



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**CRIMINAL APPEAL NO. 49 OF 2013**

**LOKIRU LOKORWALE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the decision of Hon. R. M. Washika - PM, in Kapenguria Principal Magistrate's Court in Criminal Case No. 156 of 2012)*

**J U D G M E N T**

**Lokiru Lokorwale** (herein, the appellant), appeared before the Principal Magistrate at Kapenguria charged with robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the 27th January 2002 at Nepis village West Pokot County, being armed with offensive weapons namely stones, robbed Mary Chepusha of Kshs. 103,000 cash and at or immediately before or immediately after the time of such robbery wounded the said Mary Chepusha.

After a full trial, the appellant was convicted and sentenced to death but being dissatisfied, he preferred the present appeal on the basis of the grounds in the petition of appeal filed herein on 24th April 2013. He appeared in person at the hearing of the appeal and relied on his written submissions in support of the appeal.

**Mr. Chelashaw**, the Learned Prosecution Counsel appeared for the State Respondent and opposed the appeal by submitting that the appellant was properly convicted as there was sufficient evidence which proved that he attacked and robbed the complainant of her money. That, the complainant recognized him since she had previously known him very well and that they were related. That Pw 2 corroborated the complainant's evidence since he saw the appellant whom he knew, attacking the complainant. That, the P3 form confirmed that the complainant was injured during the offence. The Learned Prosecution Counsel contended that the appeal lacks merit and should be dismissed.

Having considered the submissions by both the appellant and the Respondent, our duty is to re-evaluate the evidence and draw our own conclusions bearing in mind that the Trial Court had the advantage of seeing and hearing the witnesses.

In summary, the Prosecution case was that on the material date, the complainant **Mary Chepusha (Pw 1)**, a clothes vendor, closed her business and headed home. On the way, she noticed the flashings of a torch and immediately thereafter was hit and fell down. She realized that she had been attacked by three people one of who she recognized as the appellant, son to her uncle. The attackers took away her bag which contained approximately Kshs. 100,000. She screamed for help and her sister came to her rescue.

**Elizabeth Lomerker (Pw 2)**, was with the complainant on the material date as they conducted business.

She confirmed that they sold clothes and realized a sum of Kshs. 103,000. She indicated that they were together on their way home when they noticed that people with a torch were following them. They ran away but the complainant alleged that the money had been stolen. Elizabeth (Pw 2) indicated that she returned to the scene where the offence had occurred and saw the appellant.

**Peter Chepurech (Pw 3)**, a son of the complainant was alerted about the attack on his mother. He proceeded to the scene and found her unconscious. She could not talk. He was told by Elizabeth (Pw 2) that she suspected the appellant as having been involved in the offence.

**Siwo Natimu (Pw 4)**, remembered that he met the appellant who offered to sell a mobile phone to him. He accepted the offer and took the phone which he used until such time that the Police arrested him. He informed the Police that the phone had been sold to him by the appellant.

**Tepareng Soliongura (Pw 5)**, confirmed that the appellant sold a mobile phone to Siwo (Pw 4) and said that he (Pw 5) exchanged his two goats for a bicycle which the appellant was selling. He was later arrested and released because of the bicycle.

**P. C. Siad Ali Sheid (Pw 6)**, received the necessary report and proceeded to the scene. He confirmed that the offence took place as reported and collected three stones from the scene. The stones were allegedly used in the attack. He proceeded to the hospital where the complainant was admitted. She allegedly identified the appellant as being one of the attackers. He was later informed by his colleagues that the appellant and two others had been arrested.

**P. C. Chrispinus Alwany (Pw 7)**, indicated that he was in a group of Police Officers who escorted the appellant when he led them to his relative's house where items allegedly purchased with money stolen from the complainant were found. The items included a radio and some clothes. Additional items including a mobile phone and a bicycle were found elsewhere. All the items were found or recovered in the presence of **Cpl. Enoch Langat (Pw 8)**.

After having suffered injury during the offence, the complainant was taken to Kapenguria District Hospital where she was examined by a Clinical Officer, **Jeremiah Kisang (Pw 9)**, who thereafter prepared and signed the necessary P3 form.

It was on the basis of the foregoing evidence by the Prosecution that the appellant and his co-accused were placed on their defence by the Trial Court.

In his defence, the appellant denied the offence and indicated that he was at home on the material date of the offence and that on the day that followed, he was arrested while preparing to go to Alale. He was taken to Kacheliba where he was harassed by Police Officers and admitted the offence which he denied when taken to Court.

The Learned Trial Magistrate, after considering the evidence in its totality arrived at the conclusion that the case had been established against the appellant beyond reasonable doubt but not his co-accused. The appellant was accordingly convicted and sentenced while his co-accused were acquitted.

From our own re-evaluation of the evidence, we are satisfied that the evidence by the complainant (Pw 1) coupled with that of Elizabeth (Pw 2), Peter (Pw 3) and P. C. Siad (Pw 6) was adequate and credible in establishing the necessary ingredients of the offence of robbery with violence.

With regard to the identification of the appellant as having been one of the attackers, the material evidence was that of the complainant (Pw 1) and Elizabeth (Pw 2). These are the witnesses who said that they saw and identified the appellant whom they previously knew. The appellant however denied the offence and implied that he was arrested and charged without good cause. It was therefore incumbent upon the Prosecution to provide sufficient and credible evidence to show that he (appellant) was not erroneously or mistakenly identified as one of the attackers.

In her testimony, the complainant (Pw 1), said that she was hit and fell down. She implied that she saw the appellant at that juncture and that the offence occurred in the hours of darkness as she referred to torch lights. She said that she saw the appellant using torch light when she fell down. She did not say where the alleged torch came from and how it made it possible for her to identify the appellant. She contradicted herself by saying that she did not see the attackers yet she alleged that the appellant was one of them.

It was apparent that the complainant's evidence of identification against the appellant was unreliable such that the possibility of error or mistaken identity could not on her part be overruled.

Elizabeth (Pw 2), stated that she ran away when they realized that people with a torch were following them. Thereafter, the complainant said that the money had been stolen. She (Pw 2) returned to the scene and saw the appellant. This evidence was not clear on how the witness (Pw 2) saw and identified the appellant yet the offence occurred in darkness. She never mentioned anything about any source of light which assisted her see the appellant. She also implied that it was the complainant who saw the attackers but not herself and that she identified the appellant through his voice.

In our opinion, this witness (Pw 2) did not also provide reliable evidence of identification against the appellant.

In the circumstances, we must find that there was no credible and reliable evidence of identification against the appellant neither was there credible circumstantial evidence linking him to the offence.

There was no proof that the items recovered with the help of the appellant were purchased with money stolen from the complainant. What existed was mere suspicion that those items could have been purchased with the stolen money. However, suspicion alone is not sufficient to prove a charge against an accused person.

In sum, it is our view that the appellant's conviction by the Learned Trial Magistrate was neither safe nor sound.

We hereby quash the conviction and set aside the sentence with the result that the appellant shall be set at liberty unless otherwise lawfully held.

**(Delivered and signed this ...26th..... day of .....November... 2013)**

**J. R. KARANJA**

**JUDGE**

**E. OBAGA**

**JUDGE**

**In the presence of:**

**Appellant:** .....

**Respondent:** .....

**Court Clerk:** .....