



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 89 OF 2013**

**GEORGE ONYANGO BARAZA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[From original conviction and sentence in the Principal Magistrate's Court at Ukwala Criminal Case No. 467 of 2011 before Hon. R.M. Oanda -Ag. PM]*

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

George Otieno Okeya (PW2) is a market collector at Ngiya in Ukwala Town Council and comes from Karadolo East sub location in Ugenya District of the then Nyanza province. His wife is Florence Akinyi Otieno (PW3). On 24-9-2011 at about midnight they were asleep in their house when armed people broke into it, cut and injured PW1 and robbed the couple of Kshs. 5,550/= and seven receipt books belonging to the Council. When the attackers left, PW2 was taken to Busia District Hospital where he was admitted for five days. He was subsequently examined by clinical officer Thomas Ndiege (PW1) who found that he had suffered a cut wound on the left jaw and had lost three teeth in the left lower jaw. He had suffered grievous harm (Exhibit 1). The appellant was arrested on 17-10-2011 and charged before the Principal Magistrate's Court at Ukwala with robbery with violence contrary to section 296 (2) of the penal code in connection with the attack. It was alleged that he had committed the offence while he was with others not before the court.

The appellant denied the charge in unsworn defence and called one witness, Barasa Miyanga (DW1). The prosecution case was based on identification and recent possession. He denied that he was in the attack or that he had been found with PW2's property. He was found guilty, convicted and sentenced to death. He appealed against the conviction and sentence.

PW2 did not identify his attackers, but PW3 stated that she recognised the appellant among them. PW2 did not tell how many people entered the house but PW3 said they were two. They had a panga and a torch. PW3 testified that it was the appellant who had the panga and he was the one who cut her husband. The appellant is PW2's nephew. As to how she recognised the appellant in the attack, the record simply stat as follows:

**“They were armed with a panga and a torch. He told them that he had none of that. They cut him on the right cheek. They came where I was asleep. The assailant had a torch. Accused herein is the one who cut him.”**

There was no evidence that the torch light fell into the appellant's face for it to be recognised. It was not

said that there was any other light in the house. In the judgment, trial court observed as follows:

**“The complainant told the court that he was able to identify accused herein by his voice. His wife too told court that she was able to identify him. He was well known to them.”**

PW2 testified before the trial court (SRM R.M. Oanda) on 9-8-2012. He did not state that he recognised the appellant by voice, or at all. That left only the evidence of PW3 who did not indicate how she was able to recognise the appellant.

PW3's evidence was that of a single witness and was not subjected to the usual and necessary scrutiny for the court to be able to satisfy itself that it was reliable and not mistaken (**Anjononi & Others -VS- Republic [1980] KLR 59**). The court did not consider that PW3 had reported the attack to neighbours, assistant chief and to police on the same day and yet there was no indication that the name of the appellant had been mentioned to any of them as having been in the attack. This was crucial because both PW2 and PW3 knew the appellant as a relative. They certainly knew where to find him. Had his identity been disclosed there would have been immediately effort to arrest him. There was no evidence that the appellant had disappeared from home.

The other piece of evidence on which the appellant was convicted was that he had been found with one of the receipt books robbed from PW2 soon after the robbery. Before a court can rely on the doctrine by recent possession to convict an accused person, the prosecution must prove beyond doubt that the property in question was found with the accused, the property belonged to the complainant and that the accused had it soon after its theft from the complainant. Lastly, the accused should fail to sufficiently explain how he came by the property (**Ernest Shemi & Another -VS- Republic, Criminal Appeal No. 350 of 2011 at Kisumu**).

The only police officer to testify was corporal David Mwendwa (PW4) of Segga police patrol base. He was brought the appellant and the receipt book. It was alleged that the appellant had gone to drink and that he had unintentionally produced the receipt book thinking that it was money to pay for the drink. The appellant was brought to the base by youth wingers. PW3 testified that she was informed that the appellant had removed receipts thinking it was money in a drinking place. She went and gave the information to the assistant chief. She was not at the drinking place. PW2 testified

that:  
**“Later on the receipts were found with accused person herein.....somebody was found in possession of the receipts. He is at the dock. He is my nephew.”**

Who found him with the receipts? Why did he not testify? The assistant chief did not testify. The youth wingers who took the appellant to police did not testify. Did they find the appellant with the receipts? In short, material witnesses did not testify to show that they found the appellant with the receipt book or receipts. It follows that the fact of possession was not proved.

In conclusion, the appellant was convicted on insufficient evidence. The appeal is therefore allowed, the conviction quashed and the sentence set aside. The appellant is immediately ordered to be set at liberty unless there are other lawful reasons why he is being held.

**Dated, signed and delivered at Kisumu this 21st day of January, 2014**

**A.O. MUCHELULE**

**H.K. CHEMITEI**

**JUDGE**

**JUDGE**