



No.35

REPUBLIC OF KEN YA
IN THE HIGH COURT OF KENYA
AT KISII

CRIMINAL APPEAL NOS. 10 AND 11 OF 2009
(CONSOLIDATED)

BETWEEN

AYUB OCHIENG NYAUCHI1ST
APPELLANT

JOSEPH OGINGA OKUTHE2ND
APPELLANT

VERSUS

REPUBLIC.....RESPOND
ENT

(Being an appeal from the original conviction and sentence of the SRM's Court at Homa Bay

Hon. C.A.S. Mutai in Criminal Case Number 1215 of 2009 dated 20th January, 2010)

JUDGMENT

1.By the consolidated charge sheet dated 4th September, 2009, the two appellants, **Ayub Ochieng Nyauchi (Ayub)** and **Joseph Oginga Okuthe (Oginga)** faced one count of robbery with violence contrary

to **section 296 (2) of the Penal Code** and two counts of assault causing actual bodily harm contrary to **section 251 of the Penal Code**.

2. In count 1, the particulars given were that on the 19th of May 2009 at Kaguria area in Ndhiwa District within Nyanza Province, jointly with others not before court, while armed with dangerous weapons namely pangas robbed **MARSELUS OKUTHE NYAMBECHÉ HCCRA NOS. 10 AND 11 OF 2009 (CONSOLIDATED)** Kshs.10,000/= and a power saw make **HUSQVARNA** valued at Kshs.8200/= and at or immediately before or after the time of such robbery wounded the said MARSELUS OKUTHE NYAMBECHÉ.

3. In count 2, the two appellants were jointly charged that on the 19th May 2009 at Kaguria area, in Ndhiwa District within Nyanza Province, jointly with others not before court, unlawfully assaulted **JANE OBONYO** thereby occasioning her actual bodily harm.

4. In count 3, the two appellants were charged that on the 19th May 2009, at Kaguria area in Ndhiwa District within Nyanza Province jointly with others not before court, unlawfully assaulted **CAREN JOY** thereby occasioning her actual bodily harm.

5. The two appellants denied all the three counts and hearing ensued.

6. Briefly, the facts of this case are that on the 19th May 2009 at about 8.30 p.m., the complainant in count 1 Marcellus Nyambeche (PW1) was at his home enjoying his evening meal. He was together with his daughter, Caren Atieno (PW3); when 3 people who were armed with pangas entered the house, pointed the pangas at him and **HCCRA NOS. 10 AND 11 OF 2009 (CONSOLIDATED)** the 1st appellant herein cut PW3 on the forehead with a panga. In an effort to arm himself, PW1 ran towards the bedroom, but he was immediately followed by 2 of the 3 men one of whom hit him on the back with a metal bar. That man who hit PW1 on the back was not before court. As PW1 fell down, the two appellants herein, Ayub and Oginga lifted him up and carried him. Oginga asked PW1 for the power saw while Ayub demanded money. PW1 pointed to Kshs.10,000/= in the cupboard and the power saw. He pointed, Oginga hit PW1 on the hand with a metal bar. The robbers dropped PW1 on the floor and he lost consciousness. They then took the money and the power saw and left.

7. On regaining consciousness, PW1 contacted his son Ochieng who was in Nairobi. Arrangements were then made to take PW1 and PW3 to St. Joseph Mission Hospital Migori where PW1 was admitted for 2^{1/2} weeks. The police visited PW1 at the hospital and took his statement. PW1 gave details of the persons who had attacked him to the police. He was issued with a P3 form – **P. MF1-2**.

8. In his testimony, PW1 also testified that he was able to **HCCRA NOS. 10 AND 11 OF 2009 (CONSOLIDATED)** identify his attackers with the help of torch light from the torches that the robbers had and from two tin lamps that were inside the house. PW1 stated that he knew Ayub and Oginga before the robbery; that Oginga was his stepson who used to live with PW1's in-law.

9. PW2 was Jane Obonyo who was in the kitchen when the robbers struck at their home on 19th May 2009 at about 8.30 p.m. She is wife to PW1. One of the robbers entered the kitchen and cut her on the forehead and on the left side of the leg. She fell down. While still on the floor, Ayub cut her on the left

side of the hip, then frog marched her to the main house, hit her on the back with a metal bar and then went away. PW2 was later treated at St. Joseph's Mission Hospital Migori from where she was issued with a P3 Form – **MF1-4**.

10. PW2 stated that she knew Ayub well because he had inherited a woman in the same village and that there was light in the kitchen. PW2 also stated that she knew Oginga as PW1s son and that on the material day, Oginga was wearing a black T-shirt and a jean trouser and a white cap. **HCCRA NOS. 10 AND 11 OF 2009 (CONSOLIDATED)**

11. Caren Joy Okuthe testified as PW3. She was with her father, PW1, in the house at about 8.30 p.m. on the material day when they were attacked by about 5 robbers. Ayub cut her on the forehead. She said she heard Ayub and Oginga demanding money and the power saw from her father. That she was able to identify Ayub and Oginga with the help of a tin lamp that was in the main house. She was treated at St. Joseph Mission Hospital Migori and was issued with a P3 form – **P.MF1-5**. She said she knew Ayub and Oginga before the robbery. Ayub used to stay with her aunt but later inherited Nyakaguria in the local area. Oginga used to stay at Rongo, was son to PW1, and that the two were among the 5 people who robbed the family that night for about 30 minutes.

12. PW4 was **Number 70935**, Police Constable Paul Mogesi of Rangwe Police Post but was stationed at Ndhiwa police post at the material time. On the 20th May 2009 while at the station at about 10.30 a.m., he received a report of the robbery at PW1's home. He went to the scene together with Police Constable Gichuki and later proceeded to Ombo Mission Hospital where PW1, PW2 and PW3 were **HCCRA NOS. 10 AND 11 OF 2009 (CONSOLIDATED)** admitted. He later took statements from the said victims. PW1 gave names of the suspects to PW5 who launched investigations into the matter and also issued the victims with P3 Forms. One of the names given to him by PW1 was that of Ayub Ochieng. Ayub was arrested by Administration Police and later handed over to PW4. That Ayub had a power saw in the house for which he produced as photocopy receipt – **P. Exhibit 3**.

13. PW5 was E.A, a child of 12 years. At the time of the attack, she was in the kitchen with her mother, PW2. They were attacked by Oginga who kicked and broke the kitchen door, and cut PW2 on the forehead and on the left shoulder next to the neck. Ayub also entered the kitchen later and cut PW2 on the left side of the stomach. She said she knew both Ayub and Oginga before the incident. She also said there was light from a tin lamp in the kitchen and that she was able to recognize Ayub and Oginga using that light, and that the lamp was never put off throughout the robbery. That Oginga lived in the same homestead with the victims, though in his own house. **HCCRA NOS. 10 AND 11 OF 2009 (CONSOLIDATED)**

14. The prosecution did not call the Clinical Officer who filled the P3 Forms.

15. At the close of the prosecution's case, the two appellants were put on their defence. Each of them chose to give unsworn testimony and called no witnesses.

16. Ayub testified that the complainants in the case were all family members. That he could not recall what happened on 19th May 2009 at 8.30 p.m., but that he was arrested on the 25th may 2009 at about 8.00 a.m. while ploughing. He denied any knowledge of the charges against him.

17. Oginga told the court that PW1 was his father while PW2 was his stepmother and PW3 his step sister. He could not remember where he was on 19th May 2008 at about 8.30 p.m. He however stated that

he was arrested on 12th August 2009 from his house at Awendo after he had come from harvesting maize. He was kept at Awendo Police Station for 2 days without being told why he had been arrested. He denied knowledge of the charges against him.

18. In his judgment dated 20th January, 2010, the trial court *HCCRA NOS. 10 AND 11 OF 2009 (CONSOLIDATED)* considered all the evidence that was before it and concluded that the prosecution had proved its case beyond any reasonable doubt. The trial court accordingly convicted the two appellants on count 1 and sentenced each of them to suffer death as by law provided. The two appellants were acquitted of counts 2 and 3.

19. Being dissatisfied with the conviction and sentence, the appellants have appealed to this court. The two appeals were consolidated by an order of this court dated 19th January 2011 under Criminal Appeal Number 10 of 2010. The appellants have questioned the findings of the trial court on the following grounds; that is to say that:-

“(a) The trial court was in error in making a finding that the prosecution had proved its case beyond any reasonable doubt;

(b) The trial court erred in both law and fact in failing to note that no names of the suspects were given to the police with the first report;

(c) The trial court erred in both law and fact in failing to notice that there were contradictions in the evidence of PW1, PW2 and PW3.

(d) The sentence of death imposed upon each of the appellants was harsh and excessive.”

HCCRA NOS. 10 AND 11 OF 2009 (CONSOLIDATED)

20. At the hearing of this appeal, we heard submissions from the appellants through their written submissions and we also heard from the Senior Principal State Counsel, Mr. Mutuku. The appellants' submissions have been considered by us.

21. Mr. Mutuku conceded the appeal on the grounds that:-

(i) The circumstances for recognition of the appellants on the night of the attack were not favourable.

(ii) The complainant in count 1 did not mention at all whether there was any light in his house on the material day at 8.00 p.m.

(iii) PW3 is the one who mentioned that there was light in the kitchen, though the robbery did not take place in the kitchen but in the main house.

(iv) The position and intensity of the tin lamp light that may have been in the house was not given.

(v) PW3 who was also in the house and said she was washing clothes did not say where the tin lamp was placed and whether it was on.

(vi) Nothing was recovered from the appellants.

(vii) **The evidence was not sufficient to support a conviction under section 296 (2) of the Penal Code.**

22. Mr. Mutuku urged us to allow the appeal, quash the conviction on count 1 and set aside the sentence of death.

HCCRA NOS. 10 AND 11 OF 2009 (CONSOLIDATED)

23. After summarizing the evidence and hearing the submissions in this matter, it is now our duty as the first appellate court to reconsider and evaluate the entire evidence and make our own findings with a view to deciding whether the trial court reached sound conclusions and whether the appeal should be allowed as submitted by counsel for the respondent. See **Okeno –vs- Republic [1972] EA 32.**

24. On an analysis of the above, we find that the evidence against the two appellants in this case was one of recognition because PW1, PW2 and PW3 all said they knew the two appellants before and that Oginga is a son to PW1. We have also established that the robbery took place at 8.30 p.m. and that the only source of light was from 2 tin lamps, one in the main house and the other in the kitchen. This is what PW1 said about the conditions prevailing in the house at the time of the attack and the people who attacked him:-

“I informed the police officers about the people who attacked me. I was able to identify the accused person using the light from torches, the other suspects used to shine. There were also two tin lamps inside my house.

At this time we were in the bedroom.”

HCCRA NOS. 10 AND 11 OF 2009 (CONSOLIDATED)

25. The questions that immediately come to our minds are: how many torches were there; how bright were they? Where were the two tin lamps placed inside the house and how bright were they at that hour of night? Why would torches be necessary if there was other light in the house?

26. PW3 who was in the main house with PW1 stated this about the robbers and the light in the house:-

“We were only two. I was with my father in the main house and my mother was in the kitchen. We had a tin lamp inside the house. I heard my mother at the kitchen saying Oginga why are you cutting me.”

Later in cross-examination by Oginga, PW3 stated:-

“There were two tin lamps. I was using one to wash my clothes and my father was using another.”

27. We have carefully reconsidered and evaluated that evidence and have come to the conclusion that though the two appellants were well known to the victims, the conditions under which the robbery took place were very difficult though both PW1 and PW3 spoke of two tin lamps being in the house, whose light the two witnesses said they used to see the robbers. There is no indication as to where each of

HCCRA NOS. 10 AND 11 OF 2009 (CONSOLIDATED) the two tin lamps was placed and how strong the light from these two lamps was. It is also not indicated how big the sitting room was so as to assess whether the light from the two tin lamps was sufficient to light up the room.

28. We have been aided by the Court of Appeal decision in Karanja & another –vs- Republic [2004] 2 KLR 140. At page 147 of that judgment, the Court of Appeal referred to the case of Cleophas Otieno Wamunga –vs- Republic [1989] KLR 424, in which the same court stated the following:-

“We now turn to the more troublesome part of this appeal, namely the appellant’s conviction on counts 1 and 2 charging him with robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification. The way to approach evidence of visual identification was sufficiently stated by Lord Widgery, CJ. In the well known case of Republic –vs-

Turnbull [1976] 3 All ER 549 at page 552 where he said:-

HCCRA NOS. 10 AND 11 OF 2009 (CONSOLIDATED)

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

29. The question of visual identification was also a matter of the decision of the Court of Appeal in the case of Paul Etole & another –vs- Republic, Criminal Appeal No. 24 of 2000 where the court stated thus, 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 identifications 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.”

30. In the instant case, we do agree with counsel for the **HCCRA NOS. 10 AND 11 OF 2009 (CONSOLIDATED)**

Respondent that PW1 did not make any mention of the light that was available in the house to enable him recognize the two appellants. He gave no description of any of the appellants. He did not tell the court

that he recognized their voices. He did not say where in the house the two tin lamps were situated nor did he say that the light from those lamps was very bright. PW1 also said that he recognized the appellants when they were in his bedroom but he did not say whether one of the tin lamps was in the said bedroom. If there was torch light, how many torches were there? Who had them and how bright was the light from the said torches?

31. As we ask these questions that remain unanswered in our minds, we are of the view that there was no proper investigation in this case. The police seemed to make certain assumptions that led to failure on their part to probe the witnesses searchingly with a view to sealing all the loopholes in visual identification evidence.

32. Having said the above, this appeal succeeds. The same is allowed. We quash the conviction on the charge of robbery with violence and set aside the sentence of death imposed upon each of **HCCRA NOS. 10 AND 11 OF 2009 (CONSOLIDATED)** the 2 appellants.

33. Unless otherwise lawfully held, each of the 2 appellants is to be set free forthwith.

34. It is so ordered.

Dated and delivered at Kisii this 07th day of March, 2011.

ASIKE-MAKHANDIA

RUTH NEKOYE SITATI

JUDGE.

JUDGE.

07/03/2011

Coram: Ruth Nekoye Sitati, J.

C/C – Bibu & Ojwang

Both appellants in court

Language – 1st Appellant – English into Kiswahili

- 2nd Appellant – English into Dholuo

Court: Judgment read and delivered in open court today.

RUTH NEKOYE SITATI

JUDGE.

HCCRA NOS. 10 AND 11 OF 2009

(CONSOLIDATED)