



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 262 OF 2012**  
**CONSOLIDATED WITH**  
**CRIMINAL APPEAL NO. 261 & 263 OF 2012**

**BETWEEN**

**MALIK OKINDA ABDALLAH.....1<sup>ST</sup> APPELLANT**

**ISMAEL ABDALLAH WERE.....2<sup>ND</sup> APPELLANT**

**KASSIM SHIUNDU MURUNGA (DECEASED)..3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. H. Wandere, PM dated 24<sup>th</sup> October 2012 at the Senior Principal Magistrates Court at Mumias in Criminal Case No. 339 of 2011)*

**JUDGMENT**

1. The appellants, **MALIK OKINDA ABDALLAH (DW 1)**, **ISMAEL ABDALLAH WERE (DW 2)** and **KASSIM SHIUNDU (DW 3)** were convicted and sentenced to death one count of robbery with violence contrary to **section 295** as read with **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on 9<sup>th</sup> June 2011 at about 8.00pm at Shikonezi Village, Kholera Sub-location in Matungu District within Kakamega County jointly armed with dangerous weapons namely firearm, panga and rungus robbed **ABDALLAH KUPE WERE** of cash Kshs. 37,800/- and one mobile phone Max C 1600 valued at Kshs. 5,500/- all property valued at Kshs. 43,300/- and at the time of such robbery, they used actual violence on the said **ABDALLAH KUPE WERE** by injuring him.

2. The second appellant, **ISMAEL ABDALLAH WERE** was also charged and convicted of the offence of resisting arrest contrary to **section 254** of the *Penal Code* but he was sentenced as this was held in abeyance in light of the sentence of death imposed on Count I. The particulars of the offence were that on 7<sup>th</sup> July 2011 at about 12.00 midnight at Makunda Village, Kholera Sub-location in Matungu District within the Kakamega County unlawfully resisted arrest for a case of robbery with violence against number [...], Administration Police Sergeant **PETER EKADELI** while armed with a panga by confronting and threatening to cut the said Administration Police Officer who at the time was acting in execution of his duties.

3. The appellants now appeal against the conviction and sentence. During the pendency of this appeal, the 3<sup>rd</sup> appellant died hence his appeal has now abated. The thrust of their respective petitions of appeal and the written submissions is that the evidence of identification was doubtful as there was insufficient light for the complainant (PW 1) to recognise them. They contended that there is no evidence that they were mentioned in the initial report to the police and taking the totality of the evidence, the convictions were unsafe. They also pointed out that the prosecution evidence was full of inconsistencies and that important and essential witnesses were not called. They also submitted that the trial magistrate did not consider their respective defences.

4. In response to the appellants' submissions, Mr Ng'etich, learned counsel for the respondent opposed the appeal and submitted that the evidence of identification was that of recognition as both appellants were sons of the complainant (PW 1). He further submitted that there was ample time during the incident for PW 1 to recognise them and that there was sufficient corroborative evidence of other witnesses connecting them to the incident hence the conviction was safe.

5. As this is the first appeal, I am enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether I should uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify (see *Okeno v Republic [1972] EA 32*).

6. The material facts emerging from trial were as follows. The complainant, Abdallah Kupe Were (PW 1) told the court that he knew the appellants. DW 1 and DW 2 were his children through one of his wives he had divorced while DW 3 was a neighbour he had for a period of over 5 years. He recalled that on the night of 9<sup>th</sup> June 2011, he was alone in his house with his tin lamp on. His son, Khalid Abdalla Kupe (PW 3) knocked and called him to open the door. When he opened the door, he saw 6 men standing behind PW 2. They had torches and he could see DW 3 behind him was DW 2 while DW 3 was behind another assailant by the name Hemedi. Since it was his son who requested him to open the door he was not afraid and when he opened the door he recalled that the assailants were dressed as police officers. He ushered the assailants and even stood aside to let them in. However, DW 3 ordered him to move inside and directed him to the bedroom. He entered the bedroom while DW 3 stood at the door with a firearm. PW 3 also followed him into the bedroom. His daughter, Ralia Kecha Abdalla (PW 2) was also brought and ordered to sit down.

7. PW 1 further testified that DW 2 demanded money from him while DW 3 was holding the firearm on his neck. PW 1 decided to give Kshs. 400 from his pockets and gave it to DW 3 but DW 3 reacted in annoyance, so he removed Kshs. 3,000/- from his pocket, but the money was snatched by the assailants who tore the pocket. They also demanded his cell phone which he gave DW 2. PW 2 also gave her mobile phone to DW 3. The assailants took him to the sitting room where they forced him to open a drawer where he kept Kshs. 34,400/- which they grabbed. DW 3 ordered him to open a locked drawer and as he was opening the drawer, he could see DW 2 from the mirror which was reflecting the light from his torch. He saw DW 2 with a panga which he swung over his head. As he was trying to block the panga, DW 2 cut his arm. He screamed in pain causing the assailants to run away and in the course, attracted his wife who came and tied his hand in a cloth and escorted him to Mayoni AP Post. He was taken to Matungu District Hospital in Mumia but was transferred to Bungoma District Hospital where he was admitted for 12 days.

8. PW 2 recalled that on the material night, she was in the kitchen which is outside and about 100 metres from the main house. The tin lamp was on when she saw 3 men coming into the kitchen. One of them had a pistol and they were dressed like police officers and had torches. She recognised her nephew, Hemedi who was with them and she assumed he had come with police officers. They requested her to take them to her father and when she took them to PW 1's house, she recognised DW 2 dressed in a jungle jacket. She was pushed into PW 1's room where she found PW 1, PW 3 and her other younger brothers on the floor. One of the assailants took her mobile phone. She saw Hemedi hit PW 1 on the legs as he demanded money. She watched as Hemedi and DW 2 assaulted PW 1 with a panga. They took him to the sitting room while she was taken away. She heard PW 1 screaming that his arm had been cut. The other assailants who were watching switched off their torches while she went to assist PW 1 with her mother. They took him to the police station. PW 2 testified that she did not see DW 1.

9. PW 3 testified that on the material night while he was preparing to take hot water for his father, PW 1, to take a bath. As he approached his father's house, 6 men in jungle jacket suddenly emerged from behind him. He was able to see DW 2 who held his arm and told him to call PW 1. He recalled that all the 6 men had their torches on. When he entered the house, the assailants directed him to PW 1's bedroom. PW 2 was also brought and told to sit on the floor with PW 1. The assailants threw a blanket over them and in the course of assaulting PW 1, they took him to the sitting room. PW 3 was able to hear PW 1 scream that his arm had been cut. PW 3 confirmed that it was DW 2 who held his arm and took him to PW 1's house. He did not see DW 1.

10. The investigating officer, PC Wesley Korir (PW 5) recalled that a report was made at the police station on 9<sup>th</sup> June 2011 at about 9.14pm by PW 1 that he had been attacked by 6 assailants including the appellant who had cut his arm and stolen Kshs. 34,400/- and his mobile phone. Since his left arm had been completely cut off, he was rushed to hospital. Dr Mulianga Ekesa (PW 7) confirmed that PW 1 was received at Bungoma District Hospital on 17<sup>th</sup> June 2011 and taken to theatre where the stump of his arm was removed. According to the records produced by him, PW 1 was admitted to the hospital for 11 days.

11. PW 5 told the court that when he visited the scene 5-6 days after the robbery, he saw blood on the floor, walls and cushions in the sitting room and PW 1's bedroom. He also saw the drawer where PW 1 had removed the money and the mirror at the drawer. He was also given PW 1 bloody clothes. He further recorded the statements of witnesses.

12. DW 2 was arrested on 6<sup>th</sup> July 2011 at about 10.00pm in a police led operation. AP Peter Ekadel (PW 4) recalled that they were shown the accused's home by the Assistant Chief. When they went to his home, DW 2 was in the house but he refused to open door. The officers kicked the door open and found DW 4 in one of the room holding a panga. PW 4 told him to lay down the panga but he did not. Instead he started to approach him. PW 4 cocked his gun and fired in the air but DW 4 continued to approach him whereupon PW 4 fired at DW 4's leg. DW 4 fell, he was handcuffed and taken to hospital before being charged. According to PW 5, DW 1 was arrested when another complainant in another case brought him to Mayoni.

13. The accused were put on their defence. DW 1 denied the offence and stated that between 3<sup>rd</sup> and 14<sup>th</sup> June 2011 he was at Mambuku in Funyula and when he returned home he was informed of the incident. He could not see his father immediately as he did not have money so he went to work. He recalled that he was arrested by Administration Police officers at Mayoni on 18<sup>th</sup> June 2011 for alleged stock theft.

14. DW 2 also denied the offence. In his sworn defence, he told the court that on 8<sup>th</sup> June 2011, he left home for work and returned home at about 6.30pm. As he was having supper, his wife told him that there was noise from PW 1's house. He thought that PW 1 was quarrelling with his wife and children as he often did. He nevertheless went to the home and as he was going there, he met PW 2 and PW 3 coming from the house crying and PW 1 injured. He called a village elder and informed what happened while PW 1 was taken to hospital. He further testified that on 6<sup>th</sup> July 2011, he was attacked at night and shot in his leg. He was later arrested by people who did not identify themselves.

15. DW 2's wife, Ruth Aremo (DW 3), testified that on the material night she came home in the evening and found DW 2 at home assisting the children with homework. Later on, she heard people screaming from the direction of PW 1's house. DW 2 told her not to bother as PW 1 was quarrelsome. When the screaming continued, she followed DW 2 to PW 1's house where they were told that robbers had come and cut PW 1's arm. She also recalled that on 6<sup>th</sup> July 2011, they were attacked by robbers who shot DW 1 on his leg.

16. The trial magistrate found that the prosecution had proved all the elements of the offence of robbery with violence and that the appellants were properly identified as assailants. In their respective petitions of appeal and written submissions, the appellants raised the issue of identification. They contended that the trial magistrate erred in law and in fact in convicting them on the evidence of a single identifying witness without corroboration and that the witness did not describe the assailants in the first report to the police.

They noted that the prosecution did not provide any tangible evidence to link them to the offence. They submitted that the identification parade was conducted in contravention of the law. The appellants also contended that the trial magistrate failed to consider the respective alibi defences.

17. Counsel for the respondent, Mr Ng'etich, opposed the appeal and submitted that the conviction was sound. He further submitted that the identification was sound and the identification parade was conducted in accordance with the law. He pointed out that although the rank of the officer who conducted the identification parade was unknown, this was a mere irregularity that did not affect the outcome.

18. The offence of robbery with violence, as well as its ingredients are provided in **section 296 (2)** of the **Penal Code** in the following terms:

*If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.*

19. In **Oluoch v Republic [1985] KLR 549**, the Court of Appeal set out the ingredients of robbery with violence as follows:

*The ingredients of the offence of robbery under section 296(1) of the Penal Code are:*

*a. stealing anything and*

*b. at or immediately before or immediately after the time of stealing,*

*c. using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.*

20. The word "or" contained in **section 296(2)** above must be read disjunctively so that the prosecution need only prove that the stealing, which is the central element of robbery, took place in either of the circumstances that are set out in the subsection (see **Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR**). Proof of any one of the ingredient is sufficient to establish the offence and sustain a conviction.

21. The fact of robbery with violence was proved by the clear and credible evidence of PW 1 who gave an account of the attack by a gang of robbers armed with a firearm and pangas. They who forced him to give up his money and took his mobile phone. His arm was cut by a panga wielding assailant. His testimony was corroborated by PW 3 and PW 4. The injury to his arm was confirmed by PW 7. From the facts, I have outlined, I have no doubt that the prosecution established the offence of robbery with violence.

22. The question before this court revolves around identification of assailants in difficult conditions. Our courts have recognised in such conditions identification is fraught with difficulty and may lead to miscarriage of justice hence in the court is under a duty to carefully weigh the entirety of the evidence and before convicting an accused be sure that the circumstances of identification are free from error. In **Wamunga v Republic [1989] KLR 424** the Court of Appeal warned that;

*[W]here 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 be the basis of a conviction.*

23. In **Paul Etole & Another v Republic, Criminal Appeal No.24 of 2000 [2000]eKLR**, the Court of Appeal drove the point home again in the following words in part of its judgment,

*"--- to evidence of visual identification, such evidence can bring about miscarriage of justice. But*

*such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when a witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. When the quality is good, and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality the greater the danger.*

24. This was a case of recognition as it was not disputed that each of the appellants were well known by PW 1. However, the robbery took place at night in a small room which was lit by a tin lamp. When the assailants came into the house after PW 3 called PW 1 out to open, he saw them with torches. He was able to identify all the appellants when they came into the house. He narrated how he was assaulted by DW 3 who had the firearm. When he was taken to the sitting room and told to open the drawer, he was able to see DW 2 through the mirror. The presence of the mirror was confirmed by PW 5. Since the assailants had torches, it was possible to see the reflection in the mirror and he saw DW 2 lift the panga and cut his arm.

25. The presence of DW 2 at the scene of the robbery was confirmed by PW 2 and PW 3. According to PW 3, he is the one who led him to PW 1's house. He was clearly recognised and his complicity in the robbery proved beyond reasonable doubt by the testimony not only of PW 1, but also PW 2 and PW 3. In light of the evidence placing him squarely at the centre of the robbery, I reject his defence that he merely came to PW 1's house after alarm was raised and the robbers had left.

26. In respect of the offence of resisting arrest, the testimony of PW 4 was clear that despite the police officers identifying themselves, he refused to open the door and surrender to the police. DW 2 was shot while attempting to attack the officer. His claim that he was attacked by strangers is not borne out by any evidence. The charge against him in that respect was proved and I affirm the conviction.

27. As concerns DW 1, PW 1 stated that he was standing behind the other assailants when he invited them into the house. There is no evidence he participated in the assault and since he was a brother to both PW 2 and PW 3, it would have been impossible for him to be present yet remain unrecognised by PW 2 and PW 3. Both of them were clear that they did not see him on the material night. It was held in ***Kiarie v Republic [1984] KLR 739*** that it was possible for a witness to be honest yet mistaken hence in this case, I cannot uphold DW 1's conviction as his presence at the scene is doubtful and his conviction was not safe.

28. The trial magistrate convicted the 2<sup>nd</sup> appellant on Count I and II counts but only sentenced him on the first count. Even though the sentence for the second count was held in abeyance due to the death sentence imposed on the first count, the trial magistrate had a duty to impose a sentence on the second count which would then be held in abeyance.

29. Considering the circumstances of the case, I sentence the 2<sup>nd</sup> appellant to a term of 3 years' imprisonment on Count II. The sentence shall now be held in abeyance in view of the death sentence imposed on Count I.

30. Based on the findings I have made, I now make the following orders:

(a) The 1<sup>st</sup> appellant's appeal is allowed and his conviction and sentence quashed. He is set free unless otherwise lawfully held.

(b) Save for the variation in the sentence on the Count II, the 2<sup>nd</sup> appellant's appeal is dismissed.

**SIGNED AT KISUMU**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KAKAMEGA this 13<sup>th</sup> day of October 2017.**

**R. N. SITATI**

**JUDGE**

Appellants in person.

Mr Ng'etich, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.