



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 155 OF 2010**

*(From original conviction and sentence in Criminal Case No.152 of 2009 of the Senior Resident Magistrate's court*

*at Maralal – A.K. ITHUKU, SRM)*

**LEMAGAS**

**LEKADERI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

This is an appeal filed by Lemagas Lekaderi. He was convicted of the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and was sentenced to death. He was aggrieved by that conviction and sentence. His grounds of appeal are that he was not properly identified; that the prosecution evidence was contradictory and that the court failed to consider his defence. He filed submissions in support of the above grounds.

Mr. Nyakundi of the State Law Office opposed the appeal on grounds that the appellant was properly identified by the complainant having visited the complainant's shop twice and engaged the complainant in a conversation before the robbery and that the complainant identified the appellant on an identification parade.

Briefly, the facts leading to this case are that Orge Mohammed, PW1, and her husband, PW5, were in their shop at Ndonyo Nasiba on 28/6/2009. PW1 said that 3 men came entered the shop and asked for a kilogram of flour, they paid for it and asked for a place to eat which PW5 offered to show them. They ate and later came back for the flour and left. At about 4.00 p.m. when PW5 had gone to fetch water, the same people came back, two were armed with guns and Samburu swords around the waist. They asked for sugar, soda and maize flour. When PW1 was measuring the flour, one entered the shop, took a box which had the money. She was hit with a club on the right hand and face. PW1 said it is the appellant who took the box and briefcase with PW's coats. She later identified the appellant on an identification parade.

PW5 also testified to having sold sugar to 2 morans at about 11.00 a.m. They did not pay but asked for where to take tea and they went to take tea and later took the sugar. He left at 2.30 p.m. to go and fetch water. He heard gun shots and on going back found that the wife had been robbed and he got assistance from other police reservists to pursue the robbers. In the forest, he managed to shoot one dead and recovered his stolen briefcase and jacket.

PW3 Letimiyon Loboitome testified that he arrested the appellant after 2 days which must be about 30/6/2009. PW4 did not disclose the date of arrest though he was one of those who found where the appellant had slept and arrested him.

After carefully evaluating the evidence before the lower court, we do agree with the appellant's submissions that there are some glaring contradictions in the prosecution evidence. The two crucial witnesses are PW1 and 5 who were present in the shop told the court that the appellant came to the shop with other men. However,, PW5 told the court that the people who visited his shop about 11.00 a.m. were two in number. Whereas PW5 saw 2 men, PW1 saw the appellant and other men. It is unknown how many they were. According to PW1, the people went to their shop and bought flour but PW5 said they bought a kg of sugar. Whereas PW1 said they paid for the flour right away, PW5 said they did not pay but went to eat first and came back for the sugar. Whereas PW1 said the appellant was one of the people who went to their shop in the morning and later robbed them, PW5 denied that the appellant was one of the persons who went to buy sugar and asked to be shown where to eat on that fateful day. There remains a question whether the appellant was one of the people who visited PW5's shop on the morning of 28/6/09.

As observed by the appellant, it seems from the evidence of PW1 and 5 that it is PW1 who attended to the people who went to their shop that day (28/6/09). PW1 said that when the people came to the shop, they greeted them and asked for flour and it is Pw5 who sold to them and then directed them where to eat. PW5 said that when the people came to the shop PW1 had a small child. Though the lower court made a finding that PW1 conversed with the robbers, it was not clarified who the robbers addressed and how long the conversation took. It seems that it is PW5 who conversed with the persons who came to their shop and should have had ample opportunity to see them and identify them but he did not.

None of the robbers was arrested at the scene. One was gunned down and he is the one from whom PW5's property was recovered. It is not clear when the appellant was arrested but what is not denied is that a parade was conducted on 22/7/09 after the appellant's arrest. PW5 was correct to estimate that the appellant was arrested about 3 weeks after the robbery. PW3 said the appellant was arrested after 2 days. From the above evidence, it is not clear how or when he was arrested. PW1 said that an old woman who was outside the shop identified the appellant before the arrest. It is unknown how this happened. The identity of the old lady was not disclosed or where she met the appellant, to be able to identify him before he was arrested. Another question left immerging on our minds is, if the appellant was arrested 2 days after the robbery, why did it take the police over 2 weeks to conduct a parade?

The magistrate in his judgment observed that the assailants were not hooded, that they greeted and talked to the complainant, that PW1 was able to see them and identified the appellant at a parade. We have already considered the glaring discrepancies in the prosecution case. We also wish to note that before identifying the appellant on the parade, PW1 had not given any description of the robbers to anybody apart from saying that the appellant had a gun and that he is the one who took the money, PW5's briefcase and clothes.

As respects the parade, we note that PW8 IP Muragori did not conduct the parade in accordance with the Forces Standing Orders as respects identification parades. At no time did PW8 disclose that he explained to the witness that the suspects may or may not be on the parade as required by **Standing Order No. 6(iv) (k) of Cap 46**. In her testimony PW1 said **"later I was called by police to identify the people who robbed me. I was able to identify the accused herein. Accused was put between a group of people."** Without PW8 explaining the procedure and warning the witness as required,, it meant that the suspect had to be on the parade and the witness had to pick somebody from the parade. We find that failure by PW8 to warn PW1 as required by the **Forces Standing Orders**, was an omission that weakens the evidential

value of the identification parade which is the only evidence upon which the conviction was based, there being no other identifying witness. We find that though the offence was committed in broad daylight, there are sufficient disconnects and inconsistencies in the prosecution case that raise sufficient doubt in the prosecution case that should have been exercised in favour of the appellant. The appellant made an unsworn statement in his defence. It was a mere denial, but the trial magistrate should have taken it into consideration. We dismiss it for being a mere denial, however, we find that identification of the appellant is wanting and left doubts in our minds. We find the conviction to be unsafe. We hereby quash the conviction, set aside the sentence and set the appellant free forthwith unless otherwise lawfully held.

**DATED and DELIVERED this 14<sup>th</sup> day of February, 2011.**

**R.P.V. WENDOH**

**JUDGE**

**W. OUKO**

**JUDGE**

**PRESENT:**

The appellant present in person.

Mr. Omwega for the State.

Kennedy – Court Clerk.