



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 109 & 110 of 2011

BETWEEN

JOSEPH OTIENO OLUMU alias AJUSI.....1ST APPELLANT

BENSON OCHIENG BANDE.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Homa Bay SRM's court

criminal case No.1947 of 2010 by C.A.S. Mutai, SRM dated on 27th May 2011)

JUDGMENT

1. The two appellants herein, Joseph Otieno Olumu alias Ajusi and Benson Ochieng Bande were arraigned before the Senior Principal Magistrate's Court at Homa Bay on 2 counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.
2. In Count I, it was alleged that on the 20th November 2010 at Kanyanjua sub location in Homa Bay County, jointly with another not before court, while armed with dangerous weapons namely a panga, club, and whip, robbed Everlyne Awuor of a shirt, a blouse and ORANGE D18 all valued at Kshs.3550/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Everlyne Awuor.
3. In Count II, the appellants were charged jointly with Ben Obuya Anyango and were alleged to have committed a robbery with violence offence on the 20th November 2010 at the same place at about 3.00 a.m. when they jointly with another not before the court, robbed Joseph Ojode of a mobile phone make Motorola C118 valued at Kshs.2000 and at or immediately before or immediately after the time of such robbery used actual violence to the said JOSEPH OJODE.
4. The appellants denied the charges thereby necessitating a full trial during which the prosecution called 8 witnesses.
5. The prosecution case is that on the 20th November 2010 at about 3.00 a.m., the complainant in Count I, Everlyne Awuor (Everlyne) was returning from a funeral vigil in the neighbourhood. She was headed for her grandmother's house, Jennifer Anyango who testified as PW2 (Jennifer). Everlyne was accompanied by Joseph Ojode Obambo, PW3 (Joseph). While the two were on the way to Jennifer's home, they were accosted by 3 young men, among them the 2 appellants. The assailants had a spotlight

which they shone at both Everlyne and Joseph. There was also moonlight on that night. With the help of the moonlight, Everlyne was able to identify the 1st appellant herein, Joseph Otieno Olum alias Ajusi. The said 1st appellant was known to Everlyne as she had seen him on a previous occasion as he delivered luggage to her uncle's wife.

6. The 1st appellant then attacked Joseph with a whip and chased him away. Everlyne was left behind in the company of the 2nd appellant and the 3rd accused in the lower court. The 2nd appellant was armed with a walking stick while the 3rd accused was armed with a panga. The 2nd appellant and the 3rd accused pulled Everlyne towards the bush where they beat her up. She was slapped with a panga and hit with the stick.

7. After a while, the 1st appellant returned to the bush where Everlyne was together with the 2nd appellant and 3rd accused. The 1st appellant was armed with a whip with which he whipped Everlyne on the left eye, injuring her seriously. The 1st appellant then ran away. The 2nd appellant and 3rd accused thereafter ordered Everlyne to kneel down. As Everlyne pleaded for mercy, the 3rd accused undressed her by removing her T-shirt and underwear. She was told that if she wanted her clothes back, she should go to Rodi the following day.

8. Eventually, Everlyne found her way back to Jennifer's house. She recounted her ordeal to Jennifer and also informed her that her assailants had taken away her mobile phone together with her clothes. Jennifer took Everlyne to Rangwe Health Centre for treatment but Everlyne was referred to Homa Bay District Hospital for further treatment. She was hospitalized at Homa Bay District Hospital for 3 weeks.

9. When Everlyne arrived at Jennifer's house, she was naked and was bleeding from her left eye which was also swollen. Everlyne told Jennifer that she had been assaulted by Ajusi and 2 other people. When Everlyne came out of hospital, she reported the matter to Homa Bay police station where she was issued with a P3 form, though she had earlier made a report to Rangwe police post. The report was received by Number 57500 Police Constable John Nganga, who testified as PW8. He was the Investigating Officer. PC Nganga told the court that when Everlyne made the report to him, she informed him that she could identify the attackers if she saw them. PC Nganga also stated that at the time of the report, Everlyne's clothes were blood stained and her left eye had been injured.

10. PC Nganga also testified that on the 22nd November 2010, he received another report from Joseph who informed him that he had been attacked by people on 20th November 2010 and that he could identify those people if he saw them. Joseph gave the names of their attackers as Joseph Olumu alias Ajusi, Benson Bande and Nyabila. Both Everlyne and Joseph were issued with P3 forms by PC Nganga.

11. PW4, Imelda Adhiambo Odie (Imelda) a clinical officer at Homa Bay District Hospital filled Everlyne's PW3 form Ref. No.8433/2010 on 14th December 2010. Imelda testified that Everlyne gave her a history of having been assaulted by several people of whom she knew one. Everlyne had injuries on the left eye, face and back. Everlyne also informed Imelda that her attackers had taken away her clothes. Imelda also said Everlyne had bruises on the right elbow joint. In Imelda's opinion, the probable weapon used to inflict injuries to Everlyne was blunt. She classified the injury as grievous harm. Everlyne's P3 form was produced as **P. Exhibit 1**.

12. Joseph told the court that at about 3.00 a.m. on 20th November 2010, while he was walking together with Everlyne as they returned from a funeral vigil, they were attacked by Obuya, Bande and Joseph. He said there was moonlight and that with the help of that moonlight, he could easily identify the 3 persons. Joseph whipped him with a whip while Bande beat him with a stick on the shoulder. He was also whipped on the head and the right rib cage. Joseph, who was 1st accused in the lower court, cut him with a panga on the right forefinger. The 1st appellant herein had a whip while the 2nd appellant carried a big stick. When he could take the beatings no more, Joseph took to his heels, leaving Everlyne at the mercy of 2nd appellant and 3rd accused. He was chased by the 1st appellant who whipped him again until he fell down. As he fell down, he screamed and the screams later attracted the attention of his father James

Hagon Obando, PW5 (James). Joseph stated that his assailants took away his mobile phone, a motorolla C118 and also Everlyne's mobile phone, a Dorado D18. Joseph's phone was worth Kshs.2000/=.

13. Joseph stated further that he did not see Everlyne again until the following day as she was being taken to hospital. He also went to Rangwe sub District Hospital for treatment. He made a report to Rangwe police post to PC Nganga who issued him with a P3 form on 23rd November 2010.

14. Joseph took the P3 form to Rangwe Sub District Hospital. The P3 form was filled by Leonard Ochieng Okumu, PW6 (Leonard) who testified that Joseph told him he had been assaulted on the 19th November 2010 at about 1.00 a.m. Joseph had injuries on the chest, and upper limbs, and in particular he had a cut wound on the left finger. There was also tenderness on the head and neck. Leonard produced Joseph's P3 form as **P. Exhibit 2**.

15. During cross examination, Leonard told the court that though the law did not authorize him to fill P3 forms, he filled Joseph's P3 form because he was the one who saw the patient first when he reported to the hospital. He also stated in re-examination that he was authorized by the Medical Superintendent Homa Bay District Hospital to act on his behalf with regard to filling of P3 forms.

16. James told the court that when his son Joseph screamed, at around 3.00 a.m. on 20th November 2010, he ran out to where Joseph was and found him bleeding from the index finger, and in much pain. Joseph told him that it was Ajusi who had assaulted him. James also heard screams from Ogweyo rural DC road. There was bright moonlight. James said he also had a torch and near the road, he saw Ajusi whipping a girl who was crying. When James flashed his torch, he saw 2 other people who were also beating the girl. Ajusi then ran away towards his father's home while the other 2 people abducted the girl towards the bush. James told the court that Ajusi was the 1st appellant herein and that he knew him before as they hail from the same area. James then raised an alarm as he took refuge in a maize plantation. He was afraid that the 3 persons would beat him. James also said he was able to identify Everlyne as the girl who was being beaten. He also identified the 2nd appellant by the name Okoth who also comes from the same area as James. He identified the other suspect as Obuya, 3rd accused in the lower court. He said the 2nd appellant and 3rd accused were armed with pangas while the 1st appellant had a whip and a stick.

17. Early in the morning, James went to Jennifer's home and gave her the names of the persons who had assaulted Everlyne. After both Everlyne and Joseph had received treatment, James made his statement to the police. Subsequently, the 2 appellants and their co-accused were arrested. He also told the court that he had no grudge with either the appellants or their co-accused in the lower court.

18. PW7 was Number 231505 Inspector of police Jackson Mathenge. He is the one who conducted an identification parade at the request of PC Nganga. During the parade which had 10 members, Everlyne was able to identify the 1st appellant herein and after the 1st appellant was identified by Everlyne he said nothing in response. Everlyne was also able to identify the same suspect from two different positions. The identification parade form was produced as **P. Exhibit 3**.

19. During cross-examination, PW7 told the court that he complied with the judge's rules by informing the suspect that a victim was coming to see if he was the person who assaulted her; that he also asked the 1st appellant if he had any objection, and said he had none though these questions and answers were not recorded. PW7 also said that the 2nd appellant and 3rd accused formed part of the parade, though Everlyne only managed to identify the 1st appellant. PW7 stated that all the suspects were dressed in similar manner. He also said that Joseph was not able to identify any of the suspects from the parade, and that out of the 4 parades he conducted, Everlyne was able to identify the 1st appellant in 2 of these 4 parades.

20. In further cross examination by the 3rd accused, PW7 stated that the 3rd accused was not in the parade because by then, he had not been arrested. This response by PW7 that 3rd accused was not in the parade contradicts PW7's earlier statement that the 2nd appellant and 3rd accused also formed part of the report.

21. At the close of the prosecution case, the appellants and their co-accused were put on their defence after the trial court found that they had a case to answer. The 1st appellant gave sworn evidence in which he told the court that he did not know Everlyne. He also stated that on the 19th November 2010, he was at the home of Auma Bande who had invited him to a function where a public address system was required. The 1st appellant arrived at Bande's home at about 5.00 p.m. and left the place at about 4.00 p.m. on 20th November 2010. The 1st appellant stated that he did not at any time leave Bande's home between the time of his arrival at 5.00 p.m. on 19th November 2010 and his departure at 4.00 p.m. on 20th November 2010.

22. The 1st appellant admitted that he saw the 2nd appellant at Bande's home during that period. The 1st appellant denied robbing Everlyne and Joseph. He said he knew Joseph who was known as Joseph Ojode Okoth and also knew Joseph's father, James. The 1st appellant stated that though he was arrested a month after the alleged incident, he was all the time at his home. The 1st appellant was cross examined at length. He still denied knowing Everlyne. He stated that he had no differences with James who hails from the same locality. He however stated that the case against him was a frame up though he could not say by who. He denied that he was a liar.

23. The 2nd appellant, Benson Ochieng Bande, also gave sworn evidence. He recalled that on 19th November 2010, he was at the shop of his brother Richard Auma Bande. On that day, arrangements were in hand for the ordination of his brother Richard as an elder of the Roho Church. There were many other people, among them Tom Mboya Nyabute, Joseph Owuor Okinyi and Richard Ouma Bande. Joseph Otieno Olumu, 1st appellant was also there between 4.00 p.m. on 19th November 2010 and 4.00 p.m. on 20th November 2010. That the 1st appellant was operating a public address system, while he, 2nd appellant was engaged in cooking food for the visitors. He denied any knowledge of Everlyne. He also denied either seeing or robbing Joseph. 2nd appellant stated that he and James had a grudge between them because one day he had directed police officers to James' house and James had sworn that he would make him spend money the way he (James) did. The 2nd appellant also denied running away from home.

He confirmed that he hails from the same village with Joseph.

24. During cross examination, the 2nd appellant stated that he had no grudge against either Joseph or Everlyne, though he maintained that the allegations made against him were a pack of liar.

25. Richard Bande Ouma testified as DW4 and told the court that the 2nd appellant herein was his cousin and that on the night of the alleged crime, the said 2nd appellant was assisting him to prepare food for some visitors from the Luanda Roho Church. He testified that the ceremony took place between 6.00 p.m. on 19th November 2010 and 6.00 p.m. on 20th November 2010 and that during that whole time, the appellants were at his home for the stated function for which authority had been given vide a letter dated 19th November 2010 from the area Assistant Chief and produced in court as **D. Exhibit I**.

26. During cross examination, DW4 stated that the 1st appellant herein was a son to his wife and a brother to the 2nd appellant; and that the 2nd appellant lived in the same compound as DW4. DW4 further stated that at the time of the alleged offence, the 1st appellant was operating the public address system. He admitted that he was not happy that the 2 appellants were in trouble.

27. DW5 was Tom Mboya Nyabute who stated that on the 19th November 2010 he was at the ordination ceremony at the home of DW4. He said he saw the 2 appellants herein at the said ceremony in their capacities as public address system operator and meal preparation assistant respectively. During cross examination, DW5 stated that he could not vouch for any other activities which could have taken place that night.

28. Joseph Owuor Okinyi also testified as DW6. His testimony was that he knew both appellants and that on the material night, they were both at the home of Richard Bande Ouma during the latter's ordination

ceremony, and that he saw both appellants at the ceremony at about midnight.

29. At the close of the hearing, counsel for the appellants, Mr. Odhiambo Roch made submissions and urged the trial court to find that the prosecution had not proved its case beyond any reasonable doubt against his clients, the appellants herein. He urged the court to acquit them. The prosecution submitted that the evidence laid before the court was watertight and urged the court to confirm the convictions of the appellants on both counts of robbery with violence and to sentence them appropriately.

30. After carefully analyzing the evidence that was laid before him, the submissions and the law, the learned trial magistrate reduced the charge in Count I to one of grievous harm contrary to **section 234** of the **Penal Code** and found both appellants guilty and convicted them accordingly. The learned trial magistrate reduced the charge in Count II to one of assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. Both appellants were found guilty as charged and accordingly convicted under **section 215** of the **Criminal Procedure Code**. In reducing the capital robbery charges, the trial court applied the provisions of **section 179** of the **Criminal Procedure Code** which reads:-

“(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

31. On Count I, the 1st appellant was sentenced to serve 12 years imprisonment while the 2nd appellant and the 3rd accused were each sentenced to 5 years imprisonment. On Count II, the appellants were each sentenced to 1 year in prison with a right of appeal within 14 days.

32. Being aggrieved by both conviction and sentence, the appellants filed their separate appeals through the firm of Odhiambo & Co. Advocates. The common grounds of appeal are as follows:-

1) *The learned trial magistrate erred in law and fact [in concluding] that the Appellant was properly identified at the locus quo.*

2) *The learned trial magistrate erred in law and fact in holding that the identification parade was properly conducted which made him come to the wrong decision that the Appellant was guilty of the lesser charges of grievous harm and Assault.*

3) *The learned trial magistrate erred in law and fact and applied the wrong principles of law in application and interpretation of section 179 of the Criminal Procedure Code which made him erroneously reach the decision that the Appellant was guilty of grievous harm and Assault.*

4) *The learned trial magistrate erred in law and fact in failing to appreciate and hold that the identification parade was erroneously conducted and tilted evidence in favour of the Appellant hence the Appellant ought to have been acquitted of charges on both counts.*

5) *The learned trial magistrate was biased and failed to consider the evidence of the Appellant together with the Appellant’s witnesses which evidence was cogent, credible and totally dislodged the evidence adduced by the prosecution hence the Appellant ought to have been acquitted of charges on both counts.*

6) *The learned trial magistrate on the face of the proceedings and judgment created and or manufactured his own evidence which resulted in the conviction of the Appellant on charges on both Counts.*

7) *The Appellant was charged, tried convicted and sentenced for offences allegedly committed in a non-existent locus quo.*

8) *The convictions, given the totality of the evidence before the Honourable court, were neither sound nor safe.*

9) *The judgment was unlawful having been based on a charge sheet that had been withdrawn and further based on particulars of the charge that were at variance with the substituted charge sheet.*

10) *The sentences were unlawful to the extent that the same cannot be executed.*

11) *The sentences were harsh and excessive given all the circumstances of the case.*

33. The appellants pray that the appeal be allowed, conviction quashed and sentences set aside.

34. This is a first appeal, and in the circumstances, we are under a duty to reconsider and evaluate the evidence afresh with a view to reaching our own conclusions in the matter. We however must remember that in reconsidering and evaluating the evidence afresh, we do not have that singular privilege of seeing and hearing the witnesses who testified during the trial. We must therefore exercise caution when discharging this duty. Generally see **Pandya –vs- R [1957] EA 336** and **Okeno –vs- Republic [1972] EA 32**.

35. When the 2 appeals came up for hearing before us, they were consolidated under file Number 109 of 2011 so that Benson Ochieng Bande is 1st appellant and Joseph Otieno Olumu is 2nd appellant. However for purposes of this judgment, Joseph Otieno Olumu is the 1st Appellant while Benson Ochieng Bande the 2nd appellant in accordance with how they appeared before the lower court.

36. Joseph Otieno Olumu filed written submissions and averred that the prosecution failed to prove its case against him beyond any reasonable doubt. He contended that the evidence of the identification parade did not corroborate allegations by both Everlyne and Joseph. He further contended that if indeed the attackers accosted both Everlyne and Joseph from behind, it was highly improbable that the 2 witnesses could have seen and identified the attackers even if a torch had been shone upon both Everlyne and Joseph. The appellant also contended that neither of the witnesses was able to state the position of the moon in the sky so as to support the allegation that there was bright moonlight, whose intensity was also not allegedly given.

37. The 1st appellant also contended that there was no direct evidence linking him to the commission of the offence and that infact that was the reason why Joseph was unable to pick out the appellant from the identification parade. The appellant asks why, if indeed Joseph knew him as alleged, he was unable to pick him out from among the suspects on the identification parade.

38. The 1st appellant also contended that the identification parade was not conducted in accordance with the Judges Rules and that in the circumstances, the said evidence should be ignored. Reliance was placed on the case of **Ajode –vs- Republic [2004] 2 KLR 81**.

39. Finally, the appellant contended that the learned trial magistrate erred in both law and fact when he relied on unreliable, evasive, insufficient and contradictory evidence to convict the appellants. He urged us to allow the appeal.

40. Mr. Odhiambo Roch argued the appeal on behalf of Benson Ochieng Bande. Counsel abandoned grounds 7, 1 and 2 of the appeal, and contended that since the alleged robbery/offence took place after midnight, the issue of identification was not proved by the evidence placed before the trial court. That the intensity of the moonlight, allegedly relied upon to identify the 2nd appellant was not given by both Everlyne and Joseph especially when the identification parade revealed that Joseph was unable to identify any of the suspects from the parade.

41. Counsel also wondered how, if both Everlyne and Joseph knew the appellants, they were unable, especially Joseph, to identify the 2nd appellant from the parade, and Everlyne identified only the 1st

appellant. Counsel also submitted that the identification parade was not conducted in accordance with the rules. Reliance was placed on **Roria –vs- Republic [1967] EA 543**.

42. Grounds 9, 10 and 11 were argued together. Counsel argued that judgment by the trial court was based on a withdrawn charge sheet, and was therefore unlawful. Counsel also questioned the trial court's sentence in that it was not clear whether the sentences were to run concurrently or consecutively. It was also submitted that though the robbery offence in respect of this appeal was reduced to one of grievous harm, no evidence was placed before the trial court to show that Everlyne was assaulted by Benson Ochieng Bande. This appellant also complained that the mitigating factors placed before the court were not considered during the sentencing. Regarding the conviction and sentence, on Count II, counsel submitted that no iota of evidence was placed before the trial court showing that Joseph was assaulted by the 2nd appellant, Benson Ochieng Bande.

43. Grounds 5, 6 and 8 were also argued together. The appellant complained that the trial magistrate was biased and that he imported his own evidence into the judgment for example when he went against Joseph's evidence and said that Everlyne had a mobile phone. Further that the trial court's conclusion that Everlyne identified both appellants during the parade was of his own making.

44. The appellant also complained that the trial magistrate failed to consider the appellant's evidence and that of his witnesses, DW4 and DW5.

45. Relying on the case of **Peter Odhiambo Owino –vs- Republic Court of Appeal Criminal Appeal NO.291 of 2007, [2010] e KLR**, counsel submitted that any variance between the charge sheet and the evidence was fatal to the prosecution's case. Counsel referred to Jennifer's evidence in which Jennifer gave the dates of the alleged offence as 19th and 20th December 2010 when the charge sheet says the offence took place on 19th and 20th November 2010. Reliance was also placed on **Ouma Obenjo & another –vs- Republic – Criminal Appeal NO.402 of 2007 – Nairobi [2010] e KLR** and counsel submitted that the trial court ought to have warned itself of the dangers of relying on the evidence of a single identifying witness under difficult conditions.

46. The final ground to be argued was ground 3 by which it is contended that the learned trial magistrate applied the wrong principles of law in the application and interpretation of **section 179** of the **Criminal Procedure Code** and thereby reached an erroneous conclusion. That the 2nd appellant, Benson Ochieng Bande was not guilty of the offence of grievous harm. Counsel submitted that the learned trial magistrate did not state under which limb of the said section he substituted the charge and that in the circumstances, the substituted charge of which the appellant was convicted was incurably defective.

47. In response to appellants' submissions, Mr. Mutuku, counsel for the Respondent opposed the appeal on both conviction and sentence. Counsel submitted that both appellants were positively identified by both Everlyne and Joseph since all of them hailed from the same locality. Further, that James was also able to identify both appellants under bright moonlight and the light from his torch. Counsel submitted that there was no mistaken identity.

48. Concerning Count I, counsel submitted that the evidence by Everlyne was clear that both appellants were well known to her and that the identification parade conducted by PW7 was only in respect of 1st accused in the lower court and not the 2nd accused who is 2nd appellant herein. Mr. Mutuku also submitted that the parade conducted was improper because Everlyne already knew the suspect, but nonetheless counsel submitted that there was other waterproof evidence against the said 1st appellant.

49. Regarding the judgment, counsel for the Respondent submitted that there is room for an inference to be made as to which charge sheet the trial court referred to in its judgment. Further, counsel submitted that even if this court were to find that there was an error regarding the charge sheet after the 3rd accused in the lower court was arrested, this court can apply inherent powers donated to it as first appellate court to correct the error.

50. On the appellants' complaint that the trial court erred in reducing the 2 counts from capital robbery to charges of grievous harm and assault, counsel conceded that the trial court was wrong in doing so, but for totally different reasons. Counsel submitted that since there was ample evidence in support of the charge under **section 296 (2)** of the **Penal Code**, the trial court had no business reducing the charges. Counsel submitted that Everlyne lost her left eye due to the attack and that in the circumstances, this court should find both appellants guilty of the original charge and convict them accordingly.

51. In reply, counsel for Benson Ochieng Bande submitted that the judgment by trial court has no basis since the charge sheet on which it was premised had been withdrawn. Counsel also submitted that evidence of identification of the appellants by Joseph and James was hopelessly flawed and should be ignored/rejected by this court.

52. On the respondent's request for enhancement of sentence, counsel submitted that in the absence of a cross-appeal, this court would have no basis for enhancing the sentence. Counsel also argued that in any event, there is no evidence on record proving the ingredients of the charge under **section 296 (2)** of the **Penal Code**.

53. The 1st appellant Joseph Otieno Olum submitted that there was no evidence to prove either the capital robbery charge or even the substituted charge. Regarding the evidence of Joseph, this appellant contended that since he and Joseph admittedly hail from the same locality, it was strange that Joseph could not pick him out on the identification parade. The appellant urged us to allow his appeal.

54. We have now carefully reconsidered and evaluated the evidence afresh. We have also carefully weighed and analyzed the judgment of the trial court. We have also turned over the submission made by the appellants and the respondent together with the law cited to us. From all the above analysis, three issues arise for identification by a single identifying witness:-

- a) *Whether the appellants were properly and positively identified on the night of the alleged attack;*
- b) *Whether the judgment by the trial court was flawed on account of having been based on a withdrawn charge sheet; and*
- c) *Whether this court should proceed to find the appellants guilty of the original charges of robbery under **section 296 (2)** of the **Penal Code**.*

55. Everlyne and Joseph were attacked on the night of 19th and 20th November 2010. The time was between 12.30 a.m. and 3.00 a.m. In the circumstances, the question of identification is central to the success or failure of this appeal. The question is even more critical in circumstances where there is evidence of only one identifying witness under difficult conditions. In **Abdalla Bin Wendo & another – vs- Republic [1953] 20 EACA 166**, the Court of Appeal for Eastern Africa had the following to say on the question of identification:

“Subject to certain well known exceptions, it is trite law that a fact may

be proved by the testimony of a single witness, but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions following a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

56. In **Paul Etole & another –vs- Republic, Criminal Appeal NO.24 of 2000**, the Court of Appeal drove the point home again in the following words in part of its judgment:-

“--- to evidence of visual identification, such evidence can bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused

depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when a witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. When the quality is good, and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality the greater the danger."

57. It is with the above principles in mind that we now examine the identification evidence in this case. Both Everlyne and Joseph said they knew the 2 appellants because they all hail from the same locality.

If indeed it is established as a fact that the appellants were well known to both Everlyne and Joseph, then as it has been held before, recognition in this case would be more reliable than identification of a stranger, though it is important to remember that even when the witness is purporting to recognize someone whom he knows, mistakes can still be made in recognition of close relatives and friends.

58. With regard to Count I which involves Everlyne as the complainant, her evidence on recognition was as follows:-

"When we were near our home, there were 3 people coming from behind. They stopped us. We stopped, one had a sport light. They flashed at us with their torches. I knew one of them. The one I knew was Joseph the 1st accused. I had seen him when he brought a luggage to my uncle's wife. I was able to identify him through moonlight. --- On reaching the road, Ajusi came back running. He whipped me with a whip on the left eye injuring me on the eye. Somebody came and flashed his torch. Ajusi then ran away."

59. The above was the evidence of recognition by Everlyne of the 1st accused, who is the 1st appellant in this judgment. Later an identification parade was conducted and Everlyne says, she was able to identify the said 1st appellant at the parade. It is our view that that there was no need for an identification parade if indeed Everlyne already knew Ajusi. Looking at the whole of the evidence, we are satisfied that Everlyne indeed recognized the 1st appellant whom she knew before.

James confirmed to the court that the moonlight was very bright on that night.

60. What about the 2nd appellant Benson Ochieng Bande? Everlyne says of him:-

"The 2nd accused had a walking stick. --- I was asked to go to Homa

Bay Police Station to identify the suspects. I was able to identify the 1st and 2nd accused."

61. In cross examination, Everlyne stated that she had not known the 2nd appellant before and that she only saw him on the day he (2nd appellant) attacked her. PW7, told the court that Everlyne identified only one suspect. This is what PW7 said about the identification parade:

"--- I had 3 suspects. The person who was identified was one. This was Joseph Otieno."

What the record shows is that during the second parade, Everlyne still identified the 1st appellant Joseph Otieno.

62. In a nutshell, the evidence of identification by Everlyne as far as the 2nd appellant Benson Ochieng, is concerned was far below the required standard. We therefore do not find any evidence to link the 2nd appellant, Benson Ochieng Bande to the commission of the offence alleged in Count I. We give him the benefit of the doubt. However as far as the 1st appellant Joseph Otieno Olum is concerned, we are satisfied from the evidence of both Everlyne and PW7 that he was positively identified by Everlyne and that he is the one who whipped her on the left eye; permanently injuring the eye.

63. The evidence of identification for Count II comes from the testimony of Joseph and James. Joseph stated thus in his evidence in chief:-

“We walked towards Everlyne’s grandparents’ home. Suddenly 3 people came over. They were Obuya, Mbande and Joseph. There was moonlight hence the reason why I could easily identify them. They beat me. Joseph whipped me with whips on the head and the right rib cage. --- Joseph the 1st accused had a whip. The 2nd accused had a big stick.--- On my hand I had 2 mobile phones including Everlyne. My phone was motorolla C118 while Everlyne’s was Dorado D18. – Joseph picked up the two phones before he left.”

64. During cross examination, Joseph admitted that he had omitted critical details especially of alias names of the 1st appellant when he made his statement to the police. Secondly, when Joseph was called to the identification parade conducted by PW7, he was not able to identify anybody, whether the 1st or 2nd appellant both of whom were in the parade. It thus appears to us that there was no evidence by Joseph tending to link the 1st and 2nd appellants to the commission of the offence in Count II.

65. In the circumstances, we do not think that there was proof of the ingredients of robbery with violence on both counts. We are however satisfied that there was sufficient evidence to link the 1st appellant, Joseph Otieno Olum to the offence of causing grievous harm to Everlyne.

66. The next issue for determination is whether the learned trial magistrate applied the wrong principles in applying and interpreting the provisions of **section 179 of the Criminal Procedure Code**. Counsel for the 1st appellant says so. Counsel for the respondent also says so, but for different reasons. In our view, much of the evidence adduced before the trial court pointed to a charge of grievous bodily harm as opposed to robbery with violence as indicated in the charge sheet. In the case of **Kilome –vs- Republic [1990] KLR 193**, it was held, *inter alia*, that **“the paramount consideration in determining whether or not a defect in the charge is incurable or not is whether there is prejudice occasioned to the accused in putting up his defence because of the words used.”** In the instant case, we do not think that the appellants were prejudiced at all in presenting their defence. We are therefore in agreement with the decision of the learned trial magistrate to find the appellants guilty of the less serious offences. There was therefore no misapprehension of the law in the application and interpretation of the provisions of **section 179 of the Criminal Procedure Code**.

67. In the premises, and in answer to the third issue framed for our determination, we do not think that there is any justification in reverting to the original charges for which the appellants were arraigned before court.

68. Accordingly, the appellants’ appeal on Count II is allowed. The appeal by Benson Ochieng Bande in respect of Count I is also allowed and unless he is otherwise lawfully held, he shall be released from prison custody forthwith. The appeal by Joseph Otieno Olumu alias Ajusi in respect of Count I is dismissed. R/A within 14 days.

69. It is so ordered.

Dated and delivered at Kisii this 21st day of March, 2013.

RUTH NEKOYE SITATI

JUDGE.

R. LAGAT-KORIR

JUDGE.

In the presence of:

Mr. O.M. Otieno for 1st Appellant

Odhiambo Rodi for 2nd Appellant

Mr. Majale for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.

R. LAGAT-KORIR
JUDGE.