



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

Criminal Appeal 11 & 12 of 2009

(CONSOLIDATED)

*(Being an appeal from original conviction and sentence of the SRM's court at Keroka in criminal case No. 239 of 2008 – J. WERE, SRM)*

BETWEEN

PETER ONGERI MASESE ..... 1<sup>ST</sup> APPELLANT

JOSEPH MOMANYI MOGAKA alias

WILLIAM OSORO ..... 2<sup>ND</sup> APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

These appeals were not opposed by the State and, in our view, rightly so.

The appellants had been charged with four counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code** but were convicted in only one of them, the 4<sup>th</sup> one. The particulars of the charge were that on the nights of 12<sup>th</sup>/13<sup>th</sup> March 2006 at Mogusi sub-location within Kisii Central District within Nyanza Province, the appellants jointly with others not before court, while armed with dangerous weapons namely, an AK 47 rifle, pangas and rungun, robbed **Florence Nyabuga** of one mobile Phone make Nokia 6610, one CD player, 2 radio cassettes and cash Kshs. 3,500/= all valued at Kshs. 47,500/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said **Florence Nyabuga**, shot dead **Peter Mosigari Ongera** and caused injuries to **Cyrus Nyangaresi Ogechi**, **Jared Obwori Nyangaresi** and **Lawrence Leshan Nyaruru**.

The trial of the appellants was commenced before the Chief Magistrate's court at Kisii where several witnesses including the complainant herein, **Florence Nyabuga**, testified. Thereafter the case was transferred to the Senior Resident Magistrate's court at Keroka. The matter started *de novo*.

The complainant, who had testified in the earlier proceedings, was not recalled to testify and no reason was given for that. Without the evidence of the complainant it was not possible to conclude with any certainty that the items referred to in the charge sheet as having been robbed belonged to her.

Secondly, the learned trial magistrate relied entirely on a confessionary statement that was allegedly given by the 1<sup>st</sup> appellant, **Peter Ongeru Masese**, before a Resident Magistrate. In the said statement the 1<sup>st</sup> appellant allegedly stated that a person known as **Osoro** was one of the people who participated in the said robbery. It was alleged that **Osoro** was an alias name of the 2<sup>nd</sup> appellant, **Joseph Momanyi Mogaka**. However, the 2<sup>nd</sup> appellant was not there when the confession was made. The 1<sup>st</sup> appellant did not identify the 2<sup>nd</sup> appellant as being the person known as **Osoro** whom he had allegedly referred to. The 2<sup>nd</sup> appellant denied that he was known as Osoro.

Thirdly, the 1<sup>st</sup> appellant denied having made the confessionary statement as aforesaid. He claimed that he had been assaulted by the police and forced to appear before the Resident Magistrate to make the said confession. It is trite law that evidence of an accomplice or any alleged accomplice as in this case should not generally be accepted unless there are good reasons to believe the same and there is some other independent evidence to corroborate the same, see **KINYUA & IBRAHIM M'INANGA –VS- THE REPUBLIC** [1980] KLR 141. In the absence of any other satisfactory evidence to corroborate the retracted confession by the 1<sup>st</sup> appellant, it was unsafe to convict the appellants on such evidence. We agree with **Mr. Mutai, Senior State Counsel**, that these appeals ought to be allowed which we hereby do.

The appellants are set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KISII THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2009.**

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

**JUDGE.          JUDGE.**

**18/11/2009**

Before D. Musinga, J.

A. Muchelule, J.

Mr. Mutai for the state

Mr. Onyango for the second appellant

1<sup>st</sup> Appellant – present

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

**D.K. MUSINGA      A.O. MUCHELULE**

**JUDGE.**

**JUDGE.**