



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 3 OF 2017

CONSOLIDATED WITH

HCCRA NO.1 OF 2017 & HCCRA NO.2 OF 2017

BETWEEN

DICKSON OBUYA AMOLLO.....1ST APPELLANT

FRED OTIENO OMOLLO.....2ND APPELLANT

BRIAN JEFF OTIENO.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from original conviction and sentence in Homa Bay CM's Criminal Case No.1148 of 2017 – HON. P.N. GICHOHI,
CM dated 17th January, 2017)*

JUDGMENT

1. **DICKSON OBUYA AMOLO** (1st Appellant), **FRED OMOLLO** (2nd Appellant) and **BRIAN JEFF OTIENO** (3rd Appellant) were each convicted on a charge of robbery with violence contrary to **Section 296 (2) Penal Code** and sentenced to death.

The charge against them stated that on 11th November 2014 at about 10.30 p.m. at **NYAUDHO** village, **GEM CENTRAL** location within **HOMA BAY** County, while armed with dangerous weapons, namely pangas, jointly robbed **PAUL OTIENO OJWANG** cash Kshs.50,000/=, two mobile phones make Irtel valued at Kshs.2,300/=, a Nokia valued at Kshs.2,300/=, Safaricom Credit Cards valued at Kshs.1,750/=, all to the total value of Kshs.64,350/= and immediately before such robbery wounded the said **PAUL OTIENO OJWANG**.

The appellants denied the charge.

2. **PAUL OTIENO OJWANG** (PW1) narrated to the trial court that on 11/11/2014 just after he had supper with his family, he went outside to brush his teeth, when he saw 4 people holding pangas which were raised up. He got frightened, threw the mug he was holding in his hands at them and ran back into the house. As he turned to close the door, one of the 4 men cut him on the right hand. They tried to push him, and he fell down. The same man went where his wife sat, and threatened to cut her if she raised an alarm. He took away her phone.

3. The other two men entered into the house, and one demanded for money. PW1 pointed to where the money was, and the intruder went to check. He could not see the second man but they took the money which was wrapped in a polythene bag and hidden in a bag containing scratch (credit) cards. They warned PW1 not to make noise otherwise they would return to cut him up. They left and locked the door from outside.

4. PW1 and his wife waited for a while before shouting for help, and after a while his father arrived. After describing to him the ordeal, he was taken to hospital for treatment.

PW1 stated:-

“Among the four people who attacked me, only three entered the house and they are the 3 accused persons now on the dock. I knew them even by name. The person who cut my hand is Fred Omollo. The one who took my money is Jeff and is the 3rd

accused in the dock. The person who was standing next to me taking charge of me as the other two continued with operation is called Dickson.”

5. PW1 explained that there was a lamp on the table which enabled him to see and identify the attackers. Further that the 1st appellant stood next to him while the 3rd appellant stood in front of him, facing him, and the 2nd appellant faced his wife. He was also specific that the 3rd appellant took the Kshs.50,000/= and the credit cards worth Kshs.9,750/= while the 2nd appellant took the phones. PW1 stated this about the appellants:-

“I knew them before as they were my village mates. I have known them since my childhood.”

He was not able to identify the 4th attacker because he stood at the door.

6. PW1 explained that the lamp which was on the table was a tin lamp which did not go off during the entire episode, and after being pushed, he fell down and remained kneeling on the floor.

7. It was also his evidence that his wife was in the kitchen when he ran into the house but she went to the sitting room and peeped when she heard the commotion.

He described the sitting room as measuring about 12x12 feet with a 7 seater sofa set, a small table and a big table.

8. **LILLIAN AKOTH OTIENO** (PW3) confirmed that on the material date and time she was inside her house with her husband (PW1) and their three young children aged between 6 - 2½ years. She went to the kitchen, while PW1 got outside the house – suddenly she heard several people entering the house while making a lot of noise, while her husband made a sound as though he was in shock. She stood at the kitchen door and peeped into the sitting room and saw people standing in front of her husband.

9. PW3 screamed loudly but one of the man approached her and ordered her to go to the sitting room and get seated. She looked at his face and recognized him as **FRED** (2nd appellant). One man who was standing in front of her husband shouted in Kiswahili:-

“Huyo mama anakuangalia uso”

(That woman is looking at your face) whereupon the 3rd appellant

got a jacket and covered her face – but he remained seated next to her.

10. PW3 explained that before her face got covered, she had seen 4 men who all had pangas – one man stood at the door facing inside the house, two stood next to her husband while facing the door, and one covered her face and sat next to her.

She heard PW1 telling the attackers that the money was on the bed, wrapped in a polythene bag. She heard them walk towards the bed.

The person seated next to her asked for her phone and after telling him that it was on the table, she could hear him touching the table looking for the phone.

11. After a while PW1 told her to uncover her face, and she realized the attackers had left. They raised an alarm and eventually her father in-law arrived.

12. On cross examination, PW2 stated that she had known the 2nd appellant as he was from her village and she had known him since the year 2003, which is when she got married. She described the source of light as follows:-

“We had a tin lamp in the house and the light was bright, it covered the whole room. The incident took about 20 minutes.”

13. She also confirmed that she did not see the faces of the other people except the 2nd appellant. Further that PW1 was lying on the ground, held by two people.

PW2 also explained that although there are two neighbours, none responded to their distress calls, and it’s her father in-law who came to the scene.

14. PW3 (**JOHN OJWANG OTIENO**) told the trial court that his son **PAUL** and his wife lived near his home. On 11/11/2014 at about 10.40 p.m., he heard a woman screaming for help and also recognized the voice of his son **PAUL** screaming. He rushed to the scene which was about 100 metres away from his home and found the door locked from outside. He opened the door and got in only to find PW1 bending while holding his hand. PW1 told him that the 2nd appellant had cut him while in the company of **DICKSON AMOLLO** and **JEFF**. He knew the appellants well as the 1st and 2nd appellants’ respective fathers are his cousins, while the 3rd appellant is his grandson. He noted that PW1’s fingers had been chopped off and his clothes were soaked in blood. He organized for PW1 to be taken to hospital.

15. PW2 explained that he found a dotted cap and upon inquiring from neighbours who had now come to the scene, they said it belonged to **“Jeff”** (the 3rd appellant). PW2 was accompanied by members of the public to the 3rd appellant’s house who on being shown the cap said it

belonged to the 1st appellant. So the people got the 1st appellant and eventually both 1st and 3rd appellant were handed over to the police. He confirmed finding a bright tin lamp placed on a table inside the couple's house.

16. **EVERLYNE AKINYI OJWANG** (PW4) a sister to PW1 received a call from her father's phone but it was PW3 calling. She was crying and saying they had been attacked by thugs, and PW1's hand chopped off, so she needed assistance to take him to hospital.

17. PW4 called the area chief who advised that the victim be rushed to hospital – so she organized for that. She described PW1 as all bloody and unconscious, and was admitted to hospital.

18. PW1 mentioned **BRIAN JEFF OTIENO** and **FRED OMOLLO** as the people who attacked him. However since he appeared very tired she did not ask him the details of the attack.

On cross examination PW4 stated:-

“My brother mentioned only 2nd and 3rd accused. He did not mention Dickson ...”

19. **CHIEF OURA OTIENO PETER** (PW5) of **GEM CENTRAL** location confirmed receiving a report about the incident and he went to the scene the next morning, where he learnt from PW2, that the victim had mentioned **BRIAN JEFF** and **DICKSON AMOLLO** as the attackers.

20. He also found the three appellants already apprehended and being beaten by members of the public. He intervened, then re-arrested them and escorted them to **RANGWE** police station. The crowd also gave him a cap they claimed belonged to the 3rd appellant. He also saw a piece of human hand at the scene – it belonged to PW1.

21. **DANIEL NYAMENINO** (PW6) a clinical officer who examined PW1 noted that 4 fingers of the right hand were missing and the stump had a linear scar. The degree of injury was assessed as maim, and the P3 form in that regard was produced.

22. **IP FRED BUNUSU** (PW4) is the officer who received the appellants from the chief and members of the public. He noted that the two had cut wounds. He conducted investigations and went to the homes of 2nd and 3rd appellants but made no recovery. However in the 1st appellant's house he recovered a **G-TIDE** phone and a knife (which he later realized had no connection to the offence).

23. He also visited the victim in hospital who named the three appellants on his attackers. He also established that:-

“... the incident occurred at night but there was a light coming from a small tin lamp known as Koroboi.”

24. In his sworn defence, the 1st appellant stated that on 11/11/2014 he slept with his wife the whole night and woke up the next day at 7.00 a.m.. He left his house that morning to go and burn charcoal when he was confronted by a mob who said they recovered his cap at PW1's home. He denied ownership of the cap and was beaten up by the mob. He confirmed that he knew the complainant.

25. The 2nd appellant's sworn defence was that he went to bed on the night of 11/11/2014 and woke up on 12/1/2014 to do his daily chores. That is when he heard people discussing that PW1 had been attacked by some people. Since he was related to the victim, he went towards the latter's home to find out what was wrong but was assaulted by PW2 who had previously warned him never to go to his house. He lost consciousness and woke up in hospital.

26. The 3rd appellant's sworn defence too was that on the night in question he slept the whole night after having his supper at 5.00 p.m. He was woken up the next morning by a knock at his door. Six people armed with rungu asked him to accompany them to PW2's compound where he saw PW2 carrying a cap. The appellant was beaten up and asked whether the cap belonged to him – he denied. The mob threatened to kill him, but fortunately the area chief arrived and saved the situation. He was taken back to his house where a search was conducted with no significant recovery.

27. The appellants called two defence witnesses that is **DAVID ODHIAMBO** and **GEORGE OMONDI OTIENO** who only described events surrounding the arrest of 1st and 3rd appellants on 12/11/2014.

28. The trial magistrate in her judgment had no doubt that a robbery took place inside PW1's house where he was robbed of property and injuries were inflicted on him in the course of the robbery.

29. The trial magistrate also considered the alibi defences offered but noted that each appellant focused on how he was arrested on the morning of 12/11/2014. She noted that each appellant was very guarded as to why they could not get anyone whom they claimed to have been in their company that night as witnesses to support their claims. However in this regard the trial magistrate was conscious of the position that **(i)** the burden of proof always rests with the prosecution, and never shifts **(ii)** an alibi defence can be tested by taking into account whether the same was raised at an early stage during the trial. The alibi was rejected as being raised too late in the day.

30. The trial magistrate was satisfied that there was adequate opportunity for identification which was by recognition. The defences were rejected as being made up and claims that there existed a grudge between the family of the victim and the appellants were rejected as having no basis.

The trial magistrate stated:-

“The issue of recovery of the cap ... at the scene was not crucial ... The accused persons were not identified during the robbery by the caps and neither PW1 nor PW2 referred to such form of identification ...”

31. The witnesses were described as **“credible, straight forward and consistent”** and there was proper corroboration, and any contradiction noted was “insignificant, immaterial and had no effect to the prosecution case”.

32. The appellants challenged these findings on grounds that opportunity for identification was not satisfactory as a tin lamp cannot enable one to identify the attackers.

Further that the trial court failed to take note that no significant recovery was made from the 2nd and 3rd appellants’ house just within hours of the incident.

33. In their written submissions it was argued that the evidence presented did not prove the charge on grounds that it was not disclosed how long the witnesses had the appellants under their observation so as to determine that they had ample opportunity for identification. Secondly that the trial magistrate failed to take into account the contents of the first report made by the witnesses.

34. They contended that from the position where PW1 was kneeling after being pushed by the attackers, he could not have properly identified the persons inside the house.

35. The appellants also faulted the charge sheet saying it was defective as it did not disclose the serial numbers of the stolen phones. Further that there were inconsistencies regarding PW1’s injuries.

The third appellant also took issue with presentation of the cap saying it did not belong to him.

36. **MR. OLUOCH** on behalf of the State opposed the appeal with regard to the 2nd and 3rd appellant saying they were positively identified by PW1 and PW3 who each gave detailed evidence of what role each appellant played. He also pointed out that PW3 stated in her evidence that the incident lasted about 20 minutes; which gave the witnesses ample opportunity to see and identify the attackers.

37. In conceding the appeal against the 1st appellant, **MR OLUOCH** submitted that the victim’s sister (PW4) stated that PW3 only mentioned the names of 2nd and 3rd appellants but not the 1st appellant. Further that because PW1 was forced to kneel down, then the opportunity for him to see and identify the 1st appellant was compromised.

38. The whole incident revolved around the issue of identification since no significant recovery of the stolen items was made. This court was required to consider the prevailing circumstances in terms of light, time, distance and whether this favoured positive identification. In the case of **R –VS- TURNBULL (1976) 2 All ELR 549** it was acknowledged that a witness may genuinely be under the mistaken belief regarding the identity of accused person but the test to be applied includes *inter alia*:-

“... How long did the witnesses have the accused under observation? At what distance, in what light, was the observation impeded in any way? Had the witness ever seen the accused before? How often?...”

39. In the present case the source of light was a tin lamp, the victim described the dimensions of the sitting room as measuring 12x12 feet and the lamp was on the table. Although it is a rudimentary source of light, it does offer adequate light especially in a small enclosure such as described by the witness.

40. The lamp was placed on a table and PW1 got an opportunity to see them as they pushed the door and forced their way into the house. They were not strangers, indeed it is common ground that the victims and the appellants were known to each other and were even related village mates. It was not a fleeting glance because PW1 explained that the 1st appellant stood next to him while the 3rd appellant stood in front of him, facing him. He was also very specific on the roles each appellant played during the incident – this was corroborated by PW3 albeit to only one appellant as her face was then covered.

It was not a fleeting glance, indeed for PW3 she stated:-

“One of the men came to me and ordered me to go to the sitting room. I looked at him on the face. I recognized him. It was Fred.”

41. The evidence clearly showed the attack did not happen swiftly with the robbers quickly, taking items and leaving – they spent a considerable time first harassing the victims, making their demands, before collecting the property and leaving.

42. PW1 and PW3 were clear that the attackers were in close physical proximity and mentioned appellants in their first report to PW2 and I am satisfied the opportunity for identification was adequate for each one of them. I cannot fault the finding by the trial magistrate on that.

43. As regards the serial numbers of phones not mentioned in the charge sheet, that was not fatal – I think it would only have been significant if the phones were recovered and presented to court. The Investigating Officer was categorical that the phone and knife he recovered from the 1st appellant were not related in the case. Indeed the trial magistrate pointed out that the recovery of the cap was immaterial to the case as it was not an item used in identifying the attackers.

44. In my view the appeal against 1st appellant is not properly conceded, the evidence against him is as comprehensive just as that against the other two. The conviction was safe and is upheld. The sentence was legal and is confirmed.

Delivered and dated this 16th day of October, 2017 at Homa Bay

H.A. OMONDI

JUDGE