



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA Criminal Appeal 56 of 2000**

PATRICK MUSUMBA OBUKA)

SILAS OBUKA).....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence of S.N Riechi, P.M

in Busia SRM's Cr. Case No. 522 of 1999)

JUDGEMENT

The appellants, **Patrick Musumba Obuka alias Taabu** and **Silas Ouma** were originally charged with Robbery with violence, contrary to Section 296(2) of the Penal Code. They were convicted and sentenced to death as the law provided. They filed these appeals against the convictions and sentences.

The appeal was heard by a two – Judge Bench composed of Mitey, J and Mutitu, J who consolidated the appeals on 20.6.2003 and judgement was reserved. It was finally never delivered as the two judges left the bench. We have recently been directed by the Chief Justice to draw and deliver the judgements in this and Criminal Appeal No. 63 of 2000.

The facts of the case are that the complainant, PW1 – Wilson Omusee Otwane, was sleeping in his house in Kapina sub-location on 18.5.1999. At about 1.40a.m, unknown people broke the door of his house using a big stone to break the door. In the complainant's estimate, four people suddenly entered the house. He flashed his torch and recognized two of the attackers. They were Silas Ouma and Patrick Musumba alias "Taabu". The attackers immediately grabbed the complainant from his bed and threw him to the floor. Having recognized the two, he shouted their names, asking them why they wanted to kill him. One of the attackers immediately snatched away the complainant's torch and hit him with it on the jaw. The other intruders suggested loudly that the complainant be taken outside and be killed. They demanded for money which the complainant told them he did not have. Silas Ouma then hit the complainant with a stick. At this moment one of the attackers picked the complainant's handbag which was in the room and they all escaped because Charles Oloo who was sleeping in another house in the same compound, shouted for help from the neighbours.

The complainant's eldest wife and his sons also slept in their houses in the compound went to see the complainant in his house. Thereafter they reported the matter to the Assistant Chief and the police at Kotur Police Post. Complainant was later taken to hospital for treatment. The names of the two recognized suspects, who are the present appellants were given to the police.

It is the complainant testimony that he recognized Silas Ouma when he flashed his torch at the attackers before they threw him down from the bed. He also testified that when he woke up from his bed upon the door being smashed in, he found the attackers already inside the house. He screamed for help.

Pw2, Chrispinus Odale is a son to the complainant. He went to see his father after the latter had been attacked. His evidence is that his father at the earliest moment after attack, mentioned the names of the two appellants. He also importantly testified that when they reported the incident to the Assistant Chief, the latter told them to see him the next day. The witness then reported to the police at Orengei Administrative Police Post.

PW3 is Margaret Otwani, a wife to the complainant. She was sleeping in the same house with the complainant during the robbery. She saw four persons enter their house and go straight to complainant's bed. She saw them armed with rungas and metal bars. She recognized two of the attackers using the light from her husband's flashing torch. They were Silas Ouma and Patrick Taabu. The two beat her

husband as she watched, while demanding money. They eventually picked her husband's box and escaped with it as their son shouted to the neighbours for help. She concluded that their house was just a one-room house.

PW4 Jackton Mugache Wamalwa and PW5 Philemon Emasu Omuse, were neighbour and son to the complainant. They added little to the evidence except to say that the complainant, at the earliest possible time after the attack, gave out the names of the two appellants as being among the attackers.

Pw6 PC Gilbert Kimani received the report of the incident together with the two appellants as suspects from the members of the public. He became the investigating officer. PW7 a clinical officer confirmed injuries on the complainant as a result of beating during the robbery attack.

The appellants who both had been put on their defence gave unsworn statements. The 1st appellant, Silas Ouma Opuka, stated as to how he was arrested after being told that he was wanted by the Assistant Chief. He was later taken to the police and even much later charged with this offence. He denied the charge and gave a story to the effect that there was a grudge from the complainant against him arising from the fact that the complainant had agreed to pay him for selling to the complainant building stones which the latter finally took delivery of without paying. Appellant said that despite persistent demands which annoyed the complainant, the later refused to pay. Appellant believed that complainant fixed him to escape from paying for the stones.

The 2nd appellant also narrated as to how he ended up being arrested. He denied the charge. He said that complainant most likely fixed him because he did not answer his screams for help when he was attacked but the appellant said that he had not known of the attack until he was summoned to the Assistant Chief's home during which trip he got arrested.

We have carefully perused and considered the evidence. The complainant was certainly attacked by robbers who took away his bag or box on the night of 18.5.1999 . He was also clearly injured during the attack. There is ample evidence that the attack was so sudden. The moment the attackers shuttered the door of the complaint's house inwards, they entered and went straight to the complainant's bed. The house was a one-room house and two or so steps could have brought them to the bed where the complainant slept. This was so confirmed by the evidence of the complainant and his wife.

The likelihood that the complainant who was then a sleep could have had time to go for his torch to use it to see the intruders is minimal. Even if he managed to get hold of his torch, it is not likely that he could have had time to use it sufficiently to identify the attackers. Although we see consistence in the fact that the complainant mentioned the names of the appellant soon after the attack and thereafter, we formed the opinion that that alone is not good enough evidence to support the conviction based on this uncertain piece of evidence on identification.

On the other hand we were persuaded by the 1st appellant's explanation that the complainant had motive to prevent the 1st appellant Silas Ouma from recovering some money from him for the building stones prepared and supplied to complainant under a written contract exhibited in the appellant's defence. If the unfulfilled contract existed, and we believed it did, any such attack on the complainant at the material time, was likely to raise suspicion and be interpreted by the latter, even mistakenly, as coming from the 1st appellant.

We accordingly find that the conviction is unsafe and cannot be left to stand. The appeal is allowed as the conviction is quashed and the sentence of death on each appellant is thereby set aside. In the circumstances each appellant is hereby ordered set a liberty from prison, unless otherwise lawfully held therein. Orders accordingly.

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D.A. ONYANCHA
JUDGE

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LADY F. MUCHEMI
JUDGE

Judgment delivered in open court in the presence of the appellant and the State Counsel Mr. Ogoti on the 4th day of May 2010.

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D. A. ONYANCHA

JUDGE

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F. N. MUCHEMI

JUDGE