



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**  
**HIGH COURT CRIMINAL APPEAL NO. 41 OF 2016**  
**(CORAM: J.A. MAKAU – J.)**

**ERICK ASEWE ACHOLA ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal against both the conviction and sentence dated 21.4.2016, in Criminal Case No. 761 of 2015 in Bondo Law Court before Hon. M. Obiero – P.M.)*

**JUDGMENT**

1. The Appellant **ERICK ASEWE ACHOKA** is charged with an offence of **Robbery with Violence contrary to section 296 (2) of the Penal Code**. The particulars of the offence are that on the 14<sup>th</sup> day of August 2015 at about 11.00 p.m. at Useno-Opapla Marram Road in Kanyadeti Sub-Location, in Gem Sub-County within Siaya County with others not before court while armed with dangerous weapons, namely a panga, Rungu and a Torch robbed Jairo Onyango Onyango his mobile phone, make Techno and cash KShs.1500/= and at immediately before or immediately after the time of such robbery used actual violence to the said Jairo Onyango Onyango.

2. After full trial, the trial Court found the appellant guilty, convicted him and sentenced him to suffer death.

3. The conviction and sentence provoked the appellant to lodge the appeal setting out several grounds of appeal which can be summarized as follows:-

*(i) The prosecution failed to prove the offence against the appellant beyond any reasonable doubt.*

*(ii) That the prosecution failed to prove the offence of Robbery with violence.*

*(iii) The conditions at the material time were not conducive to favourable identification/recognition of the appellant.*

*(iv) That the trial Court erred in failing to consider the Appellant's defence of alibi.*

4. The Appellant appeared in person whereas Mr. Ombati Learned State Counsel represented the State.

5. At the hearing of the appeal the Appellant relied on his written submissions in which he urged that the Learned Trial Magistrate did not follow the law and facts in convicting the Appellant, that the Appellant was not properly identified, that the Appellant's rights as an accused person were infringed by violation **of Article 50 (2) (a) (b) and (i) of the Constitution**, that the prosecution evidence was contradictory and created doubts, that the trial was not partial as it did not consider his defence, that the proceedings did not set out the language the Appellant chose for the trial and his rights were breached, that the charge was not proved to the required standard of proof.

6. The appeal was strongly opposed by Mr. Ombati Learned State Counsel who submitted that the trial was conducted in accordance with the law, that the Appellant's fundamental rights were not violated or infringed, that the Appellant has not stated which rights were violated, that the language the Appellant preferred and wished the proceedings to be conducted in was Luo and the same was used at the trial, **Article 50 of the Constitution of Kenya** was complied with, that the Appellants was properly identified and the ingredients **of Robbery with Violence** were proved.

7. I am the first appellate court and as such I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the Court of Appeal case of **Okeno V. R. (1972) E.A. 32** where the Court set out the duties of a first appellate court thus:-

*“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434”*

8. The facts of the Prosecution's case form part of the record of the appeal and I need not reproduce the same save to summarize the prosecution's case and the defence.

9. The facts of the Prosecution's case are as follows:- PW1, the complainant Jairo Ogolla Onyango on 14.8.2015 at 11.00 p.m. on his way home from a funeral, in company of his brothers and sisters at a corner, they saw somebody, who passed them and proceeded to the funeral, that as they continued walking home, they were passed by three people who ordered them to stop flashing their spotlight on PW1's face and his companions. PW1 who had spotlights flashed at the three as PW1's companions ran away. The three assailants grabbed PW1 and started beating him, cutting him on the head and leg, they took PW1 back to the funeral direction but on the way they set him free. PW1 proceeded home and woke up his brother. They went back to the funeral and PW1 was able to show his brother one of the assailants as PW1 had seen the person who attacked him and was able to recognize how he was dressed as he was wearing a jungle trousers and a Kenya Power and Lighting Jacket. That when PW1's brother approached the assailant he was armed with a panga. PW1's brother was assisted by other people around to arrest the assailant and escorted him to Akala Police Station. PW1 proceeded to Akala Health Centre for treatment. He later recorded statement with Police and was issued with P.3 form which was filled by a doctor. That during the attack PW1 lost his phone make Techno and KShs.1500/= none of which were recovered. The jungle (Army trouser) was produced as P exhibit 2 and KPLC apron and (navy blue) as P exhibit 3. The Appellant was subsequently charged with this offence.

10. The Appellant denied the charge and gave a defence of alibi. The Appellant's defence is that on 14.8.2015 at 11.00 p.m. he was at his house asleep when he heard noises from Boda Boda and on going to check one of the members of Public hit him on the head alleging that he had beaten his brother. They then arrested him and escorted him to Police Station from where he was brought to Court and charged with this offence.

11. The first issue that came out for consideration in this appeal is whether the conditions were conducive for favourable identification/recognition of the assailants? According to PW1, the Complainant, when the three assailants ordered them to stop and flashed the spotlight on their faces, PW1 who had a spotlight flashed it back at the assailants. PW1 was able to see and recognize one of the assailants and was able to describe the mode of his dress, thus he was wearing a jungle trouser and a Kenya Power and Lighting Jacket. He testified he knew one of the attackers prior of the incident as he comes from neighbouring village. PW1 was able to see the person who cut him and stated it was the Appellant. PW1 proceeded home and informed his brothers with whom and others proceeded immediately to the funeral and Appellant was arrested, donned in the same clothes PW1 had confirmed he had seen earlier on. PW1 testified he was able to see the Appellant very well at the time of the attack. PW2 brother to PW1 was awakened by PW1 and others at around 12.00 a.m. on 14.8.2015. He noted PW1 was bleeding from the head. PW1 and the others informed him that PW1 was attacked by Erick and his colleagues. PW1 told PW2 he was robbed his phone Techno. PW1 and PW2 and others proceeded to the place of the funeral, whereby PW1 identified his attacker who was wearing a jacket with logo of KPLC and a jungle trouser. That when the Appellant saw PW1 he asked why he had gone back there and removed a panga from his trouser which was stained with blood. PW2 caught Appellant's hand as Police Officers were called. Appellant was arrested and taken to Police together with the panga. PW2 knew Erick before as he was from the same village with PW2. PW2 testified PW1 told him he was attacked by Omondi Rasta and others. Omondi Rasta is also known by the name Omosh Rasta PW4, Fredrick Otieno Ouma testified that on 14.8.2015 at 11 p.m. they were from funeral going back home with PW1 and others when three people emerged from behind, PW1 spotted them and then he was able to see Omondi Rasta and as they took off the three caught up with PW1. PW4 went and hid in the bush and on returning back, they found PW1 had been cut on the head. They went and informed PW2, Erick and proceeded back to the funeral, found Omondi Rasta armed with a panga wearing a Kenya Power and Lighting Jacket and a jungle trouser. PW4 identified the attacker as Omondi Rasta. He was told to remove the panga and it was blood stained. Omondi Rasta was arrested and taken to Akala Police Station. PW4 testified he knew the Appellant prior to the incident herein. PW5 testified on 15.8.2015 he was on duty when he received and rearrested Asewe Achola alias Omosh from members of public and the complainant. PW1 told PW5 he was able to identify the Appellant through the light of the spotlight and described how the Appellant was dressed.

12. In the case of **Wamunga V Republic (1989) KLR 424**, it was stated that where the only evidence against an accused is evidence of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of recognition were favourable and free from possibility of error before it can safely make it the basis of conviction, that apart in the case of **Simiyu and Another V R (2005) 1 KLR 192** the Court of Appeal stated that there is no better mode of identification than by name and where a name is not given, then there is a challenge on the quality of identification and a great danger of mistaken identity arises.

13. In the instant case there is PW1 and PW4 who stated that they could identify/recognize the attacker. PW1 gave PW2 the name of the attacker as Erick and described how he was dressed. PW1 identified the Appellant as the person who cut him and stated he had a spotlight which enabled him see his assailant. From the evidence of PW1, I find that the spotlight light was sufficient enough to enable him see and recognize his attacker as the Appellant with others. PW4 gave the name of Omoshi Rasta as one of the attackers and described how he was dressed. The mode of description of how Appellant was dressed was the same given by PW1, thus in Kenya Power and Lighting Jacket and a Jungle trouser. PW1 and PW2 took PW2 to the funeral place immediately after the incident and identified the Appellant who was in the same dress. PW1 and PW4 knew the Appellant before the incident being their neighbor. PW1 and PW4 in their first Report also told PW5 a Police Officer the name of the attacker as the Appellant. PW5 testified Asewe Achola alias Omosh as the person who PW1, PW2 and PW4 with members of Public brought to him on allegation of having Robbed PW1. I therefore find that the conditions were favourable for recognition/identification of the Appellant and there was no mistaken identity.

14. Whether Appellant's Constitutional rights were infringed? The Appellant contends that his Constitutional rights as enshrined under Article **50 (2) (a) (b) and (i) of the Constitutions of Kenya** were infringed. The Appellant did not state how his rights were violated, he however submitted that the

proceedings do not set out the language the Appellant chose for trial. **Article 50 (2) (a) (b) (1) and (m) of the Constitution** provides:-

**“Section 50 (2) (a) (b) (1) and (m) of the Constitution of Kenya 2010 provides:-**

***(2) Every accused person has the right to a fair trial, which***

***includes the right—***

***(a) to be presumed innocent until the contrary is proved;***

***(l) to refuse to give self-incriminating evidence;***

***(m) to have the assistance of an interpreter without payment if***

***the accused person cannot understand the language used at***

***the trial;”***

15. I have very carefully perused the Court proceedings and it reveals that the Appellant was presumed innocent since he appeared before Court and that is why the charge was read to him at the time of plea taking and Court entered a plea of not guilty. The Appellant was informed of the charge, the same read and explained to him in Luo Language which he understands. The Court ordered that he be supplied with witnesses statements. He has not stated that a plea of not guilty entered, was not entered as per Court record. The record show that he denied the charge, as explained to him in Luo language as per Court’s record. I therefore find no basis on the Appellant’s allegation that his Constitutional rights were infringed or breached because he has not been able to demonstrate the manner in which his Constitutional rights were breached, herein and in what manner and by who. I find no merits in the ground of appeal and I dismiss the same.

16. The Appellant contends the Prosecution’s evidence was contradictory and doubtful. The Appellant did not point out which testimony was inconsistent or contradictory to which evidence. I have perused the evidence by PW1, PW2, PW3, PW4 and PW5 and I have been unable to find any inconsistencies on their evidence. I am satisfied the prosecution’s witnesses evidence has no fundamental inconsistencies that makes the prosecution evidence doubtful. In the case of **Martin Mungathia V R (2015) eKLR** Court of Appeal stated:-

***“It is the appellant’s case that the testimony of the complainant PW1 is inconsistent; that the inconsistencies were not considered by the two courts below. We have examined the testimony of the complainant Pw1 and we are satisfied that there are no fundamental inconsistencies that dent the prosecution’s case. The Appellant has not succinctly identified the alleged inconsistencies and how they dent the prosecution’s case.”***

In view of the above I find the Appellant’s assertion that the evidence given at the trial Court was contradictory and created doubts and that Appellant should benefit from the alleged undisclosed contradictions and inconsistencies to be a mere speculation and without any legal basis. I therefore find no merits in this ground of appeal.

17. The Appellant contends that the trial court was not partial as it did not consider his defence. The Appellant’s defence was a defence of alibi. The Appellant did not raise his defence during cross-examination but in his defence. I have perused the trial Court’s record and noted that the Appellant’s defence of alibi was not considered however the Appellant’s defence is that he was not at the scene of incident, however PW1 and PW4 who knew the Appellant placed him at the scene of incident. The Appellant did not through cross-examination put up his defence of alibi nor did he dislodge the evidence of PW1 and PW4. PW2, PW1 and PW4 evidence is that he was arrested at the scene. I find that the evidence of PW1, PW2 and PW4 dislodged the Appellant’s defence of alibi and placed him at the scene

of crime. I find his defence to be an afterthought and I reject the same.

**18.** Whether the charge of Robbery was proved? The Appellant faced a charge of Robbery with Violence contrary to **Section 296 (2) of the Penal Code**. A charge under the aforesaid Section has three essential ingredients that must be proved by the prosecution. In the case of **Johana Ndungu R Criminal Appeal 116 OF 1998**, the ingredients of the charge of robbery with violence were stated to be as follows:-

*(i) If the offender is armed with any dangerous or offensive weapons or instruments or*

*(ii) If he is in company with one or more other person or persons or*

*(iii) If, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.*

**19.** I note from the prosecution's evidence that the Appellant was armed with a dangerous or offensive weapon, a panga, he was in company of two persons and that immediately before or after the time of robbery, the appellant wounded the complainant by cutting him with a panga. That PW3, Clinical Officer confirmed PW1 sustained multiple cut wounds on his scalp and deep cut wound on his left leg. P3 form exhibit 1 confirmed that PW1 sustained harm. PW1 and PW2 testified that the complainant was robbed of a phone make Techno and cash KShs.1500/= at the time of the robbery. In view of the aforesaid I am satisfied that the prosecution proved the essential ingredients of an offence of robbery with violence.

**20.** The Upshot is that the Appellant's Appeal is without merits. I therefore dismiss the same uphold the conviction and confirm the sentence.

**DATED AND SIGNED AT SIAYA THIS 22ND DAY OF NOVEMBER, 2016.**

**J.A. MAKAU**

**JUDGE**

**Delivered This 22nd Day of November, 2016.**

**Appellant present in person.**

**Mr. M. Ombati for State.**

**C.A.1. K. Odhiambo**

**2. L. Atika**

**J. A. MAKAU**

**JUDGE**