



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

**Criminal Appeal 340 of 2003**

**(From original conviction (s) and Sentence(s) in Criminal Case No. 114 of 2002 of the Chief Magistrate's Court at Makadara (Mrs. Kimingi - PM))**

**RAPHAEL ODUOR OWINO ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

**RAPHAEL ODUOR OWINO** was charged with **ROBBERY WITH VIOLENCE** contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the charge were that on 22/12/01 along Kenyatta Avenue the Appellant and another who escaped, while armed with a panga, robbed the Complainant **Abdul Shakur** cash Kshs 20,000/=, jewellery and a CD player all valued at 100,000/= and used personal violence against the Complainant. The Appellant was convicted of the said offence and sentenced to death. It is against the conviction that he now appeals to this court.

The Appellant and his accomplice are alleged to have gone to the Complainant's house where he was watching television with his wife at 8.00 p.m. The Appellant used the watchman to call the Complainant to pass over some keys and it was when he opened the door to do so that they pushed open and after kicking and hitting the Complainant they tied him up. When the Complainant's wife **Sultan**, P.W.2, went to find out what was happening she too was tied up. As the others were busy collecting valuables from the Complainant's bed-room, the Complainant's brother, P.W.3, who lived next door and who saw the whole episode from his bedroom window, called for help from guards on the ground floor of their house. P.W.3 also called the Complainant's son. When help came, P.W.3 led the group which responded, including police officers among them P.W.4 and guards all numbering 15, to the Complainant's sitting room. That is where the Appellant was apprehended as he emerged from the Complainant's bedroom. The other accomplice managed to escape.

The Appellant appeared in person for this appeal. The state was represented by a State Counsel, **Mrs. Kagiri** who opposed the appeal.

The Appellant has raised three grounds of appeal but he argued only the first two grounds in his written submissions. The first two grounds were that the conviction which was based on the evidence of P.W.1, P.W.2, and P.W.3 was wrong since the evidence was not watertight and that the charges were not proved. The third ground of appeal was that the learned trial magistrate erred in law and fact in rejecting the Appellant's defence. The Appellant in his written submissions urged this Court to find that the Complainant and his wife P.W.2 had no ample time to see and observe the robbers since the attack was sudden and at a time it was least expected and as the couple were watching their television. **Mrs. Kagiri**

did not agree with the Appellant. Counsel submitted that the Complainant and P.W.2 both had several opportunities to see and identify the intruders. That since the attack lasted 1 hour and since electricity lights in the house were never put off, then the Appellant was seen clearly. Counsel also submitted that the Appellant was arrested while inside the house before he could escape from the scene of crime.

The learned trial magistrate based the Appellant's conviction on the fact that the Appellant was arrested inside the Complainant's sitting room where the re-arresting officer, P.W.4, found him having been subjected to mob justice. The learned trial magistrate also found the prosecution witnesses truthful and believed their evidence. There were however several pertinent points which the learned trial magistrate ought to have considered but did not. At the time the Complainant was attacked, he was trying to hand over some duplicate keys to the watch-man whose voice he had recognized as he called him to give out the keys. The Complainant was pushed into his house together with the door he had left slightly open. According to the Complainant, he saw the first man enter his house and attack him before his spectacles fell off his face leaving him unable to see clearly. The wife joined him and she too was attacked and both of them tied up and taken to their bed-room. It was in the bedroom that the person both identified as the Appellant demanded for money as he threw drawers open and reacted angrily at one time strangling the Complainant. An hour later, the Complainant and P.W.2 stated, the Appellant was hit on his head by their son as he left their bedroom. The Appellant entered the sitting room where he found P.W.3, the Complainant's son, guards from downstairs and police officers, inside the Complainant's sitting room. Could in those circumstances the Complainant and PW2 been able to identify the Appellant? This is an issue that the learned trial magistrate should have considered.

We have analyzed and evaluated afresh the evidence adduced before the lower Court. We find that the conviction of the Appellant did not rest solely on visual identification of the Appellant by the Complainant and P.W.2. It rested more on the fact the Appellant was arrested inside the Complainant's house in the course of the robbery in question. The evidence was quite clear that after emerging from the Complainant's bedroom, the Appellant entered the sitting room which was the next room from a short corridor. That is where P.W.3 was waiting with 14 others. P.W.3 saw him enter the sitting room from the bedroom. In the circumstances we are satisfied that there was no chance that a mistake was made concerning the Appellant's identity and the purpose of his visit to the house. The Appellant was arrested within the Complainant's house and there was no escape for him.

The learned trial magistrate assessed the demeanour of the Complainant, his wife P.W.2 and his brother P.W.3 together with that of the police officer who re-arrested the Appellant P.W.4 and found them to be truthful and honest witnesses. We accept this assessment unhesitatingly. The learned trial magistrate was the best judge of demeanour having seen and heard the witnesses herself. See **OKENO – V- REPUBLIC 1972 E.A.32.**

The Appellant was arrested inside the Complainant's house while still in the course of stealing from the Complainant. Given the evidence adduced by all four prosecution witnesses, the evidence against the Appellant was in our view watertight and over whelming.

The Appellant's defence, which the learned trial magistrate rejected, was that he was walking in the street near Hilton Hotel intending to walk to GPO to take a vehicle home. The Appellant said that he was suddenly hit by people outside Hilton Hotel. That he immediately lost consciousness. That he woke up at Kenyatta Hospital where the police informed him that he had been collected from the street where he was found lying on the ground.

This defence was rejected by learned trial magistrate for being illogical. We have considered it afresh. The Appellant did in his cross-examination of all four prosecution witnesses raise questions of where he was arrested and the first time that the Complainant saw him. We have taken into account that all the prosecution witnesses were total strangers to the Appellant. None knew him before. None could have had any motive to implicate him falsely with such a grave offence.

P.W.4, the re-arresting officer, said he found the Appellant tied up and sitting on the floor of the Complainant's sitting room. At that time the Appellant did not plead mistaken identity or claim he had

been found unconscious in the streets. The first time that he raised the issue was in his defence. P.W.4 was an independent witness and his evidence renders credence to the evidence of the other prosecution witnesses that the Appellant was inside the Complainant's house on the first floor of the building and never outside in the streets as the Appellant claimed. Even though the Appellant had no duty to prove his alibi defence, having made a fresh consideration of the entire evidence before the lower court, we have no doubt in our minds that the conviction reached in this case was safe.

Accordingly we find that the Appellants appeal lacks in merit and we dismiss it accordingly.

Dated and delivered at Nairobi 19<sup>th</sup> day of September 2006

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**LESIIT, J.**

**JUDGE**

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**MAKHANDIA**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant

Mrs. Kagiri for State

Tabitha/Erick – CC

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**LESIIT, J.**

**JUDGE**

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**MAKHANDIA**

**JUDGE**