



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 319 of 2004

*[From the original conviction and sentence in Criminal Case No.810 & 678 of 2005 Senior Resident Magistrate's Court, Maralal – P.C. BIWOTT (R.M)]*

TOTI LESARA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant *Toti Lesara* was charged with the offence of robbery contrary to Section 296 (1) of the Penal Code. The particulars of the charge stated that on the 20<sup>th</sup> day of July 2004 at Wamba Trading Centre in Samburu District within Rift Valley Province, jointly robbed *Lesirema Cosmas* of cash Kshs.7,500/- and at or immediately before or immediately after the time of such robbery used actual violence to the said *Lesirema Cosmas*.

The appellant pleaded not guilty to the charge and after a full trial, they were found guilty and convicted and sentenced to seven (7) years imprisonment. Being dissatisfied with the conviction and sentence by the trial court, the appellant has appealed against the sentence on the grounds that he has suffered while in prison since he was incarcerated in October 2004,

Secondly, he pleaded with this court to reduce the sentence on the grounds that he has reformed and come to learn of his mistakes and now promises to lead a meaningful life.

This appeal was opposed by the learned State Counsel *Mr. Mugambi*. He submitted that the appellant was likely that he was sentenced to seven years imprisonment when the records clearly show that he was found guilty of robbery with violence which carries a mandatory death sentence. The sentence of seven years is extremely lenient and the court should not interfere with the same considering the seriousness of the offence.

This being the first appeal this court has a duty to re-evaluate the evidence adduced before the trial court and arrive at its own independent decision on whether to uphold the conviction and sentence of the appellant. See the case of *Njoroge Vs Republic [1987] K.L.R page 19.*

I hereby now wish to review the evidence that was before the lower court. Briefly stated, it was the prosecution's case that *Cosmas Lesirema (PW 1)* was on 20<sup>th</sup> July 2004, walking to his home within Tree top area in Rwamba in the company of his son *Roitabon Lesirema*. On the road at about 7.30 p.m., they were attacked by two people who they identified as the appellant and his co-accused in the lower court file called *Koti Lesara*. **PW 1** told the trial court that he was hit with a rungu on the cheek and shoulder and he became unconscious. His son started screaming saying that the appellant had assaulted **PW 1**. The appellant stole from **PW 1** Kshs.7,500/- being the proceeds of a cow he had sold the same day in the market. The matter was reported to the police who arrested the appellant. After a report was made that the appellant had been seen by the complainants in the village. It is the complainants who identified the appellant when he was arrested. ***P.C John Mwenje, PW 4 was the arresting officer.***

The complainant was also examined at Rwamba Hospital by *Stanley Ole Patenoi*. On the following day, he was treated of the injuries he sustained on the left eye and PW 3 completed the P3 form which he produced in court and certified the injury on PW 1 as harm. In his opinion, the injury was inflicted with a blunt object. PW 2 is a boy aged 15 years and he told the court how on 20<sup>th</sup> July 2004 at about 7 p.m, they were attacked by two people who may be referred to as Toti and John. They beat up his father and robbed him money. He said that it is Toti, 1<sup>st</sup> accused in the trial court who removed the money from PW 1's pocket and appellant closed his mouth to stop him from screaming. He said that he knew both the appellant and his co-accused.

The trial court accepted the above evidence and found the appellant guilty. Upon the evaluation of the evidence, it is clear that the appellant was convicted on evidence of identification through recognition. Both PW 1 and PW 2, recognized the appellant and his co-accused. Am satisfied that the conviction is safe and the sentence of seven years is lenient considering that the appellant could have been sentenced to death.

The principles to be considered by the court while exercising its jurisdiction to review or utter a sentence imposed by the trial court were settled in the case of Ogalo son of Owuor [1954] E.A.C.A at page 270 where the Court of Appeal held as follows: -

*“The court does not utter a sentence on a mere ground that if the member of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless it is evident that the judge acted upon some wrong principle or overlooked some material facts if the sentence is manifestly excessive in view of the circumstances of the case.”*

Taking the totality of the evidence before the trial court and in particular the sentence that is prescribed by the law, am inclined to interfere with the sentence imposed by the trial court.

In the result, the appeal is dismissed, the sentence imposed by the lower court confirmed.

Judgment read and signed in 8<sup>th</sup> February 2007.

MARTHA KOOME

JUDGE