



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**CRIMINAL APPEAL NUMBER 82 OF 2009**  
**[Consolidated with Criminal Appeal Number 81 of 2009]**

**BETWEEN**

**PETER OTIENO OMONDI ..... 1<sup>ST</sup> APPELLANT**

**MARTIN BAHATI MAKHULO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**THE REPUBLIC OF KENYA .....RESPONDENT**

**[An Appeal from the Judgment of Mr. C. Maundu, Learned Senior Resident Magistrate, in the Chief Magistrate's Court at Kibera, Criminal Case Number 480 of 2008, dated 27<sup>th</sup> February 2009]**

**Appeal before Justices Monica Mbaru and James Rika**

**1<sup>st</sup> Appellant Peter Otieno Omondi appearing in Person**

**2<sup>nd</sup> Appellant Martin Bahati Makhulo represented by Mrs. Betty Rashid Advocate**

**The State represented by Prosecution Counsel Ms. Nyauncho**

**JUDGMENT**

1. The two Appellants were charged with the Offence of Robbery with violence contrary to Section 296 [2] of the Penal Code in the Lower Court, convicted and sentenced to suffer death. The details of the charge sheet were as follows:-

**On the 26<sup>th</sup> day of February 2008, at Jonathan Ng'eno Estate Lang'ata within the Nairobi Area Province, jointly with another not before the Court, while armed with dangerous weapons namely pangas, robbed Nicholas Kioko Mutua of a mobile phone make Nokia 2626 and cash of Kshs. 1,000/= all valued at Kshs. 5,950/= and at or immediately before or immediately after the time of**

**such robbery used actual violence on the said Nicholas Kioko Mutua.**

2. Five witnesses testified for the prosecution and produced two exhibits, a medical examination form and a receipt for purchase of mobile phone. The 1<sup>st</sup> Appellant gave an unsworn statement in defence and called no witness, while his Co-Appellant gave a sworn statement and called no witness.
3. PW1 Nicholas Kioko Mutua started off with an application to be allowed to withdraw the charges against the Appellants, alleging that he wished to forgive the Appellants, having consulted with the Appellants' parents who agreed to compensate the complainant for the wrong occasioned by the Appellants. The trial Magistrate ruled that the charges were very serious, and the reason given by the complainant insufficient to warrant withdrawal under Section 204 of the Criminal Procedure Code. It was ordered that the prosecution proceeds.
4. PW1 told the Court he was walking on foot in the morning of 26<sup>th</sup> February 2008 at around 6.00 a.m. along Langata road. At the Ngong' river bridge between Kibera and Langata, he met the 2<sup>nd</sup> Appellant and another man named Oyuga. The 2<sup>nd</sup> Appellant pushed the complainant, knocking him down. Oyuga searched PW1's pockets, stole his mobile phone Nokia 2626 valued at Kshs. 4,700 and Kshs. 1,000. The 1<sup>st</sup> Appellant was standing watching on the other side of the bridge, holding a panga. He was guarding to ensure nobody came to the complainant's rescue. After the Appellants finished robbing the complainant, they ran away, each in his own direction. They disappeared into the slums. Members of the public who answered the complainant's distress call saw the attackers vanish at a distance. The complainant went and reported at the Langata Police Station that he was robbed by the two the Appellants and Oyuga.
5. PW1 went with a group of villagers to the 1<sup>st</sup> Appellant's house at 9.30 a.m. They found him in the house. They arrested him and took him to Langata Police Station. The complainant went to a private clinic in Kibera where he was treated for injury on his left thumb and throat. Later on at night, the villagers arrested the 2<sup>nd</sup> Appellant. Oyuga was not arrested. He went to Kikuyu where he was beaten to death by members of the public, after he was caught robbing. The complainant gave the police the receipt dated 27<sup>th</sup> July 2007, issued to him when he purchased the phone. The phone was Nokia 26262, serial number 353942011252844. It cost Kshs. 4,700, and used the line 0727314368. The attack happened during daybreak at around 6.10 a.m. He could see clearly for a distance of about 100 metres. He had known the 2<sup>nd</sup> Appellant for about 7 years, the two having lived in the same plot with his parents. He knew the 1<sup>st</sup> Appellant for about two years. He knew the deceased Oyuga who used to visit the 2<sup>nd</sup> Appellant at the plot. The 2<sup>nd</sup> Appellant had a knife, while the 1<sup>st</sup> Appellant had a panga.
6. PW2 Paul Ochieng' Okutu was going to work at Langata on 26<sup>th</sup> February 2008 at around 6.15 a.m. He heard screams ahead of him. He and other members of the public rushed to the source of the screams. PW2 saw about three men. There was another man across the bridge. Good Samaritans had arrived to rescue the victim. PW2 knew the victim as a man who used to ride a tuk tuk. He identified the complainant as the victim who was robbed that morning. The complainant told the helpers that his attackers had stolen his phone. The attackers were armed with pangas and knives and the members of the public saw it safe not to pursue the attackers. The complainant was swollen and bruised. His neck was swollen. PW2 recognized the attackers as the fled. They were residents of Silanga. The witness named the attackers as Martin, Peter and Oyuga, the first two being the Appellants herein and the third, their deceased accomplice. The 1<sup>st</sup> Appellant wore a black jumper with a hat, while the 2<sup>nd</sup> Appellant wore a black track suit jacket. PW2 had known the 2<sup>nd</sup> Appellant for more than five years, and the 1<sup>st</sup> Appellant for more than two years. PW2 did not see if the attackers were armed with any weapons. Later that evening, PW2 learnt that the 1<sup>st</sup> Appellant has been arrested by villagers. He went to the scene of the arrest and found the 1<sup>st</sup> Appellant pleading with the mob not to lynch him. The 1<sup>st</sup> Appellant confessed that he had, in the company of the 2<sup>nd</sup> Appellant and Oyuga, attacked the complainant. The villagers arrested the 2<sup>nd</sup> Appellant later on the same day. Oyuga escaped to Banana where he was lynched by a mob in the course of another robbery.

7. PW3 Fredrick Okello Agor heard screams while he was outside his house washing his face on 26<sup>th</sup> February 2008. He rushed to the source of the screams near the wooden bridge. PW3 was the first to arrive at the scene. He found the complainant lying on the side of the path. He recognized the victim as a tuk tuk rider. PW3 saw three young men running away from the scene. He recognized the 1<sup>st</sup> Appellant Peter Otieno when he turned back as he ran away. The 1<sup>st</sup> Appellant was wearing a black jumper with a hat. The witness did not recognize the other two men. He tried to follow the attackers but one of them drew out a panga and PW3 decided to withdraw. He informed the complainant that he had identified one of the attackers as Peter Otieno. The complainant stated he was robbed of Nokia Mobile phone 2626 and cash of Kshs. 1,000. The complainant's neck was swollen. Later on the same day, PW3 mobilized villagers and arrested the 1<sup>st</sup> Appellant. He confessed he was accompanied by the 2<sup>nd</sup> Appellant and Oyuga in attacking the complainant. He also confessed that the mobile phone had been taken by Oyuga. The 2<sup>nd</sup> Appellant was likewise arrested by the members of the public, while Oyuga went into hiding. PW3 has known the Appellants since childhood and testified he does not harbor any grudge against them.

8. PW4 CPL John Talam the Investigating Officer received a report from the complainant that the complainant was going to work on 26<sup>th</sup> February 2008, when he was attacked by two assailants, at Jonathan Ng'eno estate. The robbers were armed with pangas. They robbed him of a mobile phone, spare battery and Kshs. 1,000. He identified them as 'Pato' - Peter and another he knew physically. The complainant had been injured on the left thumb and was advised to seek treatment. He was issued with the P3 Form. He later brought to the Police Station the two witnesses who recorded their statements. The two Appellants were arrested on 26<sup>th</sup> February 2008. Nothing was recovered from them. The complainant brought the receipt for his Nokia 2626 to the police. The complainant identified the two Appellants as some of his attackers. He did not give the name of the third attackers. Nothing was recovered for the Appellants. The complainant availed the purchase receipt for his Nokia 2626 dated 27<sup>th</sup> May 2007, indicating purchase price at Kshs. 4,700. The receipt was produced in Court as exhibit 2. PW5 Dr. Zephania Kamau a police surgeon treated the complainant for a painful throat and swollen and tender right thumb, on the 28<sup>th</sup> February 2008. The injuries were about two days. PW5 prepared the P3 Form and produced it in Court as exhibit 1.

9. The 1<sup>st</sup> Appellant stated in his defence that he was in this house at 8.00 a.m. on 26<sup>th</sup> February 2008. He was preparing to go to work when two people came to his house. They asked the 1<sup>st</sup> Appellant to accompany them. They took him to the police station from where he was charged with the offence which he denied. The 2<sup>nd</sup> Appellant stated he was a footballer playing for Amref Kenya at Wilson Airport. At 3.00 p.m. he went for football practice at Nairobi West Prison. He finished the session at 7.00 p.m. He met two elders on his way home who started to interrogate him, asking what he was carrying. He informed them he was carrying his football boots. Two other men Okutu [PW2] and Okello [PW3] joined the group. They wanted to beat the 2<sup>nd</sup> Appellant but were restrained by the two elders. They conversed in Dholuo language and the 2<sup>nd</sup> Appellant did not know what they said. He was later taken to Langata Police Station and charged with the offence of robbery with violence. He was surprised to be charged alongside the 1<sup>st</sup> Appellant, a man he did not know before. He testified that he had differences with Okutu and Okello, as they had had an altercation with him at a bar in Nyando. They had wanted him to become a youth winger like them, which he had refused to become.

10. The trial Court was satisfied that the complainant was attacked and robbed of his mobile phone and cash of Kshs. 1000 at around 6.10 a.m. It was daybreak and visibility was good. He could identify a person within a distance of 100 metres. He knew the two Appellants by name. This evidence was corroborated by that of PW2. He saw three men fleeing from the scene. He identified them as Martin, Peter and Oyuga. They were all residents of Kibera Silanga where he lived and he knew them. PW3 corroborated this evidence further when he testified he saw the 1<sup>st</sup> Appellant among three persons who were fleeing from the scene of the crime. The Court concluded that the PW1 and his two witnesses PW2 and PW3 all testified they knew the two Appellants well. They were fellow villagers. The conditions were conducive for positive identification and the Court saw no possibility for error. The Court rejected the Appellants' statements in defence as being mere denial and afterthought.

11. The Consolidated Appeals raise the following grounds:-

- a. **The learned trial Magistrate erred in accepting as free from error evidence of identification;**
- b. **The evidence by the prosecution did not support the charge sheet;**
- c. **The trial Court failed to note ‘ plea of not guilty entered’ when the Appellants took plea**
- d. **The trial Court erred by failure to consider the defence mounted by the Appellants and in finding the prosecution to have established its case beyond reasonable doubt.**

12. The Appeal was heard on 16<sup>th</sup> October 2013. The 1<sup>st</sup> Appellant submitted that the charge sheet stated the complainant lost a mobile phone and cash of Kshs. 4,700, all valued at Kshs. 5,950. In his evidence, the complainant testified he lost cash of Kshs. 1000 and mobile phone valued at Kshs. 4,700. The total would be Kshs. 5,700 not Kshs. 5,950. He also claimed to have lost earphones and a battery which items did not feature in the charge sheet. He urged the Court to rely on the case of **Kalunga and Another v. the Republic in C.A. Criminal Appeal Number 348 of 1987** and find that the charge as laid before the Court was at variance with the evidence adduced and therefore defective. Conviction could not stand. The 1<sup>st</sup> Appellant submitted that the trial Court failed to follow the provision of the law when it entered ‘a plea of not guilty.’ The words ‘*the plea of not guilty entered,*’ are not apparent in the record. The evidence by the prosecution was inconsistent and contradictory. The trial Magistrate did not give cogent reasons for rejecting the Appellants defence.

13. The Appellants submitted that circumstances were not favourable for positive identification. It was dusk, with insufficient light. Mrs. Rashid submitted that the complainant was attacked suddenly. There were sugarcane and bushes at the scene. The complainant did not give the name of the 2<sup>nd</sup> Appellant to the police in the first report. First report is always important as it is made when the evidence is fresh. It safeguards against future embellishments of evidence and against the possibility of witnesses consulting other persons. If the complainant knew the 2<sup>nd</sup> Appellant for 8 years, why not give his name to the police? The 2<sup>nd</sup> Appellant urged the Court to rely on the decision of **Terekali and Another v. the Republic [1952] E.A.** where the Court ruled that, ‘*evidence of first report made by the complainant to a person in authority is important as it often provides a good test by which truth and accuracy of subsequent statements may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is fresh, and there has been no time for consultation with others.*’ PW1 and PW3 did not corroborate each other’s evidence. PW3 stated he did not recognize the other attackers. PW2 stated the 1<sup>st</sup> Appellant turned back as he fled, and that was how PW2 was able to identify him. PW2 was short sighted as he testified elsewhere in Court saying he could not read a statement in Court without the aid of his spectacles. The trial Court erred by concluding that PW2 and PW3 had corroborated the evidence of PW1 in identifying the 2<sup>nd</sup> Appellant. The 1<sup>st</sup> Appellant associated himself fully with the submissions made by his Co-Appellant on the identification evidence. There was no clarity if the complainant was attacked in Jonathan Ng’eno estate, Kibera or at the Ngong’ river. The complainant’s attack was sudden and vicious that he could not make a positive identification. Mere glances are not sufficient for recognition. PW1 himself stated it was slightly dark. The names Peter Otieno, Martin and Oyuga were not given by PW1 in his first report.

14. Ms. Nyauncho asked the Court to uphold the decision of the Lower Court. Both Appellants were identified by witnesses. It was in the morning and visibility was clear. Appellants were well known to PW1, PW2 and PW3. They were fellow villagers for many years. PW1 had known the 1<sup>st</sup> Appellant for two years and the 2<sup>nd</sup> Appellant for seven years. There were three witnesses who positively identified the Appellants.

15. The High Court ‘s role as the Court to which this first Appeal has been submitted, is to weigh conflicting evidence and draw its own conclusions, as stated in **Okena v. the Republic [1972] and in Shantilal M. Ruwala v. the Republic [1975] E.A. 570.** This role entails more than mere scrutiny of

evidence aimed at finding if the decision of the Lower Court, was based on adequate evidence. We have a duty to re-evaluate evidence, and make our own conclusions, while noting that the Lower Court always has the advantage of observing and hearing the witnesses, as cautioned in ***Peters v. Sunday Post [1958] E.A. 424.***

16. There was nothing fundamentally defective with the charge sheet. It was not necessary for the prosecution to give the exact value of the items stolen from the complainant. Section 137 [c] of the Criminal Procedure Code states that, ‘‘ *it is not necessary to name [except where required for the purpose of describing an offence depending on any special ownership of property or special value of property] the person to whom the property belongs or the value of the property.*’’ The complainant stated the robbers stole his mobile phone Nokia 2626, earphones, spare mobile phone battery and cash of Kshs. 1,000. The charge sheet disclosed only the mobile phone valued at Kshs. 4,700 and cash of Kshs. 1000 whose total value should have been Kshs. 5,700, not Kshs. 5,950. The Court does not think that the charge sheet suffered any significant defect, considering that there was no legal requirement to state the exact amount. It may also be noted that the earphones and the phone battery are facilitative tools, ordinarily part of the mobile phone, which can generally fit within the single description of a mobile phone. The exclusion of the earphones and spare battery, and the wrong value of the stolen items stated in the charge sheet cannot be seen as a fundamental defect which in any way resulted in miscarriage of justice. The assertion by the 1<sup>st</sup> Appellant that it was not clear if the offence took place at Kibera, Lang’ata or Jonathan Ng’eno estate was equally pedestrian. The complainant was clear he was attacked on a bridge that stands at the confluence of the mentioned places. The allegation that the Magistrate failed to record ‘plea of not guilty entered’ is trivial and lacks foundation. The proceedings show the charge was read to each Appellant, who upon being asked whether they admit or deny the truth of the charge replied ‘not guilty.’ A plea of not guilty was recorded. These grounds of appeal are rejected.

17. The 1<sup>st</sup> Appellant was recognized by PW1, PW2 and PW3. PW1 testified he knew the 1<sup>st</sup> Appellant for about two years. He used to see the 1<sup>st</sup> Appellant when the 1<sup>st</sup> Appellant visited the 2<sup>nd</sup> Appellant in their common residential area. The 1<sup>st</sup> Appellant stood on the other side of the bridge armed with a panga, guarding his fellow robbers as they frisked the complainant of his items. PW2 similarly recognized the 1<sup>st</sup> Appellant as he fled from the scene of the attack. He was a fellow resident of PW2 at Silanga village in Kibera. PW3 recognized the 1<sup>st</sup> Appellant as the 1<sup>st</sup> Appellant turned back while fleeing from the scene of crime. He knew the 1<sup>st</sup> Appellant from his childhood, the 1<sup>st</sup> Appellant having been born and brought up in Silanga. PW1 recognized the 2<sup>nd</sup> Appellant as the person who grabbed his neck, pushed him and knocked him down. He met the 2<sup>nd</sup> Appellant with his accomplice after crossing the bridge. There was physical contact between the complainant and his two attackers. He had ample time to observe his attackers in the early morning sunlight. PW1 had known the 2<sup>nd</sup> Appellant for about seven years. PW2 similarly recognized the 2<sup>nd</sup> Appellant as being in the three man gang that assailed the complainant. He had known the 2<sup>nd</sup> Appellant for more than five years. The witnesses were able to remember the clothes the attackers wore. It was day break, with sufficient day light. The 2<sup>nd</sup> Appellant in his defence acknowledged he knew PW2 and PW3 who had attempted to prevail upon him to become a youth winger. The two Appellants did not refute that they shared common residential area with PW1, PW2 and PW3. PW1 also reported to the Investigating Officer PW4 that he identified the Appellants as some of the attackers. PW4 was specific that PW1 did not give him the name of the third attacker, but gave the names of the two persons brought before the Court. Having re-evaluated the evidence, we are satisfied that the two Appellants were convicted on the strength of sound evidence of recognition as opposed to mere identification evidence. The evidence of each of the prosecution witnesses boosted the other. Corroborative evidence need not be the same in the case of each witness. In the context of circumstantial evidence, corroborative evidence strengthens the inference, closing up other explanations. In the context of testimonial evidence, corroborative evidence supports the testimony of each witness by closing up the possibilities of testimonial error. The Investigating Officer may not have explicitly told the Court the names that were given to him by the complainant, but his whole evidence is corroborated by that of the other prosecution witnesses, closing up the possibilities of testimonial errors. PW4 in fact testified that, ‘*the complainant identified the two accused persons as some of the attackers. He did not give me the name of the third assailant.*’ Our understanding of this evidence is that two names were given to PW4 by

PW1 in the initial report. The Court is satisfied that the first report made to the police by the complainant tallied with the overall evidence tendered by the prosecution. There was no break in the chain of evidence. Inconsistencies in the prosecution evidence were minor, and without any effect on the overall recollection of the fundamentals in the chain of events leading to the arrest, prosecution and conviction of the two Appellants.

18. The conviction and sentencing of the Co-Appellants on such evidence is well rooted in judicial precedents. The leading decision in this area is the case of ***Anjononi and Ors v. the Republic [1980] KLR, which has subsequently been endorsed in Court of Appeal at Eldoret Criminal Appeal Number 257 of 2009 between Benjamin Mbugua Gitau v. the Republic [2011] e-KLR and Court of Appeal Criminal Appeal Number 284 OF 2005 between Shalen Shakimba and Another v. the Republic [2009] e-KLR.*** The jurisprudence emerging from these decisions is that the proper identification of criminal suspects is always an important issue in a case of capital robbery, emphatically so in a case as the present one where stolen property is not found in possession of the Appellants. This was a case of recognition, not identification of the assailants. Recognition of an assailant is more satisfactory, more reassuring and more reliable than the identification of a stranger, because it depends upon personal knowledge of the assailant in some form or the other. In this Appeal, the Appellants were known to the complainant and his witnesses. The complainant testified he had no grudge against the Appellants. He testified at the outset, he had been in discussion with their parents to have the charges dropped, upon his compensation by the Appellants, a proposition rejected by the Court owing to the nature of the offence. We have no doubt the Appellants were found guilty and sentenced on strong evidence adduced by persons who recognized them. This was not the case of a suspect being fleetingly identified by a stranger; rather it was a case of a villager being robbed violently by fellow villagers, whom the complainant recognized, through his knowledge of the Appellants, and familiarity with them over the years. He knew their houses and their parents. The Appellants were arrested soon after the attack, not too far from the scene of the crime. There was nothing in their testimonies in defence that could create reasonable doubt in the mind of the Court, that they were properly recognized by their victim, arrested, charged, convicted and sentenced. ***Not without some sympathy to the Appellants, considering the trial Court rejected the compromise proposed by their victim, we reject the Appeal in its entirety, and uphold the decision of the Lower Court.***

**Dated and delivered at Nairobi this 20<sup>th</sup> day of November 2013**

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**Monica Mbaru**

**Judge**

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**James Rika**

**Judge**