



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

**Criminal Appeal 420 of 2007**

**BETWEEN**

**ERICK MOKAYA LOBES ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome & Kimaru, JJ.)  
dated 29<sup>th</sup> November, 2007  
in*

**H.C.C.R.A. NO. 327 OF 2004)**

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**JUDGMENT OF THE COURT**

The appellant has given his name in the memorandum of appeal as ***Erick Mukaya Yobes***. In a supplementary memorandum of appeal filed by his advocate Maragia Ogaro, the appellant's name is given as ***Erick Mokaya Lobes***, and on the charge sheet the name is given as ***Erick Mugaya Lobes***. Whatever his name is, the appellant has come to us on second appeal challenging his conviction and sentence for the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code, particulars being that:-

***“On the 8<sup>th</sup> day of August 2003 at Kamwaura-Molo in Nakuru District of the Rift Valley Province jointly with others not before Court while armed with dangerous weapons namely knives and clubs robbed Dismas Kihanja Nyanguka of his cash Kshs.2,000/= and at or immediately before or immediately after such time of robbery wounded the said Dismas Kihanja Nyanguka.”***

The events leading to the commission of the offence started at about 7 p.m. on 8<sup>th</sup> August, 2003. ***Dismas Kihanja Nyanguka***, a resident of Sitoito, in the Molo area, joined the appellant and another at a certain house to drink traditional liquor. After some time, Dismas Kihanja Nyanguka (the complainant) decided he had had enough of the liquor and therefore wanted to walk to his home. However, because it was late, the appellant offered to accommodate him for the

night at his house which was nearby. The complainant knew the appellant before and he therefore did not hesitate to accept the offer. At the appellant's house, the complainant was shown where he was to spend the night. The appellant thereafter excused himself, and said he was going outside the house for a short time. He left and closed the door behind him. It was the complainant's evidence that the appellant locked the door from outside. After sometime, the complainant heard voices from outside, and when he tried to open the door to check who was outside, he found the door locked from outside. He was able to identify the voice of the appellant as one of the people who were talking outside. The complainant requested him to open but the appellant ignored him. However, when the complainant screamed the door was opened. It was the complainant's evidence that it was the appellant who opened the door, and that although it was dark he was able to recognize the appellant. The appellant then attacked him with a club and injured him on his left leg. He was pulled outside the house by the appellant who was accompanied by among other people, one, **Charles**. He was stabbed on the left side of his mouth after which he was pinned to the ground and was robbed of Kshs.2,000/= which was in his coat pocket. The appellant and his accomplices thereafter left the complainant and went away laughing.

On the following morning, the complainant made a report of the incident at the Kamwaura Police Post. He gave the name of the appellant and one, Charles, as among the persons who robbed him. **P.C. Bernard Munderi** (PW2) received the report. PW2 testified that he knew the appellant before and was able to arrest him on 12<sup>th</sup> August, 2003, when he saw him at Kamwaura trading centre. The appellant was later charged with the aforesaid offence.

In his defence, the appellant gave an account regarding his arrest on an allegation that he had robbed the complainant of Kshs.2,000/=. He, however, denied having been involved in the commission of the crime. It was his statement that he was detained at the police post overnight, and on the next day he was presented to court charged with the offence of robbery with violence contrary to **section 96(2)** of the Penal Code.

In his judgment, the trial Magistrate, R. Kirui, Senior Resident Magistrate, found as fact that the complainant was robbed of his money amounting to Kshs.2,000/= by a number of persons who were armed with dangerous weapons; was wounded in the course of the robbery, and that the appellant, whom he knew before was one of the robbers. It was his further finding that the complainant was able to, and did identify the appellant. In his view conditions obtaining at the **locus in quo** during the robbery favoured a correct identification of the complainant's assailants who included this appellant. The trial magistrate found the appellant guilty of the offence of robbery with violence, convicted him and thereafter sentenced him as earlier on stated.

Following his conviction and sentence, the appellant appealed to the High Court, which after hearing submissions from the appellant dismissed his appeal. Before dismissing the appeal the superior court (Koome and Kimaru, JJ.) rendered themselves as follows:-

***“Although the appellant was under no obligation to say anything in connection to the charge facing him, when he offered his testimony in defence, he was at least under an obligation to give an explanation as to how the complainant was assaulted and robbed***

***when he was in his house. The appellant did not address this aspect of the evidence that was adduced by the complainant. The trial magistrate had no doubt that the complainant was telling the truth when he testified before the Court. We have no reason to disagree with his finding on the guilt of the appellant.”***

An accused person assumes no responsibility of proving his innocence. The prosecution has always the onus of proving a criminal charge against an accused beyond any reasonable doubt. That burden does not at all shift to the accused. However, in certain cases, the accused has an evidential burden of explaining certain matters which are especially within his own knowledge. (See **section 111 of The Evidence Act, Cap 80 Laws of Kenya.**)

In this matter, the appellant filed a memorandum of appeal with six grounds. However, his aforementioned advocate abandoned all those grounds, except **ground 4** in which the appellant complains that the superior court judgment does not comply with the provision of **section 169 (i)** of the Criminal Procedure Code. The learned advocate however, adopted the supplementary memorandum of appeal, which raises 4 grounds, the first one being that there was breach of the appellant’s fundamental rights under **Section 72(3)** of the Constitution. The second ground is that the evidence against the appellant with regard to identification, fell far short of the standard required. The third and fourth grounds relate to a failure by the superior court to warn itself on the dangers inherent in relying on evidence of identification by recognition, and also that, that court did not analyse and re-evaluate the evidence before dismissing the appellant’s appeal.

This being a second appeal, only issues of law fall for consideration. We have no doubt in our minds that the Superior Court’s judgment meets the threshold of the requirements of **Section 169** of the Criminal Procedure Code. The court was alive to its duty as a first appellate court as it cited the case of ***Okeno v. R.*** [1972] EA 32, which sets out the approach a first appellate court should adopt. The court then re-evaluated the evidence and before doing that cautioned itself of the dangers of relying on the testimony of a single witness in convicting an accused where circumstances are difficult. We do not agree with Mr. Ogaro that the judgment of the superior court falls short of what it was required to be. It cannot be said to be perfunctory as suggested.

Regarding the alleged failure by the prosecution to present the appellant to the court within the 14 days duration, we are unable to agree with Mr. Ogaro that the appellant was presented after 14 days. We earlier stated that it was the appellant’s position that he was presented to the court after staying in police cells for one night. The accuracy of the appellant’s recorded statement has not been challenged. That being so, it follows that there is no merit in the complaint that there was breach of the provisions of **section 72(3)** of the Constitution.

The main complaint by the appellant is on the question of his identification. The offence against the appellant was committed at night time when circumstances favouring a correct identification or recognition of a person were difficult. However, this is a peculiar case. The robbery complained of took place in a house. It was the appellant’s residence. The complainant testified that the appellant and him, among other people were drinking a traditional brew at a certain house, and they left together to go to the appellant’s house. It was the appellant who led him to his house. The

appellant did not challenge this fact when he cross-examined the complainant. The complainant knew him before, and explained that the appellant used to assist some women in brewing liquor, indicating that the complainant knew the appellant well. The complainant also explained that the appellant locked him inside his house from outside. Only him could explain why he did that. He did not explain. In those circumstances, a rebuttable presumption of fact arose that the appellant did so to restrain the complainant from leaving before he, the appellant, and his accomplices were able to steal from him. There are concurrent findings of fact by the trial and first appellate courts that the appellant and his accomplices lured the complainant to his house to facilitate a robbery of his money. The facts and circumstances are clear on this, as in any case, the appellant, on the next day, did nothing to extricate himself from the events of the previous night.

There were other complaints raised by the appellant's counsel, which deal with, inter alia, conflict of the testimonies of the doctor and the complainant on injuries the latter sustained and also the complaint that the investigating officer, who was said to have died, was not called to testify. These are minor aspects of the case in respect of which even if we were to draw an adverse inference against the prosecution they will not per se, have any effect on the appellant's conviction.

That being our view of this appeal, we come to the conclusion that the appeal has no merit. Accordingly, we order that it be and it is hereby dismissed.

***Dated and delivered at Nakuru this 28<sup>th</sup> day of May, 2010.***

***S.E.O. BOSIRE***  
.....  
***JUDGE OF APPEAL***

***P.N. WAKI***  
.....  
***JUDGE OF APPEAL***

***J.W. ONYANGO OTIENO***  
.....  
***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**