REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 286 & 287 of 2003

(From original conviction and sentence of the Senior Principal magistrate's court at Nyahururu in criminal case No. 2634 of 2001 [Kathoka Ngomo - P.M.])

LESHON LEKAKIO..1ST APPELLANT

STEPHEN MAUNDA NGASHINI.....................2ND APPELLANT

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT OF THE COURT

The appellants, Leshon Lekakio *(hereinafter referred to as the 1st appellant)* and Stephen Maunda Ngashini *(hereinafter referred to as the 2nd appellant)* were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 4th November 2001 at Thigio village in Nyandarua District, the appellants jointly armed with a dangerous weapon, namely an AK 47 rifle, robbed Ernest Kinyanjui Waiganjo of Kshs 200/= and various items of clothing and personal property listed in the charge sheet all valued at Kshs 2,360/= and at or immediately before or immediately after the time of such robbery used personal violence against the said Ernest Kinyanjui Waiganjo. The 1st appellant was further charged with the offence of defilement of a girl contrary to Section 145(1) of the Penal Code. The particulars of the offence were that on the same day and in the same place, the 1st appellant had carnal knowledge of Delphine Nyambura Kinyanjui, a girl under the age of fourteen *(14)* years. The appellants pleaded not guilty to the charge. After a full trial, the appellants were convicted as charged. They were sentenced to death as is mandatorily provided by the law on the robbery charge. The 1st appellant was sentenced to serve ten *(10)* years imprisonment in respect of the defilement charge. The appellants were aggrieved by their conviction and sentence and have appealed to this court.

In their petitions of appeal, the appellants presented more or less similar grounds of appeal. They were aggrieved that they had been convicted based on the evidence of identification which was made in circumstances that were not favourable for positive identification. They were aggrieved that the trial magistrate had failed to consider the fact that none of the items which were robbed of the complainant were recovered in the possession of the appellants or were the said items produced in evidence. They were further aggrieved that the trial magistrate had wrongly admitted the evidence of the police identification parade whereas the said parade had been irregularly conducted. The 1st appellant was aggrieved that he had been convicted on the defilement charge whereas no medical evidence was adduced in court to establish that it was indeed the 1st appellant who had defiled the girl. Both appellants urged

this court to allow the appeals.

At the hearing of the appeal, the appellants, with the leave of the court presented to this court written submissions in support of their appeals. They further made oral submissions urging this court to find that the prosecution had not established its case against them on the charge of robbery and defilement respectively to the required standard of proof. They took issue with the fact that the trial magistrate had found that the complainants had positively identified the appellants by their physical features. Mr. Njogu for the State made oral submissions urging this court to find that the evidence adduced by the prosecution sufficiently established the guilt of the appellants to the required standard of proof beyond reasonable doubt. He urged the court to disallow the appeal.

Before giving reasons for our decision, it is imperative that we set out the brief facts of this case. On the 4th November 2001 at 8.00 p.m. while PW1 Ernest Kinyanjui Waiganjo *(hereinafter referred to as the complainant)* was at his house with members of his family, he was invaded by robbers. The robbers entered the house of the complainant after they had knocked at the door and the complainant opened the door for them. According to the complainant, he was in the main house with his wife while his two daughters namely Delphine Nyambura *(PW2)* and Sheila Wambui were at the kitchen. The two daughters of the complainant were in the company of their cousin one David Kamuiru *(PW3)*. The complainant testified that the robbers who entered his house were two in number and one of them was armed with an AK 47 rifle.

The two robbers immediately started beating the complainant and his wife asking them to give them money. They ordered the complainant and his wife to lie on the ground. All this time the hurricane lamp which was on the table was illuminating the room. The complainant described one robber as being tall, slender and brown. He also had a gap in his teeth and wore a crotched cap on his head. It is this robber who was armed with AK 47 rifle. The other robber was described by the complainant as being short and with slightly darker eyes. The complainant complied with the order issued by the robbers and gave them a Kshs 100/= which was in his pocket. He gave them another note of Kshs 100/= which was in his bedroom. He testified that the robbers were in no hurry to complete their mission in the house. They ransacked the house looking for valuables.

After awhile, one of the robbers asked if he could be given food. He was informed that there were food remains at the kitchen. The taller robber went to the kitchen where he found the daughters of the complainant. While the complainant was in the main house he heard his daughter *(PW2)* scream. The complainant instinctively knew that the robber who went to kitchen was raping his 14 year old daughter. He wanted to go to her rescue but was prevented by the other robber who had been left to guard him and his wife. PW2 testified that when the taller robber whom he identified as the 1st appellant went into the kitchen he raped her after threatening to do harm her with a kitchen knife. After raping PW2, the robber went to the main house and took the meal with his accomplice. According to PW1, PW2 and PW3, the robbers were in their house for a period of more than three hours after which they took some clothings belonging to the complainant together with his umbrella and torch. This was after they had robbed him of the sum of Kshs 200/=.

PW1, PW2 and PW3 testified that after the robbery, the robbers locked them inside their house. They warned them not to raise any alarm or else they would return and harm them. The complainant and the members of his family remained in the house until the following day when they alerted one of their neighbours who opened the door for him. They immediately made a report to Ndaragwa police station. In his first report, PW1 and PW2 described the robbers to the police. PW2 was taken to Nyahururu District Hospital on the 5th November 2001 where she was treated by PW5 Peter Mathenge Muthee, a clinical officer. He confirmed that PW2 had indeed been defiled. He did a vaginal swab and the swab revealed yeast cells and spermatozoa. The P3 form was produced as an exhibit during trial.

On the 9th November 2001 at 4.25 p.m., PW6 Inspector John Njuguna conducted a police identification parade whereby the 2nd appellant was identified by PW1 and PW3. The police identification form was produced as an exhibit in evidence during trial. PW6 testified that he had conducted the said police

identification parade in accordance with the law. On the same day *i.e.* the 9th November 2001 at 3.00 p.m., PW4 Inspector Joseph Kendaga conducted a police identification parade whereby the 1st appellant was identified by PW1, PW2 and PW3. He testified that he had conducted the said police identification parade in accordance with the established law.

PW7 PC Chris Monda was at Ndaragwa police station on the 5th November 2001 at 8.00 a.m. when the complainant made his report to the police. He testified that the complainant gave descriptions of the robbers. PW7 was assigned to investigate the case and managed to arrest the appellants in this case. He testified that after the appellants were arrested, a police identification parade was mounted where the appellants were identified by the victims of the robbery. The 1st appellant was arrested on the 7th November 2001 whilst the 2nd appellant was arrested on the 6th November 2001 after the police were given information by the members of the public.

When the appellants were put on their defence, they denied that they were involved in the robbery. Other than narrating the circumstances of their arrest, they did not give any evidence to rebut the evidence that was adduced against them by the prosecution witnesses. They complained that the police identification parade was not conducted in accordance with the law. They complained that they were not informed that they would be put in an identification parade for the purposes of being identified by the complainants.

This being a first appeal this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of the witnesses *(See* Njoroge -vs- Republic [1987] KLR 19). The issue for determination by this court is whether the prosecution proved to the required standard of proof beyond reasonable doubt that it is the appellants who robbed the complainants. We have considered the submissions made before us by the appellants and by Mr. Njogu on behalf of the State. We have also re-evaluated the evidence adduced by the prosecution witnesses during trial before the subordinate court.

The appellants were convicted based on the sole evidence of identification. The complainant, PW2 and PW3 testified that the robbery took place variously between one hour and three hours. During this period, the robbers made no effort to conceal their identity. They even took tea and had a meal in the house of the complainant. Although it was at night, the prosecution witnesses testified that a hurricane lamp had been lit. The said hurricane lamp was emitting sufficient light that enabled the complainant and the two other prosecution witnesses to identify the appellants. Taking into consideration the long period that the robbery took place, we are of the opinion that the trial magistrate did not err when he held that the appellants were properly identified by the three prosecution witnesses. We have also taken into account the testimonies of the said prosecution witnesses *i.e* PW1, PW2 and PW3, and particularly that of PW1, who gave a detailed description of the robbers when they made the first report to the police on the 5th November 2001 about twelve hours after the robbery. We have looked afresh at the said description which was given to PW7 by the complainant when the first report was made and we are persuaded that there was no error in the identification of the appellants by the said complainant as the robbers.

Although none of the items which were robbed from the complainant were recovered in possession of the appellants, upon re-evaluating the evidence adduced before the trial magistrate's court, it is clear that the evidence of identification was sufficient to enable the trial magistrate convict the appellants. The identification of the appellants by PW1, PW2 and PW3 was confirmed by the evidence of the police identification parade which was held barely four days after the said robberies. The three witnesses unhesitantly pointed out the appellants in the said identification parade. Although the appellants complained that the said police identification parade was irregularly conducted, upon scrutinising the police identification forms, we see nothing in them that would make us reach a conclusion other than that the said police identification parades were conducted in accordance with the law. Further, the description of the appellants by the complainant made in the first report made to the police, fitted exactly with the description of the appellants after they were arrested by the police. The police identification parade confirmed the identification made by the complainant and the two other prosecution witnesses during the

course of the robbery.

The upshot of the above reasons is that we find no reason to disagree with the finding of the trial magistrate that the appellants were positively identified by the complainant. The trial magistrate had this to say on the said evidence of identification at page 3 of his judgment;

"PW1 was Ernest Kinyanjui Waiganjo. He was the owner of the homestead where this incident took place. He described in detail what transpired that night. In describing the people who went to (his) house he said one was tall and slender and brown and had a gap in his teeth. Later he said that he had pierced ears with the lobes pulled down until there was a big hole. This description perfectly fits accused 2 (the 1st appellant). He said that the other was short and had slightly big eyes and was dark again this description perfectly fits the 1st accused (the 2nd appellant). He described to the court in detail what each person did in the course of the robbery."

We have no reason to disagree with the analysis of the evidence by the trial magistrate. We have considered the defence of the appellants. The said defences do not raise any issue that would otherwise dent the strong prosecution case against the appellants. The said defences were properly rejected as of no consequence by the trial magistrate as we similarly do.

The upshot of the above reasons is that the appeals filed by the appellants lacking in merit are hereby dismissed. Their conviction and the death sentence imposed is hereby confirmed. In respect of the defilement charge we hold that the prosecution proved its case to the required standard of proof. We however set aside the sentence often (*10*) years imprisonment that was imposed upon the 1st appellant by the trial magistrate in view of the decision made sentencing the appellants to death.

It is so ordered.

DATED at NAKURU this 16th day of March 2007

D. MUSINGA

JUDGE

L. KIMARU

JUDGE