



**IN THE COURT OF APPEAL OF KENYA**

**AT NAKURU**

**Criminal Appeal 77 of 2007**

**BETWEEN**

**LESHON LEKAKIO  
STEPHEN MAUNDA NGASINI.....APPELLANTS**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from a judgment of the High Court of Kenya at Nakuru (Kimaru, J.) dated 16<sup>th</sup> March, 2007*

**in**

**H.C.CR.A. NO. 286 & 287 OF 2003)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellants **LESHON LEKAKIO** (1<sup>st</sup> appellant) and **STEPHEN MAUNDA NGASINI** (2<sup>nd</sup> appellant) were jointly charged with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the offence were as follows: -

**“1. STEPHEN MAUNDA NGASINI 2. LESHON LEKAKIO: On the 4<sup>th</sup> day of November, 2001 in Nyandarua District of the Central Province, jointly being armed with a dangerous weapon namely an A.K. 47 rifle robbed E.K.W cash 200/=, one long trouser, two pullovers, one bag, one disco wrist watch, one umbrella and one eveready torch 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 E.K.W.”**

The 1<sup>st</sup> appellant was further charged with the offence of defilement of a girl contrary to **section 145 (1)** of the Penal Code in that on the same day and in the same place the 1<sup>st</sup> appellant had carnal knowledge of **D.N.K**, a girl under the age of fourteen (14) years. The appellants denied the charges but after a full trial before the Principal Magistrate (Kathoka Ngomo Esq.) they were convicted as charged and sentenced to death as mandatorily provided by the law on the robbery charge. The 1<sup>st</sup> appellant was sentenced to serve ten (10) years imprisonment in respect of the defilement charge. The appellants’ appeal to the High Court was dismissed by the judgment delivered on 16<sup>th</sup> March, 2007 in which the learned judges of the superior court (Musinga & Kimaru, JJ.) concluded their judgment thus: -

**“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 of ten (10) years imprisonment that was imposed upon the 1<sup>st</sup> appellant by the trial magistrate in view of the decision made sentencing the appellants to death.”**

Being aggrieved by the foregoing the appellants now come to this Court by way of a second and final appeal. That being so, by dint of **section 361 (1)** of the Criminal Procedure Code only matters of law may fall for consideration by this Court.

The facts as accepted by the two courts below are rather distressing; and they were as follows. On the 4<sup>th</sup> November, 2001 at about 8.00 p.m. the complainant **E.K.W** (PW1) was peacefully at his house with members of his family when he was rudely invaded by robbers. According to the complainant he was in the main house with his wife while his two daughters namely **D. N** (PW2) and **S.W** were in the kitchen. The two daughters of the complainant were in the company of their cousin one **D.K** (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 out 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 who had a gap in his teeth and wore a crocheted cap on his head. According to the complainant this was the robber who was armed with AK 47 rifle. The other robber was described as being short with darker eyes. The complainant complied with the order issued by the robbers and gave them a Kshs.100/= note which was in his pocket. He gave them another note of Kshs.100/= which was in his bedroom. The robbers appeared to be in no hurry as they ransacked the house looking for valuables.

As if to demonstrate that they were not in a hurry to leave one of the robbers asked if he could be given food! He was informed that there were food remains at the kitchen. The tall robber went to the kitchen where he found the two daughters of the complainant. While the complainant was in the main house he heard his daughter D (PW2) scream. The complainant instinctively knew that the robber who went to the kitchen was not eating the food remains but raping his 14 year old daughter. The complainant attempted to go and rescue her daughter but was prevented by the other robber who had been left to guard his wife. Just as the complainant had thought her daughter (PW2) testified to the effect that the tall robber whom she identified as the 1<sup>st</sup> appellant raped her after threatening to harm her with a kitchen knife. After raping the complainant's daughter the 1<sup>st</sup> appellant went to the main house where he took a meal with his accomplice. According to the complainant (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 with his umbrella and a torch. The robbers locked the complainant and his family inside the house and warned the family not to raise any alarm or else they (robbers) would return and harm the family. The complainant and his family remained in the house (in obedience to the robbers' warning) until the following morning when they alerted one of the neighbours who opened for them. They immediately made a report to N police station. In their reports PW1 and PW2 gave the description of the robbers. The young girl D (PW2) was taken to Nyahuru District Hospital on 5<sup>th</sup> November, 2001 where she was treated by **Peter Mathenge Muthee** (PW5) who confirmed that the young girl had, indeed, been defiled.

When the robbery was reported to Ndaragwa police station **Pc. Chris Monda** (PW7) was assigned this case for investigations and as a result Pc. Monda arrested both appellants and charged them as already stated at the commencement of this judgment.

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 as already summarized earlier in this judgment.

Mr. C.N. Nguthari appeared for both appellants while Mr. G.E. Mugambi (State Counsel) appeared for the State when the appeal came up for hearing on 30<sup>th</sup> March, 2010. In his submissions Mr. Nguthari took up the issue of identification as the main ground. He submitted that the circumstances were not conducive for a proper identification as the robbery took place at night and hence it was difficult for the witnesses to identify the appellants. Mr. Nguthari reminded us that nothing was recovered from the appellants. He invited us to consider this as a case of mistaken identity.

In response to the foregoing Mr. Mugambi submitted that the circumstances were conducive for a proper identification as the

description of the appellants was given to the police when the incident was reported to the police. Mr. Mugambi went on to submit that the witnesses were with the robbers for a considerable period of about three hours since the robbers were even given food during the incident, and there was light from the hurricane lamp which was on the table throughout the incident.

In our view the main issue in this appeal is identification of the appellants. We have summarised the facts as accepted by the two courts below which were to the effect that the complainant was peacefully at his home with his family when a gang of robbers struck. We have shown how the robbery took place and how the robbers had even time to be served with food during the robbery incident. The learned trial magistrate was alive to this fact of identification and in the course of his judgment delivered on 10<sup>th</sup> June, 2002 stated:-

**“So it can be seen that under the prevailing circumstances the members of this family had ample time to see and recognise the accused so as to be able to identify them later. I will explore this issue later but I believe that their form of identity was proper and positive and free from error.”**

When the appellants’ first appeal came up for consideration by the superior court the learned judges of that court had, what we consider, the correct approach when in their judgment they expressed themselves thus:

**“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 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 5<sup>th</sup> 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 unhesitatingly pointed out the appellants in the said identification parade.”**

We have considered the submissions by the appellants’ counsel and the entire record of appeal and we are of the firm view that the appellants were convicted on very sound evidence of identification. We decipher no error in the manner the two courts below dealt with the issue of identification of the appellants by the complainant W (PW1) and his daughter D (PW2).

For the above reasons we dismiss this appeal and uphold the conviction and sentence of the appellants.

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

**E.O. O’KUBASU**

.....  
**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....  
**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**