



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO. 9 OF 2011**

**GREGORY OCHIENG OSINA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From original conviction and sentence in Criminal Case number 330 of 2010 of the Chief Magistrate's Court***

***at Kisumu –Mr. Ezra Awino Esq.)***

**Coram**

**Aroni, Chemitei – JJ**

**Mr. Gumo for state**

**Court clerk Ochollah / Omollo**

**Appellants in person**

**JUDGMENT**

On 3<sup>rd</sup> July 2010, the appellant was charged with the following offences

**(a) Robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code and**

**(b) Assault causing actual bodily harm contrary to Section 251 of the Penal Code.**

On the 1<sup>st</sup> count the appellant was charged with robbing **Dr. Richard Otieno Muga** and on the second count assaulting one **Paulman Ochieng**. The appellant denied both counts. This matter proceeded to the hearing as per the lower courts record and the appellant was convicted on the 1<sup>st</sup> count on 14<sup>th</sup> January 2011.

Against the said judgment the appellant has preferred seven (7) grounds of appeal namely:-

**(1) That the sentence imposed on me is manifestly harsh and excessive as to amount to misdirection.**

**(2) That the learned trial magistrate erred in law and facts by observing that I was positively recognized by PW4 yet there was no name or description matching mine in the first report.**

**(3) That the investigation done was shoddy as it uncorroborated with the facts in the first place.**

**(4) That the learned trial magistrate misdirected himself in law and facts by failing to appreciate that the prosecution case was not only insufficient but also affrictive, speculative, conjecture, discredited, unconstitutional and lacked probative values.**

**(5) That the learned trial magistrate erred in law and facts convicting me while placing my defence against the prosecution evidence without giving tangible points of determination thereby leaving it plausible and secure through to entitle me an acquittal**

**(6) That since I can't recall all that was adduced transpired during trials I humbly beseech this Honourable court to furnish me with certified copies of my trial records in order to add more grounds of appeal.**

At the hearing of the appeal, the appellant was contented with arguing his appeal and in particular relying on his submissions which were already in court. Ground number 7 above therefore was not adduced by the appellant.

The brief background of this appeal that we can deduce from the lower court record is that the complainant one Dr. Richard Otieno Muga went to sleep later after watching a world cup tournament on 15<sup>th</sup> June 2010. At about 3:00 a.m. while sleeping alone, he was awakened by people who had already surrounded his bed. They were armed with axes, pangas and rungas. He never identified any of them. They demanded money from him. They took away Kshs. 10,000/= which was in his trouser and Kshs. 40,000/= in the drawer. They further took Edox from Germany, Kshs. 1,500, lap top, N.H.I.F, DVD Music system, bottles of wine, 3 mobile phones E71 Black berry and Nokia 12, phones, traveling bag and some documents, flats screen T. V., Modern digital radio cassette, and speakers. At the end of the incident, the complainant discovered that his worker PW2 had been seriously cut and was soaked in

blood. He complained he had a bruise on his neck.

The complainant was taken to hospital and admitted at Nairobi Hospital for three (3) days. When he came back after two (2) weeks he was told that the T. V. had been found near Kutho Primary School, digital radio and one speaker. The rest of the items were never found. Photographs were taken and produced with no objection during the trial.

PW2 – **Paulman Ochieng** was equally sleeping in his house and at 3:00 a.m. he was awakened by a loud bang. He put on the electric light. He saw a black short man with a panga who cut him on the head, hands and ordered him to sit down. He was covered with a mattress. He said that he only saw the face of one short man later he was also taken to the hospital. Later on 27<sup>th</sup> June 2010 he was taken to Central Police where at the parade conducted therein he was able to identify the accused. When he was cross – examined by the accused, he was adamant that he actually saw him during the incident.

PW3 confirmed what he saw during the incident but he never identified the robbers. PW4 – **John Olas** is a neighbour of the complainant. After being woken up by the commotion and noise he met Edward, the PW3 who had a torch. He assisted the police who had sniffer dogs. At Kutho Primary School he saw the accused who was carrying a T. V. There was another accomplice who was carrying radio and speakers. They took off. He confirmed also that he knew accused since he had employed the accused's mother.

PW5 is the Police officer who took the photographs at the scene. PW6 was at the station during the incident. He recorded report in the occurrence book (O. B.).

PW6 was the clinical officer who filled the P3 form for PW1 and PW2. He assessed the injuries against PW1 as harm and those against PW2 as grievous harm.

PW8 is the Assistant Chief of Kogony Sub Location. On 24<sup>th</sup> June 2010, through his informers learned that the accused had been seen. Through the assistance of the village elders he was apprehended at his house and taken Kisumu Central Police Station. He had known the accused for along time. No items were however recovered from the appellant during the arrest.

PW9 conducted the parade on 27<sup>th</sup> June 2010. After notifying the accused of his right the parade was conducted. He said that he got people of similar features with the appellant. The appellant was also allowed to have close friends and he chose **George Otieno Oderi, Maxwell Ajima Odeni and John Omollo Osiemo** . The witnesses PW2 was at that time 50 meters away from the scene. The witness PW2 identified the appellant by touching him on the shoulder and said "**Ndio huyu**". The certificate was signed by the accused.

At the close of the prosecution case the appellant was PW1 on his defence. In his defence the appellant contended that he was on 24<sup>th</sup> June 2010 at lunch time told by the Assistant Chief to accompany him to Central Police Station. He was locked and detained upto 27<sup>th</sup> June 2010. He however denied the charges and was emphatic during cross – examination that PW4 knew him from childhood. He further denied that PW4 saw him drop the T. V.

Judgment was delivered on 14<sup>th</sup> January 2011. The appellant was found guilty and sentenced accordingly. From the lower court's judgment it's clear that the basis of conviction was that of recognition. The trial court found for a fact that PW2 identified the appellant during the night of the attack by the height, colour and the gap in the lower teeth. Special emphasis was also laid upon the evidence of

PW4 John Tika Olasa who saw the appellant at 5:00 a.m. near Kutho Primary School with the T. V. sets. He further said that he had known the appellant since his childhood. The appellant was further identified during the parade conducted by PW9.

Our duty is to evaluate the evidence on record and only interfere with the lower court's decision if it's manifestly clear that it never reached a finding that was sound both in law and facts.

From the evidence placed before it, it's clear that the lower court arrived at the said judgment and conviction rightly and we can't find any fault. The appellant positively identified PW2. In his evidence in Chief he said.

**“On 15<sup>th</sup> June 2010 at 3:00 a.m. I was in his house in my room. I was alone. I was sleeping. I was woken by a bang and I put on light – electric light. Then I saw a short black man with a panga and he cut me on the head, hands and ordered me to sit down. Then they covered me with mattress then they entered other rooms”.**

He continued.....”.....**On 27<sup>th</sup> June 2010 I was called at Central Police Station in a parade. I found eight (8) people in a parade and I found the one who cut me. He had a gap in the lower teeth. He is the accused in the dock. When he told me to lie down is when I saw the gap. In the parade they were told to open their mouth and I saw the gap in the lower teeth”.**

On being cross –examined by the appellant he said:-

**“You are the one I saw in my room and you are the one who cut me. I saw people enter the room. There were people but you are the one I saw. When I put on the light you are the one I saw you standing with me”.**

Further” **There is nobody looking like you. I saw you clearly and you told me to sit down. I identified you with your size, complexion and the gap in your mouth”.**

The appellant was clearly identified by PW2 as there was enough light (electric) light in the room. The gap in the lower teeth, the size (short) and the complexion (dark). Further identification was done by PW2 during parade. The parade identification by PW2 was equally done with within the law. We have looked at the parade form exhibit 4. It was duly signed by the appellant. All the rules and procedures were adhered to and we see no reasons to fault the same.

PW4 further identified the appellant carrying the T. V. He dropped the T. V. and took off. He said during his testimony that **“the accused is a boy I have known since birth. I saw him being born”.**

In cross examination he said **“ I know you as Ochieng and your mother was my employer”.** Its also clear that the appellant was no stranger to PW4.

In the case of **Tom Odhiambo Omusare Kisumu Criminal Appeal No. 327 of 2009.** The learned judge said: **“Both the counts below were alive to the fact that the prosecution case stood or fall on the evidence relating to identification of the appellant. In this case it was not that of a stranger but of a person previously known and therefore it was identification by recognition”**

From the evidence before us it was clear that apart from PW4, PW8 the Assistant Chief knew the appellant. He said **“I have known the accused for long. He is my resident by birth”**

For PW2 we opine that it was a case of identification of a stranger. In the case of Wamunga =vs= Republic [1989] KLR 434 it was held that:-

**“(1) Where the only evidence against a defendant is evidence of identification, or recognition, a trial court is informed to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.**

**(2) Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made”.**

This was therefore a case of both recognition and identification combined. The appellant in his submission has raised an issue that the trial court didn't comply with Section 324 and 329 of the criminal Procedure Code. We are of the opinion that this opportunity should be given to the appellant. We therefore conclude that:-

**(a) The appeal herein is dismissed.**

**(b) The appellant be granted an opportunity to mitigate against the death sentence before our final conviction.**

**Dated, signed and delivered at Kisumu this 1<sup>st</sup> of November 2011.**

**ALI-ARONI  
JUDGE**

**H. K. CHEMITEI  
JUDGE**

*HKC/aao*