



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
Criminal Appeal 50 of 2007

BONFEC OMENTA & ANOTHERAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

Consolidated with Criminal Appeal No. 52/2007

1. Criminal Law
2. Criminal Appeal – Ang’awa, Mugo JJ
 - a) Robbery with violence contrary to **Section 296(2)** of the penal code

Particulars of offence

“On 7th July, 2007 at 6.30a.m at Chebown estate in Kericho District within Rift Valley Province while armed with a dangerous weapon, namely panga jointly robbed Syvanos Zavaya Shayuga of his mobile phone Motorola C118V valued at Kshs. 3,500/= and a small Sunny radio valued at Kshs. 700/= and at or immediately before or after the time of such robbery used actual violence to the said Syvanos Zavaya Shayuga”
 - b) Plea not guilty
 - c) Complainant attacked by three persons. Hit on head, robbed and cut him.
 - d) After trial both accused 1 and 2 convicted and sentenced to death
3. **Appeal**
 - i) Accused 1 and 2’s appeal consolidated Cr. A. 50 and Cr. A. 52/2007
 - ii) Appellant No. 1 original accused No. 2
 - iii) Appellant No. 2 original accused No.1

B: Advocate for appellant No. 1

 - i) Appellant was tried on a defective charge sheet
 - ii) Magistrate arrived at wrong decision
 - iii) Relying on evidence of a single witness
 - iv) Evidence raised doubt.
 - v) No exhibits recovered.

C: Appellant No. 2 in person

 - i) Offence occurred 6.30a.m. He was arrested at 11.00a.m.
 - ii) No link between appellant and offence.
 - iii) Admits being caught with a panga but not meant to do criminal offence
 - iv) Discrepancy
 - v) Sentence harsh
4. **State Counsel**
 - a. Sentence sound

- b. Appeal be upheld
 - c. Identification not in issue
 - d. Appeal be dismissed and conviction upheld
5. **Held**
- i) Insufficient evidence to convict two appellants with offence.
 - ii) Taking three persons to complainant at hospital for identification fatal
 - iii) Appeal allowed

6. **Case Law** - Nil

7. **Advocate**

G.M. Maengwe advocate instructed by the firm of M/S G.M. Maengwe & Co. advocates for the appellant.

B.L. Kivihya Senior State Counsel instructed by the Attorney General for the Republic/Respondent

BONFIC OMENTA APPELLANT NO. 1

DENNIS NYAKUNDI APPELLANT NO. 2

VERSUS

REPUBLICRESPONDENT

*(From the original conviction and sentence of the Ag. Senior Principal Magistrate W. Nyarima
ESQ Ag SPM in Criminal Case No. 1345/07 at Kericho delivered on 26th October, 2007)*

JUDGMENT

I: Procedure

1. The two appellants originally accused No. 1 and 2 in the subordinate courts were jointly charged with the offence of Robbery with violence contrary to **Section 296(2)** of the penal code.

“On the 7th July, 2007 at 6.30a.m. at Chebown estate in Kericho district within the Rift Valley province whilst armed with a dangerous weapon namely panga jointly robbed Syvanos Zavaya Shayuga of his mobile phone Motorola C118V valued at Kshs. 3,500/= and a small sunny radio valued at Kshs. 700/= and at or immediately before or after the time of such robbery used actual violence to the said Syvanos Zavaya Shayuga”.

2. Both appellants pleaded not guilty to the charge.
3. A trial was conducted and both were found guilty as charged by the

trial magistrate and were sentenced to Death.

4. They both appealed to this court. The 1st appellant being represented by M/S Maengwe & Co. advocates whilst the 2nd appellant acted in person.
5. The two appeals were consolidated.

II: Background facts

6. The complainant was working as a team leader at the Unilever Estate. He recalls the 7th July, 2007 at 6.35a.m. He was going to Chebown Estate when he saw three persons behind him. The three attacked him by holding his waist, beating him up till he fell down. He was hit on the head. His assailants were armed with a panga (*cutlass*) and knife. They ran away.
7. The complainant screamed. Members of public came to his aid. He made a call to his supervisor PW2 who mobilized a group of workers, PW3, PW5, PW4 together with others commenced a search in the tea plantation.
8. This search continued until 10.00a.m when the three persons of whom two were the appellants were arrested and bound.
9. The assistant chief PW6, found the group of people together with the three persons. When he made enquires about them he promptly took the three to the hospital where the complainant was admitted. The complainant identified the three who were then taken to the police station. PW7 and re arrested by PW7. He took possession of a panga

that was brought with the accused.

10. Only two accused were brought to court. A third one was released by the police.
11. In their defence the two appellants each stated that it was true they were in the area in question but their intention was to pick firewood.
12. Appellant No. 1 was found by a guard. He asked for forgiveness. He had fled when caught trespassing.
13. Appellant No. 2 also likewise stated that when he was caught after tying two stacks of wood, he panicked and ran away only to be caught. He denied the incident of robbery.

II: Appeal

14. **The appellant No. 1 original accused No. 1 claimed that the charge sheet was defective.** This claim could be on the grounds that the appellant never had any weapon that had been recovered from him.
15. **The evidence of a single witness PW1 was relied on. The trial magistrate erred in doing so.**
16. **The evidence before court raised doubt and there was no exhibit recovered.**
17. Appellant No. 2 original accused No. 2 admitted he had the panga but his intention was not to commit an offence. He had no employment and decided to fetch wood. He claimed there were discrepancies to the evidence. The sentence was harsh but there was no evidence to prove

he committed the offence.

III: State

18. In reply the state counsel supported the conviction and sentence stating that there was sufficient evidence to uphold the same.

IV: Findings

19. The chain of evidence in this case broke down and or became fatal to this case when the chief took three persons to the hospital/dispensary where the appellants and another were identified by the complainant.

20. The attack on the complainant occurred. The three persons ran away. A group of workers were mobilized and did arrest three persons. The prosecution are to prove to the trial court that the three persons are the one and same robbers. This could only be done if an identification parade was held. The chief erred in taking the three persons to the complainant to be identified instead of taking them to the police station to permit the police arrange an identification parade.

21. There has been no evidence as to why the third person arrested was released.

22. The two appellant gave an explanation of why they were in the premises/land. The trial magistrate did not believe their evidence.

23. We are of the opinion that the conviction and sentence against the two appellant is unsafe. They are set at liberty unless otherwise lawfully held. The conviction is quashed and sentence set aside.

DATED this 3rd day of December, 2009 at **KERICHO**

.....
M.A. ANG'AWA
JUDGE

.....
M.G. MUGO
JUDGE

G.M. Maengwe advocate instructed by the firm of M/S G.M. Maengwe & Co. advocates for the appellant.

B.L. Kivihya Senior State Counsel instructed by the Attorney General for the Republic/Respondent