



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO. 68 OF 2012**

**STEPHEN AKWANY AOKO alias JULIUS OCHIENG.....APPELLANT**

**VERUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in Criminal Case number 572 of 2009 of the Principal Magistrate's Court at Bondo – P.W MUTUA -PM)*

**J U D G M E N T**

The appellant was convicted of Robbery with Violence contrary to section 296 (2) of the Penal Code in five counts and sentenced to death. The attacks subject of the case occurred on the night of 26th/27th April 2009 at Uhanya in Bondo District in Nyanza Province. He was aggrieved by the conviction and sentence and preferred this appeal which was opposed by the Director of Public Prosecutions through its Mr. Mongare.

The grounds of appeal can be summarised as follows:

- a. the appellant was convicted on basis of visual identification whilst the conditions and circumstances following such identification were not positive;
- b. there was insufficient evidence to prove that the goods recovered belonged to the complainants;
- c. there was insufficient evidence on which to base the doctrine of recent possession;
- d. the conviction was based on the results of identification parades when such parades were conducted in contravention of the law; and
- e. the prosecution evidence was riddled with contradictions, inconsistencies and loopholes.

The prosecution evidence was that Francis Okumu Onyango (PW2) was on 26-4-2009 at 10 p.m going home from work when he met two people dressed in police uniform which included berets and rain coats. They wanted to know where he was coming from and also wanted him to produce his ID card. He produced the card but they wanted him to remove everything he had in his pockets. They had pangas. When PW2 hesitated, they took Kshs. 700/= and Nokia 3310 cellphone (Exhibit 4) with Kshs. 2000/= from his pockets. He was ordered to lie down. At the same road, the attackers stopped Dennis Odhiambo Okeyo (PW3) and robbed him of Motorola C117 (Exhibit 7); Samson Owino Oloo (PW4) and robbed him of Nokia 1110 and Kshs. 600/=, Elizabeth Akinyi (PW5) and robbed her of phone make g-tide; and Evans Ouma Oliech (PW6) and robbed him of Nokia 5200 (Exhibit 6). PW2, PW3, PW4 and ran to Uhanya AP Post and reported the incidents. APC Patrick Eliud Andayi (PW7) and other officers proceeded to the scene with the complainants. Ahead of them, they heard a person being attacked. There was torchlight from the scene. They rushed to the scene. The attackers flashed torches at them ordering them to stop. The attackers were two and had pangas. The police officers and the complainants went to arrest them. One attacker ran away but the other was overwhelmed and arrested. But this was after he had

cut PW2 with the panga he had. The P3 that was produced showed that PW2 received a cut wound on the left shoulder and suffered “harm” (Exhibit 3).

The person who was arrested was the appellant. He was found with five cellphones. During the arrest two pangas, two green berets and a navy blue coat were recovered. Of the five cellphones, one belonged to PW2, one to PW3 and one to PW6. The appellant was subsequently charged with five counts of robbery with violence and four alternative charges of handling stolen property c/s 322 (2) of the Penal Code.

The appellant denied the charges in sworn defence. He testified that he was coming from a disco at Hippo Point at Uhanya with a lady and while going home they heard noise of people running from behind them. The people came and beat them before arresting them. They were taken to police. He denied being involved in any robbery that night, or at all. He called Carolyn Otieno (DW2) who testified to be the lady who was with the appellant that night. She stated that they were assaulted by these people while going home from a disco.

This is the evidence that the trial court considered and concluded that the robbery with violence charges had been proved against the appellant beyond all reasonable doubt. Being a first appeal, this court is mandated to analyse, reconsider and re-evaluate the evidence tendered before the trial court and arrive at its own independent conclusion keeping in mind that the trial court had the advantage of seeing and hearing the witnesses and gauging their demeanor (**Okeno -VS- Republic [1972] EA 32**).

It should be pointed out that the medical reports (P3 forms Exhibits 1 and 2) for PW2 and PW3, respectively, were tendered by Dr. Shadrack Tanui (PW1) during the time when the presiding magistrate was E.S. Olwande (SRM). The case was later on taken over by P.W. Mutua (SRM) who ordered that he would proceed “*de novo*.” PW1 was not called afresh and therefore the case was conducted without that medical evidence.

Secondly, Corporal Fredrick Mukasa (PW1) testified before the trial court to say that he conducted an identification parade for the appellant on 27-4-2009 at Bondo police station; and that during the parade the appellant was identified by the two police officers who arrested him and By PW2, PW3 and PW5. It was the prosecution evidence that all these witnesses were present when the appellant was arrested, and it was therefore improper to hold the parade at which they were identifying witnesses. They had already seen the appellant before the parade. But more important, the parade officer told court that he was a police corporal. The parade form shows he was an acting police inspector. The parade was conducted before the testimony. Was he demoted? The only conclusion one can draw is that the parade was conducted by a person below the rank of police inspector. That was not regular.

The prosecution evidence was that when the complainants brought the police officers to the scene they found two people, one being the appellant, still here and engaging in attacks. At the scene the appellant was arrested. He had five cellphones, three of which belonged to PW2, PW3 and PW6, respectively. The appellant had panga and was wearing a beret and a coat. Another panga and beret were recovered at the scene. These phones had been robbed from PW2, PW3 and PW6 at the scene that same night. The attackers were two and dressed in beret and coat each, and each had a panga. PW4 and PW5 had been attacked at the scene by the same attackers. The appellant denied that he was in the attack or that was found with the items. He called DW2. The trial court considered the two versions, accepted the prosecution version and discounted that of the defence. We have, in our own consideration, looked at all the the recorded evidence and find no reason to depart from the finding. We accept that the attackers were found on the same night still at the scene. One ran away when police came. One was left. He was the appellant. He had three of the five cellphones that had been stolen from the complainants that same night at the scene. He had a panga, a beret and a coat which the attackers, according to the complainants, had in the attack. The only reasonable conclusion that one can draw is that the appellant was one of the two attackers who had robbed PW2, PW3, PW4, PW5 and PW6 that night and taken the respective items. We confirm the conviction on each count of robbery with violence contrary to section 296 (2) of the Penal Code.

On sentence, we take the view that death penalty was the only legal sentence and therefore the trial court was correct in passing it.

The results is that, for the reasons given above, the appeal against conviction and sentence is disallowed.

**Dated, signed and delivered at Kisumu this 22nd day of January, 2014.**

**A. O. MUCHELULE**

**H.K. CHEMITEI**

**JUDGE**

**JUDGE**