parade officer did not testify to produce the parade forms despite PW1 being categorical that she identified the Appellant in a parade. In court PW1 identified the Appellant as the man who robbed her of her spotlight. The recent recovery directly connects the Appellant with the robbery. PW1 produced the spotlight and the blood-stained panga in evidence.

The Appellant said that there was contradiction of the evidence of the complainant and her daughter PW2 on where the cut finger was found. PW1 said the small cut off finger was left at the scene of crime. PW2 said that her mother was bleeding from the left small finger when she found her at the scene. PW2 did not mention that she ever saw the severed part of the finger at the scene. The Clinical Officer PW4 said the remains of the severed finger was removed. I find no contradiction in the evidence of the witnesses on that aspect.

The difference on time of visiting PW1 in the hospital by PW2 and PW3 as 7.00 a.m and 7.30 a.m respectively is negligible and does not affect the prosecution's case. The time given is very close to each other. Allowance must be given in that one or both of the two witnesses may not have looked at their time gadgets as they reached the hospital.

In defence the Appellant said he was coming from a journey on the material morning. He met with police officers who arrested him. He was taken to the police station and later arraigned in court jointly with another person whom he did not know. He denies recovery of the spotlight from himself.

The trial magistrate in his judgment said that he had considered evidence of both sides and proceeded to analyse it. He further said that the Appellant was found with the stolen spotlight immediately after the robbery. The Appellant in his defence did not explain the possession of the stolen item. The trial court considered the defence of the Appellant but found the evidence of the prosecution overwhelming. The contention of the Appellant that his defence was ignored has no basis.

We have analysed the evidence on record and find that although the parade officer did not testify in order to corroborate PW1's evidence that she identified the Appellant in a parade, the doctrine of recent recovery prevails. The recovery of the stolen exhibit directly connects the Appellant with the offence. The Appellant did not give any defence to explain the possession. All the ingredients of the offence were proved. The Appellant was therefore rightly convicted. We dismiss the appeal and uphold the conviction and sentence.

JUDGE

JUDGE

Judgment dated and delivered on the 18th day of July, 2011 in the presence of the Appellant and the state counsel.

F. N. MUCHEMI

JUDGE