



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.126 OF 2003

**(From original sentence and conviction of the Chief Magistrate's Court at Kisii
in Criminal Case No.2637 of 2000 - O. OPONDO ESQ., S.R.M)**

GILBERT NYABUTO MOGIRE APPELLANT

VERSUS

REPUBLIC RESPONDENT.

JUDGMENT

Appellant was charged and committed for the offence of Robbery with violence c/s. 296 (1) Penal Code.

The particulars were that on the night of 24th & 25th July 2000 at Jogoo Estate in Kisii Town, jointly with others., they robbed HELLEN BOSIBORI cash shs.8,500/= and household goods worth shs.200,000/= and immediately before and after the said robbery used violence on the said Hellen Bosibori. He was sentenced to 8 years imprisonment and to be under Police Supervision for five years. He has appealed against both conviction and sentence.

In his petition of appeal the appellant stated that the learned trial magistrate failed to consider that the incident took place at night when identification was difficult. He further stated that the magistrate failed to consider that he had reported loss of his identity card a month before. He said the sentence was harsh.

The learned magistrate was satisfied that the appellant was properly identified. Indeed the incident took place at night. However PW1 the complainant told the court that there was electrical lights on. Appellant had covered his face with a lessa but it fell down and she was able to see his face very well.

PW2 the complainant's daughter also saw the appellant's face when the lessa fell down. She further noticed that he had a scar on the chest which the magistrate confirmed by asking the appellant to unbutton his shirt. The incident took 1 1/2 hours. The two witnesses had ample time to see and recognize the appellant.

When the appellant was leaving the house his face was not covered. PW4 a neighbour of the complainant was all along watching from his house. He saw the appellant leave the house holding PW2. There were security lights outside and he said he saw him very well. Thus though it was at night there was enough light and the 3 witnesses had a chance to see the appellant well. PW1 & 2 said they had also identified the appellant in an identification parade though the officer who conducted it was not called to testify.

PW1 had told the court that a few days later she found an identity card and a voter's identity card near

her door. They were partly hidden. She looked at the photographs and could see they were those of the appellant. She took it to the police and it was the one used to arrest the appellant in Kericho. In his petition of appeal he states that he had reported that his identity card got lost a month before the incident. However in his defence he said it got lost on 3/3/00. That was almost two months after the robbery. If he had reported he must have been given a police abstract but he did not produce it to show when he exactly reported. There is only his word in defence that it got lost on 3/9/00. That of course was not true as it was found at the scene of robbery a few days after the robbery. It is obvious therefore it fell down during the robbery.

I found the evidence was overwhelming and the learned magistrate reached a proper conclusion. The conviction was well founded and I therefore uphold the same.

As for sentence appellant was said to be a first offender. He prepared for a reasonable sentence. Apparently the complainant was not injured during the robbery. Though the offence is a serious one a term of 8 years was a bit excessive. I therefore set aside the sentence of 8 years and substitute it with that of 4 (four) years imprisonment and 5 years Police Supervision.

It is so ordered.

KABURU BAUNI

JUDGE.

7/7/04

Dated and delivered on 7th July 2004 Mr. Kemo for the State.