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

Criminal Appeal 166 of 2005

PETER ODUOR LUKAS…………………………..……. APPELLANT

-AND-

REPUBLIC…………………………………………...RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate Ms. Muchira dated 11th

March, 2005 in Criminal Case No. 9213 of 2003 at the Kibera Law Courts)

JUDGEMENT OF THE COURT

Peter Oduor Lukas, the appellant herein, was charged in two counts, with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The particulars of the first count were that the appellant, on *21st December, 2003* at Kawangware in Nairobi, jointly with others not before the Court and while armed with dangerous or offensive weapons namely *pangas* (cleavers) clubs and axes, robbed *Benjamin Wabwire* of money in the sum of Kshs.5,500, a 14-inch colour television *National* by make, a radio cassette *National Star* by make, assorted clothes, and a metal box all valued at Kshs.17,500/=, and, at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence on the said *Benjamin Wabwire.*

The particulars on the second count were that the appellant, on 21st December, 2003 at Kawangware in Nairobi, jointly with others not before the Court and while armed with dangerous or offensive weapons, namely *pangas*, clubs and axes, robbed *Julius Oduor Ogenda* of one motor vehicle radio cassette, by make *Atech*, assorted clothes, one travelling bag, and a metal box all valued at Kshs.9,500/-, and, at or immediately before, or immediately after the time of such robbery, threatened to use actual violence on the said *Julius Oduor Ogenda.*

The first complainant, *Benjamin Wabwire*, testified that he was in the company of his wife and asleep at his home on 21st December, 2003 at 3.30a.m., when a knock on the door awakened the two. Someone at the door, claiming to be from a Police team, was ordering *Benjamin Wabwire* and his wife to open up. And, anon, the door had been hit with a heavy stone, felling it on the inside of the house. The appellant thereupon, accompanied by two other men, entered the house, armed with *pangas* (cleavers), *rungus* (clubs), stones and machetes. According to PW1, accomplices of the three attackers stayed outside the house. It was PW1's testimony that these attackers stole his coloured television, a radio-cassette, and a suitcase containing family clothes.

As the robbers broke in they ordered the lights to be switched on, and in this way PW1 was able to recognise the appellant. He had seen the appellant on earlier occasions, when the appellant would come visiting a neighbour by the name *Roselyn Adhiambo*. This earlier recognition led the complainant to find out the appellant's name from the said *Adhiambo*, who referred to the appellant by the nickname "*Odu.*" When this name was given to the Chief's camp at Kawangware, the officers at the camp had no difficulties recognising the person in question. PW1 had suffered a battery at the hands of the robbers and had to seek medical attention; and on his return he found that the appellant had been arrested, and he went and identified the appellant.

PW1 testified that, of the three robbers who had entered his house on the material night, the first to enter was the appellant herein. On cross-examination, PW1 testified that he had not known the other robbers who accompanied the appellant. He had reported the robbery the same morning, and gave the name "*Odu*" as the leader of the gang, and that morning the appellant was arrested.

PW2, *Wilcresta Akoth* testified that on 21st December, 2003 at 3.30 a.m. she was asleep with her husband, in their house, when they were attacked by robbers. These robbers knocked down the door to the house, after declaiming that they were policemen and the door must be opened for them. PW2's husband (apparently, PW1) woke up, switched on the lights, and put on some clothing. When PW2 and her husband realised they were under attack, they started screaming. The robbers entered, beat up the couple, and took away a television, a radio, clothes in a bag and also those in a suitcase, other clothes found in the house, and money. PW2 said one of the weapons carried by the robbers looked like a gun. The lights were switched on, and the robbers had not masked their faces. PW2 was able to recognise one of the robbers who used to visit the house of a neighbour, and this one robber was the appellant herein. She had seen the appellant some four days prior to the material night. The appellant was the first to enter the house, during the night robbery. The appellant was at the time wielding a *panga*, and he is the one who carried away the television. Neighbours came to lend a hand only when the robbers were gone. PW2 and her husband reported the incident at Muthangari Police Station in the morning, and the appellant was arrested.

On cross-examination, PW2 said it had not been possible for neighbours to come and rescue the couple when they had screamed, at the time of break-in and robbery, because the robbers had taken the care to lock the neighbours' doors from the outside. She testified that she had seen the appellant "very well" at the time of robbery.

PW3, Police Force No. 63997 *Police Constable Derrick Nyaga* of Muthangari Police Station, testified that he was on mobile patrol in the Kawangware area on 24th December, 2003 at 12.00 noon, when he was called to the Kawangware Chief's Camp to re-arrest and take custody of certain suspects. Sometime after he had taken custody of a number of suspects and held them at Muthangari Police Station, PW3 was asked to investigate one case. This was the case of the appellant herein. After conducting interviews, PW3 learned that on 21st December, 2003 at 3.30 a.m. a gang of some ten robbers had gone upto the complainants' house, and broken into the same, being armed with *pangas, rungus* and axes; and that this gang had robbed the complainants of money and property.

PW3 learned that the appellant herein was a frequent visitor to the compound where the robbery had taken place; he used to visit a particular house therein, for the purpose of drinking the alcoholic beverage, *chang'aa*. When on the material night the appellant was sighted in the compound in question, the Chief's camp had been informed, and the appellant was arrested.

PW4, Police Force No. 214910 *APC Cpl. Kennedy Okeyo*, who is attached to the District Officer's office at Dagoretti, was on duty on 24th December, 2003 when five people came along and complained that, on the previous day, they had been attacked and robbed, as they slept, in their houses; and they said they had identified one of the robbers. PW4 then went to the Muslim Area of Kawangware, together with the five complainants. The five pointed out the suspect, and he was arrested. This suspect, who is the appellant herein, was taken to the Kawangware Chief's Camp, and was later transferred to Muthangari Police Station where a report had earlier on been made by the same complainants. When cross-examined, PW4 testified that the five complainants had informed him they had made their complaint to Muthangari

Police Station on *22nd December, 2004.*

We have noticed an error in the dates given on the learned Magistrate's record. Hearing of the case began on 13th February, 2004, by which date the appellant was already under arrest; and the charge relates to offences committed on *21st December, 2003*. It follows that the statement attributed to PW4, that complainants had made a report to Muthangari Police Station on *22nd December, 2004* must be in error; we hereby correct it to read as it must have been intended to read: *22nd December, 2003*. It follows, accordingly, that PW4 could only have been saying that he had arrested the appellant herein in connection with the offences committed on 21st December, 2003. We have looked at the hand-written notes of the learned Magistrate taken at the hearing of the testimony of PW4, on 21st February, 2005 – and it is quite clear she did mix-up dates; so that there are times when she refers to the year 2004 when what she certainly means is the year *2003.*

The appellant when put to his defence, made an unsworn statement in which he said that on 21st December, 2003 he was at his place of work as a motor vehicle mechanic. He was called by a friend, one *Oduori,* to go to his place and help start a stalling car. As he tried to start the said car, he saw three men who came along, and claimed he, the appellant, "was one of them". The three men, two of whom he knew to be Police officers, took the appellant to his house and conducted a search. The appellant was then taken to the Chief's Camp, and several days later he was taken to Muthangari Police Station. He said he knew nothing about the offence.

The appellant did not state the *time* when he was trying to start his friend's stalled car on 21st December, 2003 and he said very little about this friend of his, *Oduori,* whose vehicle had stalled; but as he had elected to exercise *his right to make an unsworn statement*, his statements had to be taken as they stood; and it was now the trial Court's task to determine whether the prosecution had established their case *beyond reasonable doubt*. Of course, in performing that task the Court would be entitled to review the quality of what the appellant said, in the light of the perceived weight of the prosecution evidence.

The trial Magistrate defined the issues before the Court as: (i) Did the accused person rob PW1 as charged? (ii) If he robbed PW1, was the accused armed, and/or was he in company, as charged, at the time of the robbery? (iii) If he robbed PW1, did he use, or threaten to use violence on PW1 as charged?

The learned Magistrate reviewed the evidence of PW1 which implicated the appellant in the robbery. She noted that PW2's testimony, which was marked by "vivid clarity", had corroborated PW1's testimony. The lights in the house had been switched on; the robbers were armed with *pangas, rungus, machetes*. Out of the gang of robbers, both PW1 and PW2 recognised the appellant – as one who had lately frequented their neighbour's house. The robbers' faces were not masked.

PW1 had testified that he was beaten up by the robbers, but there was no medical report produced as evidence. On this point, the learned Magistrate, we believe, directed herself correctly on the law: "*Nevertheless, [PW1] need not have been injured, for if the robbers were armed with such dangerous weapons and if the accused was armed with a panga, they would only have had one mission, namely, if defied, to execute the potential violence [signalled by] the lethal weapons*."

The appellant had raised an objection to the prosecution case: that the person who pointed him out for the purpose of being arrested, hadn't been called as a witness. But the learned Magistrate ruled this point to be of no materiality, in view of the testimonies recorded by the Court: "…*whoever pointed the accused out, it does not matter now. The point is that he was arrested and identified by PW1 and PW2 as one of the attackers*." We believe the learned Magistrate to have properly guided herself on this point: *on account of a report not emanating from PW1 and PW2, the appellant was placed under arrest; and it is that same appellant whom PW1 and PW2 had perceived as the robber; so it doesn't matter that PW1 and PW2 came first, second or third in pointing him out as the robber; even if some others had already indicated the appellant as the thief, it remained open, as part of a citizen's public duty to report crime, to PW1 and PW2 to approach the Police and state they had observed the appellant as he executed robbery.*

The appellant had also challenged the prosecution evidence on a *theory*: that, had he been the robber, he would not have come anywhere near the *locus in quo* thereafter, so availing himself to arrest right there. We would agree with the learned Magistrate that such a theory has no inherent validity, so as to be a real challenge to the recorded *evidence.* In the words of the trial Court, a robber returning to the neighbourhood of the robbery scene "is very possible, as it can be a style of covering-up and/or a sign of the accused's notoriety."

The learned Magistrate found that the prosecution had proved their case beyond reasonable doubt, as regards count 1 of the charge. Although the stolen property had not been recovered, the learned Magistrate found this not to weaken the prosecution case in any way. In the words of the trial Court: "if I believe PW1 and PW2 were robbed by the accused, I do also believe they owned the property mentioned in the charge sheet, [this] being basic property found in every common family [residence]." The Court found the appellant guilty and convicted him on the 1st count; but as no evidence was adduced in respect of the 2nd count, the Court acquitted him on this count.

In his petition of appeal, the appellant stated that the offence took place at night, and those were difficult conditions for identification of him as the robber. He contended that the evidence leading to the conviction was uncorroborated. He stated that the learned Magistrate had rejected his defence without cause.

Learned State counsel *Ms. Gakobo* opposed the appeal, and supported both conviction and sentence on the 1st count of the charge. She urged that identification had been easy, in the well-lit conditions in the room at the time of robbery, and even more so since both complainants were already familiar with the face of the appellant who used to visit a neighbour in the same compound. In this regard, counsel urged, PW1 and PW2 had given evidence of both *identification* and *recognition.* Such evidence, it was urged, left no room for error, and the appellant was indeed the robber who led other robbers into the complainant's residence at night. Three people had entered the house, while their collaborators remained outside. Though the complainants did not know the total number of invading robbers on the material night, they were aware that many robbers had entered the compound, though it is three of them, one being the appellant, who broke into the complainants' house. On this element alone, counsel urged, conviction of robbery with violence was imperative.

Learned counsel then submitted that the robbers on the material night had been armed with *rungus, pangas*, stones and machetes: so they had dangerous and/or offensive weapons ? and this is again, an ingredient which attracted conviction for robbery with violence.

The appellant also urged that there were contradictions in the prosecution evidence. But learned State Counsel noted that the only contradiction was with regard to *dates* – references sometimes made to 2003 and sometimes to 2004. *Ms. Gaboko* noted that the testimonies of both PW1 and PW2 were quite clear; the act of robbery took place on *21st December, 2003* and the appellant was arrested soon thereafter, the appellant being taken from the Chief's Camp to Muthangari Police Station on *24th December, 2003.* The contradiction on dates seen on the record, counsel urged, was not a fatal one and could not vitiate the conviction.

The appellant in his written submissions, raised new grounds of appeal; challenging use of circumstantial evidence; questioning the Court's compliance with the terms of s.211 of the Criminal Procedure Code (Cap.75) – on opportunities for the accused to elect his lines of defence; claiming judgment wasn't delivered in open Court.

Ms. Gaboko addressed those grounds raised by the appellant. She noted, quite correctly, with respect, that the critical evidence given by both PW1 and PW2 was, in fact, *direct* evidence; and any circumstantial evidence relied on did not, by the mere fact of being circumstantial , lower its quality as reliable evidence which could justify conviction. As regards directions by the Court upon putting the appellant to his defence, *Ms. Gakobo* noted – and we agree – that the fact that the appellant gave *unsworn evidence*, signified his informed choice as to the line of defence he would adopt. Counsel also noted that

the record did clearly indicate that judgement was delivered in open Court, contrary to the appellant's claim.

Ms. Gakobo also drew this Court's attention to the methodical manner in which the trial Court had considered the evidence adduced, and urged that there was no unexplained rejection of the appellant's defence.

The appellant in his oral submissions contended that the complainants could not have known him before the time of identification, as he had seen no accurate description of him in first *reports.* He further dwelt on the conflicting dates on the record which we have already noted and duly resolved.

This consideration of the entire evidence, of the trial Court's judgement, and of the submissions both written and oral, leads us to the conclusion that it was in well-lit conditions, that the robbery was staged in the complainants' house; both complainants clearly observed the appellant as one of the robbers who broke into their house; the face of the appellant was already quite familiar to the complainants, on the material night; the appellant was accompanied by others as he executed the robbery; the complainants easily identified the appellant as having been one of the robbers; this identification was based on recognition – and it was thus an unmistakable mode of identification; it was immaterial that the property robbed from the complainants was not recovered; all this cogent evidence was not dislodged by anything the appellant said in his defence; and it follows that the defensive material placed before the trial Court was merely evasive, and left the overwhelming prosecution evidence entirely undisturbed. We hold, in these circumstances, that proof-beyond-reasonable-doubt had been achieved, on the first count of the charge. Conviction was properly entered, and sentence was meted out in accordance with the law. The decision to acquit the appellant on the second count was correctly reached. We uphold conviction, confirm sentence, and dismiss the appeal in respect of the first count.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 17th day of July, 2007.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ

Court Clerks: Tabitha Wanjiku, Erick

For the Respondent: Ms. Gakobo

The Appellant in person