



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**CRIMINAL APPEAL NO. 105 OF 2013**  
**COLLINS ONYANGO OMONDI.....1ST APPELLANT**  
**KEVIN OTIENO ODUOR.....2ND APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

*[From original conviction and sentence in the Principal Magistrate's Court at Ukwala*

*Criminal Case No. 270 of 2012 Before Hon. R.M. Oanda -Ag. PM]*

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

**Introduction**

1). The appellants herein were charged with the offence of Robbery with Violence contrary to section 296 (2) of the Penal Code. The Particulars were that on the 22nd night of June, 2012 at Ugunja sub location in Ugunja district within Siaya county robbed **Gilbert Opiche Odendo** two mobile phones make Nokia 2211 and C-2 and Cash Kshs. 11,000/= all valued at Ksh. 22,000/= and immediately before such threatened to use actual violence to the said Gilbert Opiche Odendo.

2). The appellants after full trial were convicted and sentenced to death hence this appeal. The two separate appeals were consolidated for purposes of hearing and determination.

**Facts**

3). The complainant Gilbert Opiche Odendo at around 8.30 p.m on the material day was at his home with his wife PW2. He told the court that he heard someone knocking at the door and when he opened he was confronted by someone who was carrying a frame. He was then ordered to sit down and threatened to be killed if he did not give them Kshs. 10,000/= and mobile phones.

4). While the other assailants was ransacking the house the other kept guard. The attackers after threatening PW2, the appellants managed to get away with Kshs. 8,000/= as well as two mobile phones which were in their bedroom. It was in the process of ransacking the bedroom that the complainant managed to escape and raised alarm alerting the neighbours. They call the OCS but by the time he came to the scene the robbers had left.

5). The appellant went the following day to record his statement at the police station and on 24-6-2012

the police called him to identify the appellants in a parade where he picked both appellants whom he further testified that he did not know them prior to the attack.

**6). PW2 Silvia Wambare**, the complainant's wife gave the same version of the events. She said that the sum of Kshs. 3000/= was taken from a bag which was used to keep undergarments.

During the identification parade she was able to identify the 1st appellant as the house was fully lit vide electricity light during the time of the robbery and the robbers were not hooded. PW1 equally identified the appellants as the electric light was fully on.

**7). PW3 John Mwau**, told the court that he was instructed by the OCS to carry out the investigation. He recorded PW1 and PW2 statements who confirmed that the appellants were known to them. On cross examination he said that he was not involved in the arrest of the appellants neither did he know who arrested them.

**8). PW4 Isaac Ewaton**, conducted the identification parade. According to him PW1 was able to identify the 1st accused since he had a cut on his ear. He identified PW2 through his height and face and also he had a left eye which had a problem. On cross examination PW4 stated that he had never seen the appellants before and that he had not read the witnesses statements before conducting the parade.

**9). Chrispine Lumwachi PW5**, arrested the appellants under instructions from the OCS. He did not recover anything from them.

**10).** During their defence the 1st appellant gave unsworn statement denying the offence. The 2nd appellant denied the charge and called DW3 her mother who gave the events during the arrest of his son.

### **Analysis and Determination**

**11).** The appellants have raised similar grounds in their petition of appeal. In summary they argue that the identification evidence was wanting, the charge sheet was defective and that the sentence was harsh and excessive. They contended that the trial court failed to take into consideration their defence.

**12).** The appellants did put in written submissions in support of their appeal as well as submitting orally during the hearing. The state on the other hand opposed the appeal orally. The state supported the trial court's finding.

**13).** Our duty is to re-evaluate the evidence afresh with a view of reaching an independent determination **(See Njoroge -VS- Republic [1987]) KLR 19 at page 22.**

**14).** The issue concerning the validity of the charge sheet ought to be determined as a matter of first thing first. They have stated that they were charged under section 296 (1) of the penal code and thus the particulars do not march with the charge. The charge sheet to the contrary shows that they were charged under section 296 (2) of the penal code. This point by the appellant is spurious.

**15).** The next issue is what we find to be more substantive namely whether the conviction based on identification was proper. The complainant told the court that he was able to identify the appellants because there was electricity light which according to him was on throughout the robbery process. He said that he did not know the appellants before and this was only the first time. Apart from the evidence of PW1 and PW2 no other evidence connected the appellant to the robbery as nothing was recovered from them.

**16).** We find from the evidence adduced that it is not clear whether the complainants gave the description of the appellants in the first report to the police. PW4, told the court that he had not seen the appellants before the parade and neither had he read the statements of the two identifying witnesses. It is not mentioned anywhere that the two witnesses described the appellants to him before the parade.

17). Apparently, PW3 took the statements of the two witnesses and left it at that. He was not the arresting officer and he did not even know who conducted the arrest or how it was done.

18). PW5 on the other hand was the arresting officer. He simply arrested the appellants under the instructions of the OCS. We do not find any basis for the arrest. Neither was the OCS a witness. We think that the OCS would have shed more light on the basis of arresting the appellants. Had PW1 and PW2 described the attackers? If so why did they not and in particular the arresting officer described them before? This issue did not come up during trial.

19). In Paul Macharia Mwangi alias Mulu -VS- Republic [2013] eKLR the court stated as follows:

**“It will not do for a complainant to tell the police that he would know the assailant if he saw him. He must give physical description of the assailant. Where the circumstances permit, he must also state the clothes that the assailant wore at the material time of the robbery. In Republic -VS- Kabogo S/O Waguyu 23 1KLR 50, the court held thus:**

**“In every case in which there is a question as to the identity of the accused the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by the person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given”.**

**In the present appeal, it was clear that the complainant and PW3 did not give the description of the persons who robbed the complainant in the first report that was made to the police; if indeed the appellant was a resident of the area”.**

20). We think the above case is analogous to the case at hand. We do not find anywhere from the evidence of PW1 and PW2 in particular that prior to the identification parade they described to the police the assailants identities features or clothings. In as much as the identification parade was properly conducted we do not find the basis for the arrest of the appellants.

21). Further, we do not think that the trial court took into consideration their defence. On the material day each of the appellant seemed to have been going on with their business and were not near the the scene. Needless to say, it was not for the appellants to assist in the prosecution of their case.

22). It was held in Macharia Mwangi alias Muhu [2013] eKLR further, a position which we identify with that :

**“The identification parade that was conducted by the police after the arrest of the appellant was useless in the absence of the first report made to the police giving the description of the person who is alleged to have committed the offence”.**

23). We consequently find the conviction of the appellants unsafe. The sentencing of course was not excessive as that was the only remedy available especially after finding as above that the charge was not defective.

We consequently allow the appeal, set the appellants free unless lawfully held.

**Dated, signed and delivered at Kisumu this 25th day of March, 2014.**

**H.K. CHEMITEI**

**A.O. MUCHELULE**

**JUDGE**

**JUDGE**