



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA Criminal Appeal 48 & 49 of 2009**

**(CONSOLIDATED WITH CR. NO.49 OF 2009)**

**(Appeal arising from BGM SPM CR. NO.159 of 2005)**

**HEZBORN MULATI MAPAKA.....1ST APPELLANT**

**FESTUS SIFUNA.....2ND APPELLANT**

**~VRS~**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants Hezborn Magati Mapaka and Festus Sifuna filed separate appeals nos. [...] both of 2009 which were consolidated. The two were charged and convicted by Bungoma Principal Magistrate of two counts I and III and acquitted of count II. In each count each of the accused was sentenced to ten (10) years imprisonment to run concurrently.

The Appellants were represented by Mr. Simiyu Makokha who took the court through the grounds of appeal. Precisely, the counsel submitted that there was no sufficient evidence to convict the Appellants on the two counts. Identification of the Appellants was wanting while key witnesses were called to testify. The defence submitted that sexual offences can not be committed jointly and it was wrong to convict the two Appellants on a joint charge of indecent assault.

The state did not oppose the appeal. Mr. Onderi Senior Principal State Counsel. He agreed with the defence that there was no sound evidence of identification. The court relied on the evidence of PW1 and PW2 which had glaring contradictions. The two witnesses did not give any names to the police on making their first report. It was in court that they said they saw the Appellants among the people who attacked them. One witness said the attackers were masked and it is doubtful that they were identified as alleged.

I have perused the evidence of the witnesses which does not make up a case of clear identification. PW1 said some people knocked his house and he recognized the voice of a police officer whom he knew who is the second Appellant herein. He gave his name as Festus Sifuna who was working at Mbakalo A. P. Camp. There was a lamp in the house and he saw five men enter inside. They identified themselves as police officer who had come to search the house. They searched and asked for receipts of certain items. Later, they took money cash Ksh.24,900/= from PW1 and his wife PW2. PW1 said he identified the second Appellant and gave his name as Hezbon Mulati. His wife PW2 was raped as he watched. By that time PW1 had been beaten with sticks and tied with a rope. PW2 was stood down and never called for cross-examination by the defence counsel.

Both witnesses said they were husband and wife and were in one house at the time of the incident.

PW9, the Investigating Officer said he was directed by his boss the O.C.S of Mbakalu Police Post to arrest the Appellants. The O.C.S did not testify in order to explain the reason for his instructions. PW9 agreed with the 1<sup>st</sup> Appellant that he had taken the bicycle to the police post having collected it from the road after the robbery. PW9 also confirmed that the complainants did not give names of any suspect when they reported the matter. It is therefore highly unlikely that PW1 and PW2 identified their attackers. Had they done so, there was no reason why they kept such names secret. The police were the right people to be given the names in order to investigate the matter. PW9 found the Appellants blameless and released them. He was later ordered to arrest them.

Identification must be clear of any no doubt that the witness positively identified the suspect. The intensity of the light was not described by the witnesses in order to show how they identified their attackers. All PW1 said was that there was a lamp burning in the house. The distances between the witnesses and the assailants were not given.

In the absence of positive identification both the charge of robbery and that of indecent assault cannot stand. The Appellants denied the offences and pleaded an alibi. It is my finding that, the trial court erred in law and infact to find that the prosecutions evidence proved the case beyond any reasonable doubt. The convictions on both counts and the sentences imposed thereon were wrongful. I find that this appeal has merit and it succeeds. The convictions and sentences in respect of both counts (I and III) are hereby set aside. The Appellants are hereby

set at liberty unless otherwise lawfully held.

**F. N. MUCHEMI**  
**JUDGE**

*Dated, Delivered and Signed at Bungoma*

*This 26<sup>TH</sup> day of NOVEMBER. 2009 in the presence of*

The appellants, their counsel Mr. Milimo holding brief for Mr. Makokha and the state counsel Mr. Ondari.