



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL NO. 15 OF 2008**

**BETWEEN**

**KILLION OMOLLO OMOLLO ..... APPELLANT  
VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal from original conviction and sentence of E.K. Mwaita, Ag. SRM in  
Homa Bay SRM's criminal case No.84 of 2007 dated 14<sup>th</sup>  
December, 2007)**

**JUDGMENT**

1. The appellant herein, **Killion Omollo Omollo** faced four counts of robbery with violence contrary to **section 296 (2)** of the **Penal code**.
2. In count I, he was alleged to have robbed **Pascal Owino** of Ogingo area of Suba District within Nyanza Province of Kshs.72,520/50 on the 3<sup>rd</sup> day of January 2007. In count 2 the appellant was alleged to have robbed **Tito Kipkurui Kipyator** of one mobile phone make Motorola T.96 valued at Kshs.6000/=, cash money Kshs.5000/= all valued at Kshs.11,000/=.
3. In count 3, the appellant was alleged to have robbed **George Ondieki Nyamanga** of a mobile phone make Nokia 2310 valued at Kshs.5,700/=, a wrist watch make Romano valued at Kshs.500/= all to the total value of Kshs.6,200/=. In count 4, the appellant was alleged to have robbed **Bernard Odhiambo Odoyo** of a motor vehicle Toyota station Wagon Registration Number KAV 211 J, a mobile phone make Bird valued at Kshs.3400/=, cash money Kshs.2,400/= all to the total value of Kshs.705,900/=.
4. According to the charge sheet the offences in the first three counts were committed at Ogingo area of Suba District within Nyanza Province jointly with others not before the court on the 3<sup>rd</sup> day of January 2007. It was alleged that at or immediately before or immediately after the time of such robbery, the appellant shot dead **Pascal Owino**, the victim in **count 1** and wounded **Tito Kipkurui Kipyator** and **George Ondieki Nyamanga**, victims in **counts 2** and **3** respectively. The offence, the subject of count 4 is alleged to have been committed on the 3<sup>rd</sup> day of January 2007 along Rodi-Rangwe Road within Homa Bay District while the appellant and others not before court were armed with dangerous weapons. It is not indicated in the particulars of count 4 whether the appellants and the others with him used any personal violence upon **Bernard Odhiambo Odoyo** at or immediately before or immediately after the time of the robbery.

5. The appellant denied all the 4 counts of robbery and the case went to full hearing.

6. The prosecution called 5 witnesses to prove its case against the appellant while the appellant gave sworn evidence but called no witnesses.

7. The facts of this case will emerge from the evidence given by the 5 prosecution witnesses. PW3, Bernard Odhiambo Adoyo told the court that he was the driver of M/V Registration Number **KAV 211 J** a Toyota Corolla Station Wagon Matatu plying the Oyugis and Rodi Kopany route. One **Nelson Otieno Ratemo (PW4)** was employed as a conductor in the same vehicle which was owned by **John Oduor Owino** (not called as a witness). PW3 stated that on the 3<sup>rd</sup> January 2007 at about 10.30 a.m., while driving the vehicle from Rodi-Kopany to Oyugis, he was stopped by 5 people – 3 of whom were standing on the right side of the road while the other 2 were on the left side of the road. After the 5 people entered the vehicle, they demanded to know the fare to Ogande but after driving for a short distance, one of the 5 clapped his hands while another took out a pistol which he pointed at PW3 and at the same time directed PW3 to stop the vehicle. PW3 complied.

8. Once the vehicle stopped both PW3 and PW4 were bundled into the boot while one of the 5 people took charge and drove the vehicle back towards Ogande junction. The gangsters drove the vehicle around for about 2 hours before they stopped. When they stopped, some 3 people entered the vehicle, with the gangsters still in control, but soon after they stopped the vehicle and started driving in the direction the vehicle had come. There were screams. PW3 came out of the vehicle and went to a nearby shamba, then there was a gunshot. People screamed the more. The gangsters entered the vehicle again and drove away.

9. Later PW3 was escorted to the D.O.'s Office where he reported the incident. The D.O. availed 2 police officers to give chase and finally found the vehicle stuck in mud and being pushed. When the police fired, those who were pushing the vehicle ran away and disappeared. PW3 told the court that he was robbed of a mobile phone, make BIRD and Kshs.2400/= in cash.

10. PW3 also stated that one of the gangsters wore a blue uniform and a brown leather jacket. The leather jacket was later found in the stolen vehicle. He also said that one of the gangsters had a mark on the head, and PW3 identified the appellant herein as the gangster with the mark on the head.

11. PW4, **Nelson Otieno Ratemo** supported the evidence given by PW3, saying that after he and PW3 had been bundled into the boot by the gangsters, the vehicle was driven around for a long time until it got stuck in the mud. That the gangsters tried to push the vehicle but that a gunshot made the gangsters to abandon the vehicle and get into a super loaf vehicle and disappeared. PW4 stated that he was the one who opened the door for the gangsters who had passed as ordinary passengers to enter the vehicle, and that it was the appellant who asked about the fare.

12. Both PW3 and PW4 were not able to pick the appellant out during the identification parade.

13. PW1 was **Tito Kipyator Kipkurui** a driver with Super Loaf Bakery, Kisii Branch. He testified that on 3<sup>rd</sup> January, 2007 he went to Mbita together with **George Ondieki, PW2** (Ondieki) and **Pascal Owino**(Pascal)deceased in count 1. They went driving motor vehicle Registration Number **KAV 267 Z**, a Mitsubishi canter. They went to sell bread. They went to Mbita, Okeyo and then headed for Homa Bay. All the three were seated in the cabin.

14. At about 11.00 a.m., they saw a white Nissan Sunny following them. The vehicle overtook them and started driving in a zig-zag manner, moving from the left to the right and then obstructed them. PW1 braked but before he knew what was happening, the 5 occupants of the vehicle that had obstructed them came out like a flying squad. He stopped the vehicle. They had a pistol, and two of the 5 people went to the right side of the vehicle. One of the two was the appellant and they had pistols. One of the five went to the left side of the vehicle, armed with a knife and screws. PW1 surrendered, after a struggle. During the struggle a magazine for one of the pistols came off and fell inside the vehicle. The gang demanded money.

Pascal, the salesman had about Kshs.72,520/= on him. The money was taken, but the robbers asked for more. After the struggle, Pascal was shot on the chest.

15. PW1 testified that another vehicle appeared on the scene and the gang struggled to enter that other vehicle, but the ignition key refused to come out of the vehicle. A vehicle belonging to World Vision then came along and assisted PW1 and PW2 who were screaming. PW1 stated that the gang used m/v Registration Number KAV 211 J to get away.

16. After the ordeal, Pascal was taken to Homa Bay District Hospital where he was admitted and taken to theatre. The matter was reported to Homa Bay Police Station but earlier on PW1 had reported the matter to Okego AP Camp. Both PW1 and Ondieki (PW2) were injured during the attack. PW1 was treated at Homa Bay District Hospital where he was issued with a P3 form – **MF1-1**. After 2 weeks, Pascal died from the gunshot wounds. In addition to the Kshs.72,520/= and a Nokia mobile phone, stolen from Pascal, the gangsters also stole Kshs.5000/= and a mobile phone from PW1 while they stole a mobile phone from Ondieki.

17. PW1 stated that he saw the gangsters well. Although he was unable to identify any of the gangsters at the identification parade because of not being given enough time to do so, PW1 was confident that the appellant was one of those who attacked them. PW1 identified the Nokia phone stolen from Pascal – **MF1-3** – a Nokia 3120.

18. PW2 was **George Ondieki Nyamanga** an employee of Mini Bakeries Kisii. He recalled how on 3<sup>rd</sup> January 2007, the vehicle he was travelling in with PW1 was carjacked and robbed as they travelled from Mbita to Homa Bay. That after their vehicle had been stopped, the gangsters ordered them out, demanded money and mobile phones and also took the key for the rear door. After Pascal was shot, PW2 was ordered to lie down and he complied. PW2 was stabbed on the chest and hit with a screw on the head.

19. After the gangsters fled, PW2 and PW1 went to Ekego AP camp and reported the robbery, and later went to Homa Bay District Hospital for treatment. PW2 was given a P3 form – **MF1-4**. He later recorded a statement at Homa Bay Police station. He later identified the appellant at the identification parade. That it was the appellant who demanded to be given phones and that as he ran, he hit the back of his head on the window. PW2 stated that he was robbed of a mobile phone, Nokia 2310, Romano watch and the keys for the rear door of their vehicle and Kshs.72,000/= together with a mobile phone were stolen from Pascal – **MF1-3** while PW1 lost a mobile phone and cash money. PW2 told the court that during the robbery which took between 20-25 minutes and in broad daylight, the gangsters were in very close proximity with PW2 and his colleagues. That it is the appellant who stabbed PW2. PW2 also testified that the appellant was dressed in a yellowish shirt and was armed with a knife and a screw. PW2 denied that he had been taken to the cells by the DCIO and pointed the appellant to him before the identification parade was conducted. PW2 stated that even when he went to the police, he told the police that one of the gangsters had a mark at the back of his head, (PW2 touched the mark on the appellant's head). PW2 also testified that during the hearing of the case in the trial court, the appellant spoke and asked questions in the same fast manner he had done during the robbery.

20. PW5 was Number 231195 Inspector of Police David Kibet Lavendi, the in-charge of investigations at Homa Bay police station at the material time. On 4<sup>th</sup> January, 2007 at 2.00 p.m., while in the company of other police officers, a report came to them that Killion Omollo Omollo who hails from North Kamagambo – at Nyagwete village was involved in a robbery along the Homa Bay –Mbita Road at Ogongo. Upon receipt of the report, they left to pursue the suspect and finding him at his home village, they arrested him in connection with that robbery. PW5 also testified that they carried out a thorough search in the suspect's house and recovered therefrom 3 mobile phones (2 Nokia's, 1100 and 3120) respectively and a Siemens C25. PW5 stated that at the station, the Nokia 3120 was positively identified as belonging to Pascal who was killed during the robbery. The matter was then handed over to the Homa Bay DCIO for further investigations. He produced Pascal's death certificate as **MF1-8** while the Nokia 3120 and 1100 were identified as **MF1-3** and **MF1-6** respectively. The post mortem report on Pascal was produced as **MF1-9**.

21. In further evidence, PW5 said that he got the information about the robbery from informers and not from PW1 and PW2. He also stated that the recovered Nokia 3120 and Siemen's C25 had no Sim cards.
22. The prosecution case stopped abruptly when the prosecutor's application for adjournment to allow him call the doctor and the Investigating Officer was refused. The appellant was however put on his defence. The appellant gave sworn testimony but did not call any witnesses.
23. The appellant testified that he hails from North Kamagambo Location, Rongo Division, Migori/Rongo District and carries on second hand clothes business at Rongo Town. On 3<sup>rd</sup> January 2007, he did not go to work, but instead, went to Mbuni Estate in Homa Bay town to visit his girlfriend by the name Jane Akoth from Nyakach. At about 4.50 a.m., an AP officer by the name George Siga went to the appellant's girlfriend's house and started questioning the appellant on his presence at Jane's house when Jane was Siga's wife. A fight ensued and that is how the appellant was set up. On 4<sup>th</sup> January 2007 the AP went to the appellant's house in the company of other police officers and arrested the appellant and had him charged with the offence of robbery.
24. The appellant denied knowledge of the allegations against him. He said that George Ziga took his mobile phones two of which had been given to him by his nephew (the Siemen's C 25) and by Felix as security for Kshs.6000/= advanced to Felix Othayo by the appellant. The appellant could not however give the Sim card numbers for the phone he claimed was his. The appellant admitted that he had been charged with robbery with violence case in Migori court but was acquitted. The appellant stated that he did not make a report to the police about the fight between him and AP George Ziga, and further that he operated no bank account.
25. The appellant made submissions and told the court that the prosecution evidence against him fell short of proving the prosecution's case beyond any reasonable doubt and urged the trial court to acquit him.
26. For the prosecution, it was submitted that its case was water tight and that the evidence of PW2 who had more than 2 hours with the appellant was sufficient to connect the appellant to the offence. Further, it was submitted that the appellant was found in possession of the Nokia phone 3120 soon after the same had been stolen from Pascal. That the phone was positively identified by PW1 as belonging to Pascal. The prosecutor urged the court to convict the appellant as charged.
27. In the judgment delivered on 14<sup>th</sup> December, 2007, the trial court acquitted the appellant on counts 1 and 2 for lack of evidence. The appellant was however found guilty as charged in count 3 and accordingly convicted. The appellant was acquitted on count 4 as well as count 6. On count 3 the appellant was convicted of the lesser charge of simple robbery under **section 296 (1)** of the **Penal code** and sentenced to serve Twelve (12) years' imprisonment.
28. Being aggrieved by the said judgment, the appellant has come to this court on appeal. The only ground that comes out of the six (6) homemade grounds is that the trial court erred in law and in fact in basing the appellant's conviction on uncorroborated evidence and further that the sentence imposed upon the appellant was excessive.
29. Before the commencement of the hearing of the appeal, the court warned the appellant that in the event that his appeal failed, then the appellate court would be minded to revert to the original charge of robbery with violence under **section 296 (2)** of the **Penal Code** and to convict him for the same. Despite the warning given on 2<sup>nd</sup> March, 2010 and repeated on 19<sup>th</sup> January 2011, the appellant chose to proceed with the appeal.
30. We heard oral submissions from both the appellant and from the Senior Principal State counsel, Mr. Mutuku. The appellant's case was that he was not properly identified during the attack and further that the identification parade was conducted after PW2 had been shown the appellant.
40. The appellant also questioned the reason for his arrest, saying that he was arrested on 4<sup>th</sup> January,

2007, before PW2 and PW1 reported the incident to the police. The appellant submitted that the evidence by the prosecution that he was found in possession of a mobile phone belonging to one of the victims (Pascal) of the alleged robbery was not sufficient to convict him because he had explained that all the 3 mobile phones found in his possession belonged to him. The appellant also submitted that since no investigation was carried out into this case, there was no evidence upon which he could have been convicted even on the simple charge of robbery under **section 296 (1)** of the **Penal Code**.

**41.** In response Mr. Mutuku submitted that both the conviction and sentence were well founded. That the appellant was properly identified by the scar at the back of the head. That the offence took place in broad daylight and that soon thereafter, the appellant was found in possession of a Nokia phone which was clearly identified by both PW1 and PW2 as belonging to Pascal. Mr. Mutuku further submitted that the trial court erred in law and in fact in convicting the appellant on the minor charge of simple robbery without complying with the provisions of **section 179 (2)** of the **Criminal Procedure Code**.

**42.** Counsel submitted that there was ample evidence that the robbers who were many were armed with a pistol. That they used personal violence against complainant in count 1 by shooting him dead. Counsel submitted that should the appellant be found to have been involved in the robbery, he should be convicted of robbery under **section 296 (2)** of the **Penal Code**.

**43.** We have now reconsidered and evaluated the evidence afresh as we are required to do being the first appellate court. See **Okeno –vs- Republic [1972] EA 32** and **Patrick & another –vs- Republic [2005] 2 KLR 162**. From the evidence, the following facts emerge:- PW1, Pascal and PW2 who were all seated in cabin of their vehicle ambushed along the Mbita-Homa Bay Road by a gun-totting gang of 5 (five) men who came out of m/v Registration Number **KAV 211 J** which had earlier on been stolen from PW3. The gangsters robbed the trio of cash and mobile phones and in the process shot Pascal dead and also injured PW1 and PW2.

**44.** On the following day, a mobile phone Nokia 3120 was found in the possession of the appellant who was thereafter arrested and charged with the counts we have set out in the first few paragraphs of this judgment. The Nokia 3120 was positively identified by both PW1 and PW2 as belonging to Pascal. The appellant was then charged.

**45.** The prosecution called 5 witnesses, but failed to call evidence on the post mortem done on Pascal and to adduce evidence of the P3 forms to confirm the injuries sustained by PW1 and PW2. This was the reason the trial court gave for acquitting the appellant of the capital robbery charges.

**46.** After reconsidering and evaluating the evidence that was placed before the trial court and after considering the submissions made to us during the hearing of the appeal, three points arose for determination. These are (a) whether the appellant was properly identified; (b) whether the appellant was found in possession of the Nokia phone that was stolen from Pascal during the robbery and (c) whether failure to call medical evidence and to call the investigating officer was fatal to the prosecution's case on the more serious charge of robbery under **section 296 (2)** of the **Penal Code**.

**47.** The robbery in this case took place at around 1.00 p.m. Both PW1 and PW2 testified that the five gangsters were armed with a pistol, knife and screws. Though PW1 could not identify any of the gangsters, PW2 was emphatic that he identified the appellant during the 20-25 minutes that he spent with the appellant. It was PW2's testimony that it was the appellant who was carrying the knife and that it was him who went to the side of the vehicle where PW2 was sitting, demanded money and ordered them out of the vehicle. PW2 also stated that the appellant held on to PW2 and that when another vehicle came by, the appellant stabbed PW2 on the chest and hit him with a screw on the head. Is PW2's testimony believable?

**48.** We are aware of the need for corroboration in criminal cases, and especially when the appellant was faced with such a serious charge. In the case of **Javed –vs- Republic [2004] 1 KLR 535**, it was held that it is not a legal requirement under Kenyan law that there must always be either corroboration generally or that corroboration has to be of a particular type. Also see **Njuguna s/o Kimani & 3 others –vs- Republic**

**[1954] EACA 316.** We are however aware of the law requiring us to carefully test the evidence of a single identifying witness as was laid down in **Abdalla Wendo -vs- Republic [1953] 20 EACA 166.**

49. In the instant case, we are satisfied that the evidence of PW2 was believable. He was even able to describe the clothing which the appellant wore on that fateful morning. He could also relate the appellant's manner of talking at the trial with the same manner the appellant had talked to the victims during the robbery – very fast way of talking. PW2 was also able to notice the scar at the back of the appellant's head at the scene and was able to pick out the appellant at the identification parade. We have considered the appellant's contention that PW2 had been shown the appellant before the parade. Our humble view of the matter is that the appellant's allegation has no basis. We therefore reject it.

50. Even if we were to be found wrong on the question of identification, we are satisfied with the testimony of PW5 that the appellant was arrested in possession of a Nokia phone 3120 which phone was positively identified by both PW1 and PW2 as belonging to Pascal who was shot dead during the robbery. Though the appellant claimed that the phone, plus 2 other phones found in his possession belonged to him, he was unable to produce the sim card for the Nokia phone to confirm that indeed the phone belonged to him. He had a duty to prove that the phone was his. He produced no document at all to back up the claim that the mobile phone was his. Under the doctrine of recent possession, the appellant has such duty cast upon him. He did not discharge it. The story concocted by the appellant about a quarrel between himself and PW5 was as hopeless as it was untrue. The evidence based on recent possession was sufficient to convict the appellant on the charge of robbery under **section 296 (2) of the Penal Code.**

52. In our humble view therefore, the ingredients of the offence of robbery with violence were proved. The robbers were five (5) in number; they were armed with a pistol, a knife and screw and during the robbery, they killed Pascal and also injured PW1 and PW2. The prosecution needed to prove only one of these ingredients but in this case, they have proved all the ingredients.

53. The final question for us to tackle is whether failure to call the investigating officer and to call medical evidence is fatal to the prosecution's case against the appellant. In the case of **Nganga -vs- Republic [1981] KLR 483,** the Court of Appeal held that if the prosecution do not call a material witness, they do so at their own risk.

54. In the instant case, however, we are satisfied that the prosecution's failure to call the Investigating Officer and the medical evidence is not fatal to their case. We are also satisfied that the application of the doctrine of recent possession provides a safety valve for the prosecution.

55. In the premises, we find that the appellant's appeal lacks merit and the same is dismissed in its entirety.

56. We also quash the conviction on the simple charge of robbery and set the sentence aside. In place thereof, we substitute a conviction on the charge of robbery with violence under **section 296 (2) of the Penal Code.**

57. As no other sentence is provided by law for a violent robbery offence, the appellant is sentenced to suffer death as by law provided.

It is so ordered.

**Dated and delivered at Kisii this 07<sup>th</sup> day of March, 2011.**

**ASIKE-MAKHANDIA  
JUDGE.**

**RUTH NEKOYE SITATI  
JUDGE.**

In the presence of:

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

**Court:** Judgment read and delivered in open court.

**RUTH NEKOYE SITATI**  
**JUDGE.**