



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

**AT KISII**

**Criminal Appeal 229 of 2008**

**JOHN ONYANGO OSANO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant was charged with robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the night of 18<sup>th</sup> /19<sup>th</sup> July 2007 at Kagwa sub location in Rachuonyo District within Nyanza Province, the appellant jointly with others not before court and while armed with pangas, rungas and stones robbed **George Otieno Osambo** of cash Kshs. 57,000/= and immediately before or immediately after the time of such robbery wounded the said **George Otieno Osambo**.

The appellant was convicted of the said charge and sentenced to death as by law prescribed. Being aggrieved by the said conviction and sentence the appellant preferred this appeal. Ten grounds of appeal were raised but the main issue that there was insufficient evidence regarding identification by recognition to warrant the conviction.

The brief facts of the prosecution case were that on the material night **George Otieno Osambo, PW1**, was sleeping in the house of his second wife, **Ann Aoko Otieno, PW3**, when his house was broken into and three people entered. PW1 testified that he switched on solar light in the bed room as well as security light outside the house. He started screaming and called out his first wife, **Maureen Awuor Otieno, PW3**, asking her to give the assailants money which they were demanding. PW1 alleged that he was able to recognize the appellant as he was his village mate. He said that the appellant was wearing a red jacket and a black long trouser. PW3 gave them Kshs. 57,000/= through a window. In the course of the robbery PW1 was cut with a panga on his right cheek.

A report was made to the police on the same night at around 3.00 a.m. **Police Constable Michael Ochola, PW6**, testified that the complaint was made by PW1 who was accompanied by members of the public. PW1 said that he was attacked by a group of thugs. The report was booked in the occurrence book but the same was not produced before the trial court. However, the statements by PW1, PW2 and PW3 were recorded on 21<sup>st</sup> July, 2007.

PW2 and PW3 corroborated the evidence of PW1 in all material aspects. They said that they were able to recognize the appellant because of the solar light. They also alleged that the appellant was from their village and they knew him before the attack.

**Nashon Olela, PW4**, who was a watchman employed by PW1 said that the attack took place at about midnight and he was not able to identify any of the assailants.

In her judgment, the learned trial magistrate held that there was sufficient light in the house of PW1 and security lights outside to enable PW1, PW2 and PW3 to recognize the appellant.

Mr. Ochwangi who argued the appeal on behalf of Mr. Kuke, the appellant's advocate, attacked the learned magistrate's findings on recognition of the appellant. He submitted that there were no favourable circumstances for positive recognition. On the other hand Mr. Mutai, Senior State Counsel, urged the court to find that there were favourable conditions for a positive recognition because of the solar light.

In his defence, the appellant testified that on the material night he was asleep in his house. He had been operating a small hotel business at Seka trading centre. PW1 was a tenant of the appellant's father and he had been given a three months notice to vacate the shop so that the appellant could occupy the same. On 21<sup>st</sup> July 2007, he was arrested on allegation that he was one of the people who had robbed PW1. The appellant alleged that he had falsely been implicated in the robbery because of the notice of termination of tenancy that had been served upon PW1.

The main issue for determination in this appeal is whether the appellant was sufficiently recognized by PW1, PW2 and PW3 as one of the people who attacked and robbed PW1. The robbery took place at night. When PW1 heard people banging his door he woke up and put on lights. He saw three people entering the house and he alleged that he was able to recognize the appellant.

In his evidence in chief, PW1 did not state that he gave the appellant's name to the police but in his cross examination he alleged that he mentioned the name of the appellant to the police. However, PW6 said that when PW1 went to Kendu Bay police station to make a report he said that he was attacked by a group of thugs but was able to positively identify the appellant. The occurrence book where the report was recorded was not produced before the trial court and neither was the statement by PW1 that was recorded four days after the said robbery.

There was no evidence that the appellant went into hiding shortly after the robbery and yet he was not arrested until 21<sup>st</sup> July 2007. If indeed the appellant who was well known to PW1, PW2 and PW3 had been named as one of the people who had robbed the complainant, one would have expected the police to have arrested him immediately after the report was made to them. Why did it have to take four days to effect the arrest? In our view this creates doubt as to whether indeed the complainant and his two wives positively recognized the appellant on the material night. As was held in **R-VS- TURNBULL** [1976] 3 ALL ER 549, mistakes in recognition even of close relatives and friends are sometimes made.

We are not satisfied that the appellant's conviction was safe. We therefore allow this appeal, quash the conviction and set aside the death sentence that was passed by the trial court. The appellant is set at liberty unless he is otherwise being lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2010.

**D. MUSINGA**  
**JUDGE.**

**A.O. MUCHELULE**  
**JUDGE.**

**02/02/2010**

A.O. Muchelule, J.

C/i – Bibu

Appellant present

Mr. Kemo for state

**Court:** Judgment delivered in open court.

**A.O. MUCHELULE**  
**JUDGE.**