



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL NO. 91 OF 2007**

**BETWEEN**

**KENNEDY ODUOR OPIYO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Appeal arising from the original conviction and sentence in Homa Bay SRM's Criminal Case No. 179 of 2006 by E. K. Mwaita, Ag. SRM on 15/03/2007)**

**JUDGMENT**

1. This appeal is against the conviction and sentence in Homa Bay SRM's Criminal Case Number 179 of 2006 dated 15<sup>th</sup> March, 2007. The appellant was convicted on a single charge of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The appellant was charged that on the 30<sup>th</sup> January, 2006 at 2100 hours at Migori Trading Centre of Homa Bay District within Nyanza Province, with others not before the court, robbed **George Oluoch Otieno** of Kshs.2040/= and one Mobile phone make Nokia 3310 valued at Kshs.6,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said George Oluoch Otieno. The appellant denied the charge before the lower court.

2. The facts of the case were that on the 30<sup>th</sup> January, 2006 at about 2100 hours, the complainant who was together with one, **Kennedy Otieno Weke** were accosted by a group of 5 people who were armed with pangas and a torch. The complainant who was driver of m/v Reg. No. **KAN 109 D** Toyota Matatu and Kennedy Otieno Weke, the conductor of the said m/v were walking towards their vehicle after taking tea in a hotel at Mirogi. Their vehicle had broken own. The two members of the matatu crew were cut with pangas and hit with rungus. The attackers, among them the appellant stole from them Kshs.2040/= in cash and a Nokia 3310 mobile phone.

3. The victims of the attack raised an alarm which sent the appellant and his accomplices running away from the scene. The victims were taken to Mirogi hospital by good Samaritans where George Oluoch Otieno was admitted for one day. The matter was reported to Ndhwa Police station and on the following day after the attack, the appellant was arrested and charged with the offence.

4. The prosecution called 4 witnesses in support of its case against the appellant. PW1 was George Oluoch Otieno. He stated that he worked as a driver of m/v Reg. No. KAN 109D, a Toyota Matatu which used to ply the Sori-Homa Bay route. He stated that on the 30<sup>th</sup> January, 2006, the m/v had broken down and the only persons in the vehicle were the vehicle conductor, one Onyango and Kennedy Otieno Weke, a

brother to the owner of the m/v. PW1 stated that at about 8.00 p.m. on 31<sup>st</sup> January, 2006, while he and Kennedy Otieno Weke (PW2) were walking back to where the vehicle had been parked, they were attacked by a gang of 5 men, among them the appellant. The gang was armed with a torch, pangas and rungas. During the attack, PW1 was robbed of Kshs.2040/= in cash and a Nokia 3310 mobile phone. PW1 stated that it was the appellant who was the first to attack the two by hitting PW1 on the mouth as a result of which PW1's upper tooth fell down. PW1 also testified that the appellant cut his upper lips (the scar was observed by the trial court). As he fell down, he screamed.

5. PW1 further stated that on raising the alarm, the appellant and the rest of the gang ran away. PW1 stated that during the attack he noticed that the appellant was dressed in a coat. Some good Samaritans among them Mathew Otieno Angata who responded to PW1's screams took the victims to the hospital at Mirogi where PW1 was admitted for one day. PW1 stated that he recorded his statement at Ndhiwa Police Station.

6. In his further testimony, PW1 stated that he was able to clearly see and identify the appellant on the night of the attack for two reasons. One is that the appellant stood right in front of him during the attack and secondly that the attack took place some 10-15 metres from a shop that was open beside the road and which had security lights that were bright enough to enable him identify the appellant, though PW1 did not know the appellant before.

7. PW1 also stated that, Mathew Otieno Angata who had met the appellant as he ran away from the scene of crime assisted PW1 in apprehending the appellant the following day as PW1 was coming from Mirogi Hospital. PW1 also stated that Kennedy Otieno Weke (PW4) also identified the appellant as their attacker on the material night and further that on the day of his arrest the appellant had not even changed the coat he was wearing the previous night. PW1 stated further that at the time of arrest, the appellant was still armed with a panga. Though the appellant was arrested, PW1 told the court that the mobile phone stolen from him (PW1) was never recovered.

8. PW1 also told the court that he was referred to Homa Bay District Hospital where the P3 form was filled.

9. During cross examination, PW1 reiterated his earlier testimony that there was sufficient electric lighting from the nearby shop which facilitated easy identification of the appellant. He also stated that the appellant cut him on the forehead above the left eye and on the mouth. PW1 also stated that the appellant was arrested at 8.00 a.m. on the morning after the attack the previous night at 8.00 p.m.

10. PW2 was Joel Suter, a Clinical Officer at Homa Bay District Hospital. He is the one who examined PW1 following an attack on him on the night of 31<sup>st</sup> January, 2006. According to PW2, PW1 had injuries to the head and upper teeth, looked sick and had blood stained clothes. PW2 stated that PW1 had a cut wound on the upper lip and had lost 2 teeth while other teeth on the same side of the mouth were loose. PW2 was of the opinion that dental replacement would be necessary. He classified the injury as grievous harm. The P3 form duly filled on 14/02/2006 was produced as **P. Exhibit 2**.

11. In cross examination, PW2 stated that PW1's wounds were still fresh when he examined him on the 14<sup>th</sup> February, 2006, and that PW1 had, before 14<sup>th</sup> February, 2006, been seen by another doctor.

12. PW3 was No. 83333 Police Constable Moses Kimei attached to crime branch duties at Ndhiwa police station at the time. PW3 stated that on the 31<sup>st</sup> January, 2006 at about 8 a.m. PW1 and three other people went to the police station. That PW1 had a deep cut on the upper lip. That PW1 and those accompanying him reported a crime incident that had taken place on the night of 30<sup>th</sup> January, 2006 involving PW1 and two others who were attacked by a gang of 5 men. PW3 stated that after taking statements from the reportees, he arrested the appellant before visiting the scene of crime where he found motor vehicle **KAN 901 D**. PW3 also produced the panga allegedly used in the commission of the offence as **P. Exhibit 1**.

13. In his further testimony, PW3 stated that he was the one who investigated this case but that he had not

been able to trace the other suspects. PW3 also stated that he did not know the appellant before.

**14.** PW4 was Kennedy Otieno Weke, who stated that he was the supervisor of the motor vehicle Registration Number **KAN 109 D**, a Nissan Matatu. That the vehicle broke down on their way from Homa Bay to Sori, forcing him and PW1 to spend the night at Mirogi. PW4 narrated how at about 8.00 p.m. on 30/01/2006, they were attacked by a group of about 5 boys, among them the appellant as PW1 and PW4 walked from one of the hotels at Mirogi where they had gone to take tea. That the gang of 5 flashed torches at the pair, aiming mainly at the face of PW1.

**15.** PW4 stated that he saw one of the boys assault PW1 with a panga and immediately PW4 raised an alarm as he headed to a nearby house which had electric security lighting. PW4 stated that he joined members of public who responded to the pairs' distress call in chasing the appellant who was armed with a panga. Though the appellant disappeared, PW4 stated that he informed those, who came to his rescue that he could identify the appellant if he saw him, and that those members of the public said they knew the appellant by the name Kennedy.

**16.** PW4 further stated that when he went to the shop in the morning, he met the appellant, still carrying a panga and pinpointed him to members of the public who were able to identify him as having been one of the 5 gangsters who had attacked them the previous night. The appellant was then arrested and escorted to Ndhiwa police station where he was locked up.

**17.** It was also the testimony of PW4 that though he did not know the appellant before the day of the attack, he was able to identify the appellant clearly when the appellant, whose face was unmasked, passed under the bright electric security light at the nearby shop as he made his bid to escape. PW4 also stated that though he lost his mobile phone, he was not beaten up by the assailants.

**18.** The appellant put a number of questions to PW4, and PW4 confirmed that as the appellant made a bid to escape, he ran towards the direction of the electric light where PW4 was and that PW4 was able to identify the appellant with the help of that light.

**19.** The other witness for the prosecution, one Mathew Otieno Angata died as a result of the injuries he sustained in the attack.

**20.** In his unsworn statement, the appellant told the court that he was a small time retailer of paraffin in Mirogi. He stated that on 28<sup>th</sup> January, 2006, he was up early and went to clear bushes in his father's shamba. That his neighbor, Mathew Angata asked the appellant to stop clearing the bushes on grounds that the shamba had been sold to somebody else. The appellant further stated that he went to report the dispute to the police in the company of Mathew Angata, but on arrival found 2 people. He was then locked up in the cells on allegations that he looked like one who had robbed the 2 people the previous day. The appellant denied the allegations against him and pointed out that though PW1 alleged that the conductor of the motor vehicle had been arrested the conductor himself denied being assaulted.

**21.** During the hearing of the case in the lower court, the appellant alleged that he had been assaulted on the 28<sup>th</sup> January, 2006 by a police officer called Ongelo. As a result of that complaint Number 69475, Police Constable Paul Onyango was called to testify and that it was not until 11<sup>th</sup> January, 2007 that he learnt of the appellant's complaint of being assaulted. PC Onyango denied the allegations made against him by the appellant.

**22.** The appellant called one George Owillo Ogwati, a robbery with violence suspect. His testimony was that he did not hear the appellant say that he was assaulted by PC Onyango on the 11<sup>th</sup> January, 2007. That the only thing he heard the appellant say was that he was feeling pain.

**23.** When George Owillo Ogwati was cross examined by the prosecution he admitted that he and the accused hailed from the same constituency represented by Hon. Orwa Ojode. This witness could not also say whether P.C. Onyango had taken either money or anything else belonging to the appellant.

24. Sergeant Omwen Onger also testified and stated that he had never received any complaint from the appellant.

25. In the ruling dated 1<sup>st</sup> February, 2007, the trial court dismissed the appellant's complaints as being baseless and only aimed at intimidating the police and the prison orderlies.

26. The court gave its judgment on the 15<sup>th</sup> March, 2007. The trial court found that there had been sufficient lighting for the proper identification of the appellant. The appellant was convicted on the basis of that evidence and the evidence of the panga (**P. Exhibit 1**) by both PW1 and PW4. The trial court dismissed the appellant's defence as a mere afterthought. The trial court found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The appellant, who alleged he was 18 years old was sentenced to death in accordance with the law.

27. Being aggrieved by the conviction, the appellant filed this appeal. The petition of appeal comprises 9 home-made grounds of appeal, that is to say:-

**“1. That the learned trial magistrate erred in law and facts by relying and basing conviction while putting much reliance on the sole evidence of identification made by PW1 and PW4 under difficult and uncondisive circumstances, I pray for justice.**

**2. That the learned trial magistrate erred by not considering that there were essential witnesses e.g. (sic) Mathius Nyangata who arrested appellant and never testified for the same, I pray for justice.**

**3. That the learned trial magistrate erred by not taking into account that witness (sic) strictly said they described appellant due to his names that was indicated in O.B. when booked in. May law prevail.**

**4. That the learned trial magistrate erred by not considering that appellant was not arrested with any exhibit relevant to the said crime in question. May law prevail.**

**5. That the learned trial magistrate erred by not observing that PW4 never reported his lost mobile phone that was proved by his statement when read before court.**

**6. That the learned trial magistrate erred when she failed to consider that no investigations (sic) carried in this case as investigation officer (sic) that when they arrived to the scene of crime people run (sic) away. I pray for justice.**

**7. That the learned trial magistrate erred to convict without evidence to prove violence as PW2 – doctor testified how he only treated complaint by giving pain killer tabs and not as complainant told court that he was assaulted. May law prevail.**

**8. That the trial magistrate erred when she failed to consider appellant's defence which was to (sic) secure an acquittal.**

**9. That the appellant prays to be present at the hearing of this appeal and also wish to be furnished with certified copy of court's .**

**10. proceedings to enable him erect (sic) more grounds to be forwarded at the hearing of this appeal.**

The appellant wants the appeal allowed, conviction quashed and sentence of death set aside.

28. At the hearing of this appeal, we heard submissions from both the appellant and the state counsel on behalf of the Respondent. The appellant was not represented.

29. In his written submissions the appellant addressed the issue of identification which he submitted was critical in the case against the appellant in the lower court. The appellant's contention was that the appellant's identification based as it were on the electric light from a nearby shop, was done under difficult circumstances and as such should not be relied upon.

30. Secondly, the appellant submitted that the exhibit evidence namely the P3 from (**P. Exhibit**) and the panga was at variance, namely that whereas PW2 stated that the injury suffered by PW1 was caused by a blunt object, PW1 stated that he was cut with a panga. Further, the appellant contended that none of the items allegedly stolen from the victims of the crime were recovered from him.

31. The penultimate point raised by the appellant was that the officer who arrested him was incompetent to do so because he was a mere police corporal purporting to arrest a suspect of a serious criminal offence. Further, that the prosecution should have called a member of the public who is alleged to have assisted in apprehending the appellant.

32. Finally, the appellant complained that his defence of alibi was not taken into consideration during the writing of the judgment. The appellant contributed his woes to what he called a long standing land dispute between his family and the complainants. Appellant urged this court to allow his appeal as prayed.

33. The appeal was opposed. Mr. Mutuku, for the Respondent submitted that there was sufficient electric light from the security light at the nearby shop which was only 10-15 metres away from where the attack took place at about 8.00 p.m. Counsel submitted that both PW1 and PW4 had no doubts about the identity of the appellant who stood right in front of PW1 and cut him with a panga.

34. Counsel also submitted that apart from the light both PW1 and PW4 were able to identify the appellant because of the coat that he wore on the night of the attack and which coat the appellant still wore on the following morning when he was arrested. Counsel also submitted that personal violence was visited upon PW1 by the appellant who was in a group of 5.

35. In reply, the appellant submitted that the evidence of identification was inadequate since both PW1 and PW4 did not know him before the day of the attack. He also submitted that the intensity of the light which purportedly enabled PW1 and PW4 to identify the appellant was not described by the witnesses.

36. We have now carefully reconsidered and evaluated the evidence that was placed before the lower court with a view to determining for ourselves whether the conclusions reached by the lower court were based on sound legal principles and solid evidence. See **Okeno –vs- Republic [1972] EA 32.**

37. Before we move on to decide whether the appellant was properly identified by both PW1 and PW4, we think that it is proper for us to reiterate the ingredients of a robbery with violence charge under **section 296 (2)** of the **Penal Code**. It is also important to note at the outset that the prosecution need not prove all such ingredients before a court can convict on a charge under **section 296 (2)** of the **Penal Code**. Proof of only one of those ingredients is sufficient to lead to a conviction as long as all other parameters such as identification are in place.

38. Under **section 296 (2)** of the **Penal Code**, the ingredients for the offence of robbery are the following:-

**(i) The offender must be armed with any dangerous or offensive weapon or instrument; or**

**(ii) The offender is in company with one or more other person or persons; or**

**(iii) The offender, at or immediately before or immediately after the time of the robbery wounds beats, strikes or uses any other perennial violence to any person.**

Once any of the above ingredients is proved, an accused person is liable to be convicted and sentenced to death on a capital robbery charge. See **Patrick & another –vs- Republic [2005] 2 KLR 162.**

39. In the instant case, the prosecution's evidence was that the appellant was a member of a gang of 5 youths who accosted PW1 and PW4 brandishing torches and a panga which was being carried by the appellant. It is also the prosecution's case that at the time of the robbery the appellant cut PW1 with the panga on the mouth and head. It was also the prosecution's case that the appellant was armed with a double edged panga which he used to inflict injury on the complainant and on the deceased Mathew Otieno Angata who had answered the distress call raised by PW4.

40. The question that now arises is whether the appellant was positively identified by both PW1 and PW4. According to PW1's evidence in chief, this was the scenario:-

**“As we returned to the m/v we met 5 people standing on the side of the main road in Ndhiwa-Rodi. They walked towards where we were. Accused flashed a torch on us. They started cutting us with pangas. Accused was dressed in a coat. Accused was the first to attack us. He hit me on the mouth and it knocked down my upper mansion teeth. It cut my upper lip (scar visible). I fell down. Ken was hit with a rungu by another attacker. They took from me Kshs.2040/= cash, mobile phone 3310 -----.**

**I was able to identify the accused. He stood in front of me so I saw him clearly. There was a shop that was opened besides the road, there was electric security lighting outside the shop. We were attacked about 10-15 metres from the shop. The light was bright enough as to be able to identify the accused.”**

Later in his testimony, PW1 also stated thus:-

**“On the morning of 31.1.2008 (should read 31.1.2006) I was coming from the hospital, we saw accused coming towards the hospital. I told Mathew he was our attacker and Ken concurred with me. We therefore identified and took him to Ndhiwa police station.”**

41. On his part, PW4, Kennedy Otieno Weke stated the following regarding identification of the appellant:-

**“On our way back to the vehicle, we met some 5 boys one of them being the accused. It was a road within the centre. They flashed torches on us one metre from them. They focused on George's face. I saw one of them slashing George with a panga. I raised alarm as I headed to a nearby house which had security lighting- an electric bulb. As I ran members of the public gave chase, he was carrying a panga. He passed me. I also chased him saying he was one of the attackers. At this point he disappeared. I told people that it was somebody I could identify again. They said they knew him as Kennedy ---**

**---. In the morning I went to the shop. I met the accused carrying a panga. I pinpointed him to members of the public who also said they saw him in the gang that had attacked us – --. I identified him as he passed when he was running near the security lights. He was unmasked. At time of arrest, he was still carrying the panga he had the previous night.”**

42. We have carefully analyzed the evidence of both PW1 and PW4 as above stated. We have also considered the relevant law on identification. The conclusion we have reached is that both PW1 and PW2 had no doubts in their minds that the appellant was one of the attackers and that it was him who was armed with the panga that he used to inflict the injuries suffered by PW1. It is our humble view that the electric light in the vicinity of the crime, at a distance of 10-15 metres was sufficient and bright enough to enable both PW1 and PW4 identify the appellant as one of their assailants. Both PW1 and PW4 were certain that if they saw their assailant they would identify him. That is exactly what they did on the following morning. They both said that the appellant was still dressed in the same coat he had worn the previous evening and still carried the panga that he had with him the previous day

43. It is worth noting that PW4 was not injured during the attack and that is why he was able to give chase. He also clearly stated that the appellant passed under that bright security light as he made a dash for safety and that at that time, PW4 who had run off ahead of the appellant was able to see the appellant better and identify him as the one who had cut PW1 with a panga.

44. We are therefore satisfied that contrary to the appellant’s contention that the circumstances for the appellant’s identification were not difficult at all. We would therefore reject the appellant’s appeal on this score.

45. We have also given due consideration to the appellant’s other complaints such as the lower court having failed to consider his defence of alibi and the alleged discrepancies in the evidence contained in the P3 form and the panga. We have ourselves considered the appellant’s defence of alibi and find that the same is discordant and was a mere afterthought. That defence does not dislodge the identification evidence against the appellant as given by PW1 and PW4. We accordingly reject that defence. We also find that the alleged inconsistencies in the evidence are immaterial. Both PW1 and PW4 clearly stated that the appellant cut PW1 on the mouth and on the head using a panga which these two witnesses were also able to identify in the court. We dismiss as fallacious the appellant’s allegation that his woes in this matter were as a result of a long standing dispute between his family and the family of the late Mathew Otieno Angeta. We note that dead men tell no tales and the appellant may have made his allegations with the knowledge that the deceased Angeta would have no chance of giving his side of the story.

46. In the premises, we find that the appellant’s appeal lacks merit. The same is therefore dismissed in its entirety.

47. We uphold both the conviction and the sentence of the lower court.

48. It is so ordered.

**Dated and delivered at Kisii this 24<sup>th</sup> day of February, 2011.**

**ASIKE MAKHANDIA  
JUDGE.**

**RUTH NEKOYE SITATI  
JUDGE.**

In the presence of:

Appellant present in person  
Mr. Mutai (present) for Respondent  
Mr. Bibu Court Clerk  
Mr. Kasera (Dholuo) Court Clerk