



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CRIMINAL APPEAL NO.122 OF 2014**  
**(ARISING FROM BGM CR. CASE NO.246 OF 2013)**  
**JOHN ODHIAMBO OLUOCH.....1<sup>ST</sup> APPELLANT**  
**DAVID ALUKOYE WASHINGTON.....2<sup>ND</sup> APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The two appellants herein namely John Odhiambo Oluoch and David Alukoye Washington were charged with 5 others, with three counts of robbery with violence contrary to Section 296(2) of the Penal Code. The 5 others were acquitted and the two found guilty and sentenced to death. The particulars of Count 1 were that on the night of 7<sup>th</sup> and 8<sup>th</sup> February, 2013 at Sinoko estate in Bungoma town within Bungoma County jointly while armed with offensive weapons namely knives, panga and rungu, they robbed the Complainant Dr. Isaac Omeri of his laptop make Lenovo, two mobile phones make Samsung 3587 and Nokia C 203, one Television set make LG flat screen 21 inches, one Panasonic TV Silver in colour 14 inches, one gas cylinder 13Kg, 3 remote controls, cash Ksh.5000/- and other personal documents all valued at Kshs.200,000/- and at the time of such robbery used actual violence.

Particulars of Count II were that on the said date as above while armed they also robbed Marolyne Agama Angoki of a Nokia mobile phone 1180 and Kshs.4,700 making a total value of Kshs.6,700 and at the time of such robbery threatened to use actual violence.

2. Being dissatisfied with the conviction and sentence the appellants appealed to this Court on the following grounds

**1<sup>st</sup> Appellant's grounds of Appeal**

- I) The learned trial Magistrate erred in law and in fact as there was no proper identification.
- II) The evidence by PW1, PW2 and PW4 was contradictory
- II) The trial Magistrate did not consider the defence.
- IV) The Judgement was against the weight of evidence and hence occasioned a miscarriage of Justice.

## 2<sup>nd</sup> Appellant's grounds of Appeal

- I) He was not present in Court during half of the hearing yet no production order issued.
- II) The trial Court relied on contradictory and speculative evidence thereby occasioning a miscarriage of justice
- III) The evidence was not to the required standard.
- IV) He was denied witness statements.
- V) The Court failed to consider the suffering the appellant was undergoing in Prison.

3. This is the first Appellate Court and it shall re-consider the evidence afresh, analyse and evaluate the same in order to arrive at an independent opinion bearing in mind that the trial Court had the benefit of seeing and directly receiving evidence. See; *Okeno V R (1972) E.A. at P. 322.*

4. The Prosecution called a total of 5 witnesses. There key witnesses were PW1 & 2 and in brief the Prosecution case was that on the night of February 2013 PW1 Dr. Isaac Omeri returned home from duty after midnight and, on reaching he open the gate for himself, drove in and parked his car, when 6 men appeared armed with crude weapons and attacked him. The said men had torches. They attacked him randomly all over his body, he screamed for help as they cut him on the head, abdomen and legs, he offered his car keys and money he had in the house and asked them to spare his life, he knocked at the window and asked his wife PW2 to open the door which she did by opening the kitchen door.

They robbed him of his wallet, ID. Card, ATM Cards and phone. When they got access to the house they took Kshs.5,000, 2 TV Sets an LG 20 inch and a Panasonic 14 inch, a laptop, remote controls and a gas cylinder. As 4 of the robbers entered the house the lights were on and after carrying the TV is when one asked for the lights to be cut. They asked for more money but were told there was no money and the attackers left as they closed the door from outside. As they cut PW1 his mother in-law who was in another house with PW3 a worker screamed and two of the robbers ordered them to open the door which they did and they were robbed off two phones.

While testifying PW1 stated that during the robbery he identified two of the robbers 1<sup>st</sup> and 3<sup>rd</sup> accused and pointed to the third as the one who cut him severally the said accused persons are the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively. It was also his evidence that the outside security lights were on and he identified the 1<sup>st</sup> accused as he made noise. Further he noted his physique and appearance. He had not seen any of them before.

**PW2 Florence Omeri** the wife of PW1 corroborated PW1's evidence. She had commotion and from the window saw her husband enter her mother's house with three men and she sensed danger. Her fears were confirmed when her husband went to knock at her window soaked in blood escorted by 4 men. She opened the kitchen door and her husband entered with 4 people. She led them to the bedroom and PW1 gave them an envelope with Kshs.5,000/-, while at the window the 1<sup>st</sup> accused had demanded her phone which she gave. The lights were on and the 1<sup>st</sup> accused of them ordered them cut before which the third accused took the TV from the bedroom. The robbers later damaged the bulbs, asked for more money when they did not get more they left and closed the door from outside. She testified that some items were recovered one of the T.Vs and a zuku remote. She stated that she identified the 1<sup>st</sup> accused due to the peculiar shape of his head although he had a cap. Further she saw the 3<sup>rd</sup> accused near the TV. She also saw the 4<sup>th</sup> accused as lights were on inside and outside the house.

**PW3** although robbed and came by the 4 robbers she could not identify any of them.

**PW4 PC Abdi Boru** was the investigating Officer. It was his testimony that on the 7<sup>th</sup> February, 2013

while on night patrol he received a call that PW1 had been robbed, injured and taken to Elgon view medical cottage hospital. He proceeded to the hospital where he found PW1 undergoing treatment. He received a briefing from PW2.

He commenced investigations and proceeded to Sio village to the house of the third accused (2<sup>nd</sup> appellant) and found one of the other accused (since acquitted) and from where he recovered a Pana Sonic TV and a Zuku remote Control which were later identified by PW2 as being amongst the stolen items. They arrest the suspect they found in the house as Accused 3 was not at the house. The same night they arrested the 1<sup>st</sup> accused (1<sup>st</sup> appellant).

It was also his evidence at an identification parade PW1 identified the 1<sup>st</sup> accused (now 1<sup>st</sup> appellant) and the 3<sup>rd</sup> (now the 2<sup>nd</sup> appellant).

**PW5 was Elias Adoka** a Clinical Officer at Bungoma District hospital he produced a P3 form that had been filed by one Dr. Mulianga Ekesa who was no longer working at the hospital. There was no objection from the defence. The witness had worked with the Dr. Ekesa for 17 years and knew his handwriting and signature. The P3 related to Isaac Omeri – 47 years who had sustained

- Cut wound on the occipital area measuring 8cm long
- 2<sup>nd</sup> cut on the left paelatal area measuring 10cm long
- Third cut on the front region of the head 6cm long
- 4<sup>th</sup> cut on the forehead measuring 2cm long
- Bruises on the left intraocular area with a fracture
- Cut wound on the left cheek region measuring 6cm
- Bruises on both forearms and right elbow
- Bruises on scapula area.
- Tenderness and swelling on the left ankle region
- Bruises on lateral maliolas
- Cut wound on left leg below knee joint 2cm
- Cut wound on right thigh laterally 5cm long.

He classified degree of injury as grievous harm.

5. The accused persons were found to have a case to answer and for purposes of this appeal I will confine myself to the testimony of the 2 appellants.

The 1<sup>st</sup> Appellant gave a sworn statement and recalled that 2 police officers went to his house on 8<sup>th</sup> February, 2013 and asked him to carry a T.V. Set Sonitex and a DVD set. He stated further that one Officer had arrested him previously and taken away his customer's phone (Accused 1 repaired phones) and he had to give 2,000/- to the said Police Officer in order for the phone to be returned a matter he reported to Officer's Boss and the said Officer was made to refund the money and there has been a grudge since as the Officer threatened to fix him. He denied having been identified at an identification parade he further denied the allegations against him.

6. The 2<sup>nd</sup> Appellant (3<sup>rd</sup> accused) on his part refused to leave the Court cells and did not testify and defend himself.

7. There is no doubt in my mind from the evidence of PW1, PW2, PW3 and PW4 that PW1 was attacked as he returned home and alongside his family was robbed by a gang of several people who used violence against him inflicting serious injuries upon him. Evidently all ingredients of robbery were present.

8. Next is to see whether there was evidence linking the two appellants to the offence.

Before Court there is evidence of the investigating Officer PW4 that the same night of the robbery at 2.30a.m. they raided the 2<sup>nd</sup> appellant's house and although they did not find him at home they found his wife, and on searched the house they found a TV Set and Zuku remote on the bed. They suspected the same to have been stolen and carried the same. The following day PW2 identified the same to have been among the stolen items and produced a receipt. Later the following day he received 5 suspects and amongst them was the 2<sup>nd</sup> Appellant and he established that he was the owner of the house, that had been raided and a TV set and remote control recovered.

9. The doctrine of recent possession come into play as no explanation was forthcoming either from the 2<sup>nd</sup> Appellant or his wife how the TV set was on a bed in their house a few hours after the robbery, other than a mere denial. In **Isaac Ng'ang'a Katunga alias Peter Ng'ang'a Katung'a Vs R Cr. Appeal No.272 of 2005**, the Court of Appeal said;

***“It is trite that before a Court of Law can rely on the doctrine of recent possession as a basis for conviction in a Criminal Case. The possession must be positively proved. In other words, there must be positive proof first, that the property was found with the suspect, secondly that the property is positively the property of the Complainant. Thirdly, that the property was stolen from the Complainant and lastly, that the property was recently stolen from the Complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”***

10. There was dock identification of the 1<sup>st</sup> and 2<sup>nd</sup> appellant by PW1 and 2 who stated in their testimonies that there were lights both in and outside the house. As for the 1<sup>st</sup> appellant PW1 said he identified due to his physique and because he made noise. As of the 2<sup>nd</sup> Appellant, he is the one who cut him severally. PW2 on her part said the 1<sup>st</sup> appellant demanded her phone from the window, he is also the one who directed the lights be put off. As for the 2<sup>nd</sup> appellant he carried the T.V. from main bedroom.

11. The dock identification was positive. Conditions at the time of robbery were conducive so as to allow positive identification as there were lights both in and outside, and the robbery took time and gave sufficient opportunity to the witnesses to see the robbers well.

In **Wamunga Vs Republic (1989) KLR 426** the Court of Appeal stated;

***“It is trite Law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis for conviction.”***

12. In **RVS Turnbull & Others (1976) 3 All E.R 549** the subject was extensively discussed where the Court said:

***“...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness can be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness even seen the accused before? How often? If only occasionally, had***

***he any special reason for remembering the accused? How long had it lapsed since the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused to the police by the witness when first seen by them and his actual appearance...”***

13. In *Muiruri & 2 Others versus R (2002)1 KLR 274* the Court stated;

***“...we do not think it can be said that all dock identification is wrong. If that were to be the case then decisions like *Abdulla bin Wendo versus Republic (1953)20 E.A.CA 166*, *Roria versus Republic (1967) E.A. 583* and *Charles Maitonyi versus R(1986)2 KAR 76*, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases Courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The Court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the Court duly warns itself of the danger of mistaken identity.”***

14. PW1 and PW2 interacted with the robbers for a while. PW1 said he was cut by the 2<sup>nd</sup> appellant severally, the 1<sup>st</sup> appellant made noise (I suppose attracting attention to himself) and had a peculiar physique and there was security light outside and light inside the house which made it possible to identify the Appellant. PW2 said she identified the 1<sup>st</sup> Appellant because of the peculiar shape of his head and the 2<sup>nd</sup> appellant as he is the one who carried the T.V. from the bedroom.

15. It should be noted from the record that the appellants both refused to have an identification parade, that notwithstanding I am of the view that in this case dock identification of the 1<sup>st</sup> appellant was sufficient. So was that of the 2<sup>nd</sup> Appellant, who apart from being identified he was found in possession of recently stolen Panasonic TV and a remote and failed to explain the circumstances of how he came to be with the same.

16. There is no material contradiction in the evidence of the Prosecution. The 1<sup>st</sup> appellant's defence was a mere denial and did not dislodge the otherwise cogent and overwhelming evidence of the Prosecution. The 2<sup>nd</sup> appellant decline to testify and cannot be heard to complain at this stage.

17. The conviction and sentence are upheld and the appeal dismissed.

DATED and DELIVERED at BUNGOMA this 21<sup>st</sup> day of September, 2017

**ALI-ARONI**

**JUDGE**