



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**Criminal Appeal 7, 8, 9 of 2005**

**ALEX ODUOR ONYANGO & OTHERS ..... APPELLANTS**

**-VERSUS-**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Coram:**

**Mwera, Karanja JJ.**

**Musau for State**

**All 4 appellants present**

**CC. Raymond inter-Eng/Kisw/Luo.**

These four appeals were consolidated and heard together. Alex Oduor Onyango (appellant 1, CR. A 7/05), Gabriel Omondi Ochanda (appellant 2, Cr. A. 8/05), Stephen Otieno Nala (appellant 3, CR. A. 9/05) and John Omondi Muga (appellant 4, CR. A. 10/05) were accused nos. 4, 3, 1 and 2 in the lower court at Siaya. They were charged with 3 counts of violent robbery contrary to Section 296(2) P.C., while in counts 4 and 5 appellant 4 (John) and appellant 2 (Gabriel) were each charged with an alternative count of handling stolen properties contrary to Section 322 (2) PC. Had those alternative charges gone on to be the basis of conviction in the lower court, we could have found them to be bad for duplicity. Each read that the accused “dishonestly received or retained “stolen goods (*See Selemia Owuor & Anr. –vs- R. CR. A. 68/1999 (C.A)*). One cannot be charged with receiving or retaining at one and the same time. The prosecution must elect one.

The robbery charges were that on the night of 15<sup>th</sup>/16<sup>th</sup> July 2002 at Mulaha Sub-Location Siaya, the appellants jointly with others not before court, while armed with offensive weapons namely pangas, rungas and spears robbed John Oyugi of a bicycle, cash, wrist watch plus clothe items valued Ksh 7,000/= and during the incident they wounded Jacob Oyugi. In count 2, on the same night and place, and in a similar manner the appellants robbed Joel Owuor Oyugi of his property and killed him in the process, while in count 3 again on the same date, time and place the appellants robbed and used violence on Elly Otieno Oyugi.

The learned trial magistrate tried the trio, found them guilty and sentenced them each to suffer death. From the record, the learned trial magistrate did not specify of which counts the appellants were found guilty, and if on all the three violent robbery charges, which sentence would be served first as the others were held in abeyance, because a sentence of death cannot be suffered concurrently with another of death or that of imprisonment.

In his petition of appeal Appellant 1 (Alex) raised the subject of having not been found with any exhibit and the case against him having not been proved beyond a reasonable doubt. The burden of proof was shifted to him and that he was convicted on a retracted confession without corroboration. The other point was that his defence was not properly considered. The appellant raised another ground of a trial – within – a trial but it was not clear what he meant. All the other appellants (Gabriel, Stephen, John) had similar grounds in their petitions. At the hearing, the appellants opted to have the learned Senior Principal State Counsel, Mr. Musau reply to their petitions first. They were then heard in

response.

Mr. Musau told us that he did not support the conviction of appellants, first on a point of law. That the judgment of the lower court was not in conformity with Section 169 CPC because the learned trial magistrate only set out the prosecution evidence. He did not set out the points for determination and so he did not determine any with due reasons. Further, that that judgment was shallow for the serious charges laid and it did not state which of the three charges were proved or not, as per the evidence. When it came to sentences it was submitted that the learned trial magistrate did not state each count with the sentence and the order of serving them.

Turning to the evidence, the learned Senior Principal State Counsel told us that the appellants were arrested and charged because one Martin Onyango, who was not called as a witness, claimed that one of the appellants gave him the names of the appellants then he led police to their homes to arrest them. The goods said to have been recovered were neither produced in court nor identified by the complainants. Having heard that reply, neither appellant had anything to say in response and we rose to consider this judgment. In doing so we are obliged to go over the evidence laid before the lower court and come to our own findings.

Elly Otieno Oyugi (PW1, complainant in count 3) testified first. On 16.7.2002 at about 3 am many raiders attacked their compound, assaulting his father and brother Joel whom they killed, before coming to his own house. They ordered the witness to lie down and they tied him. They stole his bicycle, wall clock, cash and curtains. They were armed with pangas, rungas and spears. The incident lasted about an hour but PW1 could not identify any of those thugs at all. The incident was reported to Siaya Police Station and later some people were arrested.

Jacob Oyugi (PW2, complainant count 1) entered the witness box. On the material day his house was attacked at about 3 am by thugs who broke his door, got to him and beat him up. They blind – folded him. They stole his properties including a bicycle, cash and clothes. He was taken to Siaya District Hospital but while there he learnt that his son, Joel had been killed in the robbery. PW2's bicycle and his son's shoes were recovered (MF1, 2). He did not know the appellants then in the dock.

Caleb Onyango Omboli (PW3) was woken up by barking dogs at about 5 am on the material day. He got out and met some three youths who told him that their home had been attacked by robbers, killing their brother and injuring other family members. PW3 visited the home of Jacob Oyugi (PW2) and found him screaming in pain. A dead body lay on a bed. PW3 directed the 3 youths to go to the police to report the incident. Police arrived at the scene. Then the witness went to report the matter to the assistant chief. On returning to the scene, he found that the police had taken away the injured and the dead.

Walter Orido Awandu (PW4), the assistant chief Malunga sub-location, got a note from C.I.D addressed to him and to the assistant chief of Sirembe to go and arrest some 3 suspects on 16.7.2002. These were John Okebe, Omondi Ochanda and Oduor Omido. After two days' planning PW4 went and arrested John Amani Okebe, he recovered a wall clock suspected to have been stolen. PW4 pointed to appellant 4 (accused 2 before the lower court, as the John Amani Okebe. Next they arrested Omondi Ochanda (appellant 2, accused 3) at his home. No recoveries were made here. Then appellant 4 and 2 told the witness that one Oduor Omigo was at Umala sub-location. They went here and arrested (accused 4, appellant 1 here) at his house. A bicycle was recovered. And the three were escorted together with the wall clock and bicycle to Siaya Police Station.

After sometime, George Wayodi (PW5) testified – an assistant chief of Umala sub-location. PW4 called on him to go and arrest Alex Oduor (appellant 1), a resident of his area. When the team entered his house appellant 1 armed himself with a panga and threatened to attack the team. But he was overpowered and arrested. He was escorted to Yala Police Station. No exhibits were recovered.

On 19.5.2003 PC Peter Gwaro (PW6) while serving at Siaya C.I.D. Office was directed to investigate a robbery incident which took place on 15<sup>th</sup>/16<sup>th</sup> July 2002. There was a suspect one Martin Odhiambo Jaduong who had been arrested with a pair of shoes suspected to have been stolen during that robbery. Martin told PW6 that he bought the shoes for Ksh 200/= from one Stephen Otieno (appellant 3). Stephen's brother led the witness to Bondo Town where he found the appellant. He arrested him and took him to Siaya Police Station. In what may have sounded like a confession appellant 3 is said to have told PW6 that these shoes he sold to Martin were stolen during a robbery at Mulaha sub-location in which one Joel Oyugi was killed. That he then disclosed the names of his accomplices John Okebe (appellant 4, accused 1), Gabriel (appellant 2, accused 3) and Alex (appellant 2, accused 4). PW6 had the 3 arrested by an assistant chief. At this point we may observe that the story is rather curious. PW4 was on 19.5.2003 directed to investigate the robbery of 16.7.2002. He got the assistant chief to arrest the three, quite probably some days after 19.5.2003. But the assistant chiefs had told the learned trial magistrate (PW 4, 5) that they effected the arrests on 18.7.2002! Anyway, appellant 4 (accused 2) admitted the robbery at Mulaha with the recovered wall clock and bicycle as having been stolen during the incident. The witness then released Martin Jaduong. In cross – examination this Martin was lined up as a

witness. The suspects were charged accordingly and the exhibits produced (Exh. P1 to 6). That appellant 4 (accused 2) gave the bicycle to this witness saying that it was stolen during the robbery. This does not seem to fit in with the evidence of Walter Awandu (PW4), the assistant chief who testified that he arrested appellant 4 (John, accused 2) with a wall clock and also appellant 1 (accused 4) with the bicycle before court. Then PW6 added that the assistant chief recovered 4 bicycles. One was retained to be produced in court. The other 3 were given back.

Dr. Kelly Okumu (PW7) of Siaya District Hospital produced the post mortem report (Exh P7) for the death of Joel Oyugi (count 2). He also produced a P3 form in respect of the injuries that Jacob Oyugi sustained (Exh. P8).

In their defences the appellants said s follows beginning with appellant 1 (Alex). On 15/5/2003 the assistant chief of Umala sub/location came to invite him to go and play at a certain funeral on 18/5/2003. The assistant chief did not pay the usual ksh 1,200/= and so the appellant was not accompanying him. At that point the assistant chief directed the appellant never to play at funerals again. On 28/6/2003 while asleep people knocked on Alex's door, got to him and beat him up. They took him away with his bicycle. He eventually ended up at Siaya Police Station where these charges were preferred.

As for Gabriel (appellant 2), on 27.5.2003 an assistant chief from Malunga sub-location arrived at 9 pm and arrested him. He was later taken to Siaya Police Station where a long list of names were read to him. He did not know the persons. He was asked to produce ksh 5000/=. He could not raise it. He was then charged.

Stephen (appellant 3) was at his eating house on 22.5.2003 when people went there at 6 am and arrested him. Nothing was recovered from his house. He was taken to Siaya Police Station and later charged. He was shocked.

Appellant 4 (John) said that he lived in Sirembe sub/location. On the night of 28/5/2003 people calling themselves police officers knocked on his house and arrested him. They were his assistant chief, Josiah Onyango Murogo and another from Malunga sub/location. His assistant chief claimed that the appellant had given him so much trouble in the past and now was the time to arrest him. His wall clock – Ajanta was taken and he was escorted to Siaya and later charged. Later the police returned to the appellant's home with him and took away a bicycle and another wall clock. The bicycle was his property. He had receipts for its spare parts.

Beginning with the evidence, we think it was weak. Nobody identified the appellants at the scene of the violent robberies that took place in the home of the Oyugi family where Joel was killed on 15<sup>th</sup>/16<sup>th</sup> July 2002. They took place at night.

Then if we accept from PC Gwaro (PW6) and the appellants that indeed investigations and arrests were done somewhere from 19.5.2003, that was a whole ten (10) months from the incident. The sub-locations of Mulaha, Malunga, Sirembe do not appear to lie very far from each other. If the case was a hard one what link do we have in the evidence on how the appellants became suspects and they were arrested? What was the link? There was one Martin Odhiambo Jaduong who led PW6 to arrest Stephen (appellant 3) because he sold a pair of shoes. This Martin was to testify, he did not. We found this a missing link in the evidence. He was not an informer.

If Stephen (appellant 3) disclosed the names of his accomplices, the co-appellants, to PW6, then when/if he also admitted committing the robbery that amounted to a confession. Such a confession did not fall within the old requirement of confessions which had by 2003 been repealed. Or in the new form (See Act 7/07) which the Attorney general has not put into effect yet. So that confession was invalid.

Or he may have disclosed his accomplices. But then evidence against them needs corroboration. We were not able to come by any here at all. Evidence was not clear as to who was found with which item and whether identification of the same was positive e.g. the bicycle. It was alleged to have been stolen during the robbery at the Oyugi home. PW6 (PC Gwaro) told the court that three bicycles were recovered. One was produced in court others were returned. Why? No answer. Yet appellant 4 (accused 2) claimed the bicycle in court and added that the wall clocks were taken from his house. With all the above, we are unable to conclude that even if the appellants were not identified at the scene, any stolen articles were recovered from them ten months later and that the same were positively identified to have been stolen during the robbery.

We now turn to the law Section 169 CPC. It says.

**“169. (1) Every judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer of the court at the time of pronouncing it.**

**(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.”**

Then sub-section 3 says that on acquittal the court shall direct that the accused be set at liberty.

The judgment of the learned trial magistrate did not conform to the requirements of Section 169 (above). He simply set out the prosecution case. He did not set out the points to be determined; he did not determine any with reasons. He did not clearly state each count on which the appellants were found guilty and the sentences thereto. If we assume that the appellants were found guilty on all the three violent robbery charges, the learned trial magistrate did not direct the mode of executing the three sentences. They cannot be served concurrently. The practice is to order that one death sentence will precede while the others are held in abeyance. Our view was that the learned trial magistrate treated the serious charges the appellants faced in a most casual manner – a thing that should be deprecated.

In sum, we allow the appeals. The conviction is quashed and sentence (s) set aside. Appellants to be set free forthwith unless otherwise lawfully held.

Judgment delivered on 1.7.2008.

**J. W. MWERA      &      J. R. KARANJA**

**JUDGE**

**JUDGE**

*JWM/hao*