



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NOS. 61, 62 AND 63 OF 2008**

**STEPHEN OTIENO ANYANGO ALIAS STEVE ..... 1<sup>ST</sup> APPELLANT**  
**PETER ODHIAMBO ALIAS ABAA ..... 2<sup>ND</sup> APPELLANT**  
**RAPHAEL KOCHWA OKUYO ALIAS MATHAYO ..... 3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being an Appeal against the conviction and sentence in Kapsabet Principal Magistrate's Court Criminal case No. 256 of 2007 delivered on 15.8.2008 by HON. S. ATONGA (Principal Magistrate))**

**JUDGMENT**

The three appeals were consolidated and heard together. The three appellants, **STEPHEN OTIENO ANYANGO Alias STEVE** (appellant one), **PETER ODHIAMBO Alias ABAA** (appellant two) and **RAPHAEL KOCHWA OKUYU Alias MATHAYO** (appellant three) were jointly charged before the Principal Magistrate at Kapsabet with the offence of robbery with violence contrary to S. 296 (2) of the Penal Code.

It was alleged that on the 4<sup>th</sup> January 2007 at Chepsweta Location, Nandi South District, jointly with others not before Court while armed with guns, the appellants robbed Benjamin Busienei of Kshs. 78,000/= cash and a mobile phone all valued at Kshs. 96,000/= and at or immediately before or immediately after such robbery shot and wounded the said Benjamin Busienei.

After pleading not guilty to the charge, the appellants were tried and convicted. Each of them was sentenced to suffer death. They were however aggrieved with the conviction and sentence and decided to file separate appeals which have now been consolidated.

The grounds of appeal are more or less similar and revolve around the alleged identification of the appellants as having been part of those who committed the offence, the failure by the prosecution to call essential witnesses and failure by the learned trial Magistrate to consider the defence raised respectively by the appellants.

At the hearing of the appeal, the appellants represented themselves and each relied on their written submissions.

The learned **SENIOR DEPUTY PROSECUTION COUNSEL (SDPC), MR. OLUOCH**, appeared for the respondent and opposed the appeals. He briefly went through the evidence adduced against each of the appellants by PW 1, PW 2, PW 3, PW 5, PW 6, PW 7, PW 8, PW 12, PW 13 and PW 14 and submitted that the appellant's conviction and the sentence meted out were proper as the charge was fully established against the three appellants. The learned Prosecution Counsel prayed for the

dismissal of all the appeals.

Having considered the appellants' written submissions and the oral submissions by the learned Prosecution Counsel, our obligation is to re-consider the evidence and draw our own conclusion bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses (**See, OKENO VS. REPUBLIC [1972] EA 32**).

In summary, the prosecution case was that on the material date at about 7.00 p.m., the complainant **BENJAMIN KIPRUTO BUSIENEI (PW 1)**, closed his shop and went home. On arrival at his house, he saw four people in front of the house. His watchman opened for him and he entered the house. While in the sitting room conversing with his wife, he heard gunshots and people ordering his daughters to keep quiet. The daughters were in the kitchen. He moved towards the door and was confronted by a group of people who had guns and pangas. Three people emanated from the kitchen holding his second wife by the hair. They threatened and demanded money from him. They also demanded the keys to his vehicle. In the process, he was shot at. The bullet entered through his right hand and exited through the mouth. He said that there were lights at his home. He identified the second appellant as the person who threatened him with a panga. He said that the second appellant was previously known to him as a former employee of his.

The complainant's wife, **NANCY BUSIENEI (PW 2)**, was with the complainant when they arrived home from the shop. She went to the kitchen where she found the house maids preparing supper. While there, she heard gunshots and saw three people two of whom were armed with guns. She identified the three appellants as those three people and said that the first appellant and the third appellant were armed with guns while the second appellant had a panga and was the person who held her by the hair. The three proceeded to the sitting room with her. It was there that they demanded money and car keys from the complainant. They were given Kshs. 70,000/= and forcefully took away the complainant's car keys and mobile phone. They shot the complainant and escaped through the gate and fence.

The complainant's wife said that she had previously been seeing the appellants within the neighbourhood and that during the robbery which lasted about 30 minutes, she saw them with the aid of bright lights.

The complainant's day watchman, **SIMON RONO MALAKWEN (PW 3)**, was at his home on the material night. His home was near that of the complainant and while there he heard screams emanating from the complainant's home. He went there and found a crowd of people. He used a spot light to look round the compound and saw footmarks on the ground and walls. He returned to the scene on the following day and looked around the fence. It was then that he found a pair of open shoes and handed them over to the complainant who identified them as belonging to the second appellant. He (PW 3) had previously been seeing the second appellant in the neighbourhood.

**DR. ADEDE (PW 4)** of the Nyanza Provincial Hospital as well as the Aga Khan Hospital Kisumu examined the complainant on 17<sup>th</sup> February 2007 and filled the necessary P3 Form. He confirmed that the complainant had suffered grievous harm.

The complainant's night watchman **FRANCIS CHEPTULBEI (PW 5)** was on duty on the material night when he opened the gate for the complainant and his wife to enter their home. After the two had entered the house, two people jumped over the gate where there was security lights. The two people wore monkey caps and were armed with a shot gun and a panga. He identified the two people as the first and second appellants. He said that the first appellant had the gun and the second appellant, the panga. The second appellant took away his whip and torch and warned him against speaking. He feared for his life and did not speak. He was ordered back into the guardroom as the two went into the complainant's house while firing gun shots. Later, the complainant's wife reported to him that one of her younger kids had been kidnapped. The complainant could not speak as he had been injured on the mouth and hand.

The watchman (PW 5) said that although the robbers were more than six, he only identified the first and second appellant.

**BENJAMIN MUGE (PW 6)**, a neighbour of the complainant was at his home on the material date when an alarm was raised at the complainant's home. He armed himself with a panga and rungu and proceeded there. He found other neighbours and learnt that the complainant had been taken to hospital. He returned to his house after the police arrived and on the following day was shown a pair of shoes recovered at the scene. He said that the shoes belonged to the second appellant. He said that he had previously known the second appellant for a long time and knew that the shoes belonged to him.

**P.C. JOSEPH MISERA (PW 7)**, of Chepsweta Police Post investigated the case. On the material date he was on duty when the complainant's son by name Kemboi called him on phone and informed him that there were some suspicious people at the complainant's house gate. He (PW 7) booked the report and headed to the scene in the company of colleagues. On the way, they heard screams from the complainant's home and on arrival there, found the gate opened. They also found the complainant with a gunshot injury on the mouth and bleeding from the hand and lower jaw. He (complainant) promised to give them the names of the suspects after treatment. He had been robbed of his mobile phone and money (Kshs. 78,000/-).

P.C. Misera (PW 7) relayed necessary information to his superiors at Songhor and Nandi Hills Police Stations. Three police dogs were brought to the scene to track the suspects into a sugar cane plantation. In the process, the second appellant was arrested. He was identified by a watchman as the owner of the pair of shoes found at the scene of the robbery.

P.C. Misera (PW 7) continued to say that the first and third appellants were arrested after their names were mentioned by the complainant who knew them as neighbours. He charged all the appellants on completion of his investigations.

**DR. MARIWA (PW 8)**, was on duty at the Aga Khan Hospital Kisumu when the complainant was taken there for treatment after being shot on the mouth and right hand. He operated on the complainant and removed a bullet from his mouth.

**SGT. LINUS OUMA (PW 9)** of C.I.D Nandi South District, took over the investigations of the case from P.C. Misera (PW 7). He said that the complainant identified the second appellant as a person previously employed by him.

**P.C. ENOS SANG (PW 10)** of Songhor Police Station visited the scene of the robbery in the company of his colleagues. While there, he saw bloodstains in the room and a pair of shoes. He was told by Benjamin (PW 6) that the shoes belonged to the second appellant who was arrested at Chepsweta and handed over to the investigations officer.

**KESHIA AUMA (PW 11)** was at the complainant's house when the robbery occurred. She was at the kitchen when armed people went there and fired a gunshot. She and others were told to lie down. She said that she identified the third appellant as the person with a gun. She said that she saw the third appellant very well with the help of bright lights. He was a person whom she had been seeing around.

**NANCY AUMA (PW 12)** was also at the complainant's house during the robbery. She was in the kitchen. She also said that she identified the third appellant with the help of the bright lights at the scene. She said that she had previously seen the third appellant.

**VERONICA CHERONO (PW 13)** was the other person inside the complainant's house on the material date. She was at the kitchen door when an armed person confronted and told her to go into the kitchen. The person fired a gunshot. Three other people appeared. She identified the second appellant as one of the three. He had a panga and demanded money. She had previously been seeing him at Chepsweta Centre. She and others were locked in the kitchen but managed to escape by climbing over a wall. She called out for help and heard gun shots from the complainant's house.

**IP. JOSEPH KASIMO (PW 14)** the Officer Commanding Station (OCS) Nandi Hills Police Station, produced identification parade forms on behalf of his colleague, IP Onzere. He said that the

identification parade was in respect of the appellant who was pointed out by the complainant's wife (PW 2).

The three appellants were placed on their defence on the basis of the foregoing evidence by the prosecution witnesses. The first appellant said that he was at his home at Chemase on 10<sup>th</sup> January 2007 when Police Officers went there at 9.30 p.m. and conducted a search. They found nothing. He was arrested and taken to Songhor Police Station. On 22<sup>nd</sup> January 2007 an identification parade was conducted but he was not identified. Later, he was charged together with persons not known to him.

The second appellant said that on 5<sup>th</sup> January 2007 at about 10.00 a.m., Police Officers arrested him on allegation that a pair of shoes found at the scene of the robbery belonged to him. He was taken to the Songhor Police Station where an identification parade was conducted but was not identified. He was thereafter charged together with people not known to him.

The third appellant said that Police Officers went to his house on 10<sup>th</sup> January 2007 at about 5.00 p.m. and arrested him. They recovered nothing in the house. He was taken to the Police Station and on 21<sup>st</sup> January 2007 an identification parade was conducted. He was identified by a witness previously known to him. Later, he was charged with the present offence.

Basically, our independent consideration of the evidence presented before the learned trial Magistrate leaves no doubt in our minds that the offence of robbery with violence was fully established. Indeed, the complainant (PW 1) was attacked in his house by a group of armed people numbering six and above who shot and injured him on the mouth and hand before taking away his money and mobile phone. The appellants did not deny the occurrence of the offence. However, they all denied that they were part of the group which attacked and robbed the complainant. They all implied that they were arrested by the police without good cause and later charged with the offence. They have herein complained against the prosecution evidence of identification and contended that it was unreliable, insufficient and improper such that it cannot be said that it was free from possibility of error or mistaken identity. Without doubt, the main issue that fell for determination by the trial Court was whether the three appellants were positively identified as having been part of the gang of robbers.

With regard to the first appellant, the evidence of identification emanated from the complainant's wife (PW 2) and the complainant's night watchman (PW 5). As for the second appellant, the identification evidence was led by the complainant (PW 1), the complainant's day watchman (PW 3), the complainant's night watchman (PW 5), the complainant's neighbour (PW 6), the complainant's employee (PW 13) and to some extent, the investigation officer (PW 7). With regard to the third appellant, the evidence of identification came from the complainant's wife (PW 2) and the complainant's employees (PW 11, PW 12) and to some extent PW 14.

Although the offence occurred in the hours of darkness (at night), there was undisputed evidence that the scene was well lit by bright electric lights. There was also undisputed evidence that the offence took a duration of about thirty minutes.

We may, therefore safely state that there was adequate opportunity and favourable conditions for the identification of the offenders.

Nonetheless, it was incumbent upon the learned trial Magistrate to treat the evidence of identification against the appellants with extreme caution considering that the scene was chaotic, confusing and distressful at the material time of the incident.

On our part and as relates to the first appellant (Stephen), we hold the view that the evidence by the complainant's wife (PW 2) was sufficient and reliable as regards his identification. She said that she saw and identified him by recognition. He was a person she had previously been seeing in the neighbourhood. She said that he was one of the robbers carrying a firearm. The other evidence of identification against the first appellant is that of the complainant's night watchman (PW 5) but we do not

think that it was reliable. This is because the watchman said that he identified the first appellant as one of the two robbers who jumped the gate while wearing what he called monkey caps. If the two robbers who jumped the gate were wearing “monkey” caps, it meant that their faces were partly concealed for them to be effectively identified by the watchman (PW 5) or any other person. It would not be far-fetched to opine that the alleged identification of the first appellant by the watchman (PW 5) was based on guesswork.

As for the second appellant (Peter), the evidence against him was that of the complainant (PW 1), his wife (PW 2) and his employee (PW 13). In our view, the evidence was reasonably credible and reliable. The three witnesses (PW 1, 2 & 13) had previously known the second appellant. He was a former employee of the complainant. They all identified him by recognition. However, his alleged identification by the complainant’s day watchman (PW 3), night watchman (PW 5), the complainant’s neighbour (PW 6) and to some extent P. C. Misera (PW 7) was not reliable.

These witnesses (PW 3, PW 6 and PW 7) alleged that the shoes found at the scene of the crime belonged to the second appellant. By so saying, they attempted to link the second appellant to the offence by indirect evidence. However, there was no proof that the said shoes actually belonged to the second appellant. There was nothing peculiar or unique to show that it was only the second appellant who could possess such shoes.

As for the night watchman (PW 5), his evidence of identification was unreliable for reasons stated hereinabove.

As regards the third appellant (Raphael), the evidence of identification against him was that of the complainant’s wife (PW 2) and the complainant’s employees (PW 11 and PW 12). We are of the view that the said evidence was reliable. The third appellant’s identification by the said witnesses (PW 2, PW 11 and PW 12) was by recognition. They had previously known him. PW 2 said that he was one of those robbers armed with a firearm. This was confirmed by PW 11.

The evidence by IP Kasimo (PW 14) showed that the third appellant was also identified by the complainant’s wife (PW 2) in an identification parade. This evidence was unnecessary and so was the identification parade. The identification parade accomplished nothing since it was stated by the complainant’s wife that she had previously known the third appellant.

Generally, the identification of all the appellants by the complainant (PW 1), his wife and employees (PW 2, PW 11, PW 12 and PW 13) was by recognition which is considered to be more assuring and reliable (**See, ANJONONI VS. REPUBLIC (1980) 59**).

In sum, we are satisfied that the learned trial Magistrate treated the evidence of identification with care and correctly convicted all the three appellants. In the circumstances, we uphold the conviction with the result that the three appeals are dismissed.

**F. AZANGALALA**  
**JUDGE**

**J. R. KARANJA**  
**JUDGE**

**[Delivered and signed this 16<sup>TH</sup> day of JUNE 2011]**