



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

**Criminal Appeal 78 of 2007**

**GEOFREY OMONDI  
ODERO**

.....  
**... APPELLANT**

**VERSUS**

**REPUBLIC**

.....  
.....  
**.... RESPONDENT**

*[From original conviction and sentence in Criminal Case number 828 of 2006 of the  
Chief Magistrate's Court at Kisumu]*

**CORAM**

**Mwera, Karanja J. J.**

**Musau for State**

**Court Clerk – George/Laban**

**Appellant in person**

**JUDGMENT**

Geoffrey Omondi Odero (herein the appellant) appeared before the Chief Magistrate at Kisumu charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code, in that on the 3<sup>rd</sup> October 2004 at about 9:20 p.m. in East Kadianga Location Apok village Nyando District Nyanza province, jointly with other not before court while armed with a dangerous weapon namely a homemade gun, robbed Modekai Owuor of his motor vehicle registration number KAR 223 H Nissan Double cabin valued at Kshs. 3 million and at or immediately before or after the time of such robbery used actual violence and wounded the said Modekai Owuor thereby resulting in his death.

After pleading not guilty to the charge, the appellant was tried, convicted and sentenced to death. He

now appeals against the conviction and sentence on the basis of the grounds contained in his petition of appeal dated 12<sup>th</sup> June 2007.

The petition contains seven(7) grounds which put together are a complaint on the insufficiency and credibility of the prosecution evidence which the learned trial magistrate relied on to convict the appellant and a complaint on the failure by the learned trial magistrate to consider his statement of defence.

Written submissions to fortify the grounds were filed and at the hearing of the appeal, the appellant represented himself and orally addressed us in response to the address by the Learned Senior Principal State Counsel who represented the respondent.

**Mr. Musau**, the learned Senior Principal State Counsel, opposed the appeal and after taking us through the vital parts of the prosecution evidence contended that although the evidence was essentially circumstantial it was nonetheless strong and credible to support a conviction.

The appellant disagreed and maintained that the evidence against him was contradictory and did not establish his identification as one of those who committed the offence. He lamented that the stolen vehicle was never dusted for finger prints to confirm that he was one of its occupants at the material time.

This being a first appeal, we are obliged to re-examine and re-evaluate the evidence afresh and make our own conclusions. We however bear in mind that the trial court had the advantage of seeing and hearing all the witnesses (**See, Okeno =vs= Republic [1972] E. A. 32**).

The prosecution case was founded on the facts that follows:-

On the material date at about 9:30 p.m. **Mary Auma (PW1)** was called by a relative and informed that her husband (now deceased) had been carjacked. She contacted their manager called Clement Makokha who informed her that her husband was injured and being taken to hospital. After about an hour she was informed by the same manager that her husband had passed on. She later learnt that he had been attacked as he parked his vehicle registration number KAR 244 H and that the attackers drove away in the vehicle. She also learnt that the vehicle had been involved in an accident and that two of the attackers had perished, one was apprehended by the police while another escaped. She saw the arrested suspect at the Ahero Police Station but he also perished while in the police cells. She did not know the attackers but confirmed that the appellant was related to her.

**Philip Okinda Owuor (PW2)** is a brother of the deceased. He was called to the St. Monica Hospital on the 5<sup>th</sup> October 2004 to identify the body of the deceased for purposes of post-mortem. He said that the appellant was his cousin and that he was with the deceased at Ahero earlier on the fateful day.

**Joshua Ojwang Ogodo (PW3)** was on the material date at about 8:00 p.m. undertaking tuition at a teacher's house when he heard screams from the home of the deceased and saw a motor vehicle being driven from the home at a terrific speed. He thereafter went to sleep at his cousin's place. He told his cousin what he had seen and the cousin tried to call the deceased on his phone but all in vain.

He later went to Nyabondo Hospital where the deceased was undergoing treatment. However, the deceased passed away. He (PW3) said that the appellant was his cousin and that he had seen him a day prior to the material incident with three strangers at Nyamarimba market.

On the material date at 6:00 p.m., **Eric Otieno Walla (PW4)** was at Nyamarimba market buying seedlings from a kiosk operated by one Mark who is a brother of the appellant. He (PW4) found the said Mark, the appellant and one Ken at the kiosk.

Thereafter, he (PW4) and three others including the appellant and Ken walked to his place where the appellant and Ken remained briefly and then went away. He (PW4) said that Ken was a visitor of the appellant and had said that he was from South Nyanza. At about 9:00 p.m. he (PW4) heard screams from his cousin's home. He proceeded there with others and found that his cousin (the deceased) had been

attacked. Later, a report was received that the deceased had passed on. People cried while mentioning the appellant's name. He (PW4) said that he next saw the appellant after one year.

The deceased was a nephew of **WILLIAM ONGETE KOKO (PW5)** who was asleep at his home on the material date when he was woken up by his son and informed that the deceased had been robbed and shot. He (PW5) reported the incident at the D. O.'s office and together with three administration police officers went to Nyabondo Hospital. While there, the area O. C. P. D. came and informed him that the stolen vehicle had rolled and that two of its occupants had died, one had been arrested and one had escaped.

He (PW5) said that the appellant was also his nephew and had ran away. His (appellant's ) name had been revealed by the suspect who later died.

The firearms examiner **Chief Inspector Lidse Kipkemoi (PW6)** examined a recovered home-made gun and some rounds of ammunition. He compiled a report which he tendered in court.

**P. C. James Agudhu Oloo (PW7)** of Katito Police Patrol Base, was on duty with colleagues on that material night. They were manning a road block at the Katito market along the Sondu/Ahero Road and were informed at 9:00 p.m. that the deceased had been robbed of his vehicle and that the robbers numbering four drove towards Sondu market.

P. C. Oloo and colleagues later joined Inspector Karanga and they all drove towards Sondu. On the way, at an area called Kandaria they spotted a vehicle on the opposite side moving at a high speed with full lights. They turned their vehicle and pursued the speeding vehicle which they found at Stopamba market where it had rolled into a ditch. They found three people lying on its side. Two were dead but one was alive.

After interrogation at the scene, the person who was found alive mentioned that the dead men were Ken and Morris while the missing one was Geoffrey, the appellant.

The scene was searched and a home-made pistol was recovered in the ditch where the vehicle had landed.

P. C. Oloo said that the person who was found alive had injuries all over the body and that his name was Jackton. He was charged with the offence of robbery with violence but later succumbed to his injuries.

On 1<sup>st</sup> October 2004, **Macdonald Otieno Odera (PW8)** was at his place of business at Nyamarimba centre when the appellant and his friend called upon him at about 4:00 p.m. They later went to spend the night at his (PW8's) place during which time the appellant introduced his friend as Ken.

Odera (PW8) said that the appellant was his younger brother and that on the material 3<sup>rd</sup> October 2004 he received a report that his cousin (deceased) had been murdered.

**Lukas Owuor Oketch (PW9)** is a brother in – law of the appellant. He testified that on the material date at about 4:00 a.m. he was sleeping in his house when he was awakened by the appellant who arrived there covered with mud and wearing bloodied clothes. He (appellant) said that he had been involved in an accident at Stopamba and that his colleagues were too injured to move.

Oketch (PW9) decided to go for his brother so as to witness the happenings but on their return to his house found that the appellant had disappeared. He (PW9) reported the matter to a village elder. They searched the scene but could not find the appellant.

Later, Oketch (PW9) received a report that the appellant had committed murder. He recorded a statement at the Ahero Police Station and at a later stage saw the appellant at the said station.

The pathologist **Dr. Margaret Oduor (PW10)** attached to New Nyanza General Hospital carried out a post mortem on the body of the deceased and compiled a report which she tendered in court.

**I. P. Joseph Karanga (PW11)** formerly of the Katito Patrol Base repeated more or less what was stated by P. C. Oloo ( PW7) and

**P. C. Felix Maritim ( PW12)** of C. I. D Suba indicated that he escorted the appellant from Suba upto the office of the Provincial Criminal Investigations Officer ( P. C. I. O.) in Kisumu.

**P. C. Simiyu Nanyonge (PW13)** of Pap Onditi Police Station also identified the body of the deceased for post mortem purposes and Chief Inspector Stephen Birgin (PW14) of the P. C. I. O.'s office Nyanza investigated this case and charged the appellant accordingly.

**P. C. Peter Nyawino ( PW15)** formerly of Mbita Police Station Ringiti Police Post arrested the appellant at an Island in Suba and handed him over to the office of the District Criminal Investigation Officer ( D. C. I. O. ) Suba.

In his defence, the appellant made a sworn statement and said that he was a fisherman and was sent by his boss to Kibuye to bring sacks of “**Omena**”. This was on the 1<sup>st</sup> October 2004 and since he was not far from his home he visited his grandmother and slept at home with a colleague. They went to Sondu on the 2<sup>nd</sup> October 2004 and in January 2005 re-located to Mfangano. In January 2006 he was summoned to the Mbita Police Station where he was informed that he was required in Kisumu. He was arrested and taken to the P. C. I. O. Kisumu. He was questioned about a theft at his home and was later charged with the present offence which he knew nothing about. He denied the offence.

After considering all the evidence before her, the learned trial magistrate convicted the appellant and in so doing stated that:-

**“ I do appreciate that there is no eye witnesses who saw the robbers and what they did at the deceased’s home. What is before me is entirely circumstantial evidence the position in law is as was held in the case of Mwita =vs= Republic [2004] 2 KLR 61 is (sic) that in a case depending exclusively upon circumstantial evidence. The court must before deciding upon a conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of any other explanation upon any other hypothesis than of guilt”.**

On our own reconsideration of the evidence, we find as did the learned trial magistrate, that the offence of robbery with violence was indeed committed against the deceased by a group of armed men who ended up inflicting fatal injuries upon the deceased.

The crucial point for determination was the identification of the appellant as having been among those who committed the offence.

In that regard, we entirely agree with the conclusions of the learned trial magistrate that the circumstantial evidence adduced against the appellant was strong enough to show that he was in the company of those who robbed and shot the deceased.

The learned trial magistrate clearly appreciated that there were no eye witnesses to the robbery but having carefully considered the evidence and the incriminating circumstances as well as correctly directing herself arrived at the inevitable conclusion that the appellant was one of the robbers.

His defence was in the circumstances unsustainable. To us, the fact that the stolen vehicle was found to have rolled and that two of its occupants were dead while one was alive with serious injuries and yet another escaped after the accident only to be mentioned as the appellant by the person who succumbed to his injuries and the fact that one of the dead suspects was a person called Ken who had prior to the offence been seen with the appellant was more than a mere coincidence.

This was compounded by the fact that a few hours after the offence and the accident, the appellant went to his brother – in – law (PW9) in the wee hours of the morning (4:00 a.m.) while in a state of injury, wearing bloodied clothes and covered in mud. He informed his brother in law that he was

involved in a road accident at Stopamba but was rather economical with the truth regarding the circumstances of the accident and those with him at the time.

Truly, the accident occurred at Stopamba but interestingly the appellant could not wait for the appearance of a witness to hear his narration of the incident. He disappeared before the witness arrived never to be seen again in the area for almost two years. He was found and arrested in an island in Suba-District.

All the foregoing were inculpatory facts which when viewed in the light of the appellant's defence were completely incompatible with his innocence and incapable of any other explanation upon any other hypothesis than of guilt, (See Mwita =vs= Republic [2004] 2 KLR 60, Mwangi =vs= Republic [2004] 2 KLR 28, Daniel Kioko Mbuva =vs= Republic NBI Criminal Appeal No. 65 of 2008 C/A (unreported), Rex =vs= Kipkering Arap Koskei & Another [1949] 16 EACA 135 and Simon Musoke =vs= Republic [1958] E. A. 715).

Added to that, we must say that the appellant's conduct of escaping from the general scene after the offence and going into hiding for a considerable period of time was inconsistent with that of an innocent person and provide a further circumstantial evidence against him (See Ronald Mwachia Ezekiel =vs= Republic NBI Criminal Appeal No. 318 of 2007 C/A (unreported).

In the end result, this appeal is without merit and is dismissed accordingly.

**Dated, signed and delivered at Kisumu this 17<sup>th</sup> day of November 2009.**

**J. W. MWERA**

**J. R. KARANJA**

**JUDGE**

**JUDGE**

*JRK/aao*