



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 303 of 2005**

**JAMES OGOT OLALE.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(From the original conviction and sentence in Criminal Case No. 11708. of 2003 of the Chief Magistrate's Court at Makadara by Mrs Gandani – SRM)***

**J U D G M E N T**

The appellant **JAMES OGOT OLALE** had been jointly charged with **DAVID ODHIAMBO OFULA** on three counts of robbery with violence contrary to section 296(2) Penal Code. Both pleaded not guilty and the matter proceeded to hearing. They were each convicted on all three counts and sentenced to death on all three counts.

The appeal by James Olale Ogot proceeded separately after – it became apparent that his co-accused had a mental condition which required prolonged treatment at Mathare Hospital and this was causing delay in hearing of James Olale Ogot's appeal. On count 1 the charges were that on 8<sup>th</sup> day of June, 2003 at Githurai 44 Estate Nairobi within Nairobi Area, jointly with others not before court, while armed with pangas and whips, robbed Carrey Charles Atiang of a mobile phone make Sagem 3020, one pair of brown leather shoes, one sports jacket and cash Kshs 1500/- all valued at Kshs 9600/- and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Carrey Charles Atiang. The second count stated that on the same date and place, jointly with others not before court, while armed with pangas and whips robbed Edward Okiri Awero of a black pair of leather shoes, a jacket and cash Kshs 700/- all valued at Kshs 2600/- and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Edward Okiri Awero.

The particulars of the third count were that on the same date and place, with others not before court, while armed with pangas and whips, robbed David Ondenge Odewa of one pair of black shoes, one jacket and cash Kshs 300/- all valued at Kshs 2,350/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said David Ondenge Odewa.

PW1 Edward Okiri Awero (PW1) described how he was walking on 8<sup>th</sup> June, 2003 at about midnight to a funeral gathering accompanied by Charles Atiang, Joseph and David Odewa and Monica Achieng, within Githurai 44 area. He had broken away briefly from his friends, to go for a short call. He heard his friends being ordered to lie down and thinking that they were policemen, he went to join his friends, but just before reaching them, he was surrounded by six people. There were security lights from a nearby house but his friends lay in darkness. The people who surrounded him were armed with pangas and he could see them clearly as the security light was about five metres away. They hit him using the pangas and he lay down. They stole from him Kshs 1500/- a jacket worth Kshs 400 and Kshs 700/-, lays and a

handkerchief. He identified two people who were known to him one being the appellant, as having worn a long jacket and a cap and both were holding pangas. He says:-

***“I knew the first accused as Brown, which was his street name ..... first accused is the one who removed my shoes and jacket and money.”***

It was his evidence that the incident lasted five minutes. The next day PW1 gave the Githurai Chief the names of inter lia, Brown. Later on in the day PW1 and his friends met appellant who on seeing them started running away, so they gave chase, caught him and took him to the chief.

During the attack PW1 suffered injury to his neck. He had known appellant for four years. PW2 Charles Atiyang Ombewa confirms being in the company of PW1 and described how they met six boys who ordered them to lie down. He confirmed that PW1 had remained behind to answer to a call of nature. The group demanded for money and mobile phones and he was robbed of a mobile phone make Sagem 3020 worth Kshs 4,500/-, shoes, a jacket and Kshs 800/-. At first he could not identify his attackers because he lay facing down but when the gang moved to attack PW1, PW2 raised his head and saw the gangsters faces with the aid of security light from a nearby building. He recognized Odhiambo and Brown whom he had grown up with in Githurai 44 – he identified Brown as the first accused (the appellant herein) and says that was the appellant’s street name. David Ondenge (PW3) also confirms the attack as he was in the same company with PW1 and PW2. He said there were security lights nearby and said that when he met the six people, he knew two of them and he greeted them and walked ahead with Achieng. When they were passing the six, they were ordered to lie down, one of them slapped him and robbed him of Kshs 300/- shoes and a jacket. He asked the one who had taken his jacket to give him back his keys and this was done. He too knew the appellant as Brown. He had known the two people charged herein for one year as they lived in the same estate.

***“They came from the darkness to the light.”***

Joseph Amin Odewa (PW4) who was in the group which fell under attack says as they walked back to the funeral meeting, he heard David Ondenge wailing ahead of them and he also heard Charles says “don’t kill me take whatever you want.” He heard Okiri being beaten using a panga and saw a group of people. He was behind Okiri and turned back towards the bar where they had gone to buy drinks, but having found it closed, he used another route to get to the funeral meeting place. He met his friends just near the funeral place and found that they had all lost their shoes jackets and money. His friends told him that they recognized the thugs and he accompanied Edward and Charles in the morning to go and look for the appellant. However, PW4 did not identify any of the attackers during the incident.

PC Daniel Mangi (PW5) attached to Kasarani police station received the report about the robbery from the complainants. He received appellant from Githurai Chief’s camp where he had been taken to by members of the public. Appellant had injuries inflicted on him by members of the public.

PW6 Sergeant Daniel Kamau of Kahawa Chief’s camp received the report about the incident on 8<sup>th</sup> June, 2003 at about 9.30a.m. from Edward and Charles. He booked the report then referred the complainants to Kasarani police station. At around 11.30a.m., the reporteess came back with appellant whom they handed over to PW6.

Upon being put on their defences, the appellant gave unsworn testimony saying he went to sleep on 7<sup>th</sup> June, 2003, then the following day some five people whom he knew very well called him and started beating him, then took him to Githurai chief’s camp. Later he was transferred to Kasarani police station and detained for there then charged for the offence.

The learned trial magistrate noted this in the judgment:-

***“All the complainants here said that they knew the accused persons as they lived in the same estate. They also said that there were street lights nearby so they could see clearly. They said that the accused had been armed with pangas and that they robbed them several items which were listed in the charge***

**sheet. Since the accused and complainants lived in the same estate, I believe they knew each other well so I find they were properly identified. Though none of stolen items nor the weapon were recovered from the accused, I find that there is no doubt that the accused were involved in the robberies here. I will therefore disregard the defences by the accused persons here and convict them of all the charges here.”**

It is against the finding that the appellant contests both conviction and sentence and in his handwritten amended ground of appeal the states that:-

**· That learned trial magistrate erred by relying on visual identification by recognition which was not supported by PW5 to whom the first report was made. Further that the identification was made under hectic prevailing conditions.**

**The charge was not proved to meet the circumstances of Section 77(2) of the Constitution.**

**That there were irregularities during the trial as there was no indication of the language used.**

**The learned trial magistrate erred by rejecting his defence which was not displaced by the prosecution’s evidence.**

In his submissions, the appellant stated that his conviction was arrived at by the trial magistrate based on the purported visual identification by recognition yet opportunity for identification was not clear because it was past midnight and that the witnesses may have confused a face they recognized from the scene of crime with that of an innocent person. He quoted from the decision in **Kaveta and others versus Republic Criminal appeal No. 65 of 1986** which held that:-

**“Where evidence is based on identification the court should closely examine the circumstances in which the identification by each witness came to be made.”**

He also stated that PW3 and PW4 were not certain of the time lapse when the offence was committed against them whilst PW2 claimed it took three minutes and PW1 alleged it took five minutes and therefore no accurate time observation. Appellants also points out that the complainants never gave a description of their attackers as PW5 and PW6 nor do these witnesses testify that complainants had given them the names of their attackers and that his name is not even Brown and that the witnesses failed to disclose to court whether he was the only person they knew by the name Brown. Appellant also submits that the total value of the items purported to have been robbed off the three complainants in the charge sheet is at variance with the total value given or referred to by the witnesses. It is his contention that such inconsistency should have been resolved in his favour. As regards language – appellant complains that at plea, the language used when the charges were read to him was not recorded and that this violated Section 77 (1) and 77(2) of the Constitution as he did not know what he pleaded to and so he was prejudiced.

As for his defence, which he describes as brief, the appellant submits that if the learned trial magistrate had intrinsically examined the evidence adduced by both sides, he ought to have found his defence worthy of being relied on in the light of what he terms as a shaky prosecution case which was riddled with lots of doubts and that he had no duty to prove or disprove his innocence.

The learned State Counsel Mr Makura appearing for the respondent, opposed the appeal on grounds that PW1 was able to see and identify the appellant with the aid of security lights from a nearby house. Further that the appellant was someone known to PW1 prior to the incident as Brown, so that identification was by recognition.

The learned State Counsel also noted that according to PW1, the incident lasted 5 minutes, which was sufficient time for complainant to see and recognize appellant. He further argued that this evidence is buttressed by that of PW2 who also confirmed that there were security lights from a nearby building and that he was able to see and recognize the appellant. PW2 had also know the appellant for four years and knew his nickname Brown. Mr Makura further pointed out that PW3 gave evidence which was similar to

that of PW1 and PW2 and that he had known the appellant for a year and was able to see and recognize him due to the availability of light. The learned State Counsel submitted that the evidence of PW1 – 3 was consistent and corroborated and was sufficient to convict the appellant on a charge of robbery with violence.

As regards the appellant's defence, it is Mr Makura's contention that the same was considered and rejected by the learned trial magistrate. The learned State Counsel concedes that at plea, the language was not recorded but that the appellant was not materially prejudiced as he entered a plea of not guilty and subsequently during trial the language used was indicated as Kiswahili, which the appellant is conversant with.

We have evaluated the entire evidence as was presented before the trial court. It is not in dispute that the incident took place at midnight or past midnight – which would be during the hours of darkness. How were the witnesses able to see and identify their attackers? PW1, PW2 and PW3 consistently stated that they were able to see and identify and recognize the appellant because of security lights from a nearby building. Indeed this was duly considered by the learned trial magistrate in her judgment. Of course the appellant has taken issue with certain statements made by witnesses such as PW1 who says that initially he thought that the people who had stopped his friends were police officers and he went to join them. However, it is also his evidence on record that before he could reach his friends, people came towards him and began attacking him and that is when he saw and recognized their identity under the lights from the nearby house and that it is at the place where his friends had been forced to lie down that was enveloped in darkness – we do not find any contradiction in that at all. Each of the complainants consistently described to the trial court the conditions which enabled each one to see and identify their attackers and it is our finding that those conditions were favourable. Then there is also the issue as to the duration of the attack whereat appellant submitted that since the prosecution witnesses were not conclusively accurate with regard to how long the attack took, then it can only be because they were not able to sufficiently see their attackers. It is true that PW1 referred to the attack lasting five minutes whereas PW2 said it took three minutes. On cross examination PW2 stated:-

***“I was lying down for five minutes. I was facing down but I tried to plead with you to take anything from me and spare my life. I saw you clearly in the light .....*”**

We do not think the question of time accuracy is fatal – It is an estimation. Infact PW1 on cross examination said ***“The above incident took about five minutes.”*** And we consider that the bottom line is that it was not a split second action, at least it lasted longer than one minute, more time than just taking of a fleeting glance and that the witnesses had ample time to see their attackers. Appellant has also contested the fact that the complainants had not described or given his names to the police. Would that be fatal? It is true that the witnesses did not give any names or descriptions, PW6 confirms that the complainants told him upon reporting that they were attacked by a gang. Yet PW1 on cross examination stated:-

***“The next day we went to the Githurai Chief and gave the names of Brown and Odhiambo.”***

The Githurai Chief did not testify and there is nothing to negate that claim that the names were given to the chief and not PW6 the administration police attached to the Chief's camp. In any event the conviction was not solely based on the names given, but on visual identification and recognition, the opportunity for identification was considered and properly found to be favourable. As regards the value of the items in the charge sheet not tallying with the value given by the witnesses, that is **NOT** the material consideration. The material consideration is that the self same items mentioned in the charge sheet were mentioned by the witnesses as having been stolen from them and so that is not fatal.

With regard to language, we do confirm that at plea the language used to take plea was not recorded but this did not occasion any prejudice on the appellant as he had entered a plea of not guilty and the matter proceeded to hearing during which the language used was recorded as Kiswahili. The appellant in his defence simply said he had gone to bed on 7<sup>th</sup> June, 2003 and slept, the rest of his evidence referred to the arrest process. We have re-evaluated that defence against the evidence tendered by prosecution and our

finding is the learned trial magistrate infact did consider it but rejected it – really there was nothing in that defence to dislodge the very consistent and corroborated evidence tendered by prosecution witnesses and so the conviction was proper.

As regards the sentence, we notice that the appellant was sentenced to suffer death three times – it has been repeatedly stated in various decisions that one can only die once, then it would follow that the sentences for count two and three would remain suspended. We otherwise confirm sentence on count one.

The upshot then is that:-

***(1) Appeal herein is dismissed.***

Delivered and dated at Nairobi this 15<sup>th</sup> day of May, 2008.

**J.B. OJWANG**

**H.A. OMONDI**

**JUDGE .**

**JUDGE.**