



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**Criminal Appeal 100 &101 of 2007**

**GEORGE OUMA OKOTH .....1<sup>st</sup> APPELLANT**

**CALEB MUGA ODONGO .....2<sup>nd</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*[From original conviction and sentence in Criminal Case number 1304 of 2007 of the Senior Resident Magistrate's Court at Nyando]*

**CORAM**

**Mwera, Karanja J. J.**

**Musau for State**

**Court Clerk - Raymond/Laban**

**Appellant in person**

**JUDGMENT**

The first appellant George Ouma Okoth was the second accused in the lower court while the second appellant Caleb Muga Odongo was the first accused where they faced the charge of robbery with violence contrary to section 296 (2) of the Penal Code, in that on the 1<sup>st</sup> May 2006 at 1:00 a.m. at Kakola Ahero Sub – location in Nyando District within Nyanza Province jointly with another not before court, being armed with dangerous weapons namely pangas, robbed Julian Adoyo Oyoo of cash Kenya Shillings One Thousand ( Kshs. 1,000/=) and at or immediately before or immediately after the time of such robbery used personal violence against the said Julian Adoyo Oyoo. They appeared before the Kisumu Chief Magistrate (H. I. Ongudi Mrs.) and pleaded not guilty to the charge on the 4<sup>th</sup> May 2006.

The trial commenced on 7<sup>th</sup> August 2008, before the Senior Resident Magistrate (L. N. Mbugua) at Nyando. The prosecution called a total of four witnesses including the complainant Julian Adoyo Oyoo (PW1), her daughter Beatrice Anyango (PW2), a watch-repairer John Mboya Mbonyo (PW3) and a police officer P. C. John Njenga (PW4). Briefly, the prosecution's case was that the complainant and her daughter were inside their house on the material date at 1:00 a.m. when suddenly the house door was hit and the second appellant (Muga) entered therein holding a panga. He was with Toto (first appellant) who stood at the door. They demanded money and Kenya Shillings One Thousand (Kshs.1, 000/=) was handed to them. They demanded more which was not available. They cut the complainant on her right hand, which she had used to defend herself. They fled as the complainant raised alarm by screaming. They were arrested later after the matter was reported to the police. They were then charged accordingly.

On being placed on their defence, the appellants gave unsworn statements and called no witnesses. The first appellant defence was that he is a farmer and was in his house on the 2<sup>nd</sup> May 2006. He was asleep between 11:00 p.m to 5:00

a.m when he saw light inside the house. He opened the door and was arrested. His house was searched and nothing recovered. He was thereafter taken to the police station where he found a woman who implicated him. He did not commit the offence. The second appellant's defence was that he is a second hand clothes dealer and on the material date (1<sup>st</sup> May 2006) at 6:00 a.m was at home when his door was knocked. He opened it and was immediately ordered to sit down by a group of six people who stabbed, tied him with a rope. They searched the house and removed his second hand clothes. They called the police and said that he had robbed a person. He was taken to the police station where he found the complainant. He was beaten and ordered to remove a panga he did not have, he denied any knowledge of the panga and was placed in the cells.

After having considered the evidence in its totality, the trial magistrate found both appellants guilty as charged and sentenced them to suffer death as prescribed by the law. They are dissatisfied with the conviction and the sentence and have lodged the present appeal on the basis of the grounds contained in their respective petitions of appeal filed herein on the 19<sup>th</sup> July 2007. The said grounds are in effect a complaint on the evidence of identification, which was relied upon by the trial court to convict them. There is also a complaint in the manner in which the police investigations were conducted and the non-consideration by the trial court of their respective defences.

At the hearing of the appeal, the appellants appeared in person and made oral submissions in response to the State's oral submissions. The State was represented by the Learned Senior Principal State Counsel (Mr. Musau) who supported the appellant's conviction and contended that they were identified as the culprits on sound evidence. He also contended that any police officer may investigate a case of robbery with violence and that it is not mandatory for exhibits used in crime to be recovered. The two appeals were consolidated and heard together.

As a first appellate court we, are guided by the principles set out in the case of **OKENO =vs REP [1972] CA 32**. We are thus obliged to re-examine and re-evaluate the evidence adduced in the lower court and draw our own conclusions in deciding whether the judgment of the trial court should be upheld or not. Having so re-examined and re-evaluated the evidence, we concur with the trial court that the offence of robbery with violence was committed against the complainant on the material date. The evidence by the prosecution did clearly undisputedly establish the necessary ingredients of Section 296(2) of the Penal Code. On the issue of identification of the offenders, the evidence by the complainant (PW1) and her daughter (PW2) shows that even though the offence occurred in the night at 1:00 a.m the inside of their house was well lit by a hurricane lamp such that they were able to see and recognize the two offenders. The complainant (PW1) stated as follows:-

“ I was in the bedroom, I suddenly realized the door was hit and one Muga entered my room. He told me to produce money. I could see him, as there was lamp in my house. It is the hurricane lamp that was on. Muga entered and Toto stood at the door. I could see him at the door. They are people I knew”.

The complainant said that Muga was the first accused in the court (i.e. second appellant herein) and that Toto was the second accused (i.e. first appellant herein). The appellants' defence was that they did not commit the offence and were arrested and implicated by the complainant without good cause. However, the complainant's evidence strongly and credibly indicated that she saw and recognized people previously known to her. Hers was identification of the two appellants by recognition. She said that she had known the second appellant for several years. She gave out the names Muga and Toto to the first people who went to her rescue when she raised alarm by screaming. The said people included the watch repairer John Mboya Mbonyo (PW3) who is also a village elder and chairman of Community policing and together with others managed to apprehend the appellants a few hours after the offence. P. C. John Njenga (PW4) also said that the complainant reported to the police that the assailants were the two appellants.

The complainant's daughter (PW2) did significantly support the complainant's evidence. She also stated that she had previously known the appellants by the names of Muga ( 1<sup>st</sup> accused) and Toto (2<sup>nd</sup> accused) and had been seeing them for along time at Ahero town. Her identification of the appellants was also by recognition, which is more reliable than identification of a stranger. **In [Anjononi =vs= Republic (1980) KLR 59]** it was stated:-

**“ This was, however case of recognition, not identification of the assailants, recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya =vs= The Republic (unreported)”.**

Although the offence herein occurred in the night, we are satisfied that favourable conditions for identification did exist and that the complainant and her daughter (PW2) were able to see and recognize the appellants as the offenders. The trial court did appreciate its obligation to test the evidence of identification with care, caution and arrived at the correct and proper conclusion. We do uphold its judgment with the result that the present appeal is dismissed.

**Dated, signed and delivered at Kisumu this 17<sup>th</sup> day of June 2008.**

J. W. MWERA

J. R. KARANJA

**JUDGE**

**JUDGE**

JRK/aao