



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 62 of 2004

PHILIP MAOMA LEAKY.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G E M E N T

The appellant was charged with the offence of robbery with Violence contrary to *section 296(2)* of the Penal Code. The particulars of the charge were that on the 9th of July 2003 at about 12.30 a.m. at Emmatsi village, Ebukhando Sub-location, Wekhomo Location in Vihiga District, Western Province, jointly with others who were not before the court and while armed with offensive weapons namely pangas, rungas and Torches, the accused robbed Tabitha Kwendo Maria of sixteen (16) iron sheets, a metal box, three sufurias, three bed sheets and nine (9) hens all valued at KShs.13,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Tabitha Kwendo Maria.

On the 9TH July, 2003 the complainant, **PW1, Tabitha Kwendo Maria**, was asleep in her house. She heard her dog barking and when she peeped through the window, she saw many people. They broke her front door and went to her bedroom. They were armed with pangas and rungas. The complainant had put her lamp on and she was ordered to lie down. She saw the appellant among the people who had entered her house that night.

PW1 testified that it was the accused who cut her with a panga as she tried to talk to him. She knew the accused well and he was also holding a spear. PW1 testified further that she knew the Appellant since he was a child and that throughout the robbery the lamp was never put off. She went to wake up the village elder and was taken to Luanda Police Station where she reported the incident. She was later taken to Maseno hospital where she was treated. **PW4. Protus Kwendo** is PW1's son. He was a student at Ebuleko Primary School in standard 8. The witness was at home that night with his mother when they were attacked by robbers. He woke up and lit the lamp. His mother had already woken up. He was able to see and identify the Appellant and another attacker by the name Kisia. He saw the appellant with a panga and a spear as there was light in the house. The witness testified that he knew the Appellant before and that the Appellant came from a neighbouring area.

PW7, Fred Wekesa, a clinical officer at Kima Hospital testified that he examined the injuries of PW1 on 14.7.2003. The complainant had a cut wound on the scalp and she was tender on the interior chest. The injuries were 5 days old.

PW3, NO.73528 PC Etyang visited the scene and saw the complainant's front door and bedroom door broken. The witness testified that the complainant, PW1 had given them the names of the Appellant and another called Kisia.

An identification parade was conducted on 13th July 2003, by PW6 Acting Inspector Susan Pullis and the complainant was identified by Kwendo. It is not indicated in the evidence whether the witness at the parade was Tabitha Kwendo Maria or Patrick Kwendo.

The appellant was put on his defence. He gave unsworn testimony and testified that he operates a boda boda with a bicycle. On 9th July 2003 he was carrying on his duties when he was arrested by two police officers and taken to Maseno Police Station. He denied having participated in the robbery and confirmed that indeed the complainant knew him.

The appellant was convicted and sentenced to death. It is upon the conviction that the appellant preferred this appeal. He based his appeal on four grounds, namely:-

- i) ***That there was insufficient light at the scene of crime and that the identification of the assailants was improper.***
- ii) ***The identification was by recognition which was not tested to be free from error.***
- iii) ***That no exhibits were produced during the hearing.***
- iv) ***That the learned magistrate erred by convicting with the identification parade report, yet the complainant claimed to know and recognized the assailants.***

During the hearing of the appeal, the appellant relied on his filed grounds of appeal. He further added that the complainant was his neighbour and had disagreed with her. The Appellant stated that he was cutting grass on his compound and in the process cut the complainant's trees.

Mr. Karuri, Learned State Counsel opposed the appeal. He submitted that the prosecution proved its case beyond any reasonable doubt. **PW1** and her son **PW4** were at home that night when they were attacked. There was lamp that had been lit and it was on throughout the incident. PW4 saw the appellant when his cap fell off.

The complainant gave the appellant's name to the police and she knew the appellant. Since nothing was recovered from the appellant, there were no exhibits produced. The learned State Counsel urged the court to uphold the conviction.

It is the appellant's contention that there was insufficient light at the scene of crime and that the identification of the assailants was improper. PW1 testified that there was tin lamp on and the lamp was never put off during the robbery. She looked at the appellant and started talking to him when the appellant cut her with a panga. The identification is corroborated by the evidence of PW4 who confirmed that there was light from a lamp at the scene. He saw the accused who had a panga and spear and he could identify him as Leakey and another one called Kisia. It is our considered view that there was enough light provided by the tin lamp.

In the case of **WAMAI v. REPUBLIC, CRIMINAL APPEAL NO.71 OF 2002: 2003 KLR 279** the Court of Appeal upheld a conviction based on identification through the use of torch light. We uphold the finding of the trial court that the appellant was properly identified. Ground one of the Appeal therefore fails and is declined.

The appellant further contends that the evidence of identification by recognition was not tested and also was not free from error. The complainant testified that she knew the appellant from the time the appellant was a child. The complainant gave the appellant's name and that of one Kisia to PW5. It is evident that the complainant knew the Appellant both physically as well as by his name. the contention that the evidence was not tested cannot stand. During cross examination by the appellant PW1 responded by stating:-

"I gave the police your name, I know you very well. The lamp was on."

In the case of **KINGORI v REPUBLIC CA CR. APPEAL NO.132 OF 2002: 2003 KLR 289**. The court upheld a conviction on the evidence of recognition by one witness. In the current case both PW1 and PW4 knew the appellant and saw him that night. We are convinced that the complainant and PW4 did recognize the appellant and that their evidence was properly admitted by the trial court.

When the appellant was arrested nothing was recovered from him. The complainant alleged to have been robbed of sixteen (16) iron sheets, a metal box, three sufurias, three bed sheets, and nine hens. The fact that none of these items was not produced in court does not disprove the claimant's evidence that she was robbed of those items on 9th July 2003, and the appellant's 3rd ground of appeal also fails. These are disposable items and can easily be sold or hidden without being traced.

We do agree with the appellant's contentions that the identification parade was erroneous as the complainant claimed to have known the appellant. We do note that the trial court took cognizance of this fact and indeed in its judgment positively stated that there was no need of the parade at all. This being the case, the trial court did not base its conviction on the outcome of the parade and the Appellant's fourth ground of appeal does not assist him too.

It is clear to us that the trial magistrate correctly convicted the appellant. Accordingly and for the above reasons, we see no merit in this appeal. We order it dismissed.

Dated, Signed and Delivered this 19th day of May 2009 at Kakamega.

FLORENCE MUCHEMI SAID J. CHITEMBWE

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