IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MWERA, OUKO & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO.356 OF 2011

BETWEEN

LEONARD KIBOI NAIBEI.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Bungoma (Muchemi & Onyancha, JJ) dated 18th July, 2011

in

HC.CR.A. 82 of 2010)

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JUDGMENT OF THE COURT

The appellant herein, ***Leonard Kiboi Naibei***, was charged with another in the Senior Resident Magistrate's Court (Kimilili) with robbery with violence contrary to ***Section 296(2) of the Penal Code***, in that on 20th March, 2009, while armed with pangas, they robbed ***Rael Benson*** of a torch and wounded her.

It was in the alternative charge stated that on the same day the appellant was found in possession of stolen property – namely a torch contrary to Section ***322(2) of the Penal Code***.

At the end of this trial, on the 6th July, 2010 appellant was found guilty of the main charge and sentenced to suffer death. His appeal to the High Court Bungoma, (Onyancha, Muchemi JJ) was dismissed. He has now come before us on second appeal.

The memorandum of appeal filed in person was adopted by ***Mr. V. Mutai***, learned counsel and the grounds therein argued accordingly. They ranged from a claim that the trial of the appellant went on despite his rights being violated; the evidence was contradictory and the learned Judges of the High Court did not analyse it; the appellant's evidence was not properly considered and the trial and conviction was arrived at after taking in regard extraneous evidence. And that the sentence was harsh

and excessive.

Mr. Mutai, told us that the High Court dismissed the first appeal on the ground that the doctrine of recent possession was established. It failed to analyse the evidence regarding the case and so the learned judges did not arrive at their own conclusion. Further, that the appellant had raised an *alibi* concerning where he was on the material day which *alibi* was not displaced by the prosecution even after cross-examining the appellant on his claim that he had been on a journey. We were told that on the evidence, while the robbery took place at *6.00 a.m*., the appellant was arrested at 6.00 p.m, allegedly with a blood-stained panga, which according to ***P.C. Wanjala*** (PW5) had been exhibited in another case and further that the appellant had been led to a place where some property was recovered, which property was not connected with the robbery in issue. Therefore the doctrine of recent possession was not proved at all.

Mr. N. Mutuku, the learned Senior Assistant Deputy Public Prosecutor conceded the appeal on the ground that the doctrine of recent possession only holds when the stolen goods are identified by the complainant. The complainant (PW1) did not identify or recognize the torch exhibited in court as hers or the one she was robbed of. We heard that on the part of ***PC Wanjala*** (PW5), he had arrested the appellant with a spotlight which was produced while the learned trial magistrate concluded that the exhibited "***spotlight resembled***" the exhibit.

This is a second appeal before us. We need not restate the principle that such an appeal should be determined on points of law only and not fact. As regards facts we are bound by the current findings of the courts below unless it is shown that those findings were not based on evidence (see ***Njoroge Vs Republic [1982] KLR 358.***)

In the present appeal after hearing counsel submit, and on perusal of the records the two courts below, we are satisfied that the finding of guilt on account of recent possession of a torch cannot stand. To begin with, the complainant (PW1) told the learned trial magistrate that the incident took place at *6.00 a.m.* on the material day. She said that she was able to see and recognize her attacker whom she saw for the first time. She identified him on an identification parade the following day – 21st March, 2009. As for the spotlight the attacker stole from PW1, she explained as follows;

"I had a spotlight which he took ... The spotlight was recovered. It was taken at (sic) Police Station. I did saw (sic) my spotlight, was taken to police. I was told that the accused was found with the spotlight. It is red and white. This is the torch I was robbed – red and white. I will not know if any other person had this spotlight. This is my spotlight red and white."

Peris Wanjiru (PW2) the complainant's daughter who ran to the scene when PW1 screamed when she was attacked said that she knew the spotlight PW1 – red and white in colour. She recognized it at the police station. ***Benson Wanta*** (PW3), PW1's husband recognized the spotlight in court as the one he bought. He said:

"This is our spotlight. I purchased it."

PC Eliud Wanjala (PW5) arrested the appellant at *6.00 p.m*, on the material day. They had heard of robbers being around Kamusinga junction. He with a colleague went there and saw one suspect. They arrested him – the appellant.

"He had a panga hide (sic) PTC Shirt. He had a spotlight which he used. The panga had bloodstains. This is the panga which I have produced in the other case."

In cross-examination:

"I find (sic) you with a panga at 9.00 p.m. This is the panga which is blood-stained."

In re-examination:

"The exhibits and particularly panga which I found with accused which had a gap and bloodstains."

This far we see that the time of arrest by PW5 has moved from *6.00 p.m*, to 9.00 p.m. He was particular about arresting the appellant with the bloodstained panga. He says nothing of the important item before the trial court – the spotlight.

PW5 does not say anything about the appellant's co-accused ***Mark Juma Manyonge*** yet they were charged together with the subject robbery. ***Manyonge*** was acquitted at the no-case-to-answer stage. In what connection was the appellant charged" And why was he arrested" There appears to be a slim link with the robbery in issue. PW5 the arresting officer had produced the bloodstained panga in another case, and he did not say whether the appellant was an accused person in that case. Could it not be quite probable that this red and white torch, nothing particular about it (see PW1, 2, 3), was recovered in that other case" Quite probable. And then the complainant told the court that she identified the appellant on a parade. Where is evidence of this parade" There is none on record. In our view when at 6.00 p.m. PW5 and a colleague got a report that there were robbers around Kamusinga junction, they proceeded there, found a person or persons and the appellant was arrested and later charged – along with a stranger. PW1 saw her attacker for the first time at the scene. She does not say for how long she looked at him and if she took note of any physical features in order to identify him the following day on a parade. She had carried a torch. That signifies that there was no sufficient sunlight at 6.00 a.m. - the time of the attack. And with PW5 not being sure of what time he arrested the appellant, whether he had a panga and a torch or a panga alone, doubt must linger as to whether the torch was found in possession of the appellant or those involved in the other case where the blood-stained panga was produced.

Although the issue of identification was not before us as a ground of appeal, it has found its way in as we grapple with this issue of recent possession of a torch.

Turning to the appellant's *alibi* that he was from a journey at 8.00 p.m, that sounds closer to 9.00 p.m. the time PW5 said in cross-examination that he arrested the appellant. He was going home when he met police officers who arrested him. He denied being in possession of the torch and the prosecution did not cross-examine him on this point yet he made his defence on oath. He was only led to a latrine where goods were recovered. The appellant did not lead the way to that latrine. Probably, the torch was among those goods recovered.

Before we conclude on this point, it is pertinent to refer to part of the learned trial magistrate's judgment:

"I am aware that spotlight resemble (sic) but it is also true that this A1 lead to the recovery of other robbed items in the series of robberies at Kamusinga area. I have no doubt in my mind that A1 committed the offence charged..."

It is clear that the learned trial magistrate was of the view that torches, like the one before him, resemble. He did not then ascertain that the one before him was the one robbed from the complainant. And besides, bringing in his own knowledge about other robberies in the locality and that the appellant

led to recovery of items subject of those robberies, really prejudiced the appellant. As at the time of trial right to the time of judgment, the appellant faced no such robbery charge. So the learned trial magistrate stating, and he appeared to state firmly, that it was true that appellant led to recoveries of items stolen in other robberies, he was bringing in unrelated and extraneous material that no doubt greatly prejudiced the appellant. The learned trial magistrate was bound only to address the material placed before him regarding the robbery charged as against the appellant and determine accordingly and not otherwise. By alluding to those other robberies, he reached a finding of recent possession not based on cogent evidence.

As for the learned judges' finding regarding the recovery of the spotlight they said: -

"PW1....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...The recent recovery directly connects the appellant with the robbery."

And later:

"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."

With due respect to the learned judges, PW5 did not find the appellant under arrest a few minutes after the robbery. The witness told the learned trial magistrate that he arrested the appellant at *9.00 p.m*. - long after the alleged robbery at *6.00 a.m*. There was thus no *recent* recovery of the spotlight to connect the appellant to the robbery. The appellant was not found with that spotlight immediately after the robbery. It was some 15 hours later and the appellant denied possessing the spotlight.

In sum, had the learned judges of the High Court analysed the evidence on record better and deeper than they did, we are not in doubt that they would have allowed the first appeal. In our so doing, we conclude that this appeal succeeds. It is allowed, the conviction and sentence of the lower court and confirmed by the High Court stand set aside. The appellant to be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered at Eldoret this 11th day of April, 2014

J. W. MWERA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

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