



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

Criminal Appeal 7, 8 & 55 of 2008

PETER MUNGAI OTWERE & 2 others APPELLANTS

VERSUS

REPUBLICRESPONDENT

**(From original convictions and sentences in the Senior Resident Magistrate' Court at Ogembo Criminal Case No.205 of 2006 by
Hon. J. D. Kwena Esq., SRM)**

JUDGMENT

The appeals of 1st appellant **Peter Mungai Otwere**, 2nd appellant **Boi Okerosi Oire** and 3rd appellant **Bob Zephania Magero** were consolidated. They were 3rd, 4th and 1st accused, respectively, before the Senior Resident Magistrate, Ogembo, who convicted them on counts 1, 3 and 4 each of robbery with violence contrary to **section 296(2)** of the **Penal Code**. They were sentenced to death. The appellants were aggrieved by the conviction and sentence and preferred this appeal.

The particulars of the charge in count 1 were that on 15/1/06 at Boikanga sub location in Gucha District within Nyanza Province, they jointly with others not before court robbed **James Kenyatta** of cash Kshs.53,000/=, one radio cassette make Panasonic, solar panel 14wts, and small radio make Philips Akiva all valued at Kshs.80,000/= and at or immediately before or immediately after such robbery wounded the said **James Kenyatta**. In count 3 the appellants, jointly with others not before court, allegedly robbed **Mellen Gesare Ondieki** of cash Kshs.5000/-, crate of beer, crate of soda (500 ml), radio cassette make national Panasonic, radio make Philips and omena fish in 6 tins all valued at Kshs.15,500/- and at or immediately before or immediately after such robbery wounded **Christopher Okundi**, husband of the complainant. In count 4, it was alleged that they jointly with others not before court allegedly robbed **Ayiema Okeri** of Kshs.20,000/= and at or immediately after the robbery wounded the said **Ayiema Okeri**.

The evidence that was tendered before the trial court was as follows. **JKN(PW2)** (Complainant in count 1) was operating a shop at Gesonso market. **Mellen Gesare Ondiek** (PW5) complainant in count 3) was operating a bar at the market and **Ayiema Okeri** PW4 (complainant in count 4) was living at Botibwongo village. They were each attacked by a group of people on 15/1/06 at about 11 p.m. PW2 was asleep in the shop. He was with his wife **EN** (PW7). They were woken by people talking outside. The door was hit open by people who said they were police officers. The attackers were many and had a gun and torches. They ordered the couple to sit down and demanded money. PW2 pointed to the table where he had put money which they took. It was Kshs.18,000/=. They took another Kshs.30,000/=: two cell phones, panasonic radio and a solar panel, and left for the bar of PW5. PW2 was injured in the attack. He testified that he recognized the 3rd appellant in the attack. He saw him by use of torch light. He also recognized the 1st appellant by his voice. PW7 said she recognized the 1st appellant by his voice. The attackers knocked hard on the door to the bar of PW5 saying they were police officers. PW5's husband **Christopher Onkundi** (PW6) opened. There were patrons here. The attackers (who were about seven) started beating the people here demanding I.D. Cards. They had rungu and long knives and demanded money. PW5 lost cash Kshs.5000/-, three radios (Panasonic, Phillips and national) and 6 tins of omena fish to the attackers. She told court there was a lantern lamp burning in the bar and used it to see and recognize the 3rd appellant who came in first and had a rungu. PW6 said the lantern lamp was on the counter in the bar. He saw and recognized the first attacker to enter. He was the 3rd appellant. He had a rungu. He also said he recognized the 2nd appellant. PW4 told court he recognized 3rd appellant. The complainant lost Kshs.20,000/= to the attackers.

Each of the appellants made unsworn defence and denied he was in the attack. The 1st appellant told court that he retired to sleep that evening at 8 p.m. after selling in his father's shop. He said he also sells jaggery stones and that he had sold them to one of the complainants

on credit. He called his father **Shadrack Otwere Maanya** (DW) to support his evidence. The 2nd appellant told court he was at home throughout that night. He called his mother **Caroline Gesare Oire** (DW6) as a witness. The 3rd appellant told court he is a carpenter and was at home asleep when at 4.30 p.m. he was arrested for having been in the attack and yet he wasn't.

During this appeal, the 1st and 2nd appellants were represented by **Mr. Sagwe** whereas the 3rd appellant was not represented. **Mr. Kemo**, learned senior principal state counsel, appeared for the Republic. The basic ground of the appeal was that there wasn't sufficient identification or recognition evidence on which the trial court could base the conviction, and that the trial court erred in finding that the prosecution had proved the charges against the appellants beyond all reasonable doubt. **Mr. Kemo** opposed the appeal. His contention was that PW2, PW4, PW5, PW6 and PW7 had properly recognized the appellants as their attackers as the attack took a long time, appellants were known to the witnesses and there was sufficient light. He relied on the case of **R. v. Turnbull and others [1976] 3 All ER 549**.

On first appeal from a conviction by a magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its decision thereon (**Kariuki Karanja v. Republic [1986] KLR 190**). The court has, however, to bear in mind that it did not have the advantage of seeing or hearing the witnesses as they gave evidence.

There is no dispute that the witnesses knew the appellants before. They all come from the same neighbourhood. It is also not in dispute that appellants were arrested the same night of the incident and none was found in possession of any of the stolen property. The court did not consider this fact when evaluating the evidence.

Beginning with count 3, the evidence of PW6 was that he was drinking in his bar in company of PW4 and other people. His wife (PW5) was the one selling. The attackers broke open into the bar. There was a lantern lamp on a the counter. The attackers were about 7, according to PW5, but over 18 according to PW6. PW5 and PW6 told court the 3rd appellant was the first to enter. He had a rungu and was wearing a blue shirt. They each recognized him. According to PW4, the attackers were the 3rd appellant and "about 20" others. The 3rd appellant was carrying a panga and had a blue shirt. PW6 was cross examined and said the following.

"We were drinking. It was now 11 p.m. I started drinking at about 7 p.m. My eyes are not so good. I am short sighted. At night I can't see very clearly. When I drink I may not see well"

The witness had been drinking for nearly five hours and has problems with his eye-sight. He cannot be relied upon to say with certainty that he saw the 3rd appellant in the attack. PW4 did not mention that he was drinking, but PW5 and PW6 said he was. It is not known for how long he had been drinking. The trial court did not address itself to this fact of drinking and whether it may have affected the judgment of the witnesses. PW5 was the one selling beer to the patrons. When cross examined, she stated:

"I would sell till 8 p.m. Then I was to leave to my house. That day it was at 11 p.m. My husband was sick that is why I stayed late"

The "husband" she was talking about is PW6. Was he sick and drinking at the same time? If PW4 and PW6 had been drinking and their evidence is not safe, that leaves PW5 as a single recognizing witness. It is trite law that her evidence would require to be treated with the greatest care to be sure that the witness was honest and unmistakable (**Murube and Another v. Republic [1986] KLR 356**). Such evidence would require corroboration.

For all the counts it is of critical importance to note that **Hezron Manduku Ayiema** who was drinking with PW4 and PW6 was arrested and charged (as 2nd accused) along with the appellants. There was no explanation at all why an innocent person was arrested for the offences and charged. In fact, he was injured in the attack. That says something about the quality of investigations in this case.

Regarding count 4, PW4 was the complainant. He was found in PW6's bar where he was robbed. What has been said in the foregoing about the value of the witnesses' testimony regarding count 3 also affects the count.

In count 1, the evidence of PW2 was that when the attackers came in and demanded money he pointed to the table where the money was under a paper. The attackers rushed there. They all shone their torches on the table. At that point he saw the person who bent to remove the money. This is because the light from the torches shone on the person. It was 3rd appellant. The light landed on his head. PW2 was standing behind them. It should be noted that by this time PW2 had been cut on the head and on the shoulder. He was bleeding. The attackers were "many" and had torches. They were ransacking the room. The size of the room was 5m x 5m. It was a small room. The attack took about 10 minutes. The witness was not asked how long he had the appellant under observation, or whether all these many people had crowded the small room to the extent that vision was difficult. Had the fact that he had been cut on the head and was bleeding affect him in any way? All these matters go to the quality of the recognition evidence.

PW2 and his wife (PW7) gave evidence that they recognized the 1st appellant by his voice. PW2 said the 1st appellant shouted to PW7 in Ekegusii demanding he produces a cellphone or she be raped and infected with AIDS. PW7 testified that she had hidden herself under sacks. One man came and pulled away the sacks and talked to her for long. He was demanding a cellphone and a motor vehicle and was threatening to rape her. He was talking in Ekegusii language. The lady told court the attack took 1½ hours. Her husband stated it lasted only 10 minutes. That is material difference. Identification by voice can be a sound and reliable method of identification (**Maghenda v. Republic [1986] KLR 255**) but must be treated with the greatest care and requires corroboration (**Chogo v. Republic [1985] KLR 1**).

It is also trite that evidence which itself requires corroboration cannot be used to corroborate.

The court has carefully re-evaluated and considered the evidence that was tendered in the trial court. The evidence regarding identification (by recognition) was not full proof. It was not a safe basis for finding that the guilt of the appellants, or any of them, had been established beyond all reasonable doubt.

In conclusion, the appeal is allowed. The conviction is quashed and sentences set aside.

The appellants shall be released forthwith unless they are otherwise legally held.

Dated, signed and delivered at Kisii this 23rd day of July, 2009

D. K. MUSINGA. **A. O. MUCHELULE**

JUDGE

JUDGE

23/7/2009

Before D. Musinga J

Mobisa – cc

Mr. Mutai for the State

Mr. Sagwe for the Appellant – 1st and 2nd.

3rd Appellant – in person.

Court: Judgment delivered in open court.

D. MUSINGA.

JUDGE