



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL APPEAL NO. 24 OF 2017**

**JOSEPH OCHIENG ODHIAMBO ALIAS JESKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....REPUBLIC**

*(From the original conviction and sentence in Criminal case No. 1161 of 2015 of the Chief Magistrate's Court at Busia by Hon. G.N Wakahiu- Chief Magistrate)*

**JUDGMENT**

1. **JOSEPH OCHIENG ODHIAMBO ALIAS JESKA**, the appellant herein was convicted after trial in two counts of robbery contrary to section 296 (2) of the Penal code.
2. The particulars of the offence in count one are that on the night between 24<sup>th</sup> and 25<sup>th</sup> May 2015 at **MACHOGA** village **BULOMA** Sub Location of **BUSIA** County, jointly with another not before court, robbed **ANNETT FLORENCE MASIGA** of one gas cylinder, DVD player, 25 DVDs, a Safaricom phone, a thermos flask, a sports bicycle, a computer, one radio, one woofer, two pairs of shoes, two suits, one mattress, beddings and clothes all valued at Kshs.65,000/= the property of **SOLOMON OPWOYO** and immediately before or immediately after the time of such robbery used actual violence to the said **ANNETT FLORENCE MASIGA**. In count two the particulars were that at the same place and time robbed **FLORA MAJALE APWOYO** of one M-kopa solar system and an Itel mobile phone all valued at Kshs.16,000/= the property of the said **FLORA MAJALE APWOYO** and immediately before or immediately after the time of such robbery used actual violence to the said **FLORA MAJALE APWOYO**.
3. The appellant were sentenced to suffer death on both counts after trial and conviction. He has appealed against both conviction and sentence.
4. The appellant was in person. He raised seven grounds of appeal which I have summarized as follows:
  - a) That the learned trial magistrate erred in law and in fact by disregarding the violation of the appellants' rights to fair trial.
  - b) That the learned trial magistrate erred in law and in fact by invoking the doctrine of recent possession.
  - c) That the learned trial magistrate erred in law and in fact by relying on hearsay and contradictory evidence.
  - d) That the learned trial magistrate erred in law and in fact by relying on expert evidence that was

admitted contrary to the law.

e) That the learned trial magistrate erred in law and in fact by disregarding the defence.

5. The state opposed the appeal through M/s Ngari, the learned counsel.

6. The facts of the prosecution case were briefly as follows:

A gang of about eight people or thereabouts struck at the complainants' home. They were having very strong spotlights and this disabled the victims from identifying any one of them. One of the items robbed of one of the victims was a mobile phone. When this matter was reported, the Phone was tracked. The person who was arrested in possession of the said phone led police officers to the appellant. Upon his arrest, his house was searched and a recovery of some other items robbed of the victims was made. He was therefore charged.

7. The appellant denied any involvement in the offences.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

9. Article 50 (2) (m) of the Constitution provides as follows:

***(2) Every accused person has the right to a fair trial, which includes the right—***

***(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;***

This is to ensure fair trial. Though the plea was taken in Lusamia language, the subsequent proceedings were interpreted in Kiswahili. At no time did the appellant protest to the court that he was not able to follow what the witnesses were saying. From the nature of questions by the appellant during cross examination, I am satisfied that he was able to follow and participate in the proceedings and that he was not prejudiced any way. My finding is bolstered by the mode of communication at the hearing of this appeal. The appellant addressed the court in Kiswahili and at no time did it occur to me that he had any challenges in the language. Had it been the case, I would have ordered for an interpreter of the language he understood.

10. The initial charges were substituted with the charges the appellant was convicted in, on 14<sup>th</sup> November 2016. By this time the prosecution had called six witnesses. Section 214 of the Criminal Procedure Code provides:

***(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that—***

***(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***

***(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.***

The record does not indicate that the appellant was explained of his right to demand the recalling of any of the witnesses who had already testified. With the introduction of more serious charges, the learned trial magistrate was obligated to explain to the appellant of this right and record his response. This resulted in a mistrial. It would not be necessary for me to address the other issues that were raised.

11. Having made a finding of mistrial, I hereby quash the conviction and set aside the sentence. The appellant will be tried afresh. I make an order that he be presented before the Chief Magistrate's Court Busia on 10<sup>th</sup> May 2018 for plea taking and any other necessary orders to facilitate the retrial before another magistrate other than Hon. G.N. Wakahiu.

**DELIVERED and SIGNED at BUSIA this 3<sup>rd</sup> day of May, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE**