



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**OF KISII**

**Criminal Appeal 112 of 2008**

**DAVID OMARI OTISO.....1<sup>ST</sup> APPELLANT**

**MESHACK OCHARO MAYAKA.....2<sup>ND</sup> APPELLANT**

**DENNIS ONYANCHA ONGUSO.....3<sup>RD</sup> APPELLANT**

**JUDGMENT**

The appellants were jointly convicted by the Senior Resident magistrate's Court at Nyamira of three counts. In count 1 they were charged with robbery with violence contrary to *section 296(2) of the Penal Code* that on 4/11/2006 night at Magwagwa sub-location in Nyamira District within Nyanza province they jointly with the accused Zablon Laini Oguto and others not before the court and while being armed with offensive weapons namely machetes, robbed Ann Obadia Nyarango (PW1) of cash Kshs. 70,000/= and one mobile phone make Motorola T11 valued at Kshs. 5000/=, all valued at Kshs. 75,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said PW1. In count 2 they were charged with arson contrary to *section 332(a) of the Penal Code* that during the incident they jointly with others not before the court wilfully and unlawfully set fire to the dwelling house of Obadia Bundi (PW2) valued at Kshs. 1.2. Million. In count 3 they were charged with assault contrary to *section 251 of the Penal Code* that in the incident they unlawfully assaulted Obadia Bundi (PW2) and occasioned him actual bodily harm. They were sentenced to death on count 1, jailed for ten years each on count 2 and jailed for 12 months each on count three. They were aggrieved by the convictions and sentences and preferred these appeals. The appeals were consolidated.

The evidence on which the appellants were convicted was briefly that PW1 and PW2 are a couple. They were in their house at about 10.p.m and wanted to pray when the door was knocked open and a man entered. He had a panga which he used to cut PW1 on the head. There was a lantern lamp on the table whose light the couple used to recognize the attacker who was their neighbor and employee. They said he was the 2nd appellant. He went out and returned carrying a container and in company of the 1st appellant who was also their employee and whom they recognized using the lantern light. The 1st appellant held PW1's hand and demanded money. He led PW1 into the bedroom and here was given Kshs. 70,000/= which the complainant had in a handbag. He took five handbags. At this time a third man, the 3<sup>rd</sup> appellant, came to the house and stabbed PW2 with a knife on the left elbow. He demanded money from PW2 and pushed him into the bedroom. This man was known to PW2 as he was a former employee. He left PW2 when he was told PW1 had already given money to his colleague. The 2nd appellant then poured something on the seats from the container and lit them on fire. The same attacker hit PW2 on the head with a club. The 3<sup>rd</sup> appellant demanded a mobile phone. PW2 showed him his Motorola T190 which was on the seat. The 2nd appellant hit PW2 again and the attackers ran out. The couple raised alarm and people came. By this time their entire house was on fire. Nothing from it was saved. Among the people who responded to the alarm was the 2nd appellant who was arrested. The 1st appellant was arrested the same night at his house. Next morning the couple went to Nyamira District Hospital for treatment. The 3<sup>rd</sup> appellant was arrested on 18/12/2006 and from his house was found PW1's simcard.

The appellants denied in unsworn testimony each that he was in the attack. The 1st appellant said he was asleep in his house at 2 a.m that night when police came to arrest him. The 2<sup>nd</sup> appellant said that he was at home at about 10 p.m that night when he heard PW1 and PW2 crying for help. He went there and found many people. PW1 and PW2 were injured and their house had been burnt. Police officers from Nyamira arrested him. The 2nd appellant stated that he was arrested on 29/12/2006 in Kericho and was at Kericho G.K.Remand when police came for him for this case. The appellants did not call witnesses.

It is on this evidence that the trial court found the prosecution had established the guilt of each appellant on each charge. The appellants complained that they were convicted on improper and unreliable evidence of identification; that the prosecution evidence was uncorroborated; and that the conviction was against the weight of evidence. Mr. Masese

conducted their appeal which Mr. Kemo for the State opposed. The state counsel submitted that there was sufficient light which PW1 and PW2 used to recognize the appellants. Further that, PW II had recovered a phone which PW2 had identified to be his and one of the items stolen in the attack. Mr. Kemo, however, conceded that since assault is a constitutive element of capital robbery it was wrong for the trial court to have found the appellants guilty of assault in count 3 after the conviction of capital robbery in court 1.

The attack at the house of PW1 and PW2 was during the night. There is no dispute each complainant knew the appellants before. They testified they were attacked by three people whom they recognized to be the appellants. PW1 recognized the 1st and 2<sup>nd</sup> appellants, but not the 3rd appellant. PW2 recognized all the three appellants. In regard to the 3<sup>rd</sup> appellant there was evidence of a single witness, PW2, as to recognition. The appellants denied to have been in the attack. The trial court believed PW1 and PW2 in regard to recognition and disbelieved the defence. There is, however, no indication that the court exercised the usual caution about the evidence of recognition given by the witnesses to make sure it was water-tight and safe to justify a conviction. It was not borne in mind that a witness may be honest but mistaken (See *Roria .v.Republic* [1967] EA 583) and that a number of witnesses could all be mistaken(See *R.V. Turnbull and others* [1967] 3ALL ER 549). For the 1st and 2nd appellants the conviction was entirely resting on identity. Such a conviction invariably causes a degree of uneasiness. It is noted, however, that usually evidence of recognition is more assuring than that of identification.

It was said there was a lantern lamp that produced sufficient light to enable recognition. It is material that the 2nd appellant was arrested at the scene where he was with members of public who had come to respond to the alarm the couple had raised. We consider that the appellant may have been here innocently because he was not involved in the attack or because by turning up immediately and yet he was in the attack he wanted to use this to say he could not have been in the attack. Or maybe, he did not care at all. It does not appear his presence at the scene immediately following the attack taxed the trial court's mind.

PW2 was cross examined to say he had not mentioned the 3rd appellant to police. He was referred to one of the police statements he wrote in which he stated that he was attacked by a man whom he did not know. This clearly shows

that PW2's evidence connecting any of the attackers could not have been safe. That leaves the 3rd appellant without any evidence that he was recognized in the attack and only the evidence of PW1 that she recognized the 1st and 2nd appellant in the attack. Such evidence has no corroboration as they were arrested almost immediately and yet none of the stolen items was found with them.

The 3<sup>rd</sup> appellant was allegedly found with a sim card that belonged to PW2. PW5 Jacob Muchai of CID Nyamira investigated the case. The record shows that it was the 4th accused in the case who was found with a mobile phone and a simcard. The simcard was for number 0726161335 belonging to PW1. The card was in the phone which did not belong to PW1. The 4th accused then mentioned the 3rd appellant who was arrested and had PW1's mobile phone. PWII was A.P. Corporal Jeremiah Nyakundi of Ikonge Administration Police Post. He testified that the 3rd appellant had been arrested by A.P. Constable Kennedy Obure (PW12) who found him with a sim card belonging to the complainant. He was himself (PWII) not there. PW 12 testified that he was with PW 11 when they arrested the 3<sup>rd</sup> appellant and found him with the sim card. It is clear that the prosecution evidence regarding the recovery of this sim card is materially contradictory. We are unable to find that the evidence of possession of the card that the trial court relied on against the 3<sup>rd</sup> appellant was reliable as to be a safe basis for a conviction.

The result is that the prosecution did not prove beyond doubt that the appellants were in the attack. We allow the appeal, quash the convictions and set aside the sentences. The appellants will be set at liberty unless they are otherwise being legally held.

Dated, signed and delivered at Kisii this 3rd day of February, 2010.

**D. MUSINGA**

**JUDGE**

**3/2/2010**

**A.O.MUCHELULE**

**JUDGE.**

**3/2/2010**

Before A.O.Muchelule-J

Court clerk-Bibu(Kisii)

Mr. Masese-present

Mr. Mutai for State

Appellants-present

**COURT:** Judgment in open Court.

**A.O.MUCHELULE**

**JUDGE**

**3/2/2010**