



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**OF KISII**

**Criminal Appeal 107 of 2007**

**CALVIN OSINGO AMANYO.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being from original conviction and sentence by the Senior Resident Magistrate's Court  
at Homa Bay Criminal case no.1134 of 2006)***

**JUDGMENT**

The appellant was convicted by the Acting Senior Resident Magistrate at Homa Bay of robbery contrary to *section 296(1) of the Penal Code* and sentenced to serve 10 years imprisonment. The particulars of the charge were that on 23/8/2006 at about 7.30 p.m at Homa Bay G.K.Prison area in Homa Bay District within Nyanza Province, he jointly with others not before court, robbed Pius Oketch Zakayo (PW1) of cash Kshs. 3000/=, a long trouser and pair of shoes all valued at Kshs. 5000/= and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said Pius Oketch Zakayo (PW1). He was not satisfied with the conviction and sentence and preferred this appeal.

The evidence as recorded by the trial court was briefly that PW1 was going home from Homa Bay at about 7.30 p.m and was pushing a bicycle. It was dark. When he reached the G.K. prison gate he was attacked by three men. One of them slapped him on the right cheek until he fell down. The men stepped on him and strangled him. They removed his long trouser and pair of safari boots that he was wearing. In the trouser pocket was his T190 motorolla mobile phone and

cash Kshs. 3000/= which they took. When the men heard women coming to the scene, they ran away. PW1 testified that he recognized one of the attackers to be the appellant who comes from the same locality. He was aided by light from the prison gate. PW2 Veronica Aoko Oketch is PW1's wife and was one of the women who came to the scene and found him. They helped PW1 to Homa Bay police station where the attack was reported. PW1 was issued with P3 and was treated at Homa Bay District Hospital. The P3 was produced in evidence of Exhibit 1 by clinical officer Joel Suter (PW4) of the Hospital. He examined PW1 to find he had swollen and tender right cheek. He had injuries on left clavicle and bruise on exterior elbow joint. He had suffered harm and the injuries were caused by blunt object.

The report was made to Corporal Momanyi Henry (PW5) of Homa Bay police station who was told the appellant was one of the attackers. The appellant was arrested by area Assistant Chief Maurice Ondiek (PW3) on 30/8/2006. PW3 told court that he searched the appellant's house and from there he recovered PW1's pair of safari boots (Exhibit 2) and motorolla mobile phone (Exhibit 3) which he had lost to the attackers in the attack.

The appellant gave unsworn testimony in defence and denied the robbery charge. His version was that there was no robbery but a fight between him and PW1. He stated that he was going home at about 6.30 p.m when PW1 came from behind him while carrying his wife on a bicycle. He was riding fast and rung the bell. He hit the appellant with the bicycle while passing. The two quarreled and begun to fight. PW1's wife (PW2) begun to separate them. Other people (women) who were passing came to the scene. The two separated and each went his way. The appellant called one witness, James Oduor Odema (DW1) to say he was with other women while going home from the market when he found PW1 and the appellant fighting. They were being separated by PW1's wife. She was unable. He intervened and separated the fight. He stated that there was no robbery.

The trial court considered the above evidence and came to the conclusion that the prosecution had established the offence of robbery under *section 296(1) of the Penal Code* and convicted the appellant. The appellant, through his counsel Mr. Onyango, complained that the conviction was against the weight of evidence as the prosecution did not prove the charge beyond doubt. He continued that there was undue reliance on the prosecution evidence and that the defence case was not considered. It was alleged the court convicted the appellant on extraneous considerations. Lastly, that the trial court failed to appreciate the fact that the appellant's right to liberty under *section 72 (3) (b) of the*

*Constitution* was violated.

The trial court had two versions. PW1's version that he was robbed by the appellant and two other people, and the appellant's version that there was no robbery but that the two had fought. The court thought identification (recognition) was an issue. It was not. The appellant was not saying he was not at the scene at the material time. He stated he was at the scene and in fact fought with PW1. The court, therefore, fell into error when it indicated that identification was an issue to be determined.

According to PW1, his wife PW2, and other women happened to be passing when she came by him having been attacked by people she did not identify. The appellant is saying that PW1 was carrying his wife on bicycle when they knocked him. PW2 gave evidence consistent with that of PW1. The appellant called DW1 to agree with him. The court accepted the prosecution testimony as against the defence. It did not believe the appellant because, among other things, he had not reported to police the alleged assault by PW1 or obtained P3. Further, that when he cross examined the prosecution witnesses he did not indicate that incident was about a fight, and not a robbery. It should always be remembered that it was on the prosecution to prove the guilt of the appellant and not for the appellant to establish his innocence. His innocence was presumed in law. Secondly, an accused is convicted on the strength on the prosecution case and not on the weakness of the defence case. An accused is entitled to keep quiet in defence and that cannot be held against him.

When the appellant cross examined PW3 (who allegedly recovered the shoes and mobile phone at appellant's house), he alleged that the items had been planted on him. Of course, PW3 denied this. When he cross examined PW1 the appellant alleged he was being framed and that there was a previous grudge. The appellant alleged that out of that grudge PW1 had vowed to have him jailed. PW1 denied this. It can be seen that throughout the prosecution testimony the appellant was complaining that the case had been made up. This was consistent with his testimony in defence, and therefore, the trial court was wrong to dismiss that defence as an afterthought.

PW1 and PW2 were apparently coming from Homa Bay. PW2 sells petrol at Homa Bay town. PW1 testified that:

*"I had come from town"*

and was going home. PW2 stated:

*“I do sell petrol at Homa Bay town. On 23.8.2006 at around 7.30 p.m . I was from the market.....”*

She was going home. The prosecution and the defence agree that PW1 had a bicycle. In PW1’s evidence in-chief he made reference to people having rescued him but did not say any of them was his wife. It is during cross examination that he disclosed his wife was among those who rescued him. In fact his examination in chief gave the impression that those who rescued him happened to be passing. If both PW1 and PW2, a couple, were coming from Homa Bay town and were going home then it is consistent with the appellant’s testimony that the two were together on a bicycle going home.

The appellant was alleging PW1 had a grudge against him. PW2 is PW1’s wife. According to the prosecution, PW2 was with two other women when they came by the incident. These two women were material witnesses given the circumstances of the case. They were not called to testify, and there was no explanation for this. The usual presumption is that had they been called they would have given evidence adverse to the prosecution.

This is the first appellate court. It had the responsibility to reevaluate and consider the evidence adduced at the trial court and be able to come to its own conclusion as to whether such evidence supported the conviction, bearing in mind that it did not see or hear the witnesses.(See *Okeno. V. Republic [1972] EA 32*). Making my own assessment of the recorded word, I find that the prosecution evidence was not a safe basis to convict the appellant.

The result is that the appeal against conviction and sentence succeeds. The conviction is quashed and the sentence set aside. The appellant is ordered to be set at liberty forthwith unless he is otherwise being lawfully detained.

Dated, signed and delivered at Kisii this 27th November, 2009.

**A.O.MUCHELULE**

**JUDGE**

**27/11/2009**

Before A.O.Muchelule-J

Mongare court clerk

Mr. Kemo for the state

Mrs. Asati for Mr. Onyango for appellant

**COURT:** Judgment in open court.

**A.O.MUCHELULE**

**JUDGE**

**27/11/2009**