



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

**Criminal Appeal 89 ,90 & 91 of 2006**

**LIVINSTONE OUMA MUDENYO.....1<sup>st</sup> APPELLANT**

**NAFTALI ONYANGO ODIRA.....2<sup>nd</sup> APPELLANT**

**JAMES OKOTH ODUOR.....3<sup>rd</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[From original conviction and sentence in Criminal Case number 649 of 2005***

***of the Senior Resident Magistrate's Court at Siaya]***

**CORAM**

**Mwera, Karanja J. J.**

**Musau for State**

**Court Clerk – Raymond/Laban**

**Appellant in person**

**JUDGMENT**

The three appellants Livingstone Ouma Mudenyio, Naftali Onyango Odira and James Okoth Oduor were charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code, in that on the night of 18<sup>th</sup> /19<sup>th</sup> May 2005 at Kochieng 'B' Sub location in Siaya District Nyanza Province jointly robbed in count one, Alice Auma Owiti of one travelling bag containing assorted clothes, a radio cassette make Panasonic and cash Kshs. 3,000/= and in count two Dorsila Ondego Akonga of her bag containing assorted clothes and at or immediately before or immediately after the time of such robbery beat to death the said Alice Auma Owiti and Dorsila Ondego Akanga.

In the lower court, the first appellant (Livingstone) was the second accused, the second appellant (Naftali), the first accused and third appellant (James), the third accused. They pleaded not guilty to both counts and trial commenced before the Siaya Senior Resident Magistrate (S. A. Okato) who upon completion found them guilty of both counts and convicted them accordingly. They were then sentenced to suffer death by the Siaya Principal Magistrate (G. K. Mwaura) who delivered and dated the judgment on behalf of the said Senior Resident Magistrate who had by then been transferred to another judicial

station.

Being dissatisfied with the conviction and sentence the appellants filed separate appeals i.e. Number 89 of 2006, 90 of 2006 and 91 of 2006, which were duly consolidated and heard at the same time. The appeals are based on the following grounds:-

For the first appellant (Livingstone) -

- (i) That the trial magistrate erred in convicting on hearsay and the uncorroborated evidence of the prosecution**
- (ii) That the trial magistrate erred by failing to observe that no documentary evidence was produced to support the allegation that the appellant was mentioned by his co-accused**
- (iii) That the trial magistrate erred by denying the appellant the opportunity to cross – examine his co-accused**
- (iv) That the trial magistrate erred by failing to note that the prosecution had failed to avail essential witnesses.**
- (v) That the trial magistrate erred by rejecting the appellant’s defence without due consideration**

For the second appellant (Naftali)

- (i) That the trial magistrate erred in failing to note that the charge was inappropriate considering that the ingredients of Section 296(2) of the Penal Code were lacking**
- (ii) That the trial magistrate erred by failing to appreciate the material discrepancies between the statements made to the police and the evidence tendered in court.**
- (iii) That the trial magistrate erred in placing reliance on the prosecution evidence of identification**
- (iv) That the trial magistrate erred by over looking the need for a first report this being a case of identification by recognition**
- (v) That the trial magistrate erred by failing to note that the prosecution evidence was tainted with contradictions**
- (vi) That the trial magistrate erred by failing losing sight of the family dispute cited by the defence**

For the third appellant (James)

- (i) That the trial magistrate erred by failing to note that the particulars contained in the charge did not justify the requirements of Section 296(2) of the penal code.**
- (ii) That the trial magistrate erred by failing to appreciate the evidence value of essential witnesses who were not availed to testify.**
- (iii) That the trial magistrate erred by failing to note that in a case of recognition, the first report is essential.**
- (iv) That the trial magistrate erred in conviction on hearsay, flimsy, contradicted and uncorroborated evidence.**
- (v) That the trial magistrate erred by failing to explain or read the whole judgment to the accused causing them to be unaware of the basis for the conviction.**

At the hearing of the appeals, the appellant appeared in person and presented their arguments. The first appellant made oral submissions while the second and third appellants presented written submissions. The State was represented by the learned Senior Principal State Counsel, Mr. Musau who conceded the appeals respecting the first and third appellants on the ground that the said two appellants were mentioned by a suspect who was lynched to death and there was no other evidence to sustain that claim.

As for the second appellant, the learned State Counsel stated that the evidence of the two minors (PW1 and PW2) showed that they knew the second appellant and mentioned his names to PW4 and PW6 who proceeded to his home and failed to locate him. His wife led them to a house where he allegedly lived with the suspect who was implicated and where some of the complainant's stolen goods were found. He was apprehended after the offence and handed to the police. The learned State Counsel contends that the conviction of the second appellant was safe and proper.

The second appellant in response to the learned State Counsel argued that he was held in police custody for a period of forty (40) days before being taken to court. If therefore, he was a known person why the delay in taking him to court?. He argued that the police did not go to his house and that his name was not mentioned by anybody. He also argued that he was convicted on the evidence of children who did not identify him and whose evidence the trial magistrate noted, was not of much help. He contends that he was wrongly convicted after being arrested over a land dispute with the complainant. The first appellant also stated that he was held in police custody for long i.e. 39 days and was not told the reasons for the delay to take him to court. He said that he was arrested on 19<sup>th</sup> May 2005 and taken to court on 28<sup>th</sup> June 2005.

We have considered the appeals in the light of the supporting grounds and arguments and also in the light of the arguments advanced by the learned State Counsel. Our duty is to re-examine and re-evaluate the evidence and arrive at our own findings and conclusions bearing in mind that the trial court had the opportunity to see and hear the witnesses. The prosecution called a total of seven witnesses namely:- A school pupil Christine Achieng Owiti (PW1), another school pupil Cynthia Akinyi Owiti (PW2), a businessman Stephen Owiti Akanga (PW3), a farmer –cum-youth winger, Charles Otieno Omondi (PW4), a medical officer Primus Ochieng (PW5), a farmer –cum- youth winger, James Omondi Okanga (PW6) and a police officer, P. C. Mathenge Kinyua (PW7).

The case for the prosecution was that on the material date at 11:00 p.m, Christine (PW1) and Cynthia (PW2) who are sisters were at their home with their mother (now deceased) and others, when two people went there and demanded money. The two people left briefly after failing to get money. Upon return, they forcefully entered the house and forcefully removed the deceased out while beating her up. They then broke a box and took away some clothes. They took the sister's mother to a grand mother's nearby homestead and killed her together with the grandmother called Dorsila Ondego Akanga. The sisters father Stephen (PW3) is a businessman in Nairobi. He was informed of the incident and confirmed the same on his arrival at the scene from Nairobi.

The incident was reported to the police and in the course of investigations the appellants were arrested and charged accordingly.

The defence case was a denial and a contention that the three appellants knew nothing about the offences. The first appellant stated that he is a cobbler and was at his home on 19<sup>th</sup> May 2005 when police officers accompanied by youth wingers arrived and arrested him. They searched his house and led him away. He remained in police custody for forty (40) days and was charged.

The second appellant stated that he is a jua-kali artisan and was at his workshop on 19<sup>th</sup> May 2005, at around 10:00 a.m when a group of people, led by Charles (PW4) and James (PW6) who were armed with pangas and rungas arrived and said that they wanted him. They arrested and beat him up. They took him to a post office where they informed members of the public that he had shot a person. He was set upon by the said members of the public and was only rescued from their wrath by the police. He was thereafter taken to the hospital where he was not treated. He was taken to Siaya Police Station and then his house, which was searched, and nothing recovered. On the following day Owiti (PW3) came to the police

station with his daughters (PW1 and PW2) and forced them to say that they had seen him (appellant two) at the scene of the offence. He was held in police custody for 40 days and later charged.

The third appellant stated that he is a fisherman and was at his house at Port – Victoria on the 28<sup>th</sup> October 2005, when police officers arrived and arrested him. He was brought to Siaya Police Station and charged.

The basic issue for determination is whether concurrent acts of robbery were committed against the two deceased persons Alice Auma Owiti and Dorsila Ondago Akanga and if so, whether the appellants were positively identified as having been involved. The evidence adduced by the two school pupils (PW1 and PW2) shows that the attackers were more than one and may not have been armed with any dangerous or offensive weapons. The evidence also shows that violence was used in a ferocious manner such that two people were left dead. The evidence by the medical officer (PW5) shows that the deceased died as a result of severe haemorrhage occasioned by chest, vascular and cervical spine injuries.

In our view, the foregoing witnesses did establish that concurrent acts of robbery with violence were committed against the two deceased. The necessary ingredients of the offence of robbery with violence under Section 296 (2) of the Penal Code were duly established in terms of the case of [**JOHANA NDUNGU =vs= REP CR/APP NO. 116 OF 1995**].

As to the identification of the offenders at the scene the determining evidence would be that of the sisters Christine (PW1) and Cynthia (PW2). They are both minors and one gave evidence on oath (i.e. PW1) while the other (PW2) was affirmed following the usual examination as to their capability of understanding the duty to speak the truth and the meaning or nature of an oath. They were both cross – examined by the accused. They both implicated the first and third accused (i.e. the second and third appellants).

Christine (PW1) said that when the two robbers returned to their house, they broke the door and entered. They had a match box and struck a match stick to light a lamp on the table. She then saw the two people clearly. She identified them as the second and third appellants whom she said she had previously known as persons from her village. She said that the second appellant is called Naftali and the third appellant is called Okoth. In cross – examination, she said that she had previously known the second appellant and that she told the police his name. She also said that she saw the first accused (second appellant) for the first time during the robbery and that she came to know his name when she heard him being called out in court. She further said that she knew the third accused (third appellant) as Okoth but did not mention the name to the police.

Cynthia (PW2) also said that she saw the two people when they struck a matchstick and lit the lamp. She said that they thereafter searched the house and found money. She said that one of them told the other that he had found a lot of money. She said that the one who said so was the first accused (second appellant). She said that she also saw the third accused (third appellant). She said that that was the first time to have seen both the first and third accused (second and third appellants). In cross examination, she said that when the robbers struck she glanced at them through the blanket. She said that the second appellant had put on a cap. She also said that she had previously known the third appellant but did not mention his name to the police.

The offence occurred in the hours of darkness meaning that the alleged identification was under difficult circumstances. Such situation would call for credible and watertight evidence of identification. Despite the circumstances prevailing at the time, the identifying witnesses Christine (PW1) and Cynthia (PW2) said that a lamp was lit by the attackers and this enabled them see and identify the second and third appellants. They (PW1 and PW2) did not say anything about the first appellant. The lamp was therefore the source of light at the scene. However, PW1 and PW2 did not say whether or not the light was bright or dim. They did not indicate that the light from the lamp was bright enough to enable positive identification or recognition of a person. They did not give any indication of the distance between them and the attackers to show that they were close enough to identify anybody. They did not say for how long their eyes were directed at the attackers so as to imply that they had adequate opportunity to identify

anybody.

Christine (PW1) said that she had previously known the second appellant and that she gave his name to the police. She also said that she knew the third appellant but did not give his name to the police. Yet, she also said that it was her first time to see the second appellant and that she heard his name when it was called out in court. Cynthia (PW2) said that it was her first time during the robbery to see the second and third appellants. She said that she had a glance at and saw them while she was underneath a blanket. Yet, she also said that she had previously known the third appellant but did not give his name to the police. She also said that the second appellant was wearing a cap, this was not mentioned by Christine (PW1) and neither was the fact reported to the police. Although P. C. Kinyua (PW7) said that Christine (PW1) and Cynthia (PW2) told him that their mother died while mentioning the name of the second appellant, none of them indicated as much in court. They should have indicated the fact in court if it were the truth. Although Cynthia (PW2) talked of an attacker wearing a cap, she did not mention the type of cap while it is common knowledge that whereas some caps may not effectively conceal the face of a person others may do so. A cap of whatever type would hinder proper identification of a person and more so where conditions for identification are difficult.

It is our view that the evidence of identification by PW1 and PW2 was laden with uncertainties and material contradictions to be of any worth in terms of credibility and reliability. We do not share the trial court's view that the said evidence was reliable and credibly corroborative. Being minors and considering the contradictory nature of their evidence, it is more likely than not that PW1 and PW2 may have been coached on what to say not only at the police station but also in court even though they both denied the fact during cross examination.

Be that as it may, even in the absence of direct evidence of identification a suspect may be linked to an offence by other indirect factors. To that end, the evidence of Charles Otieno Omondi (PW4) and James Omondi Okanga (PW6) comes into focus. They are both youth wingers. Charles (PW4) said that he was woken up at about midnight on the material date and told that some thieves had attacked and killed some people at a nearby home. He and fellow youth wingers including James (PW6) proceeded to the home and found dead bodies of two women. They (PW4 & PW6) said that the children said that the deceaseds had mentioned the name of the second appellant before passing away.

The youth wingers then went in search of the second appellant and traced his shelter at an estate known as Banana. They did not find him but a person called James Nyangor Ongango who made an attempt to flee but after being apprehended allegedly cried out that he would not die alone, mentioned the names of the three appellants and others.

The youth wingers were then led by the said Nyangor to his house where some of the items stolen during the material acts of robbery were recovered. As they led him to the police station, he was beaten up by irate members of the public and died from the injuries inflicted. The youth wingers never entered the house of the second appellant. They found him at a place called Jua-kali and apprehended him. He was almost killed by the members of the public but was rescued by the police who arrived at the scene just in time. The youth wingers also found and apprehended the first appellant while the third appellant was later arrested by the police at Sio Port. P. C. Kinyua (PW7) confirmed that none of the recovered stolen items (PEX 3-8) were found in the house of the second appellant. There was no indication that any of the items was found with the first or third appellant.

In our view there was nothing to link any of the appellants with the offences. They were not found in possession of any of the stolen property. They were arrested only after being mentioned by the person who was found in possession of all the recovered items. The person was beaten to death by members of the public. If he had survived, he would have been an accomplice in which case his evidence against the appellants would require corroboration. Such corroboration is not found in the evidence adduced herein even if it were accepted that the appellants were indeed mentioned by the dead suspect. Basically, the entire evidence against the appellants was not credible and cogent enough for a finding that they were responsible for the concurrent acts of robbery. It did raise very strong suspicion and more against the second appellant but fell short of dislodging the denial by all the appellants. In the circumstances, the

conviction that followed was not based on proper and sound evidence and was unsafe thereby necessitating interference by this court.

The evidence notwithstanding, the issue of the appellant's long stay in police custody rendered the trial null and void. This applied firstly to the first and second appellants and secondly to the third appellant. The record shows that the first and second appellants were arrested on the 19<sup>th</sup> May 2005, and taken to court for the first time for plea on 23<sup>rd</sup> June 2005. The plea was however taken on the 28<sup>th</sup> June 2005. The third appellant had by then not been arrested. He said that he was arrested on 28<sup>th</sup> October 2005. The police record does not show exactly when he was arrested. We may have to go with the 28<sup>th</sup> October 2005, as the third appellant's date of arrest. After his arrest, his case was consolidated with that of the appellants one and two on the 5<sup>th</sup> December 2005, which is the day when plea was taken in respect of the consolidated charges.

Whichever way we look at it, it is apparent that the three appellants were detained in police custody for more than 30 days prior to their being taken to court. The issue was raised by the first and second appellants during the trial but the trial court chose to ignore it. This was rather unfortunate as the prosecution did not give satisfactory or any reasons for the delay in taking the appellants in court. In this appeal, the learned State Counsel conceded that there was no explanation for the delay.

Undoubtedly therefore, the provisions of Section 72(3) (b) of the Constitution were not adhered to by the police. This amounted to a gross violation of the appellants' constitutional rights. An unexplained violation of a Constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. **{See ALBANUS MWASIA MUTUA =vs= REP C/APP NO. 120 OF 2004 NRB}.**

The appeals by the three appellants must be and are hereby allowed with the result that their respective convictions are quashed and the sentences set aside. They shall be set at liberty forthwith unless otherwise lawfully held.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 29<sup>th</sup> day of July 2008.

**J. W. MWERA**

**J. R. KARANJA**

**JUDGE**

**JUDGE**

JRK/aao