



**REPUBLIC OF KENYA**

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

**Criminal Appeal 42 of 2005**

**MICHAEL OTIENO OCHIENG ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*[From original conviction and sentence in Criminal Case number 80 of 2004 of the Senior Resident Magistrate's Court at Bondo]*

**CORAM**

**Mwera, Karanja J. J.**

**Musau for State**

**Court Clerk – Raymond/Laban**

**Appellant in person**

**JUDGMENT**

The appellant Michael Otieno Ochieng was the second accused in the lower court at Bondo where he had been charged jointly with three (3) others for robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the night of 24<sup>th</sup> January 2004, at North Ramba sub –location, Bondo District within Nyanza province jointly with others not before court while armed with dangerous weapons to wit pangas and rungas robbed Janet Auma of one wall clock, one radio cassette make Panasonic, one car battery, one bicycle make riley, one mobile phone make Siemens A35, a box containing assorted goods and clothes and cash Kenya Shillings Two Thousand (Kshs. 2,000/=) all valued at Kenya Shillings

Sixteen Thousand (Kshs. 16,000/=) and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Janet Auma.

The appellant pleaded not guilty and trial commenced before the Senior Resident Magistrate (R. Ngetich) on the 15<sup>th</sup> September 2004. After the trial the appellant was found guilty and convicted. He was sentenced to suffer death in the manner prescribed by law. He is dissatisfied with the conviction and sentence and has now appealed to this court on the basis of the grounds set out in his petition of appeal filed herein on 28<sup>th</sup> February 2005. His main complaint is his alleged identification as one of those who committed the offence. He contends that the case against him was not proved beyond reasonable doubt and that the trial court failed to consider and it disregarded his defence statement.

At the hearing of the appeal, the appellant appeared in person and chose to rely on his written submissions. The State was represented by the Learned Senior Principal State Counsel Mr. Musau. He pointed to us crucial anomalies in the prosecution's evidence of identification and contended that the appellant's conviction was unsafe. He did not in the circumstances support the conviction. We have re-examined and re-evaluated the evidence in its totality and hereinbelow are our findings and conclusion.

With regard to the offence, the evidence is undisputed and did clearly establish the material ingredients of Section 296 (2) of the Penal Code. The complainant Janet Auma (PW1) stated that she was asleep at home on the material date when she was awoken by a big bang on her door at 11:30 p.m, she was in the house with her younger sister (PW2). She opened the door and was immediately confronted by two people who gained entry into the house. The two were armed with pangas and in the company of others outside the house. They demanded money and made threats. They left after having taken away her property including a mobile phone, a radio, a battery, wrist watch, a bicycle, a suit –case and clothes. She thereafter called neighbours and reported to the police.

With regard to the identification of the offenders, the main evidence was that of the complainant (PW1) and her sister (PW2). The complainant said that the two people who entered her house had a torch or torches. She said that she used the light from the torches to see them. She said that she saw and recognized the appellant (accused two). He had a panga. She also said that the two people took about thirty minutes inside the house. She further said that on the 26<sup>th</sup> January 2004 she was called to the Bondo Police Station where she again identified the appellant at an identification parade. Her sister Josephine Akinyi (PW2) a minor aged thirteen (13) years old at the time said that she saw two people enter the house and that they included the appellant who had a torch. She said that the light from the torch made her identify them. She also said that the attackers were strangers to her and that they took about ten minutes in the house.

Evidence of identification particularly in unfavourable circumstances has to be tested with care and caution. The offence occurred at about 11:30p.m in the night and it would appear from the evidence that the complainant's house was at the time not lighted with any source of light. Conditions favourable for identification did not therefore exist. However, the complainant (PW1) and her sister (PW2) stated that the offenders had either one torch or more than one torch and that it was the torch light which enabled them to see and identify the second appellant. The complainant stated that she had previously known the appellant and that she gave out his name to the police. She said that his name is Dundo and that she saw the scar on his face during the robbery. The complainant's sister (PW2) stated that she had not previously known the appellant.

Light from a torch may enable a person to see and recognize or identify another. However, this would be dependant on the intensity of the light, the distance between the person and the other, the position of a person from the other, whether there was a direct flash on a person's face and of course, the duration of the availability of the light. Neither the complainant nor her sister (PW2) pointed out any of the aforementioned factors in order for the court to overrule the possibility of any error or mistake. Added to that, the complainant's contradictory evidence clearly indicated that she was unreliable and incapable of making positive identification of the offenders. She said that she knew the appellant and gave his name to the police. If that were the case, why would she be called to an identification parade to identify somebody she already knew. She also said that she gave the police the description of the appellant's co-

accused (Accused one) in that he was tall and had a cut on the forehead such that she was able to identify him in the identification parade of the 26<sup>th</sup> January 2004. Yet, in court, the complainant pointed at a mark on the forehead of the second accused (appellant). She also said that the offence occurred within a duration of thirty minutes but her sister (PW2) said that it took only a duration of ten minutes.

In his evidence P. C. Vincent Omondi (PW6) said that the complainant gave physical description of the suspects. This was in contradiction to what the complainant stated. She said that she gave the police the name of the appellant and distinguished him with the scar on his head. Yet, at the same time said that the scar was on the forehead of the first accused. The complainant's sister (PW2) merely repeated what was stated by the complainant regarding the ability to identify the appellant. She said that light from a torch enabled her identify the appellant. Interestingly, she said that she was asleep and had covered her head with a blanket at the time of the attack. If this were the case, then it was not possible for her to have been in a position to identify any of the attackers. It was an afterthought for her to state that she uncovered herself on hearing a bang and was therefore able to identify an attacker.

Basically, the evidence of identification against the appellant was far from satisfactory and in that regard we agree with the Learned State Counsel that the conviction on the basis of the said evidence was unsafe. The trial magistrate did not treat the evidence with great care and caution. We have also noted that Josephine Akinyi (PW2) was a minor aged 13 years at the time she testified but the trial magistrate failed to examine her to determine whether she understood the nature of an oath or whether she was possessed of sufficient intelligence to justify the reception of her evidence or whether she understood the duty of speaking the truth.

All in all, the appeal is merited and is allowed. The appellant's conviction by the lower court is quashed and the sentence imposed set aside. The appellant shall forthwith be released unless otherwise lawfully held.

**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