



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 305 OF 2006**

*(From Original Conviction and Sentence in Criminal Case No. 1717 of 2005 of the Chief Magistrate's Court*

*at Mombasa – T. Mwangi, SRM)*

**CHARLES OCHIENG**  
**OKWAKO.....APPELLANT**

**- Versus -**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**Charles Ochieng Okwako (the appellant)** appeals against his conviction of Robbery with Violence Contrary to Section 296(2) of the Penal Code. The particulars of the offence as per the charge sheet were that-

**“CHARGE**

**ROBBERY CONTRARY TO SECTION 296(2) OF THE PENAL CODE**

**PARTICULARS OF OFFENCE: On the 20<sup>th</sup> day of April, 2005 at Magongo, Changamwe in Mombasa District within the Coast Province, jointly with others not before court while armed with dangerous weapons namely pangas and iron bars robbed BEN OSENO one Mobile Phone make Motorola valued Kshs. 2,500/- and cash Kshs. 1,100/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said BEN OSENO.**

**COUNT II**

**MALICIOUS DAMAGE TO PROPERTY CONTRARY TO SECTION 339(1) OF THE PENAL CODE: On the 20<sup>th</sup> day of April 2005 at Magongo, Changamwe in Mombasa District within the Coast Province, willfully and unlawfully damaged front and rear windscreens and two right side windows of**

***a Motor Vehicle registration number KAC 079X valued at Kshs. 20,000/- the property of BEN OSENO.***

### **COUNT III**

***BEING IN POSSESSION OF NARCOTIC DRUG CONTRARY TO SECTION 3(1) OF NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCE CONTROL ACT NO. 4 OF 1994 AS READ WITH SUB-SECTION 2(1) (A) OF THE SAME ACT: On the 12<sup>th</sup> day of May, 2005 at Bomu area Changamwe in Mombasa District within the Coast Province, was found in possession of Narcotic drugs to wit Four rolls of Cannabis Sativa in contravention of the said Act.”***

The appeal raised three grounds. The appellant’s case is that in the circumstances of the incident, identification was difficult and the learned Magistrate was in error in finding that the complainant positively identified the accused. Second, the identification parade was flawed and of no value. Lastly that the learned Magistrate erred in failing to find that the appellants defence was credible. The appeal was opposed by Mr. Jamii on behalf of the State.

At trial the appellant had been charged jointly with one Denis Oduor Opondo and both faced a second count of malicious damage to property contrary to Section 339(1) of the Penal Code. Both were acquitted on the second count whilst Denis Oduor Opondo was acquitted on the robbery charge. At the hearing the prosecution called six (6) witnesses while the appellant gave an unsworn statement.

On the first hour of 20<sup>th</sup> April, 2005 PW1 BEN OSENO, a taxi operator, dropped a customer at Magongo. As PW1 tried to leave, a person emerged and held him by the neck. Another forced the car door open and pulled him out of the car. They were joined by four others. The six were armed with pangas and slashers. They threatened PW1 and robbed him of a mobile phone and cash of Kshs. 1,100/-. They then smashed the windows and windscreen of his motor vehicle. As the thugs left the scene some policemen were on the beat arrived, amongst them was PW3. The appellant was arrested by PW2 on 12<sup>th</sup> May 2005. Four days later, on 16<sup>th</sup> May 2005, PW6 conducted an identification parade in which PW1 attended and picked out the appellant.

As a first appellate court, this court will consider all the evidence at trial, re-evaluate it and draw its own conclusions. [**Ajode –Vs- Republic [2004] KLR 81**].

The only evidence that implicated the appellant was the identification testimony of PW1. We are minded that the evidence of this nature must be absolutely watertight to justify a conviction. The robbery happened in the middle of the night at about 1.00am. In the words of PW1 it took about 10 minutes. PW1 says that he saw the first two thugs on the light of the street lights. PW1 described them as both being tall but that one had a gap between the teeth of his lower jaw. The latter was the appellant. On the source of the light PW1 said as follows-

***“I was able to see the thugs. There were street lights at the scene.”***

He later adds-

***“The street light was just next to the scene.”***

The identification of the thugs was aided by the street lights. In addition the incident lasted for about 10 minutes and the appellant was amongst the first two attackers who made bodily contact with the witness. The light at the scene, the duration of the attack and the proximity of the witness to the appellant offered a good opportunity for the witness to see the unmasked face of the 1<sup>st</sup> appellant well enough to even make note of the gap between his teeth.

We now turn our focus to the identification parade. From the account of PW1 he was able to pick out two people from the identification parade but the police directed him to identify only one. In his own words-

***“I had seen two but police told me to identify only one.”***

However, the officer conducting the parade did not direct him on which of the two to pick out. The officer did not influence him to identify the appellant. Once he had identified him by touching him, the witness requested the suspect to open his mouth. He saw the gap on the lower jaw of the suspect. In that way PW1 was able to confirm that the 1<sup>st</sup> appellant was one of the robbers. The learned Magistrate considered this issue and in our view came to the right conclusion when she said-

***“I have considered his (sic) defence by the first accused. The identification parade form does not talk of identification through the missing teeth. It was by touching. Witness asked accused to open his mouth after identification to confirm that he indeed got the right person.”***

We are unable to agree with the appellant that parade was arranged or conducted in breach of The Force Standing Orders. It was fair and properly conducted and the appellant appended his signature on the Parade Form in satisfaction.

The last ground of the appeal is in respect to the defence raised at trial. The appellant denied committing the offence. He said that he was arrested on 6<sup>th</sup> May, 2005 at the instigation of one Mzee Ondari, a village elder. That three days later Mzee Ondari visited him at the police station and assured the appellant that he was mistakenly arrested and that he would be released in due course. This did not happen. The learned Magistrate considered this defence and did not believe it. Mzee Ondari did not testify in the lower court proceedings. Mzee Ondari would have been an invaluable witness for the Defence but the appellant did not summon him to testify. The appellant's story is therefore uncorroborated. The prosecution evidence on record puts the appellant at the robbery scene on the night of 19<sup>th</sup> April, 2005. This must be contrasted with the appellant's response to a question in cross-examination-

***“I cannot recall where I was on the night of 19<sup>th</sup> April, 2005.”***

Again we are unable to find any merit on this ground.

The prosecution was able to put together evidence that proved beyond reasonable doubt that the appellant in the company of others robbed PW1 of a mobile phone and cash of Kshs. 1,100/-. They were armed with pangas and slashers. They threatened to use actual violence on the complainant. The learned Magistrate, in our view, properly convicted the appellant of Robbery with Violence contrary to Section 296(2) of The Penal Code and his appeal on conviction fails.

We now look at the sentence imposed. The appellant was sentenced to death. The circumstances of the incident is that the complainant (PW 1) physically resisted the robbery and engaged in a tussle with the robbers. Although the appellant and his colleagues were armed with pangas and slashers, they never used them on PW1 and did not injure him. And although all the ingredients for capital robbery were proved it would seem appropriate, that we apply the provisions of Section 179(2) of The Criminal Procedure Code and find, the appellant, as we now do, guilty of a lesser offence of Robbery Contrary to Section 296(1) of The Penal Code. We have also considered that the appellant was treated by the trial court as a first offender. We therefore set aside the death sentence and substitute it with an imprisonment term of 14 years. As we do this, we remain sympathetic and sensitive to the loss and trauma suffered by the victim.

We have reached the decision on sentence bearing in mind, as well, the view expressed by the **Court of Appeal in Godfrey Ngotho Mutiso –Vs- Republic Mbsa Criminal No. 17 of 2008** when they stated-

***“We declare that Section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the constitution, which as we have said, makes no such mandatory provision.***

***We have confined this judgment to sentences in respect of murder cases, because that was what was before us and what the Attorney General conceded to. But we doubt if different arguments could be raised in respect of other capital offences such as treason under Section 40(3), robbery with violence under Section 296(2) and attempted robbery with violence under Section 297(2) of the Penal Code. Without making conclusive determination on those other sections, the arguments we have set out in respect of Section 203 as read with Section 204 of the Penal Code might well apply to them.”***

The result is that the appeal on conviction fails. We substitute the death sentence with a prison term of fourteen (14) years to run from 1<sup>st</sup> November, 2006 when the appellant was convicted and sentenced by the Magistrate.

Those are our orders.

***Dated and delivered at Mombasa this 13th day of December, 2011.***

**G. L. NZIOKA  
JUDGE**

**F. TUIYOTT  
JUDGE**

**Dated and delivered in open court in the presence of:-  
Gioche for state  
Appellant in person  
Court clerk - Moriasi**