



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Criminal Appeal 160,160,161,162,163,164 of 2010**

**JACKSON ASAT ODUOR ..... 1<sup>ST</sup> APPELLANT**

**BENSON OMUSEMBE ..... 2<sup>ND</sup> APPELLANT**

**JACKTON ABUTI ..... 3<sup>RD</sup> APPELLANT**

**CHARLES INYANGALA ..... 4<sup>TH</sup> APPELLANT**

**REUBEN OKONDO..... 5<sup>TH</sup> APPELLANT**

**V E R S U S**

**REPUBLIC..... RESPONDENT**

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

The appellants were charged with three counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. They were convicted and sentenced to suffer death. The appellants preferred these appeals. The grounds of appeal are quite similar and are that the appellants pleaded not guilty to charge, their sworn defenses were rejected, the prosecution failed prove its case beyond reasonable doubt, that their constitutional rights were violated as they stayed at the police station for longer periods than permitted, the identification parades that were conducted were not proper and that no first report was made to the police stations giving their names.

The 1<sup>st</sup> appellant submitted that PW1 testified that he identified him by way of his voice and yet when the parade was done there was no voice identification. PW1 did not give his name to the police or to his wife PW6. PW1 knew him and testified that the appellant went to school with his son yet he was allowed to participate in identification parade. The parade officer testified that he was not given the description of the suspects and that made it difficult for him to choose the participants in the parade. The kind of light and its density used to identify them was not clear. A cap that was allegedly picked at the scene belonged to him but there was no evidence to prove that.

The 2<sup>nd</sup> appellant submitted that PW7 did not give the description of the light he used to identify him. Although PW8 testified that he knew him he did not give his description to the police. The parade officer allowed PW7 and PW8 who knew him to participate in the parade. He complained but he was told to take his complaints to the court. None of the witnesses led to his arrest and nothing was recovered from him. The 3<sup>rd</sup> appellant only relied on his grounds of appeal and urged the court to evaluate the

proceedings. The 4<sup>th</sup> appellant filed written submissions and he relied on them. The submissions are titled “*AMENDED MEMORANDUM OF APPEAL*” and the only issue raised therein is that the identification parade was flawed and that no exhibits were found with him. The 5<sup>th</sup> appellant submitted that a jacket that was purportedly recovered near a river was not produced. None of the witnesses identified him. The appellant filed written submissions which simply state the grounds of appeal and that the prosecution evidence was contradictory.

Mr. Orinda, State Counsel, opposed all the appeals and submitted that the identification parades were properly conducted. Most of the victims were injured during the robbery and it took time for them to participate in the identification parade. The conviction was not based on the identification parade but also on other evidence. The appellants are known at the area where the offences occurred. A cap belonging to the 1<sup>st</sup> appellant was sent for blood testing. The source of light was clear although it was at night. There were torches and moonlight. The issues of contravention of Constitutional rights were dealt with by the trial court.

Being the first court of appeal we have gone through the record of the trial court. The record shows that 18 witnesses testified for the prosecution. **PW1, JACKSON ESHIWANI LUKOYE**, testified that he was in his house on the night of 28/29 July 2007 with his wife. At about 11 p.m. he heard dogs barking, people broke his glass window and entered. They had head gears and some wore long jackets and caps. He identified the voice of the 1<sup>st</sup> appellant. The told him to produce money or they would have killed him. He was able to identify the 1<sup>st</sup> appellant, **JACKTON ABUTI** (3<sup>rd</sup> appellant) who was the 4<sup>th</sup> accused before the trial court and the 4<sup>th</sup> appellant who was the 5<sup>th</sup> accused before the trial court. He was robbed of KShs.400,000/= cash and several items also valued at about KShs.400,000/=. They were about 9 robbers. He was attacked with a panga and sustained injuries on the head. There was a torch light. Neighbours came after the robbers had left and he was taken to Aga Khan Hospital. He later realized that two people died out of the robberies. One being his son. On the 13.8.2007 he identified the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants at an identification parade. Some of his stolen items including a blanket and a bag were recovered.

**PW2, FREDRICK CHARLES OMUKUBA**, was on patrol with the area assistant chief on the night of 28.7.2007 at about 11 p.m. They got information about the robberies and went to the house of PW1. They notified the police who went to the scene. A white cap belonging to the 1<sup>st</sup> appellant was recovered on the road. They also recovered a bag and a blanket. They did not arrest any of the robbers who ran away as the police confronted them. He was not able to identify anybody. **PW3, ALEXANDER LUKOYE**, was the area assistant chief and was on patrol with PW2 that night. They got information about the robberies and informed the police. They went to PW1’s house and the police arrived at the scene. The police shot in the air and there were response shots from the thugs. They found PW1 was injured and was taken to Aga Khan Hospital.

The evidence of **PW4 HESBORN OMBITO LUKOYE** is that he was sent to buy a cow by PW1 on the 20.7.2007. His evidence related to one **PHILIP LITUNYA ALUKWE** who was acquitted by the trial court. PW5, **ZEPHANIA MANYA ALUKAME**, testified that on the 27.7.2007 he was in his house at about 11 p.m. when they heard people talking outside. They broke his door and went into his house and he ran into the bush. After sometime he went back and found that his neighbor PW1 had been injured. **PW6, GLADYS ESHIWANI** is the wife of PW1. She was with PW1 that night when the robbers went in through the door. She was beaten up and taken to the bedroom. Her husband was injured. The robbers had pangas and rungas. Her whole body was hit and cut and she collapsed. She regained consciousness at Aga Khan Hospital. She attended an identification parade and was able to identify one **JAVAN SITANDI OMOLO** who was the 2<sup>nd</sup> accused before the trial court. **PW7, PHILLISENAMWENYA LUKOYE** was with her husband **JOHNSTONE LUKOYE** who died during the robberies. On the 28.7.2007 she was in her house with her husband when they heard voices from outside. Robbers broke through the wall on their house and entered. They were armed with rungas, pangas and spears. They stabbed her husband and he fell down. There was light from optimus lamp and torches. She was able to identify **JACKTON ABUTI** the 3<sup>rd</sup> appellant. The robbers went with her and beat her up. She was later released to go home. She was treated and issued with a P3 form.

**PW8, CHRISTINE AMUNGA**, testified that on the 28.7.2007 she was at her house at about 11 p.m. when dogs woke her up. She was with her husband **ZEPHANIA AMUNGA**. They saw torches coming from their gate and they started raising alarm. The robbers broke into their house. Her husband tried to run away but he slipped and fell and he was cut with an axe on the back. He managed to run away. PW8 remained behind and she was told to give out money. She gave the robbers KShs.10,000/= and the robbers beat her up. She was able to identify **BEN OSEWE** who was the 3<sup>rd</sup> accused before the trial court and 2<sup>nd</sup> appellant herein. According to her the 2<sup>nd</sup> appellant is related to her mother in law and she knew him. She heard the robbers saying that they had been instructed not to rape anyone. Police went to the scene and she heard gun shots. She was treated at Yala Hospital.

**PW9, ABIGAELE ORUKO AUMA**, was in her house on the 28.7.2007 at about 11 p.m. She heard people asking them to open the door. Her husband had gone to the toilet which is located outside the house. Her husband came from the toilet and they ordered that his throat be cut. She pleaded with them not to kill her husband. She was able to identify two people who were not amongst those who were charged in court. She did not know the appellants. She then went to check on her neighbor **JACKSON LUKOYE** and found him in a pool of blood. There were gun shots and she was shot through the ear and was taken to Aga Khan Hospital where she was hospitalized for 6 months. **PW10, FLORENCE ALUKWE**, testified that she had seen the 2<sup>nd</sup> appellant and another accused person on the 27.7.2007 at about 6.35 p.m. and she greeted them but they did not respond. They two were standing at the crossroads near PW1's gate. On the same night at about 10 p.m. she heard dogs barking and heard people saying "*Kwa Lukoye nihuko chini*". The robbers hit her door with a stone. PW10 ran away through her back door and she never saw the robbers.

**PW11, AMOS ATUNDO MAYEKA**, testified that on the 2.8.2007 he attended a post mortem of **STEPHEN CHARLES ASEKA** who was his relative. **PW12 IP MBOYA** conducted identification parade on the 13.8.2007 at Butere police station. He had five witnesses and eight members of the parade. The suspect was **JACKSON ABUTI**. He was identified by the 1<sup>st</sup> witness **JACKTON ORUKO ESHIWANI**. The 2<sup>nd</sup> witness **CHRISTINE AMUNGA** could not identify him while the 3<sup>rd</sup> witness **JACKSON ESHIWANI (PW1)** managed to identify him. **PW13, PC MICAH DAUDI**, was attached to the Khumusalaba police patrol base. On the night of 28.7.2007 they were notified about the robbery at PW1's home and they went to the scene. They heard gunshots and they responded by shooting in the air. The robbers ran away and disappeared but they never succeeded in arresting anybody. A cap that was suspected to belong to the 1<sup>st</sup> appellant was recovered. The police officers later raided a village and arrested three suspects namely **JAVAN SHIKANDA**, **BENSON ASEKA** (2<sup>nd</sup> appellant) and **JACKTON ABUTI** (3<sup>rd</sup> appellant). They were escorted to Butere police station. **PW14, OLIVER MAHASO**, was a clinical officer who filled a P3 form while based at Butere hospital. The P3 form was for a 19 year old lady by the name **ABIGAELE AUMA**. The victim had a cut wound on the right finger. **PW15, CIP FRANCIS KIPROP**, conducted an identification parade on the 13.8.2007. The suspect was **JACKSON ASATI OWUOR** (the 1<sup>st</sup> appellant). He had five witnesses and Jackson Eshiwani PW1 identified the appellant. Also witness Christine Amunga identified the appellant. The appellant complained that the other parade attendants were not of the same height. PW6, Gladys Eshiwani was not able to identify anyone.

**PW16, SGT. AMWAYI**, investigated the case. He got information about the robberies on the 28.7.2007 and went to the scene at about 4 a.m. He saw PW1 and his wife who had sustained serious injuries. He also saw **STEPHEN ASEKA** who had been shot. He rushed the victims to Aga Khan Hospital and continued with his investigations. They recovered a cap, a green travelling bag, a torch and a blanket. The cap was alleged to belong to the 1<sup>st</sup> appellant. The District Criminal Investigation Officer, **MR. JOSEPH KIOKO** went to Luanda police station and after getting a tip off managed to arrest **BENSON ASEKA OMUSEBE**, **JACKSON ABUTI** and **CHARLES INYANGALA**. He organized for identification parade and some of the appellants were identified. A blood stained shirt was taken to the Government Chemist and it was found to have blood group A. The cap was also taken to the Government Chemist and it was found it had no blood stains. They arrested 12 suspects and 7 were charged in court. **PW17, DR. LILIAN NAWIRE KABENGA**, produced a post mortem report on behalf of **DR. ANDAKALA** done on the body of the late **JOHNSTONE LUKOYE**. **PW18, AGGREY JUMA NYONGESA**, was a

clinical officer and he produced a P3 form of PW6 Gladys Eshiwani.

The appellants were put on their defence. The 1<sup>st</sup> appellant gave sworn evidence and testified that on 28.7.2007 he arrived at his rural home at about 3p.m. from Nakuru. He slept at home and his niece **CAREN ACHIENG** was there with him. He was to go back to Nakuru the following morning and about 7.30 a.m. police officers went to the house while armed and they arrested him. They searched the house but nothing was recovered. They asked him if he normally puts on a cap and they took his boots which he had worn the previous day. He was told to put on his cap which he had and boots and was handcuffed. He was taken to Khumusalaba police patrol post and was later charged with the offence. Identification parades were done on 13.8.2007 and he was identified by some faces which he knew. The appellant called his witness Caren Achieng Nyamamu who testified that the appellant arrived from Nakuru on the 28.7.2007 and he slept at home.

The 2<sup>nd</sup> appellant also gave sworn testimony and stated that on the 29.7.2007 he was doing his boda boda business and was arrested by the assistant chief. He was taken to Luanda police station. It was about 5 p.m. and he was booked as a robbery suspect. He stayed there until 13.8.2007 when an identification parade was done and people who knew him picked him from the parade. He appeared in three identification parades but some witnesses did not identify him.

The 3<sup>rd</sup> appellant gave sworn evidence and stated that he was 16 years old. On the 28.7.2007 at about 3.30 p.m. he was in his house when police officers went to arrest him. He was then taken to Khumusalaba patrol base and later charged with the offence. The 4<sup>th</sup> appellant Charles Amakhumba Inyangala gave sworn evidence. He testified that he is a carpenter and on the 1.8.2007 police went to his house at night together with the assistant chief. He was told to dress up and he was taken to Khwisero police station. The following morning he was taken to Butere police station. A parade was later done and some people picked him. The 5<sup>th</sup> appellant also gave sworn evidence. He testified that on the 7.9.2007 he was cycling with a friend while drunk and they hit a pedestrian. Members of public decided to take them to the police and his friend apologized and he was released. Since he was drunk he was taken to Khumusalaba police post and later to Butere police station where he stayed for three days. He was then taken to Kakamega police station and later charged before the Mumias court.

From the prosecution evidence, it is established that there were robberies that occurred on the night of 27.7.2007. PW1 was robbed off several items as he was in his house with his wife PW6. The only evidence connecting the appellants to the offence is identification. The evidence on record shows that after the robberies police officers combed the area and arrested 12 people as per the evidence of PW16. Some witnesses testified that they were able to identify some of the robbers who were not arrested. PW1 and PW6 testified that they were able to identify some of the appellants. The incident occurred at night and the two witnesses sustained serious injuries. According to the two witnesses there was an optimus lamp in the bedroom. The robbers took almost one hour conducting the robbery. The robbers had caps and long jackets and there was torch light. It is clear from the evidence that the police officers were not led by the victims to arrest the appellants. The identification parades were conducted on the 13.8.2007. It is clear from the evidence on record that the victims did not give the description of the robbers to the police. Although we do agree with the sentiments of the State Counsel that some of the victims sustained serious injuries and were hospitalized, we do find that when the victims recovered and were called upon to attend identification parades there was no evidence to show that at least they had described the robbers either by way of appearance or physical structure to the police. It is not clear what criteria the police used to assemble the parade participants.

The prosecution evidence does establish that some of the appellants attended identification parade together. Witnesses were attending and the members were not replaced. The appellants appeared before us and they all appear to be different. Although PW15 testified that there was nothing wrong in having suspects appearing together in one parade we do find that since the appellants are of different appearance and physique and therefore the parades were flawed. During cross-examination PW15 tried to deny that one of the parade members by the name **DAVID NANDWA** of P.O. Box 11, Butere who appeared in the parade for the 1<sup>st</sup> appellant was the same **DAVID NANDWA** of P.O. Box 21, Butere who appeared in the

parade for the 3<sup>rd</sup> appellant. We do note from the parade forms that the same members of the parade were used when conducting the parade. The names of **DAVID NANDWA, BEN NANDWA OYUNGU, ROBERT AMUKHOYA KABARA** and **KAMAU ORUKO OMUKHUMA** were the same people who participated in the parade for Benson Omusebe and Benson Aseka. The same participants also appeared in the parade of Jackson Asati Owuor. Given the fact that there was no description of the suspects by the complainants and that all the members of the parade who attended in the identification parades which led to the identification of the appellants were the same and noting that some of the witnesses appeared several times during the parade, we do find that the identification of the appellants by the witnesses was not procedural. Further the appellants were merely arrested as suspects and were not arrested in connection with the robberies. Nothing was recovered from them yet some of them were arrested one day after the robberies. The evidence that a cap belonging to the 1<sup>st</sup> appellant was recovered at the scene does not implicate the appellant as it was mere suspicion that he was the owner of the cap. The cap was sent to the Government Chemist for analysis and nothing was found connecting the appellant to the cap. According to PW1 he was robbed of several items as indicated in the charge sheet but nothing was recovered from the appellants despite the fact that the appellants were ambushed in their respective homes and arrested. We also note that the victims were injured during the incident and the purported identification of the appellants is not free from doubt. PW1 sustained serious injuries yet he was able to identify three appellants. His wife PW6 lost consciousness and only regained it at the Aga Khan Hospital yet she could still identify some of the appellants. We do find that the identification by the prosecution witnesses is not free from doubt.

In the end, we do find that the appeals are merited and the same are allowed. The appellants are hereby set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 29<sup>th</sup> day of May 2013.

**SAID J. CHITEMBWE**

**J U D G E**

**B. THURANIRA JADEN**

**J U D G E**