REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.2 OF 2012

1. **NORMAN OWINO AGWATA ……1ST APPELLANT**
2. **OSMAN DOLL MWANZA……2ND APPELLANT**
3. **DALTON CLINTON MUKOYA ……..3RD APPELLANT**

VERSUS

REPUBLIC ……RESPONDENT

(An Appeal arising out of the conviction and sentence of K.W. Kiarie C.M delivered on the 12th January 2012 in Busia cr. Case no.1028 of 2010)

J U D G M E N T

1. The Appellants were convicted of two counts of Robbery with violence contrary to Section 296(2) of the Penal Code and each was sentenced to death. The three had been charged alongside Martin Baraza who was acquitted by the Trial Court. The Appellants have preferred this Appeal against both sentence and conviction. The Appeal is as a result of consolidation of three appeals namely Busia criminal Appeals Nos 2/2012, 3/2010 and 4/2012.
2. It had been alleged that the four had on the 13th day of June 2010 at about 18.15 hours at Nasira area in Busia district within Western Province jointly with others not before court while armed with offensive weapon namely pistol robbed FAICE OMOYI one LG Tv set 21" valued at kshs.38,000/=, four blankets and 14 bedsheets valued at kshs.25,000/=, four speakers valued at kshs.28,000/= motor vehicle reg.no KAT 672T Nissan Saloon valued at kshs.600,000/=, three omax watches valued at kshs.10,000/= and cash 37,500/= all valued at kshs.738,500/= and immediately after the time of such robbery wounded the said FAICE OMOYI. In the second count it had been alleged that at the same time and place they jointly, with others not before court while armed with offensive weapon namely pistol, robbed FLORENCE NAMLONDA one mobile phone make vodaphone valued at sksh.2,800/= and cash kshs.500/= all valued at kshs.3,3,00/= and immediately after the time of such robbery, wounded the said FLORENCE NAMLONDA.
3. Kennedy Oundo (PW3) operates "boda boda" business at Nasira. In the course of his business, on 13th June 2010, he gave a ride to two people. The two were amongst a group of five who had asked to be taken to Nambale. The other two took a ride on another motor cycle. PW3 rode his passengers to Malanga junction at Nambale where he dropped them off. It is said that the five people then walked to the home of FAICE OMOYI (PW1). This would be at about 11.00 a.m.
4. At that home were Khaba Catherine (PW4), John Juma (PW 6) and Dalton Clinton Mukoya (the 3rd Appellant). The five it is said, inquired about the whereabouts of the owner of the house. It is also said that they requested for some water but PW4 and PW6 declined their request. It is however said that the 3rd Appellant gave them the water and they moved to the side where they had a discussion.
5. Later on that day at around 6.15 p.m, some five people made a surprise entry into the kitchen of

PW1. PW1 was with Florence Namulunda (PW 2), Catherine (PW6) and Achieng. The five people ordered PW1 and PW2 into the main house where they found some children watching TV in the living room. PW1 and PW2 were forced to sit down and the five demanded money from her. PW1 gave them some ksh.37,500/= and keys to two of her vehicles. It is said the assailants were still not satisfied and so they tied the hands of their victims. The victims plus their children were locked in one room and the robbers ransacked the other rooms. It is from this other rooms that they stole some household property. Also stolen, was motor vehicle registration KAT 672T.

6. PW2 was also a victim of the robbery and lost a mobile telephone handset and kshs.500/=. As the robbers made their way out, the victims forced the door open and managed to get out. They were screaming in the process. Some neighbours came to their rescue and it was at this time that the 3rd Appellant returned home. It is said that the whole ordeal took some three hours. And during the ordeal the robbers assaulted their victims.
7. When the victims lodged a complaint at Nambale Police Station, Cpl John Onyango (PW8 in the handwritten notes of the Trial Magistrate) was assigned the duty of investigating it. These investigations led him to the stolen motor vehicle which had been abandoned some 10kms from the scene of crime. The vehicle had been cannibalized of its radio speakers. The investigating officer received information about the Appellants and he arrested them. Sometime on 22nd of June 2010, the investigating officer requested Inspector Nganga Muchembi (PW 7) to organize and conduct an Identification Parade on the suspects. It is said that the suspects were positively identified by the witnesses.
8. In their defence, each of the Appellants gave sworn statements. The 1st Appellant is a fisherman who claims to have been away on a visit to his uncle at the time of the robbery. Caroline Naswiri Buluma is a farmer who testified on his behalf. It was her testimony that on 13th of June 2010, she saw her step-mother Gladys abuse each other with the 1st Appellant. This evidence was in support of the 1st Appellants Alibi.
9. The 2nd Appellant gave evidence how he was arrested on the Thursday following the robbery. He was at Matayos Shopping Centre. He denied the charges and says that on the date of the robbery, he was at his place of work at the Kenya-Uganda Customs Yard having reported to work at 6.00 a.m. and left at 7.00 p.m.
10. Then there was the evidence of the 3rd Appellant who was an employee of the complainant. He recalls that on the 13th of June 2011, whilst in the company of PW4 and PW6, some visitors came to that home. That the visitors spoke to PW4 and PW6. PW4 directed him to fetch water for the visitors. That he continued with his usual chores until 6.00 p.m. when he was requested by his employer to buy some house supply from the shop. When he returned he was surprised to find that a robbery had taken place. He denied the charges.
11. The three Appellants had filed separate Appeals but on application of the State, the three Appeals were consolidated for purposes of hearing and disposal. The Appellants were not averse to the proposal for consolidation. Distilling the grounds raised in the Petitions by the Appellants, there would the following four substantial grounds;

I. The evidence on identification was weak.
II. The charge sheet was defective.
III. The Trial Court failed to consider the Alibi Defence raised by the Appellants.
IV. The Trial Magistrate erred in law by imposing a death sentence on each capital charge.

The Appeal was opposed.

12. This Court is a first Appeal Court. It has an obligation to assess and re-evaluate all evidence presented at trial. Upon such assessment and re-evaluation, the Court must draw its own conclusions. Always recalling, however, that unlike the Trial Court it never had the advantage of seeing and hearing the witnesses testify and due allowance must be given for this (see ***Okeno –vs- Republic [1972] E.A.32***)
13. It would be apposite to start by examining the technical objection taken up against the charges preferred against the Appellants. One argument is that the charge sheet is defective as the word "dangerous" was omitted. True, the word dangerous was omitted and the Appellants were

charged with robbing while armed with an offensive weapon; namely a pistol. But that alone cannot make the charge faulty. The provisions of Section 296 (2) of The Penal Code itself provides an answer and is here;

> **"296(2) If the offender is armed with any <u>dangerous or offensive</u> weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."** (emphasis ours)

One element of capital robbery is that the offender is armed with a weapon that is either dangerous or offensive. Where the weapon is both dangerous and offensive then it is desirable that the charge sheet states as much. So is a pistol an offensive weapon? On this we turn to the legal definition of an offensive weapon. In Blacks Law Dictionary 9th Edition an offensive weapon is defined as a weapon "**of or for attack**". There can be no doubt that a pistol intended for attack is an offensive weapon. We do not see any substantial fault in the manner the charge was drawn, save we may add that a pistol being also a dangerous weapon then the charge would have been more complete if it included the word "**dangerous.**" We are however unable to find that the omission makes the charge defective or fatally wanting.

14. The other criticism against the charge sheet is that the evidence does not support the charge. It seems to us that the criticism is on content and quality of the evidence and not the charge as drawn .It is to this evidence that we now turn. The conviction of the Appellants was based solely on evidence of identification. That is the evidence whose content and quality we must test.
15. PW1 and PW2 recall that five people entered the kitchen of PW1 at around 6.15p.m on the fateful day. PW1 says this about the quality of light then:-

> **"They arrived while I was in that kitchen cooking. I could see them because it was not very dark and electric lights were on."**

As to PW2 she said,

> **"Later I was asked to go to the Police Station. I could identify the people because they came at 6.15 p.m when it was not yet dark. I told the police that I could identify them."**

So when the robbery commenced total darkness had not set in and the kitchen was lit with electricity. We shall return to this.

16. The theatre of crime then moved from the kitchen to the main house. The robbers forced PW1 and PW2 into the main house. In the main house they found PW4 and her brother PW6 watching TV. All the four witnesses told Court that electricity light was on. In addition PW6 said,

> **"It was not yet very dark outside. We had put on lighting on the house."**

17. The robbers then took PW1 to her bedroom.They thereafter came back and later tied the hands of all the four witnesses and locked them in a bedroom.
18. There is no evidence about the intensity of the electricity light either at the kitchen or the sitting. Neither was there evidence of the position of the light vis-à-vis the faces or bodies of the assailants. As to the natural light, it was the evidence of the witnesses that complete darkness had not set but again there was no evidence about the clarity of the light. It was also the evidence of the witnesses that the assailants were violent and one was armed with a pistol. These must have been terrifying moments for the witnesses. Given that there was no evidence on the intensity, quality of light or view of assailants' against the witnesses, this Court cannot say with certainty that the circumstances favoured easy identification of the assailants. On the other hand PW4 and PW6 testify that they had seen the robbers earlier in the day in broad daylight. It is with all these in mind that we now consider the conduct and outcome of the identification parades.

19. The evidence of PW1 on the identification parades is worthless as it contradicts the written report of the parade. Twice in the course of her testimony, the witness stated that she picked out 1st Appellant, 2nd Appellant and Martin from one parade. Yet the Report shows that three (3) different parades were conducted.
20. PW2 identified Martin, and the 1st Appellant from two separate parades. She was unable to identify the 2nd Appellant.
21. PW3 was also asked to identify the suspects. He was able to identify three suspects from the different parades conducted. The three suspects were Martin, the 1st Appellant and the 2nd Appellant.
22. In her testimony PW4 says that she identified Martin and the 2nd Appellant. The Reports tell a slightly different story. The Reports are that she did not identify Martin but identified the 1st and 2nd Appellants.
23. Then there is PW6. He was a witness who participated in the identification parades. He was only able to pick out Martin.
24. On an analysis the identification evidence of PW1 and PW6 must count for nothing. The evidence of PW1 contradicted the Report. As for PW6, he did not identify any of the suspects. So the 1st Appellant was identified by three witnesses namely PW2, PW3 and PW4, while the 2nd Appellant was identified by PW3 and PW4.
25. The Police Officer who arranged and conducted the identification parades gave a detailed account of how we did so. All the suspects agreed to participate in the parade. The suspects had been in the cells while the witnesses were outside. The members of the parade were picked from within and outside the police cells. Both the 1st and 2nd Appellants were satisfied with the arrangement and conduct of the parade and each, separately, signified this by signing the identification reports. This Court is satisfied that the parades were arranged and conducted as required by the Force Standing orders.
26. The Appellants were each identified by more than one witness. In each instance two of the identifying witnesses had also seen the Appellants in the day when they visited the compound. Although we have held that the terror visited upon the victims may have made identification difficult, we are nevertheless assured that the Appellants were positively identified as they were each identified independently by more than one witness.
27. What about the Alibi evidence of the 1st and 2nd Appellants? Once an Alibi is raised by an accused person then the onus remains on the prosecution to disprove it. The onus never shifts to the accused to prove that Alibi. That said an Alibi which is first raised at trial, and more so like here during the defence hearing, must be treated differently. The Court of Appeal made observations of such a situation in ***Wangombe –vs- Republic*** [1980] when it said,

> "**On the other hand, however punctilious the prosecution or police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time an unsworn statement at the trial, out of the blue. Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it."**

The Court of Appeal then stated that in those circumstances, the Trial Court ought to weigh the evidence of the Prosecution evidence against the Alibi.

28. The Trial Court was on the mark in the manner in which it treated the Alibi evidence that was raised by the 1st and 2nd Appellants. The Court weighed the strength of the Alibi against the strength of the prosecution case. On the Alibi of the 1st Appellant, the Learned Trial magistrate remarked,

> **"He may have indeed quarreled with his uncles and aunts on 13/6/2010 during the day. He does not however disclose the face that he may have travelled to Nasewa during the day and gone back during the night."**

On the 2nd Appellant, the Learned Trial magistrate found, that,

> **"The third accused produced a job association members card. It does not indicate that he was working on 13/6/2010. The photo album that he alleges to have had on his alleged journey for the village is quite preposterous and in face is a lie. All the evidence adduced squarely place them at the scene during the day and at night."**

Just like the Trial Court we are unable to hold that the weak Alibi put forward by the Appellants displaced the identification evidence proved by the Prosecution.

29. We turn to consider the case against the 3rd Appellant. He was not present at the robbery but the investigating officer explained why the preferred charges against him.

> "**I arrested A4 who was employer to the home to look after cattle and other clothes. He had led the dogs out of the home during the robbery and interacted with the robbers when they came during the day. He had talked to them aside and discussed something. His actions were suspicious. He unchained the dogs earlier than normal and went with them towards the river and the robbery commenced soon after. He could not explain why he took away the dogs.**"

That fact that, out of character, he unchained the dogs and went away with them, and then a robbery happened would raise a suspicion about the conduct of the 3rd Appellant. But they are the events of the morning which must be juxtaposed with this unusual behavior. On that morning, notwithstanding resistance from PW4 and PW6, he offered some strangers water and spoke to them on the side. The strangers turned out to be amongst persons who robbed his employer later on the same day.

30) The case against the 3rd Appellant has caused us some anxiety. His behavior prior and during the robbery was certainly questionable. But there is no evidence that he knew the robbers or indeed conspired with them. It was the evidence of PW4 that PW6 also had a conversation with the strangers about the dogs. Then there was no consistence as to who was in charge of those dogs. PW4 said,

> **"I don't know the number of dogs in the home for you are the one who looked after them."**

While PW6 testified,

> "**A the dogs are normally chained. I normally unchain them to feed them. It was the first time that you released the dogs and went with them**."

The owner of the dogs seemed to support the position of PW4 when she quipped.

> "**You unusually freed the dogs and left the homestead with them**."

We are swayed towards giving the 3rd Appellant the benefit of doubt. Although there is strong suspicion that cannot be an assured ground to convict him of such a serious offence.

31) It is never in doubt that what happened to PW1 and PW2 on the night of 13th June 2010 was a robbery with violence. Property was stolen from them. The robbers were armed with a pistol, the robbers were more than one and in the process assaulted the victims. All the elements of a robbery with violence were present. We uphold the conviction of the 1st and 2nd Appellant. As for the 3rd Appellant, for reasons stated, we quash his conviction and set aside his sentence.

32) On the sentence, we must agree with the 1st and 2nd Appellants that having been found guilty of two counts which attract a death penalty then the Learned Magistrate ought to have imposed the sentence on the 1st count and held the other in abeyance. In **Ganzi & 2 other v Republic** [2005] eKLR the Court of

Appeal observed that;

> "**We would like to repeat the observation of this Court in *Muiruri v Republic* [1980] KLR 70 that where a person is charged with a number of capital charges, it is preferable to proceed with one capital charge only and leave the other capital charges in abeyance even if the other charges appear inter-linked. In our view, and as a collorary, where that advise has not been heeded by the prosecution and a person has been convicted of several capital charges with or without other charges, it is a good practice to pass a sentence of death on one count and leave the sentences in the other charges in abeyance."** (our emphasis)

33) The result is as follows:-

1. The Appeal of the 3rd Appellant is allowed. His conviction is quashed and sentence set aside. He is a free man unless otherwise lawfully held.
2. The conviction of the 1st and 2nd Appellant is upheld. The Death penalty on the 1st count is upheld while that on the 2nd count is set aside. Sentence on that Count is held in abeyance.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 13TH DAY OF NOVEMBER 2013.

F. TUIYOTT **S.M. KIBUNJA**

J U D G E **J U D G E**

IN THE PRESENCE OF:

……. ……..COURT CLERK

…….FOR APPELLANTS

……...FOR RESPONDENT