



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**HCCRA NO. 53 OF 2013**

DANIEL MASIKA KALINDA .....APPELLANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

*(From the original conviction and sentence of G. A. MMASI Ag.PM, Vihiga, criminal case no 594 of 2012)*

**JUDGEMENT**

The appellant herein Daniel Masika was originally charged before the learned Ag PM Magistrate's court with three counts. On count one he was charged with the offence of robbery with violence C/S 295 as read with Section 296(2) of the Penal Code. Particulars were that on the night of 2<sup>nd</sup> May 2010 at Emanda Sub-location in Vihiga County, within Western Province, jointly with others not before court, while armed with dangerous weapons namely; simis, pangas and bright torches, robbed Dick Atsiaya Kisivuli of his motor vehicle KAZ 236V Toyota valued at Kshs 800,000, mobile phone make Nokia, ignition keys, Somali sword and cash kshs 15,000 all valued at kshs 850,000 and immediately before the time of such robbery wounded the said Atsiaya.

On the second count, the accused faced the charge of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. Particulars were that on the night of 2<sup>nd</sup> May 2010 at Emanda Sub-location in Vihiga County within Western Province, jointly with others not before court, being armed with dangerous weapons namely; simis, pangas and torches robbed Flora Ayoma Kisavuli off her mobile phone make Nokia and kshs 8000 all valued at kshs 18000, and immediately before the time of such robbery, wounded the said Flora Ayoma Kisavuli.

On count three, the accused faced the charge of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. Particulars of the offence were that on the night of 2<sup>nd</sup> May 2010, at [particulars withheld] in Vihiga County of Western Province in association with others not before court, intentionally and unlawfully caused his penis to penetrate the vagina of P A aged 20 years without her consent.

Upon conclusion of the trial the accused person was found guilty of counts one and three and was sentence to suffer death in respect of count one and 10 years in jail in respect of count three.

He has appealed before this court on both the conviction and sentence. During the hearing at the lower court, the prosecution called 4 witnesses. The witnesses called were the complainant in respect of count 1, the son of the said complainant, the complainant in count 3 and the arresting office.

The 1st witness PW1 told court how the robbers got into his house at 3 am armed with pangas, rungas and crude weapons and tied him up before robbing him of his phone, Ksh 15,000/= and a motor vehicle KAZ 236V Toyota. They also took his bank ATM card. He says he was unable to identify any of the robbers. In the course of robbing him, he told court that they also robbed his wife, the 2nd complainant and also raped the 3rd complainant P.

The second witness who is the son of the 1st complainant told court that the robbers struck at 3 am. They were armed with crude weapons including rungas, pangas and bright torches. He went to hide in the ceiling board but they ordered him to come out or they shoot him. He obliged and came down. He told court that the robbers were flashing their bright torches around and he was able to see some of the robbers who included one tall dark one. He later attended an identification parade and was able to identify the accused person as one of those people who robbed them that day.

PW3 was the complainant on count 3. She told court that when robbers struck she was sleeping and one got into her bedroom and ordered to remain silent. He took her to the corridor where he raped her. Another also came and raped her. The robbers were in the house for about 2 hours and were not masked. He identified the accused who she says raped her. She says she was able to identify him as the robbers had torches which they were flashing all the time. She was able to identify him on the identification parade as one of the robbers and one who raped her.

PW4 was the police officer who arrested the accused. He told court that he went to accused house on 6.6.2010 at midnight and arrested him. The accused was later identified on the identification parade.

The trial magistrate found accused person guilty of the charges and convicted him. It is the accused person's contention that he was wrongfully convicted because he was not properly identified.

Going by the evidence adduced before the lower court, two key prosecution witnesses failed to testify. The witnesses are the officer who conducted the identification parade and the doctor who examined the 3rd complainant and filled her P3 form. The identification parade officer would have given evidence on the manner in which the accused person was identified and authenticate the same. The appellant's contention is that the identification done was not proper. In absence of the witness, it would not be possible to ascertain whether or not the accused person was properly identified.

On the issue of the doctor not being called, then it follows that there was no conclusive proof that the 3rd complainant was raped. In both instances, there was no evidence that the appellant was properly identified. There was also no corroboration of the aspect of rape by the doctor who examined the complainant that she was actually raped. It was therefore not safe to convict the appellant on these charges.

The appeal therefore succeeds. We therefore order the appellant set free forthwith unless otherwise lawfully held.

DATED THIS 11<sup>TH</sup> DAY OF DECEMBER 2013

**GEORGE DULU**

**HELLEN S. WASILWA**

**JUDGE**

**JUDGE**

DELIVERED THIS 11<sup>TH</sup> DAY OF DECEMBER 2013

**S. J. CHITEMBWE**

**JUDGE**