



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEALS NOS. 206 – 211 OF 2012**

TEMBANI OTIALO ..... 1<sup>ST</sup> APPELLANT

PATRICK ADABWA MANGO ..... 2<sup>ND</sup> APPELLANT

YONA MUKASI alias GEROGGE (DECEASED..... 3<sup>RD</sup> APPELLANT

LABAN MWATELA ..... 4<sup>TH</sup> APPELLANT

MUSA TOM ELIANDA ..... 5<sup>TH</sup> APPELLANT

HILLARY OTINDO OKOTH ..... 6<sup>TH</sup> APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(Appeals against conviction and sentence arising from the Judgment of [M.I.G. MORANGA, P.M.] dated 4.9.12 from the original Criminal Case No. 568 of 2010 in the Chief Magistrate's Court at Kakamega)*

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

The six appellants were charged with four counts of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of each count are as follows:-

**COUNT I:** *On the 20.3.2010 at Shitera village in Kakamega Central District within Western Province jointly while armed with dangerous weapons namely pangas robbed ZACHARIA ELIANDA cash KShs.45,890/=, Nokia phone make 110 valued at KShs.2,670/=, and immediately before the time of such robbery struck the said ZACHARIA ELIANDA causing his death and grievously harmed MARY ELIANDA.*

**COUNT II:** *On the 20.3.2010 at Mungulu village in Kakamega Central District within Western Province jointly while armed with dangerous weapons namely pangas robbed CRITADOS RICHUMA TENDETE of cash KShs.3,600/= and immediately before the time of such robbery wounded the said CRITADOS RICHUMA TENDETE.*

**COUNT III:** *On the 20.3.2010 at Shitera village in Kakamega Central District within Western Province jointly while armed with dangerous weapons namely pangas robbed EDWARD SHITEKWA MUKWESOCash KShs.1,600/=, one mobile phone make L3 Motorola valued at KShs.1,800/= and immediately before the time of such robbery beat the said EDWARD*

## **SHITEKWA MUKWESO.**

**COUNT IV:** *On the 20.3.2010 at Shitera village in Kakamega Central District within Western Province jointly while armed with dangerous weapons namely pangas robbed ISAAC MATAKWA LUMUMBA of his radio make Sonitex valued at KShs.550/= and immediately before the time of such robbery used actual violence to the said ISAAC MATAKWA LUMUMBA.*

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants were found guilty of Count I and sentenced to death. The four appellants were acquitted of Count II, III and IV. The 5<sup>th</sup> and 6<sup>th</sup> appellants were found guilty of Count II and were sentenced to death.

The grounds of appeal for the 1<sup>st</sup> appellant are that he did not plead guilty to the charge, the case was not proved beyond reasonable doubt, there was no positive identification, the trial court relied on the evidence of a single identifying witness, the prosecution evidence was full of contradictions, he was arrested several days before the identifying witness gave her statement and that the trial court did not properly evaluate the evidence. Mrs. Osodo counsel for the 1<sup>st</sup> appellant argued the grounds together. Counsel submitted that PW6 referred to the appellant as Marasta while that name does not appear on the charge sheet even as an alias. No identification parade was conducted and PW6 was not present when the appellant was arrested. PW6 recorded a statement after the appellant had been arrested. His sworn defence was not properly considered.

The 2<sup>nd</sup> appellant's grounds of appeal are that the charge sheet was defective, the identification was by a single witness and the trial court failed to warn itself, the prosecution failed to prove its case beyond reasonable doubt, the burden of proof was shifted and the investigations were poorly conducted. The 3<sup>rd</sup> appellant's grounds of appeal are similar to those of the 2<sup>nd</sup> appellant. The two appellants filed written submissions which are the same and expound on the above grounds. The two appellants further informed the court that they called for the Occurrence Book and the first report did not give their names. The 4<sup>th</sup> appellant's grounds of appeal are similar to those of the 5<sup>th</sup> appellant. The grounds are that the conviction is unsafe as the identification was by a single witness. The evidence of PW4 was contradictory and could not be the basis of the conviction. The conviction is based on suspicion and the case was not proved beyond reasonable doubt. The investigations were poorly done and the alibi defences were not considered. The appellants filed written submissions which expounded on the above grounds and relied on them.

Mr. Oroni, State Counsel, opposed the appeal. Counsel relied on the evidence on record and emphasized on the evidence of PW6. Counsel contends that although it was the evidence of a single identifying witness the same was reliable.

The record of the trial magistrate shows that 8 witnesses testified for the prosecution. **PW1 EDWARD WASISI SHITEKHA** testified that on the 20.3.2010 at about 9.30 p.m. he was asleep in his house when he heard noise. His door was broken and people entered. He was hit with a jembe handle on his chest and he fell down. Robbers took his Motorola phone, radio and KShs.1600/=. He hid himself under the bed and his wife was beaten. The robbers had pangas and rungas and also had torches. He did not see their faces and could not identify them. When the robbers left they went to his grandfather's house ZAKARIA and they found him dead in a pool of blood. Police went to the scene and the body was taken to the mortuary. None of his stolen items were recovered.

**PW2 DR. JEREMIAH KUNUNIA** testified that he attended to one **CRISANDES WACHIA** who had a history of having been assaulted by robbers. He produced the P3 form for the victim. The witness also produced the post mortem report of **ZAKARIA ELIANDA MAYONGE** who sustained fatal injuries during the robbery. The record of the trial court shows that **CRITADOS LICHUMA TENDETE** testified as **PW4**. His evidence is that on the 20.3.2010 at around 10.00 p.m. he was in his house when he heard dogs barking. His door was broken into and about thirteen to fifteen people entered. They started cutting him and his right arm was chopped off. He fell outside the house. The robbers flashed torches and he was able to identify the 5<sup>th</sup> and 6<sup>th</sup> appellants whom he knew very well.

The robbers took KShs.3,600/= from his wife who was hit with a panga. Neighbours went to the scene and took him to hospital. He was taken to hospital in the same vehicle which took the deceased Zacharia Elianda to the mortuary. He was admitted from 20.3.2010 to 12.4.2010 when he was discharged. He further testified that he did not lose consciousness and the robbers had jackets and caps. It is his evidence that the father of the 5<sup>th</sup> appellant (the deceased Zacharia Elianda) had sold land and the appellant robbed him the sale proceeds.

**PW5 FRIDA LICHUMA** testified that she is the wife to Crisandes Richuma (PW4). On the 20.3.2010 they were asleep when robbers entered their house and demanded money. She was slapped with a panga and gave them 3,600/=. The robbers had torches and she recognized one by the name **SAMMY SAWANGA**. Her husband was assaulted and he fainted as he was bleeding. Sammy was not charged with the offence but was arrested in connection with another case. It is her evidence that when her husband was cut he was unable to talk and became unconscious.

**PW6 MARY NASIMIYU ELIANDA** testified that she is the wife of the deceased Zacharia Elianda. On the 20.3.2010 at about 10.00 p.m. about 13 robbers entered their house and her husband tried to attack them with a panga. He was hit on the arm and the panga fell down. The robbers attacked him and killed him. They said they had been sent to kill her husband and her. They demanded for money and she gave them KShs.45,890/=. The money was meant to be for the 5<sup>th</sup> appellant as the deceased had sold apportion of his land. The 5<sup>th</sup> appellant had told her to keep the money for him. She was cut on her arms and there was a lantern lamp on. The robbers told her that they had been sent by **NORAH AYUMA (PW9)** and **PATRICK LUMUMBA** to kill them. The two are children of her co-wife with the deceased. She was taken outside and some robbers went to a neighbour's home. One of the robbers told her to run away as she would be killed. She walked slowly to a neighbour's house by the name Edward who took her to Kakamega Provincial Hospital. She was able to identify the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants during the robbery. It is her evidence that the 1<sup>st</sup> appellant counted the money and the 2<sup>nd</sup> appellant cut the deceased with a panga. The 3<sup>rd</sup> appellant cut her on the arm while the 4<sup>th</sup> appellant hit the deceased with an axe on the head. She did not see the 5<sup>th</sup> and 6<sup>th</sup> appellant. Her mobile phone was also stolen. She gave the names of the robbers to the police while in hospital. The 3<sup>rd</sup> appellant is the deceased's son. There was a kerosene lamp that was on. The 1<sup>st</sup> appellant according to her is also called Marasta. Her grandson by the name ISAAC ran away when they were attacked.

**PW7 CI PAULINE MWANGI** was based at the Kakamega police station. On the 20.3.2010 she was on duty and they got a report of the robbery at around 11.00 p.m. She went to the scene with colleagues and found Zacharia Elianda had been killed by the robbers. PW6 informed them what had happened and she was taken to hospital. She later visited PW6 at the hospital and PW6 mentioned the first four appellants. She notified the area chief who assisted in the arrest of the appellants. The 5<sup>th</sup> and 6<sup>th</sup> appellants were mentioned by Crisandes (PW4). The names given by PW6 were common names used in the village. The 1<sup>st</sup> appellant was arrested on the 23.4.2010 together with five other suspects. Nothing was recovered from him. The complainants did not give the description of the clothes the robbers were wearing. According to her the first report by PW6 did not give any names. The 4<sup>th</sup> appellant was arrested on the 23.3.2010 nothing was recovered from him. It is her further evidence that the 5<sup>th</sup> appellant was interrogated by the police and he informed them that he was stopped by the robbers who whipped him and took his KShs.150/=. She was with the 5<sup>th</sup> appellant at the scene when they collected the deceased's body. The 5<sup>th</sup> appellant was arrested on the 20.3.2010.

**KENNEDY NJAYA** testified as **PW8**. He was a clinical officer based at Kakamega Provincial General Hospital. He produced the P3 form for Mary Elianda. It is his evidence that the victim was in shock and stated that she had been attacked by three people and she had recognized two of them. When she was taken to the hospital she was unconscious and was not talking. She gained consciousness after one day. **PW9 NORAH AYUMA** testified that on the 20.3.2010 she was asleep in her house with her children. The deceased was her father in-law. At about 10.00 p.m. she heard people outside and one by the name Isaac told her to get out of the house or it will be set on fire. Isaac told her to walk away. She was only wearing her inner wear and she went to the road while screaming. Police went to the scene and

neighbours gave her clothes. She was arrested on the 21.3.2010 but was not charged with the offence. She knows the 3<sup>rd</sup> and 5<sup>th</sup> appellants who are her brother in-laws. It is her evidence that there was no dispute in the homestead.

The appellants were put on their defence. The 1<sup>st</sup> appellant testified under oath and stated that he is a boda boda cyclist and on 20.3.2010 he slept in his house. He was arrested by Administration Police officers who took him to Khayega police station and he was combined with 7 other people who had been arrested. The APs were in the company of the area assistant chief. No identification parade was conducted. He was later charged with the offence.

The 2<sup>nd</sup> appellant **PATRICK ANDABWA MANGO** testified that he is a peasant farmer from Ebushimiko village. On the 20.3.2010 he was in his house with his wife and three children. He slept up to morning. He did his normal duties and at about 8.00 a.m. a customer by the name Beatrice went to buy cabbages. Beatrice told him that Zacharia Elianda had been attacked. The deceased was his immediate neighbor and he went to his homestead with his wife. They found only neighbours at the homestead and they sat with the neighbours consoling the bereaved family. He then left at about 9.00 a.m. and went to his home. On the 23.3.2010 the area assistant chief went to his house at about 4.00 a.m. in the company of three Administration Police officers and searched his house. They found five liters of chang'aa behind a cupboard and he was arrested. He was taken to Shikoti AP camp where he found other people had been arrested. He recognized the 1<sup>st</sup> appellant as one of those who had been arrested. He was later taken to Kakamega police station and charged with the offence. It is his evidence that he knew the deceased and his wife PW6 very well and there was no grudge between them. He called his wife who testified as DW7. She informed the court that the assistant chief and APs found five liters of chang'aa in their house and her husband was arrested. She further informed the court that the deceased was their neighbor.

The 3<sup>rd</sup> appellant died while the appeal was pending.

The 4<sup>th</sup> appellant **LABAN WALIELA** gave sworn evidence. He testified that he knew the deceased and his wife PW6 as they are his relatives. On the 20.3.2010 he slept in his house with his children. In the morning he went to his farm to plant some maize. On the 25.3.2010 he went to visit his father **JOSECK SHILOLE** who was staying away from him and he informed him about the death of the deceased. His father gave him a letter to deliver to one SUPER NILON who was attending the deceased's burial the following day. He went to the deceased's house and delivered the letter. He attended the burial up to 4.30 p.m. and went to report to his father that he had delivered the letter. On the 3.4.2010 at about 3.00 a.m. he was asleep when the area assistant chief **EMANUEL SHIKANDA BULIMO** went to his house in the company of police officers. They searched his house but recovered nothing. He was taken to Shikoti chief's camp and was later charged with the offence. His further evidence is that his home is about three kilometers from the home of the deceased.

The 5<sup>th</sup> appellant **MUSA TOM ELIANDA** testified under oath. His evidence is that the deceased was his father while PW6 is his step mother. The 3<sup>rd</sup> appellant is his step brother. He used to stay in the same compound with the deceased but in different houses. He is a tractor driver and used to carry cane for farmers. He used to park his tractor at Muliro Gardens in Kakamega town. On the 20.3.2010 he went to work up to evening and went back home at about 9.30 p.m. Before he reached home he was assaulted by a group of people who ordered him to kneel down. They robbed him of Kshs.150/=. They hit him with a club on the back and told him to run away. He ran home only to find that there was nobody inside. He went to his neighbor by the name Edwin who informed him that robbers had attacked his father. He went back with the neighbor and searched his father's house and he saw his father having been cut on both legs and head. He was still alive and he told him goodbye. He screamed and people went to the scene. Police went to the scene and took the body to the mortuary. The OCS told him to remain behind to take care of the other family members. He then saw his children in a sugarcane plantation. He went to Kakamega Provincial General Hospital and saw Crisandes Richuma admitted in Ward No.2 with several cuts on his head and hand. He talked to him and he also saw PW4 being taken care of by his brother by the name Kizito Tembete. He was told that his step mother had been taken to the operation room. He later recorded his statement with the police and he was told to go home. He attended the post

mortem on the 26.3.2010 and the deceased was buried on that date. The appellant went home and in the morning at about 7.00 a.m. the area assistant chief Emanuel Bulimo Shikanda went to his house in the company of two village elders and told him that the area chief wanted to see him. He went to see the area chief and he was locked up. The following day 28.3.2010 he was taken to Kakamega police station. It is his further evidence that the deceased had sold a parcel of land and he had been given KShs.50,000/= as his share. The portion sold was meant for him and it was sold for KShs.70,000/=. Since he had no bank account he took KShs.1000/= and told PW6 to keep the remaining KShs.45,000/= for him. He denied committing the offence.

The 6<sup>th</sup> appellant **HILLARY OTIEN OKOTH** gave sworn evidence. He testified that he was arrested on the 12.6.2010 and brought to court on the 13.6.2010 and charged in a different case. The case was later consolidated with the current one. He did not know the deceased and his wife.

The evidence of **PW4 CRISANDES LICHUMA TENDETE** was the basis for the conviction of the 5<sup>th</sup> and 6<sup>th</sup> appellants. It is his evidence that he identified the two appellants using the light from the torches. The main issue for determination is whether given the circumstances under which the robbery occurred PW4 could identify the robbers. According to the evidence on record PW4 was hit with a panga and his right arm was chopped off. It is the evidence of his wife PW5 that when PW4 was assaulted he fainted as he was bleeding. The source of light at the scene was from torches. The 5<sup>th</sup> appellant gave a detailed sworn defence. It is his evidence that he met the robbers while he was on his way home and he was also assaulted. The robbers took his KShs.150/=. When he was arrested he gave the same story. It is his evidence that he went home and found nobody. He later found his late father lying in a pool of blood and he wished him goodbye. It is also the evidence of PW6 that the deceased had sold a portion of land and part of the money was meant for the 5<sup>th</sup> appellant. This is in line with the evidence of the 5<sup>th</sup> appellant. The investigating officer PW7 testified that the 5<sup>th</sup> appellant was at home when she went to the scene. According to PW4 the 5<sup>th</sup> appellant robbed his late father of the sale proceeds from the land. Given the evidence on record it is not clear how the 5<sup>th</sup> appellant could have participated in the robbery. The motive to do so is not clear as the money that was stolen belonged to him. The 6<sup>th</sup> appellant was arrested much later and his case combined with those of the other appellants.

It is clear to us that the complainant PW4 sustained very serious injuries and was unconscious. There is no direct evidence that he gave the names of the appellants to the police and that led to the arrest of the 5<sup>th</sup> and 6<sup>th</sup> appellants. The area assistant chief who arrested the appellants did not testify. On the evidence on record we do find that the prosecution did not prove its case against the 5<sup>th</sup> and 6<sup>th</sup> appellants as required by the law. The appeals for the 5<sup>th</sup> and 6<sup>th</sup> appellants are hereby allowed.

With regard to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants they were found guilty in relation to Count I. The victim of the robbery in that count was the late **ZACHARIA ELIANDA**. The incriminating evidence is that of **PW6 MARY NASIMIYU ELIANDA**. It is her evidence that the deceased tried to attack the robbers with a panga and they hit him and he died. It is PW6 who gave out the money that was stolen. PW6 was cut on her arms. According to her she identified the appellants using her lantern lamp that was on. She was taken out of the house and one of the robbers asked her to run away. According to **PW8 KENNEDY NJAYA**, PW6 was in shock and was unconscious when she was taken to hospital. She gained consciousness after one day. Given the evidence on record we do find that it would have been difficult for PW6 to identify the four appellants during the robbery. It is not clear how intense the light from the kerosene lamp was. There were many robbers and PW6's husband had just been assaulted and suffered serious injuries. Although PW6 testified that she knew the four appellants we do find that her evidence in relation to identification is doubtful. She was taken to hospital and was unconscious. The manner in which the appellants were arrested does not show that it is the identification by PW6 which led to their arrest. PW7 testified that when she met PW6 at the first instance she did not give her the names of the robbers. PW7 was given the names later while PW6 was hospitalized. It is possible that PW6 was mistaken as to the identity of the robbers.

In the end, we do find that the conviction is not safe. The case was not proved beyond reasonable

doubt. The appeals are merited and the same are allowed. The appellants shall be set at liberty unless otherwise lawfully held.

**Delivered, dated and signed at Kakamega this 20<sup>th</sup> day of May 2014**

**SAID J. CHITEMBWE**

**GEORGE DULU**

**J U D G E**

**J U D G E**