



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUSIA**

**CRA NO.10 OF 2008**

*(Appeal arising from original BSA PM CR. No.1360 of 2006)*

**JOHN OUMA SIDERE OTOBOTO .....APPELLANT**

**~VRS~**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant John Ouma Sidere was convicted by Busia Principal Magistrate of four (4) counts of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. This appeal is against both conviction and sentence.

The grounds of appeal are based on lack of positive identification, contradictory evidence and failure to call key witnesses.

The State Counsel Mr. Okeyo conceded to the appeal regarding three issues:

- a) that the language of the court was not recorded;**
- b) That the key witnesses contradicted themselves;**
- c) That the evidence was not clear on how the Appellant was arrested.**

On perusal of the record, it is apparent that the language used during plea was not recorded. The record reads: ***“Interpretation in English and Kiswahili.”*** The court did not inquire into the issue of which language the accused understood. This is a duty that the court must do as required by section 72 of the former Constitution. The language used by the witnesses (PW1-5) in testifying and that of the accused in his defence was not recorded. The court again failed to comply with the law.

PW1 said that the robbers cut the window grills to gain access to the house. PW2 the watchman of PW2’s hotel said he opened the door on request of a man who was a lodger because he wanted to get out. When he did so, the man pointed a pistol at him. Other robbers entered through the door. PW2 later hid in the toilet and while there, he could hear the robbers breaking the door of the hotel rooms. PW3 said the robbers cut the window wire mesh to gain entry. We agree with the state counsel that the key witnesses contradicted each other on how the robbers gained access to the hotel, a fact which was not addressed in the judgment of the court.

The complainant PW1 told the court that some money was recovered while the Investigating Officer PW5 testified that no recoveries were made.

On the issue of identification, PW1 said that at the material time the security lights were on. Inside the hotel corridors was electricity lights which were later switched off. PW1 said he could not tell the identity of the man who confronted him with a pistol after he opened the door. It was several hours later that the Appellant was arrested near Chauna Hotel by PW1 and others and handed over to the police. None of the complainants described the appearance of the Appellant as they saw him during the robbery in order to connect him with the man they arrested about five (5) hours later. The distance from the scene to the place of arrest was not given. PW1 said the Appellant is the man who had a pistol while PW3 said he is the one who had a panga. PW3 further said he knew the Appellant since he had been seeing him in Busia Town for a long time. If it is true that PW3 knew the Appellant and saw him during the robbery, he would have given the police the identity immediately after the robbery. It is our finding that there was no positive identity in this case and that the court erred to find that the Appellant was positively identified. Due to the foregoing reasons, we find that the conviction was not founded on cogent evidence. We hereby quash it and set aside the sentence.

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

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

Judgment delivered and signed at Busia this 27<sup>th</sup> day of June, 2011 in the presence of the Appellants and State Counsel.

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