



No. 2941

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 219 OF 2010

POLYCAP GOR.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal of the Original Conviction and Sentence of the Principal Magistrate's Court at Migori Hon. Nyakundi

in Criminal Case No. 570 of 2009 dated on 27th October, 2010)

Polycarp Odoyo Gor, the appellant, **Tobias Ogweno** and **Lukas Otieno Ojanga**, the appellant's co-accused in the trial court were jointly charged before the Senior Principal Magistrate's Court, Migori with robbery with violence contrary to section 296(2) of the **Penal Code**. The particulars of the charge were that on the 7th August, 2009 at Nyabisawa village in Migori district, jointly with others not before court, while armed with offensive and dangerous weapons namely unknown rifles and a panga robbed **Daniel Ouma** of cash kshs. 76,000/= and immediately before or immediately after the time of such robbery killed the said **Daniel Ouma Jalang'o**.

The appellant and his co-accused denied the charge and the case proceeded to trial.

In brief, the prosecution case was that the deceased **Daniel Ouma Jalang'o** had two wives, both called **Teresa Achieng**. They were PW1 and PW3 respectively during the trial. They stated that they were in their house when suddenly the door was forced open with a stone and three people entered. That the three had very bright torches and amongst them they recognized the appellant whom they used to see at the shopping centre. He wore black clothes and carried a panga. The three struggled with their husband as PW1 hid under her bed upon seeing the appellant's weapon. They cut the deceased on the stomach, neck and head as he fought back. Overwhelmed, their husband came running and fell on the bed saying that he had seen the appellant and **Otieno Ojango** but it is **Ogweno** the 2nd co-accused who had killed him. The deceased had a torch which had been quickly put off by the thugs. The thugs demanded money and the deceased gave them kshs. 76,000/= . After they had finished their mission, they left. They came out of

the house and screamed and neighbours came to their assistance. They took them to Ombo hospital from where their husband was referred to Homa Bay hospital from where he died while undergoing treatment. The two were however treated at Ombo hospital for the injuries inflicted on them during the robbery. **Moses Odhiambo** (PW2) whilst taking care of the deceased at Homa Bay Hospital, he disclosed to him before he died that he had been attacked by the appellant, **Ogweno** and **Otieno**. Cross-examined he denied disclosing this fact to police officer at the time he recorded his police statement.

Clinical officer, **Justus Magati** (PW4) examined both PW1 and PW3 at Migori District Hospital on 23rd September, 2009. He noted that PW1 had a cut on her upper lip while PW3 had a healed cut wound on the scapular region and another cut wound on the left hand. In both cases he classified injuries suffered by the two as harm and filled their respective P3 forms which he tendered in evidence before court alongside treatment notes.

PC Vincent Muswagi, PW5 of Migori Police Station received PW1's report of the incident and visited the scene in the company of other police officers. They came across the stone used in breaking the door of the house which he collected. He also produced the post mortem report filled by the doctor who conducted the post mortem on the deceased's body at Homa Bay Hospital. The appellant was arrested on the same day and brought to the police station. His co-accused were arrested later. He then charged the trio with the offence.

In his defence on oath, the appellant told the court that on the night of 6th and 7th August, 2009 at about 11.00p.m his wife, **Caren Achieng** (DW2) who was expectant developed pregnancy complications. He called his brother, **George Ojanga** (DW3) at 3.00a.m to assist him take her to hospital. Together they walked with his wife towards the road in a bid to take her to hospital. 10 yards from home, the wife gave birth with the assistance of his mother and the child is alive. That he never left home that night. Otherwise he had known PW1 whom he saw where his motor bike was being repaired. His wife, **Caren Achieng** confirmed that she developed labour pains at 11.00p.m that night and at 3.00a.m gave birth as she was being assisted by her husband, brother-in-law and her mother-in-law to hospital. The the child was called **Harrice Anyango**. The brother-in-law, **George Ojanga** testified that the appellant informed him that the wife was in labour at 11.00p.m. That they had no means to take her to hospital. Then at 3.00a.m they all left walking to the road when she delivered.

The learned magistrate having carefully evaluated the evidence on record, reached the verdict that the appellant was guilty as charged, convicted him and sentenced him to death as prescribed by law. She however acquitted the appellant's co-accused for lack of evidence.

Aggrieved by the conviction and sentence aforesaid, the appellant mounted his appeal on the grounds that the case against him was not proved beyond reasonable doubts, the prevailing conditions were not favourable for his positive recognition, the case was poorly investigated and that his defence was not given due consideration.

When the appeal came before us for plenary hearing on 25th July, 2011, the appellant with the permission of the court tendered written submissions which we have carefully read and considered.

Mr. Mutuku, learned senior principal state counsel however conceded the appeal on the grounds that the evidence of recognition was not safe and ought not to have been relied upon to find a conviction.

As already stated, the appellant was the 1st accused in the trial court. His conviction was based on the evidence of PW1 and PW3. The two were the spouses of the deceased who was killed during the robbery. The trial court relied on the evidence of recognition of the appellant by these witnesses to found the conviction. However, we do not think that, that evidence was credible given the prevailing conditions. Whereas PW1 never stated how she was able to recognize the appellant, PW3 claimed that she recognized him through the torches that the thugs had. However there was no evidence as to density of the light that was emitted by the torches nor the distance between the thugs and these witnesses, nor for how long PW3 kept the appellant under observation as to be able to recognize him. Again if the torches were directed at these witnesses, how could they have been able to see the appellant? They would have

been blinded by the light from the torches. Further these witnesses did not say where the appellant stood among the thugs. If he stood at the back, how could they have been able to see him. In any event, the attack appears to have been sudden and violent. Indeed PW1 ran and hid under the bed, from where he claims to have seen the appellant. We doubt very much that in those circumstances, PW1 could have recognized the appellant or indeed any of the thugs. The prevailing conditions at the scene of crime, to our mind, were unfavourable for positive recognition. We all know that it is possible for a witness to believe genuinely that he knows the attacker very well yet be mistaken. Mistakes in recognition always occur. That is why there is need to subject such evidence to cautious and careful consideration. We think that the learned magistrate failed in this noble task.

It is also on record that the name of the appellant was not given to the police by the two witnesses in their first report. If indeed they knew the appellant as they wanted the court to believe, and recognized him at the scene of robbery, how come they did not give his name to the police in their first report. The learned magistrate erred in failing to observe that this was a case of recognition as opposed to identification and failure to give names in the first instance causes uneasiness in believing such evidence.

The only evidence which would have salvaged the prosecution case was the alleged dying declaration made to PW1 by the deceased immediately after the attack and PW2 who was taking care of him in the hospital. However the trial court ruled and rightly so in our view that the alleged dying declarations were inadmissible.

It is upon the prosecution to prove its case beyond reasonable doubt and it is also the duty of the trial court to look at the evidence as a whole. In this case the trial magistrate failed to consider the fact that conditions prevailing at the alleged scene of crime were unfavourable for positive recognition and that the first report made to the police regarding the incident lacked ingredients to prove the involvement of the appellant in the crime.

We therefore agree with the learned senior principal state counsel that the appellant's conviction was not safe in the circumstances and ought to be set aside. Accordingly, we allow the appeal, quash the conviction and set aside, the sentence of death imposed on the appellant. The appellant should forthwith be set at liberty unless otherwise lawfully held.

Judgment dated, signed and delivered at Kisii this 23rd day of September, 2011.

ASIKE-MAKHANDIA
JUDGE

RUTH NEKOYE SITATI
JUDGE