



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 147 of 2007**

*[From Original Conviction and Sentence in Criminal Case No.1876 of 2005 of the
Chief Magistrate's Court at Mombasa]*

FIDEL OUMA OSUDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The appellant, Fidel Ouma Osuda, Alias Castro, and Dominic Onyango Ayuga were charged in the Chief Magistrate's Court at Mombasa jointly with others not before the court with three counts of robbery with violence contrary to section 296 (2) of the Penal Code. At the end of a full trial, they were found guilty on two of the counts and sentenced to death. The appellant has appealed to this court against conviction and sentence.

The particulars of the offence with which the appellant was convicted were that on 27th February 2005, at London Bar and Restaurant in Mikanjuni Location of Mombasa District within Coast Province, the appellant and the said co-accused jointly with others not before the court, while armed with dangerous weapons namely; guns, robbed Gladys Nelima Ouma of cash Kshs. 1,000/= and one mobile phone make Erickson T18 all valued at Kshs. 10,529/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Gladys Nelima Ouma. The third count carried the following facts: that on the same date and place while so armed, the appellant and his co-accused jointly with others not before the court, robbed Stephen Oduor Arodi of cash Kshs. 300/= and one wallet containing an ID card all valued at Kshs. 500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Stephen Oduor Arodi.

In the Grounds of Appeal filed on 19th September 2007 the appellant has challenged the charge and the manner of recording evidence. He has also alleged conflict in evidence and failure to analyse the same. The appellant further alleges breach of statutory provisions when the trial was taken over by a different magistrate and that his defence was not considered. There is also an allegation that the case was not proved as required and that the proceedings were conducted in a language not understood by the appellant.

On 18th July 2008, the appellant lodged a Notice of Motion under section 358 (1) of the Criminal Procedure Code seeking one order of the court that he be allowed to adduce additional evidence relating to his whereabouts on the 27th February 2005 i.e. the date when the robberies were committed. It is the Notice of Motion which came up before us for hearing on 14th July 2009. The application is supported by an affidavit sworn by the appellant's advocate. It is deponed in the affidavit, *inter alia*, that the said

advocate was informed that at the time of the offence, the appellant had travelled to Siaya for the burial of his late father. Annexed to the affidavit are copies of burial permit and death certificate in respect of one Lukas David Ododa Wasuda.

In his oral submission before us, Mr. Magolo, Learned counsel for the appellant, argued that the appellant did not put forward the defence of alibi because he did not have the benefit of counsel and further that in view of the gravity of the offence, the appellant should be allowed to call additional evidence. The application was opposed by Mr. Monda, the Learned Senior State Counsel who represented the State. Counsel submitted that the application has been made too late in the day and is intended to circumvent specific findings of the trial court. In Mr. Monda's view the order sought if granted would gravely prejudice the prosecution as the additional evidence was not presented to the prosecution for verification and to test its veracity.

We have considered the application, the supporting affidavit and the submissions of counsel. Having done so, we take the following view of the matter. The offences with which the appellant was convicted were committed on 27th February 2005. The charge sheet indicates that the appellant was arrested on 4th March 2005 and arraigned on 15th March 2005. A total of six (6) witnesses testified for the prosecution including the complainants. The appellant extensively cross examined some of the witnesses and on no occasion did he suggest that he was attending the funeral of his father when the offences were committed.

The record further shows that when the appellant was put on his defence, he expressly stated that, he had no witnesses to call. In his unsworn statement, the appellant said nothing about the date of the commission of the offence. Instead he testified about his arrest. Throughout the trial therefore, the appellant did not intimate that he would put forward the defence of alibi. The death of a father is, to say the least, a grave matter which the appellant would not have been expected to forget when he was charged as already stated. The witnesses testified about specific dates. It is unbelievable that for the entire period of the trial, the appellant could not remember that he had buried his father around the period about which witnesses were testifying.

There is no allegation that the appellant was, at the trial, not given an opportunity to put forward the defence of alibi. In the premises, we concur with the Learned Senior State Counsel that this application has been made rather too late in the day. To allow the same would create a dangerous precedent. It would open flood gates for appellants with benefit of hind sight, to be allowed to call evidence to perfect their cases. We do not think we should create that opening.

The principles upon which an appellate court in a criminal case will exercise its discretion on deciding whether to allow additional evidence to be adduced were stated in **Elgood – v – Regina [1968] EA 274** as follows:-

- (i) The evidence that is sought to be called must be evidence which was not available at the trial;**
- (ii) It must be relevant.**
- (iii) It must be credible.**
- (iv) The court will consider the evidence together with the evidence on record to determine whether it would create reasonable doubt.**
- (v) It is only in very exceptional cases that the evidence will be permitted.**

We do not think that, the appellant has satisfied the conditions set in the said case. The alleged death of the appellant's father was a fact available to the appellant at the time of trial. The fact of the death of the appellant's father could very well be true but it does not necessarily follow that the appellant was indeed attending the funeral at the material time. As we have already observed, it appears incredible to us that the appellant would forget such an event during the entire trial. We further detect no special circumstance

in this case.

In the premises, we decline the appellant's application. It is accordingly dismissed.

Order accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER 2009.

F. AZANGALALA

JUDGE

M. ODERO

JUDGE

Read in the presence of:-

Jengo holding brief for Magolo for the Applicant and Onserio for the State.

F. AZANGALALA

JUDGE

6TH OCTOBER 2009