



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Criminal Appeal 351 of 2008

HESBON MUGANDA ADAGI APPELLANT

were attacked by a group of people who robbed them of their valuables including a wrist watch, long trousers, shorts, shoes, kerosene, T-shirt, national identity cards and money Kshs.800/= all valued at Kshs.5,500/= respectively. Three of the robbers also dragged L to a nearby river bank where they raped her in turns. In the course of the robbery, M was injured on the right hand with a panga. After M was robbed and injured, the robbers ran away. M made his way to V market where he met a watchman, **Gerishom Madegwa** (PW3) to whom he reported the incident. And after her ordeal, L joined M and Gerishom at V Market and narrated to them what had happened to her. M and L were assisted by Gerishom to go to K Police Post where they reported the incident. Statements were later taken from them by **No. 40036 Sgt. Dominic Muthui** (PW 4) who later arrested the appellant and 2 others as suspects in the robbery and rape charges. He then handed over the matter to Vihiga Police Station where further investigations were carried out before the appellant and the others were charged as herein before stated.

When put to his defence, the appellant denied the offences in sworn evidence and testified as to how he was arrested on 3rd August, 2000 by administration police officers and the area assistant chief for an offence he knew nothing about. He also testified as to how he was taken to the area administration police camp, where, after his details were taken, he was released but was soon after re-arrested in the evening by police officers, placed in a police vehicle and taken to K Police Post where he was booked in. Then police officers from V Police Station were called in and they collected the appellant and took him to Vihiga Police Station where further investigations were conducted before he was charged as aforesaid. In her judgment delivered on 7th August, 2003, the trial magistrate (A. Onginjo, SRM) stated in part:

“Considering that A2 and A3 were identified on parade as having been among robbers, I do find that duration of robbery and rape of PW 2 was sufficient for the victims to positively identify accused persons. The red track trouser recovered was also said to have been won by A2 and he has not denied that in his defence. Medical findings of numerous pus cells on PW 2, A2 and A3 is also a pointer that they are the ones who committed the offence charged. I do find prosecution evidence against A2 and A3 overwhelming and I do find them guilty as charged for offence of robbery with violence in count 1 and 2 jointly. A2 is also found guilty in counts 4 and 7. A3 is also found guilty in count 5 and 8. They are accordingly convicted under section 215 C.P.C.”.

The trial magistrate then proceeded to sentence the appellant to suffer death on counts 1 and 2 and also to 7 years imprisonment and 3 strokes of the cane on count 5. Though the appellant was also found guilty in count 8 apparently no sentence was imposed on him in respect of that count. Even if it was imposed it would have been a prison term to lie in abeyance since counts 1 and 2 carry a mandatory death sentence. An appeal lodged by the appellant to the superior court (J. W. Mwera and M. G. Mugo, JJ) was dismissed and the learned Judges in their judgment dated 20th February, 2008 rendered themselves, thus:

“On our part, we are, not in doubt that identifying the attackers including the appellants at the scene was not easy. It was dark with little moonlight. The victims and attackers were strangers to each other. The situation was stressful. But then there was this torchlight as the attackers flashed at each other. The complainants said that by this, they were able to identify their attackers. And of course, the whole thing took a long time – two hours or so. Three or four days after the attack, the appellants were put on parade and PW 1 and 2 picked them out. PW 1 said that his memory was clear without saying about what aspects. The parades that CIP. Kirui (PW 6) conducted yielded the identification of the appellants by the witnesses. We went over the evidence of PW 6 and also the parade forms (exh. P11, 12). We were not able to perceive any error in carrying out the parades, e.g. that either that the appellants objected or were handled in such manner as to expose them to prejudice. We moved to the medical examination reports. PW 2 and the appellants were found to have venereal disease infections. And PW 2 was said to have had that too. It could be a coincidence, yes, but in this state of things, we were prepared to say that if the appellant did not infect PW 2 then she infected them when they raped her. Either way, they are in it”.

On recoveries, the Judges found it difficult to connect the trousers recovered from the appellant herein with accused 2 or

PW 1. Then they continued:

“How about the statements under inquiry? Only the one from Hesbon, [appellant herein] was produced. (exh. P 13)

Hesbon’s statement was brief and direct. With his co-appellant, co-accused and other confidants they came from a funeral on 1/8/2000 at 1.30 pm (sic). On the way they saw a man and a woman walking. They followed them and decided to snatch the bag from the man. They then proceeded to rape the woman in turn. As a fact, the learned trial magistrate found on evidence in a trial within trial that that statement was voluntary. We have no reason to say otherwise. So following our own assessment of the evidence in the lower court, we conclude that there remained a doubt as to Samuel’s participation in the offence charged. Not that he did not take part but that the evidence is not strong enough to uphold his conviction. His appeal is allowed. He is set at liberty forthwith unless otherwise lawfully held.

As for Hesbon, all regarded and with the content of the statement under inquiry, he took part in the offences laid against him. His appeal is dismissed. The death sentence on count 1 will proceed while the other together with prison term remaining in abeyance”.

The appellant was dissatisfied with this decision too and has now appealed to this Court through a memorandum of appeal filed herein on 8th July, 2009 by Messrs Kimanga & Company Advocates. It has 7 grounds of appeal as under:-

- 1. The superior court failed to exercise its jurisdiction as the first appellate court and independently and properly analyze (sic) the evidence and arrive at its own and just decision.**
- 2. The superior court failed to appreciate the fact that the appellant’s trial was a nullity in law as the subordinate court part of the proceedings (plea) had been conducted by an incompetent prosecutor (corporal of police).**
- 3. The superior court failed to appreciate that the evidence against the appellant was inconsistent and insufficient to sustain a conviction against the appellant.**
- 4. The superior court erred in upholding that the appellant has sufficiently and properly been identified notwithstanding the time, circumstances, and stressful situation under which the alleged offence took place.**
- 5. The superior court failed to dismiss the identification as a sham given the circumstances in which it was conducted.**
- 6. The superior court failed to appreciate the peculiar circumstances the statement under inquiry was made and thereby allowed same as confession culminating in a miscarriage of justice.**
- 7. The superior court failed to appreciate that the judgment of the subordinate court was tainted with extraneous matters resulting in wrong decision.**

The appeal was heard before us on 1st December, 2009 when Mr. Kimanga, learned counsel for the appellant abandoned ground 7 but argued grounds 2, 4 and 5 together, grounds 1 and 3 together and then ground 6 alone. The learned counsel stated that the trial in the subordinate court was a nullity since the plea was taken in the presence of an incompetent police officer. He further stated that the circumstances under which the offence was committed were not conducive to a positive identification of the appellant as the intensity of the light at the time was not given and no mark was given to identify the appellant and that the sudden attack on the complainants and the ensuing commotion could not give the complainants sufficient opportunity to identify the attackers. This submission covered grounds 1, 3, 4 and 5. On ground 6 counsel complained about the identification parade and the inquiry statement which culminated in the trial within trial. On these, he submitted that although the appellant did not object to the process during the identification parade, he complained that the complainants had seen him when he went for finger prints exercise when he testified in the trial within trial. The counsel stated further that although there was discovery of a venereal disease in the appellant, his co-accused and L, the court did not analyze which type of venereal disease it was.

Mr. Musau, learned Senior Principal State Counsel for the State, submitted that the police corporal in the case only appeared during plea and mentions but did not prosecute the case as such hence, there was no prejudice to the appellant. On identification, the learned Senior Principal State Counsel submitted that the court found sufficient evidence for this and it was supported by discovery of a venereal disease infection on the appellant, his co-accused and L. He also stated that the statement under inquiry taken from the appellant was accepted by the court as having been made voluntarily and that the appellant was convicted on sound evidence.

This is a second and final appeal and as such only matters of law fall for this Court's determination, see – **section 361 (1)** of the *Criminal Procedure Code*. Although, the appellant listed 7 grounds of appeal, the main legal point raised therein was that of identification. The superior court was aware of the difficult conditions of identification during the commission of the offence and pointed out in its judgment that:

“On our part, we are not in doubt that identifying the attackers including the appellants at the scene was not easy”.

The Judges then went on to pin point the difficult conditions and added:-

“The situation was stressful”.

But then they referred to the light from the torches which the robbers flashed at each other and which enabled the complainants to identify the appellant. Thus, on the issue of identification of the said appellant, there were thus concurrent findings by the two courts below, (see ***Christopher Otieno Amolo, Criminal Appeal No. 452 of 2007***). The superior court also referred to the identification parade where the complainants identified the appellant and the medical examination report where L and the appellant were found to have a venereal disease infection which was specified as “gonorrhoea”. There was also evidence of the inquiry statement made by the appellant to Inspector of Police Charles Gimode (PW 8) which was admitted by the trial court. The two courts below were of the view that this statement was voluntary and amounted to an admission of the commission of the offences by the appellant as charged. All this evidence supported the evidence of the identification of the appellant and his implication in the commission of the offences with which he was charged. We have no reason to differ from the concurrent findings made by the two courts below. This finding covers grounds 4, 5 and 6 of the grounds of appeal.

On ground 1 of the memorandum of appeal, we have perused the superior court's judgment which set out the case as recorded in the trial court. It re-evaluated and analyzed the evidence and made its own independent conclusion of the case – see ***Okeno vs R. [1972] EA. 32***. We do not find any merit in this ground of appeal. On ground 2, it is true when the appellant and his co-accused took the plea, a Corporal Nyongesa appeared in as the prosecutor. This was also the position whenever the case was mentioned. Otherwise the trial court record shows that during all the hearings, one Inspector of Police Wangatia was the prosecutor. Corporal Nyongesa did not prosecute the case as such. In those circumstances, we agree with the learned Senior Principal State Counsel that there was no violation of any statutory right arising from the appellant's trial.

Ground 3 of the memorandum of appeal complained about the inconsistent and insufficiency of the evidence to support the appellant's conviction. Our perusal of the record of the superior court as well as that of the trial court does not support this view. We are of the view that the evidence of the appellant's identification by the complainants as supported by the identification parade and the discovery of a venereal disease on the appellant and L proved the charge of robbery with violence against him beyond any reasonable doubt. This was also supported by the inquiry statement recorded from the appellant and accepted by the trial court as having been voluntarily recorded by him. In view of the foregoing, we find no merit in this appeal which we

order to be dismissed.

Dated and delivered at Kisumu this 5th day of February, 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR