IN THE COURT OF APPEAL

AT ELDORET

(CORAM): MARAGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 20 OF 2015

BETWEEN

HILLARY KEMBOI SEUREI.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Eldoret (Ochieng and Macharia-Ngenye, JJ.) dated 6th June 2013,

in

H.C.CR.A No. 334 of 2009)

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JUDGMENT OF THE COURT

The appellant Hillary Kemboi Seurei, was charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***. The particulars of the offence were that on 8th April 2008 at Ketiplong farm in Uasin Gishu District, within the former Rift Valley Province, while armed with a knife he robbed the complainant of Kshs. 300/-, and immediately before or immediately after used violence on the complainant, ***Sosten Ruto (PW 1).***

Upon consideration of the entire evidence, the learned trial magistrate found that the prosecution had proved its case to the required standard, and convicted the appellant and sentenced him to death as by law prescribed.

Aggrieved by that decision, the appellant appealed to the High Court against both the conviction and sentence. The High Court upheld the decision of the trial court, and dismissed his appeal.

Further aggrieved by the High Court's decision, the appellant lodged this appeal setting out five grounds of appeal which are that, the ingredients for the offence of robbery with violence were not proved; that identification by recognition was not proper as the conditions were unfavourable; that the courts below failed to appreciate that a grudge existed between the appellant and the complainant; and that the High

Court failed to properly evaluate the evidence.

Mr. Angu Kitigin, learned counsel for the appellant, submitted that the courts below failed to consider that a grudge existed between the complainant and the appellant arising from the contention that the appellant had taken over the complainant's girlfriend particularly as the courts below acknowledged that the two had quarreled. Counsel further submitted that there were contradictions in the complainant's evidence, as it could not be ascertained from the evidence that his hands had sustained an injury.

Counsel posited that the crime was one of passion and not one of robbery with violence, and that robbery was not proved. There was nothing to support the alleged theft of Kshs. 300/-. Counsel concluded that the offence of aggravated assault, in the circumstances of this case, should have been preferred against the appellant.

Ms. Karanja, learned counsel for the State, opposed the appeal. Counsel submitted that the appellant was properly identified, as the complainant knew and recognized him as a person well known to him. With respect to the theft of Kshs. 300/-, counsel submitted that Gideon was at a distance where he was able to see the theft occur. Turning to the nature of the offence, counsel argued that the incident involved a chain of events culminating in a robbery where the complainant's trousers pocket had been cut off, and the money stolen.

We have considered the grounds of appeal, the submissions by counsel on both sides and carefully read the record of appeal. The issues for our determination are whether the appellant was properly identified and whether the doctrine of recent possession was applicable in the circumstances of the case.

This being a second appeal, only matters of law fall for the consideration of this Court – See ***section 361 (1)*** of the ***Criminal Procedure Code*** and ***Njoroge vs Republic [1982] KLR 33.***

Regarding the appellant's complaint that the courts below failed to appreciate that a grudge existed between the appellant and Soston, the trial court concluded that there was no evidence to show that a grudge existed between Soston and the appellant.

We are inclined to agree with the trial Court. There was nothing to show that a grudge existed between the appellant and Soston. An argument initially arose between Gideon and the appellant over a girlfriend, one Chepkoech, which did not involve Soston. The appellant attacked Soston with whom he had no grudge, and not Gideon. We find that this ground is unfounded and accordingly dismiss it.

The next issue was that the offence of robbery with violence was not proved. Both the trial Court and the High Court were satisfied that robbery with violence was proved beyond doubt.

Section 296(2) of the ***Penal Code*** sets out the ingredients for a charge of robbery with violence and provides:-

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other personal violence to any person, he shall be sentenced to death."

As regards proof of the necessary ingredients under ***section 296 (2)*** and whether the prosecution was able to demonstrate that an offence under the section had been committed in the circumstances of this case, the case of ***Johana Ndungu v. Republic*** ***Criminal Appeal No. 116 of 1995*** sets out the

requirements in these words:-

"(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.

(1) If the offender is armed with any dangerous or offensive weapon or instrument, or

(2) If he is in company with one or more other person or persons or

(3) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

If the court finds that immediately before or immediately after the time of robbery, though alone, the offender wounds, beats, strikes or uses any other violence to any person, the offence under ***subsection (2)*** is proved.

To determine whether the offence of robbery with violence was proved in this case, we return to the facts of the case. Soston stated that on his way back home from work at about 9 p.m, he was accompanied by Gideon his colleague, when the appellant accosted Gideon. An argument ensued. Soston told the appellant to stop, and in response, the appellant went to his house and came back with a knife. With it he attacked Soston cutting him on his right hand. Scared by appellant's actions, Gideon fled from the scene. A P3 form completed by ***Dr. Joseph Embenzi (PW 4),*** a medical officer at Moi Teaching and Referral Hospital, showed that Soston sustained injuries to his left upper limb and right shin. The doctor found these to be grievous harm.

The facts show that Soston, Gideon and the appellant were all well known to each other. According to both Soston and Gideon the appellant was well known to them, as they all lived in the same area and the appellant's home was about two kilometres from Soston's home. And Soston stated that he knew the appellant before the incident. This is further buttressed by the argument that ensued between Gilbert and the appellant in which he alleged that Gideon had taken over his girlfriend. On his part, the appellant did not deny that the complainant was not known to him. He testified that on the day he was arrested, it was the complainant's brothers who came to his home thus confirming he and the complainant knew each other.

When we consider the events as they unfolded, we find that they do not have the hallmarks of a violent robbery. We say this because, we are not convinced that Soston was robbed of money as alleged. The only witness to this would have been Gideon. But he testified that he fled after he saw the appellant attack Soston. He also stated on cross examination that he saw the appellant remove money from the complainant's pocket, which could not have been the case, as it was dark, and he had already left the scene. With regard to the alleged cutting of Soston's trousers he stated;

"This is the trousers the complainant was putting on that day. It had not been cut…"

When this evidence is considered in its totality, we are not satisfied that Soston was robbed, or that the appellant's intention was to rob persons who were well known to him. The events point to a serious argument over one Chepkoech that led to the assault of Soston by an agitated boyfriend, the appellant. Had both the courts below properly reevaluated the evidence, they would also have come to the conclusion that the offence of robbery with violence was not proved, and as a consequence found that the conviction was not safe.

We are nevertheless satisfied that on account of the attack on Soston following which he sustained injuries, a lesser offence of assault causing actual bodily harm contrary to ***section 251*** of the ***Penal Code*** was proved beyond doubt.

Accordingly, we allow the appeal in part and quash the conviction for robbery with violence and set aside the sentence imposed. We substitute therefore a conviction for the offence of grievous harm contrary to ***section 234*** of the ***Penal Code*** and sentence him to ten years imprisonment from the date of conviction. The period already served to be computed within the period of sentence.

It is so ordered.

DATED and delivered at Eldoret this 28th day of October, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR