



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL APPEAL NO. 11 OF 2016**

**BETWEEN**

**GEORGE SAITOTI NJOGA.....1<sup>ST</sup> APPELLANT**

**TOBIAS ODOYO OBUOLA.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in Criminal Case number 147 of 2015 of*

*the Senior Principal Magistrate's Court at Rongo)*

**JUDGMENT**

1. **GEORGE SAITOTI NJOGA (1<sup>st</sup> appellant)** and **TOBIAS ODOYO OBUOLA (the 2<sup>nd</sup> appellant)** had been jointly charged on a count of robbery with violence contrary to Section 296 (2) of the Penal Code, that on 06/05/15 at CHAMGIWADU TRADING CENTRE within MIGORI COUNTY while armed with dangerous weapons namely rungun, jointly robbed **ESTHER ONYANCHA DEVY** of her mobile phones make Huawei, Nokia TS 90, Samsung and Kshs. 7,000/= all valued at Shs. 63,000/= and at the time, assaulted her.

2. **ESTHER ONYANCHA DEVY (PW1)** a businesswoman in Nakuru selling and transporting sugarcane to factories was at Chamgiwadu Trading Centre on 06/05/15 where she was taking sugarcane in a tractor registration number KAP 113 to Ndhiwa. She was in the company of her loader **DAVID OTIENDE** and the driver **PHILIP OLUA** at about 8:00 p.m, when the tractor rolled off the road at Chamgiwadu. With the help of other loaders, they began removing the sugarcane and loading it onto another tractor. She stood by the roadside watching as the tractor was being pulled away, when two men approached her. They assaulted her and she lost consciousness – when she came to, she realized she had lost everything she had and she was all alone. She identified her attackers as the appellants who were among the persons who had helped her to offload the sugarcane from the other tractor.

3. She explained that there was a full moon, and there was another tractor at the scene, whose full headlights were on. She had a black handbag containing her clothes, 2 ATM cards, one identity card, 2 Huawei phones, 2 Nokia phones and one Samsung phone, plus Kshs. 7,000/= - she lost all these items. She was able to identify and recognize the attackers as they had helped to off load the sugarcane, she had paid them, and they were not strangers to her.

4. PW1 explained that after she had paid the two loaders, they left but returned shortly, pretending to pass

by the scene.

5. Upon being attacked, she screamed and the persons who were driving the tractor away, plus someone who was in a lorry rushed to the scene, but the attackers fled.

6. **DAUDI OTIENDE MBUNI (PW2)** explained that the tractor they were using to transport sugarcane belonging to PW1 had a mishap at Chamgiwadu. He stated that he was in the company of PW1 and one OTIENDE and five (5) people helped in off-loading the sugarcane into another tractor who included the appellants. He explained that although it was 8:00 p.m it was not so dark as there was moonlight and there was another tractor at the scene which had full headlamps on. After completion of off loading and reloading the cane onto the tractor, the loaders were paid and left, but returned shortly armed with a rungu then attacked them and he managed to flee to a nearby home.

7. On cross examination he stated he had seen the 2nd appellant for the first time on that day but he knew 1<sup>st</sup> appellant even before as a fellow tractor driver.

8. **EDWIN OWINO WASONGA (PW3)** was in Chamgiwadu area as his lorry had broken down on the date in question and he confirmed seeing the appellants helping to off load sugarcane from a tractor which had rolled off the road and onto another tractor. He returned to his lorry and he saw PW1 and PW2 walk towards Chamgiwadu.

9. Shortly, thereafter he heard screams and saw PW1 approaching saying she had been attacked. He had noticed the appellants following PW1 and PW2 just before they were attacked.

10. **KENNEDY ONUNDA (PW4)** who examined PW1 confirmed she suffered injury classified as harm – he presented a P3 form in court as Exhibit. He confirmed that PW2 was also injured as per the P3 Form produced by PW4.

11. **CPL PIRAUNI LEPARLENGA (PW5)** stationed at AYORA AP Post was led to the appellants by members of the public after receiving a report from PW1's husband at 9:00 p.m about the attack. He had earlier visited the scene and recovered 2 handbags and other papers. A search in the appellant's house recovered a National Bank ATM Card in the name of ONYANCHA ESTHER - the card was under a pillow on a bed inside a house which the appellant's parents had pointed out to PW5 as belonging to appellant and another ATM Card. A KCB ATM Card in Esther's name was also recovered from the 1<sup>st</sup> appellant's trouser which he was wearing.

12. The appellants were handed over to **PC JAPHETH MOKOLDA (PW6)** of OKUMBA Police Station and they were eventually charged.

13. Upon being placed on his defence, 1<sup>st</sup> appellant said he was not aware about events of 6<sup>th</sup> May 2015 and opted to describe events surrounding the day he was arrested. The 2<sup>nd</sup> appellant gave unsworn evidence in which he confirmed that he did help in off loading the sugarcane as stated but maintained that after he was paid he left and was surprised to see police come to his house someday later and ransack it, then arrested him on allegations that he had attacked PW1. He was taken to the Police Station where he was also questioned about the items which had been stolen from PW1. He explained that he did not even own a bed, so how did police get a card under a pillow.

14. While seated outside at the Police Station PW1 came with another man, and the man pointed at the appellant and his co-accused as the robbers. The 2<sup>nd</sup> appellant insisted that nothing related to the robbery was recovered from him. Later on 21/12/15, a police officer produced ATM Cards.

15. The 2<sup>nd</sup> appellant's uncle **THOMAS OMOGO OWUOR (DW1)** testified saying he went where the appellant was being arrested and found him being caned so as to produce the stolen items. DW1 said he never saw any exhibits being recovered.

16. The appellant's employer **OKWANGO KIREO** told the trial court that the appellant was of good character, whom he would even leave at his home for days yet he never stole anything. He was certain that if the appellant had robbed PW1 of her phone, given the period he had spent in remand custody, he would have returned it.
17. The trial magistrate noted that PW1's evidence concerning the sequence of events was corroborated by PW2, PW3 and even the appellant. He also noted the fact that identification of appellants earlier at the scene was also not in dispute.
18. As for the incident which occurred at 8:00 p.m, the trial magistrate observed that PW1 and PW2 noticed some men approaching, while they were watching the tractor being towed away and PW2 spoke to them. However, PW1 was immediately hit on the back and lost consciousness but she identified some of the attackers as persons who had helped her to off load the cane from the tractors. He noted that this was also confirmed by PW2.
19. The trial magistrate pointed out that PW1 claimed there was sufficient light to enable her identify the attackers because ***“there was a full moon, and both tractors had their head lamps on. However, she told the court that the incident had occurred between 10-15 minutes after the tractors had started pulling the other. The court can therefore safely presume that the only source of light available then was the full moon.”***
20. The trial magistrate also noted the contradictions in the evidence of PW1 and PW2 on the circumstances of the robbery, pointing out that whereas PW1 said she lost consciousness before running to the nearby lorry, PW2 stated that he screamed and struggled with the accused for one hour before escaping from the scene.
21. Another contradiction noted by the court was PW1's claims that her bag was recovered from the appellant and his co-accused, then she later changed to say bag was recovered from a plantation whereas PW5 said the handbag was recovered from the scene. Furthermore PW1 informed the court that the ATM cards were not recovered, but later she changed this and said the appellant and his co-accused had been found with the cards. PW5 on the other hand said one ATM Card was recovered from the appellant's house.
22. The trial magistrate held the view that the contradictions were not so grave as to warrant the evidence of the witnesses being rejected – he relied on the Uganda Court of Appeal decision in ***TWEHANDANE ALFRED vs= UGANDA Criminal Appeal No. 139 of 2001 [2003]UGCA6*** which held that it is not every contradiction that warrants rejection of evidence.
23. The trial magistrate was satisfied that the appellants were properly identified because they had been seen at the scene earlier in the day and they had spent a lot of time with the witnesses when the cane was being off loaded, before the incident so there could be no chance of mistaken identity and that the attackers were positively identified.
24. The appellant has contested these findings on grounds that conditions for identification were not favourable to enable the complainant recognize the attackers and it was not possible to verify the illumination of the moonlight.
25. At the hearing, Mr. Kisera appeared for the appellant and submitted that the offence occurred at night and it should be noted just before the attack, PW1 was receiving a call and although she saw two men approaching she thought they were passing – instead they suddenly attacked her- from the back. He therefore questions the opportunity that PW1 had to see and identify her attackers. He confirms that this is why when she made a report to police; she did not give the names of her attackers who were people supposedly known to her.
26. Counsel poked holes at PW2's evidence saying the minute the loaders were called to assist in off – loading the cane, PW1 sent him to go and buy batteries, so he did not remain at the scene long enough to

see and recognize the appellant. He also cast doubt on the witnesses' ability to identify the attackers saying that PW2 claimed the men who approached them had torches which they shone on their faces before the attack, so the opportunity for identification was not water-tight. Counsel submitted that under such conditions PW1 and PW2 had difficulty in identifying the attackers.

27. In any event the light from the tractors was facing away from the witnesses, as they were being driven away.

28. Mr. Kisera also argued that the evidence regarding the recovery of the stolen items was covered in a maze, and in fact PW1 never identified anything said to have been recovered from the appellant. The ATM cards were belatedly presented by PW5 and it is Mr. Kisera's contention that it was simply a move to fill in the gap in the prosecution case.

29. In opposing the appeal, Miss Owenga argued that this was a case falling under the doctrine of recent possession where the appellants were found with property belonging to the complainant. She submitted that even though the ATM Cards were not identified by PW1, the fact remains that they bore her name and photograph she urged for dismissal of the appeal.

30. This appeal hinges mainly on identification and recovery of the property. In considering opportunity for identification, I can do no better than to be guided by the decision in **CHARLES O. MATANYI vs R (1986) KLR 198** which addressed what conditions to be taken into account when identifying at night.

31. David had got the appellants and two other men to assist in the loading which was completed by 8:00 p.m

32. Esther then stood by the road watching as the ill fated tractor was being towed away by another tractor and it was then that some men approached. She thought they were passersby and in fact David (**PW2**) who was in her company spoke to them in dholuo; but before he could even finish talking, they hit her on the back and she lost consciousness.

33. Both she and **PW2** were able to identify and recognize the men as they approached because there was a full moon. They were the same people who had earlier on been engaged to off – load the cane and PW1 stated:-

*“ .... you came back just as you were dressed.”*

PW1 knew both appellants even before the incident and explained on re-examination:-

*“I knew them officially at the station, not their names, the 1<sup>st</sup> accused is known as Job at work, I know he is George Saitoti; I know the 2<sup>nd</sup> accused as Tobias.”*

34. PW2 confirmed that he stood by the roadside as the tractor was being towed away two of the people they had engaged as loaders returned to the scene and he spoke to them but the 1st appellant signaled to him that they were okay. He explained

*“It was not so dark, there was moonlight...A few minutes later the accused came back again, we thought they were passing..... they lit our faces with torches, the 1st accused lit my face, the 2<sup>nd</sup> accused lit PW1's face, before, .... questioning them, they assaulted both of us .... they were and with a rungu.”*

35. Whereas I agree with counsel that when one shines a torch direct into another's eyes, it has a blinding effect – this could not have affected the positive identification by recognition because the attackers did not suddenly and stealthy appear and immediately attack. They walked towards the witnesses-, they were not strangers to them, and they had been together yet at least 4 hours, and when they returned they were in the same clothes they had worn earlier in the day. As they walked towards PW1 and PW2 they

were not shining their torches on the witnesses' faces.

36. Secondly, the torches they had were not the only sources of light, the witnesses saw and recognized them because there was a full-moon, and infact PW2 even spoke to themselves

37. I agree with counsel that an identification parade would have been necessary to confirm that the witnesses could pick their attackers even from a lineup of more than five people, but it is my view that such an exercise would have been superfluous precisely because the appellants were persons already known to them from the past. The appellant's argument, were an identity parade to be carried out would be that -

***“Even if they picked us in an identification parade, they already knew us.”***

The lack of an identification parade was not fatal

38. PW3 stated that he had seen 1<sup>st</sup> appellant pass by following PW1 and PW2 first before they were attacked. He too confirmed that there was sufficient moonlight to enable him see. I take note that the both appellants were well known to PW1, PW2 and PW3 and their evidence placed them at the scene at the time of attack. This was not first identification of strangers, it was recognition – indeed PW1 said ***“they were not new to me...”*** Moreover they had spent a considerable time together with PW1 and PW2 off – loading and re-loading the cane onto the tractor.

39. Although the evidence of PW1 was a bit mixed up as to exactly where her handbag was recovered, it did not alter the fact that PW5 recovered the very recently stolen ATM Cards from the appellants. The evidence of **CPL LEPARLENGA PW5** was that upon being led to the homes of the appellants he recovered PW1's KCB ATM card from the 1<sup>st</sup> appellant and her National Bank ATM Card from the 2<sup>nd</sup> appellant's house under his pillow – one does not need to have a bed so as to have a pillow. The appellants did not give an explanation as to how they came to be in possession of such recently stolen items, and indeed the trial magistrate correctly invoked the doctrine of recent possession. The doctrine of recent possession aptly applied here.

40. The attack was committed by more than one person, actual violence was used against PW1 and she suffered injury, in a bid to forcefully rob her off her property. The ingredients of robbery were satisfied and the appeal has no merit. The appeal is thus dismissed, conviction upheld and sentence is confirmed.

**Dated, signed and delivered at Migori this 7<sup>th</sup> day of November, 2016**

**H. OMONDI**

**JUDGE**