



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUSIA

CRA NO. 66'A' OF 2010

Consolidated with CRA No.66'B' of 2010

(From original BGM SPM CR. NO.1520 of 2003)

TIMOTHY SIMIYU KIKETE.....1<sup>ST</sup>  
APPELLANT

ANIVA NAMBOGA MALIKI.....2<sup>ND</sup>  
APPELLANT

~VRS~

REPUBLIC.....PROSECUTOR

JUDGMENT

The Appellants Timothy Simiyu Kikete and Anifa Namboga Maliki were convicted of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and were sentenced to death. Both lodged separate appeals against conviction and sentence which appeals were consolidated.

The grounds in the memorandum of appeal in summary are as follows;

- a) that the language used during the trial was not understood by the Appellants and that no interpretation was provided;
- b) that identification was not positively established;
- c) that all the ingredients of the offence were not proved.

The State Counsel Mr. Okeyo opposed the appeal on grounds that the complainants positively recognized the Appellants and that the evidence was watertight.

PW1 and PW2 are the complainants and are co-wives married to PW3. Both live in separate houses within the same vicinity. PW1 testified that she was attacked by about four (4) thugs in her house on the 11/06/2003 at around 1.00 a.m. Out of the four, she recognized three of them including the two Appellants who are her neighbours and her grandchildren. According to the witness, the 1<sup>st</sup> Appellant was cohabiting with the 2<sup>nd</sup> Appellant as husband and wife at the material time. PW1 heard some noise on the roof of her house and on looking up saw the 1<sup>st</sup> Appellant ready to jump into her room. He jumped inside and opened the inner door for his accomplices. The main door had already been forced open using a stone. When the other three came inside, PW1 recognized the second Appellant and one Idi Taabu who was armed with a gun. They demanded money from PW1 and ransacked the house. Cash worthy Ksh.10,200/= was stolen. PW1 was forced to go with the thugs to the house of her co-wife PW2. The door was forced open and the assailants gained access. PW2 had no money on demand and she surrendered bed sheets and mosquito nets to the attackers. She recognized the Appellants who were her grandchildren. PW3 heard gun shots from outside while in the house of PW2. He ran outside and hid in the maize plantations and later reported to the police.

PW1 told the court that the lights were on when Timothy (1<sup>st</sup> Appellant) jumped into the house. The witness did not tell the court the source and intensity of light which aided her to see the 1<sup>st</sup> Appellant. Was it electric light, lantern light or that of a pressure lamp? How much light did the source produce and how far could it see. Although PW2 said she recognized the Appellants, she was silent on the source of light which aided her to see the two Appellants. The robbery took place around 1.00 to 2.00 a.m in the night. It must have been dark and it would have assisted the court had the witnesses explained how they saw and recognized their assailants. When cross-examined by the 2<sup>nd</sup> Appellant, PW2 and PW3 both said that there was a woman among the four robbers. Both PW2 and PW3 proceeded to describe how the woman was dressed and how she ransacked the house without saying whether that woman was the 2<sup>nd</sup> Appellant.

PW3's evidence contradicted that of PW1 and PW2. He testified that he was in the house of PW2 when he heard gunshots from the house of PW1. He opened the door and left the house. Outside the house, he met with the robbers. The two Appellants whom he recognized got hold of him and wrestled with him. PW3 managed to escape and hide in the maize plantation. Later he went to the house of the village elder and both went to report the matter at Malakisi Police Station.

PW1 testified that as she walked with the robbers from her house to that of PW2, she did not see PW3. Neither did she mention that PW3 was in the house of her co-wife PW2. The door was locked and it was forced open by the robbers according to PW1 and PW2. PW2 did not tell the court whether she locked the door from inside after PW3 left the house. It is not possible that PW3 met the two Appellants and struggled with them without PW1 (who was in the robbers' company) seeing or noticing what was happening. This leads to the conclusion that PW3 was not telling the truth thus putting his credibility in question. PW3 went to the house of PW4, who is his brother and the village elder of their Napara Village. He told PW4 that, he had recognized some robbers. In court, he said that he recognized the two Appellants. PW4 escorted PW3 to Malakisi Police Station to report the matter the same night. Yet PW3 did not give names of any suspect to the police. PW7 the investigating officer confirmed this when he said on cross-examination by the first Appellant:

***“On 12/06/2003 your name was not mentioned and therefore your name does not appear in the occurrence book.”***

It therefore follows that had PW3 and the two complainants recognized their assailants, they would have given their names at Malakisi Police Station at the time the incident was reported.

The evidence of PW5 sheds light on how the Appellants were arrested. The witness testified that during that period, there were many robberies in the neighbourhood. One had taken place in 2003 where the first Appellant was implicated and the worst having taken place in the nights of 11<sup>th</sup> and 12<sup>th</sup> June,

2003. Together with the village elder PW4, the two witnesses planned to go and look for the 1<sup>st</sup> Appellant. They found him at Kanduyi around 3.00 p.m that day and arrested him. The 1<sup>st</sup> Appellant was handed over to Malakisi Police Station. The issue which arises is why the witness and the village elder waited for more than one month after the robbery which PW5 describes as the worst in order to go and look for the suspect. If the witnesses were sure that the 1<sup>st</sup> Appellant was involved in that particular robbery, they should have caused him to be arrested immediately. The delay points at some doubts in their minds as to the involvement of the first Appellant.

The Appellants in their defence explained that they were in a marriage union which started six months before they were arrested. The parents, grandparents and other relatives of the 1<sup>st</sup> Appellant vehemently opposed the union and swore to scuttle it. This was confirmed by PW1 and PW2 in cross-examination by the Appellants. The two witnesses said that the Appellants were cohabiting together and that the 2<sup>nd</sup> Appellant was teaching the 1<sup>st</sup> Appellant how to be a criminal. There is all likelihood that there was a plan by relatives to ensure that the two Appellants separated. It is also possible that the Appellants were engaging in criminal activities to the knowledge of the relatives and neighbours. PW1, PW2 and PW3 were grandparents of the 1<sup>st</sup> Appellant. What is lacking in this case is positive and independent evidence that the two Appellants are among the four (4) robbers who attacked the complainants on the material night. PW5 endeavours to arrest the Appellants for the many robberies in the area was definitely based on suspicion.

In his judgment, the magistrate observed that the complainants observed the Appellants for a considerable length of time and that there was no possibility of mistaken identity since the complainants had known their attackers before the incident. This observation was disapproved by the evidence of PW7 that the complainants did not give names of any suspects to the police.

The language used by PW1 and PW5 to testify was not recorded by the court. It is not possible to tell whether the Appellants understood the proceedings. PW1 was the first complainant therefore a key witness in the case. The Appellants were convicted of the relevant count. Section 72 of the former Constitution and section 198 of the Criminal Procedure Code imposes a duty on the court to ensure that the accused understands the charge. He must be accorded an interpreter if he does not understand the language of the court. The language used by the court must be recorded. The trial court failed to fulfill this important duty.

We find that there was no positive recognition in this case. There was contradictory evidence by the key witnesses. Suspicion was a ground for arrest of the Appellants. The uncelebrated cohabitation of the Appellants and the alleged criminal history of the 2<sup>nd</sup> Appellant as perceived by the relatives may also have contributed to heightened suspicion. The magistrate did not address all these factors in his judgment. It is our finding that the conviction was based on very shaky evidence and that the ingredients of the offence were not proved. The appeal is therefore merited. We quash the conviction in respect of both Appellants and set aside the sentence. The Appellants are hereby set at liberty unless otherwise lawfully held.

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**D. A. ONYANCHA**  
**JUDGE**

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**F. N. MUCHEMI**  
**JUDGE**

Judgment dated and delivered in open court on the 28<sup>th</sup> day of June 2011  
In the presence of the Appellants and the State Counsel Mr Okeyo.

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**D. A. ONYANCHA**  
**JUDGE**

