



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KERICHO**

**Criminal Appeal 162 & 163 of 2008**

**JOB MOSOMI KENYANYA.....1<sup>ST</sup> APPELLANT**

**JARED ONYIEGO OGAKE.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants were convicted of robbery with violence contrary to section 296(2) of the Penal Code in five counts by the Ag. Principal magistrate, Migori, and sentenced to death. The particulars of Count 1 were that on 16/2/2007 at St Joseph's Ombo Mission Hospital in Migori District within Nyanza Province, jointly with others not before the Court and being armed with dangerous or offensive weapons namely guns, pangas and metal bars robbed cash Kshs. 189,592/= and four mobile phones (one siemens S25, motorolla C113 and two motorolla C200) all valued at Kshs. 209,592/= the property of Christopher Omondi. In count III it was alleged that in the same incident they robbed Aloys Odhiambo Tiengo (PW8) of Nokia 1100 mobile phone worth

4500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Aloys Odhiambo Tiengo (PW8). In count IV they robbed Esther Agola Otieno (PW1) of motorolla C113 mobile phone worth Kshs. 2,300/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Esther Agola Otieno (PW1). In count V they robbed Fredrick Nyongesa (PW 15) OF his mobile phone make Samsung S GH X640 valued at Kshs. 7000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Fredrick Nyongesa (PW 15). In count VI the appellants robbed John Omweri (PW2) of cash Kshs. 300/= and a mobile phone make *sendo* 300 all valued at Kshs. 5800/= and at or immediately before or immediately after the time of such robbery used actual violence to the said John Omweri (PW2).

The appellants, who were represented by Mr. Sagwe and Mr. Kerosi Ondieki, were aggrieved by the convictions and sentence and preferred this appeal. Mr. Mutai represented the Republic and opposed the appeals in their entirety.

The brief facts of the case are as follows: After 1a.m on 16/2/2007 St Joseph's Ombo Mission hospital was attacked by a large group of people who remained there up to about 5 a.m. They tied the people they found and stole from them various items. They broke into the cash office and emptied the cash box. AP Corporal Omune (PW4) and APC Rodgers Masiwa (PW5) both

of Migori DC's office were rung at about 3.30a.m and told the robbery was taking place. They came, PW5 armed with a G3 Rifle. They found the attackers were quite many. They called for reinforcement which brought the OCS Migori police station and a team of CID officers who included PW14 P.C. WOCASA. It was still dark. PW5 shot at these attackers 5 times. They fled as the police officers gave chase. The attackers abandoned two black bags with 3 metal bars and a hammer (exhibit 10), cash kshs. 9,411/50 (exhibit 11) in notes and coins, hark saw (exhibit 12), 5 mobile phones namely motorolla, sagem, nokia 1100 and samsung (exhibits 13 to 16), and clothes (exhibit-17). One of the attackers had apparently been shot when PW5 fired. Stains of blood were evident. PW14 collected sample of it for investigations.

PW1, Esther Agolla Otieno, was in the hospital in the pediatric ward with a sick child. She was woken up by the attack and saw two men who dragged a nurse away. The nurse had her motorolla phone which they took but which was later found abandoned. PW3, Remjews Otieno Aluoch, PW8, Alloys Otieno and Elias Ogutt Pesa (PW9), work with the hospital as askari, driver and maintenance personnel, respectively. They were on duty. There was power black-out which necessitated PW 9 to switch on the generator. It was at that point that AP Senior Sergeant John Omweri (PW2) and AP Sergeant Nyongesa (PW15) brought in GK Landrover a sick wife of their colleague for treatment. She was admitted. PW15 was found by three attackers while waiting at the corridor of the maternity ward. He was ordered to surrender. He was caught, subdued, tied and robbed of his Samsung cell phone. It was among the items the attackers dropped while running away. PW2 was found sleeping in the landrover. He was forced to the out-patient area where he found people having been made to lie down. He was forced down and tied with ropes on the legs and hands. He was robbed of his *Sendo* cellphone and 300/=

PW3 was surrounded at the gate by 5 people one of whom had a gun. He was made to lie down before being taken to the maternity ward where he found other attacked people lying down there, having been tied. He was tied and remained here until 4.30 a.m when he heard the attackers talking in Ekegusii language and sharing money. He heard gunshots and everything went quiet until he was untied. PW8 was found resting when attackers came. He hid under the bed where he was removed and his nokia 1100 phone and cash Kshs. 2000/= taken. He was tied like others. He remained here until he heard gunshots. His phone was recovered. PW 9 saw a group of men and went under the bed in fear. He was found there and his siemens 118 cellphone taken. He was taken to be tied in the maternity ward. His phone was not recovered.

The attackers were strangers. PW2, PW3, PW9 and PW15 stated they each identified the 1st appellant in the attack while the 2nd appellant was identified by PW2 and PW15. They used light from the generator to identify the two. Identification parades were conducted at Migori police station. Inspector Kiboi (PW11) conducted parade on 18/2/2007 at which PW2 identified the 2nd appellant. On 20/4/2007 he conducted another parade at which PW15 identified the same appellant. PW13, C.I. Charles Bundi, conducted the parades for the 1st appellant. In the first parade PW2 and PW15 identified the appellant. In the second parade the 1st appellant was identified by PW3 and PW9.

PW2 and PW15 had testified that they had identified the

2 nd appellant in the attack.

The 1st appellant was arrested in Embakasi in Nairobi and collected from there by PW14. He was found with a wound on the left chest and forearm which according to Dr. Nyamohanga (PW12) was made by a bullet. The prosecution case is that he was shot on the day of the attack as he was, along with others, running away. The 2nd appellant was found for arrest in Itago in Gucha. PW14 said he was mentioned by the 1st appellant.

Each appellant denied he was in the attack. They made sworn statements and did not call

witnesses. The 1st appellant said he had suffered his injuries in a violent attack in Nairobi and had gone to Embakasi police station to report when he was arrested.

The grounds of appeal were basically that the appellants had been convicted on insufficient evidence; they were not properly identified to have been in the attack; their defence had not been considered; and the identification parades had been defectively arranged.

It is the duty of the first appellate court to reconsider the whole evidence and evaluate it and make its own conclusion before deciding whether or not the Judgment of the trial court should be upheld. (*See Wagude .v.Republic [1983] KLR 569*). In so doing, however, it should bear in mind that the trial court had the distinct advantage of seeing and hearing the witnesses.

Regarding identification parades held in this case, the 1st appellant complained thus:

*"the identification parade was not conducted in the required manner as the prosecution witnesses were first given opportunity to see me before the parade was conducted pretending that they were my relatives who waited to see me while they were not thus proving foul play."*

The 2nd appellant complained that:

*"During the identification parade, nobody identified me except two administration police officers and who had earlier mingled with me at the police cell when I had been arrested thus proving failure in law which need to be followed during such parades".*

While prosecuting the appeal Mr. Sagwe submitted that the parades in which PW2 and PW15, both police officers, identified the appellants were irregular as the officers were attached to the same station where the appellants had been detained. Counsel must have been saying that the officers had prior opportunity to see the suspects. It has been indicated in the foregoing that the parades were conducted at Migori police station. The other officers belong to the Administration police and were attached to Migori DC's office. One does not know if the station and the DC's office were in the same place or compound. Although this issue has caused this court anxiety, PW3 denied when cross examined by the 1st appellant that he came with PW2 to ask the appellant if he would agree to take part in the parade. He stated he left PW2 in the report office. There was no other evidence called to show the officer or other witnesses had access to the appellants before the parades. However, PW13 testified that it was the 1st appellant who selected the 8 prisoners who participated in the parade as members. He stated:

*"I told the accused of my intention and he agreed. I took prisoners as suggested by the accused as those similar like him. He is the one who selected 8 prisoners. We made parade."*

Under the Force Standing Orders under the Police Act Cap 46 of the Laws of Kenya, the responsibility to select the members of the parade who are as far as possible of similar age, height, general appearance and class of life as the suspect belongs to the officer conducting the parade. The suspect cannot be asked to select such members. The officer, and that is why he must be at least a Police Inspector, is trained in such exercise. The suspect is not. Consequently, the parade conducted by PW13 was faulty. The court doubts the credibility of the parades he conducted for the 1st appellant. It follows that all that the prosecution has against the 1st appellant by way of

testimonies of PW2, PW3, PW9, and PW15 is dock identification which is worthless. (*See Kiarie.V.Republic [1984] KLR 739*). Further, the 1st appellant had a fresh wound in the parade. No evidence was given to show the other selected members had such wound. This wound may have aided the witnesses to pick him.

PW 12 opined that the wound on the 1st appellant was made by a bullet. Blood samples were

collected from the scene and matched with blood sample taken from the appellant. The result was not produced in evidence. That failure, we find, undermined the opinion of the witness.

That leaves the 2nd appellant whom PW2 and PW15 allegedly identified. We consider that this being a case wholly depended on visual identification by witnesses at night, it was incumbent upon the trial court to caution itself of the special care that is required in dealing with such evidence and the need to subject it to exhaustive examination before convicting the appellants (See *Cleophas Otieno Wamunga .V. Republic, Criminal Appeal no. 20 of 1982 at Kisumu*). The court did to caution itself of the danger of convicting the appellants on that evidence. That was a serious misdirection. The court believed PW2 and PW15 but should have remembered that an honest witness may still be mistaken. Several witnesses may be honest but still be mistaken. This is how the court dealt with evidence of PW2 and PW15:

*“For the 2 nd accused he was identified by PW2 and PW15 . As I have said before PW2 said that he made a quick observation as an officer and he saw the face of the 2 nd accused and that he saw the face of 2 nd accused in the robbery, he was also able to pick the 2 nd accused from the parade”.*

PW15 also picked the 2 nd accused in the parade and said that the 2 nd accused and others are the ones who tied him.

The trial court further stated that the evidence on record

*“shows that this robbery took place from 1.30 a.m to around 4a.m . That is a period of over three hours. We are also told that the generator was on throughout and there was no attempt to switch it off.*

*The robbers did not attempt to hide their faces. And I am of view that the witness had ample time and opportunity to observe the attackers.”*

The attack may have taken about three hours, but there was no evidence the 2 nd appellant remained in the view of the witnesses all that long. It would appear that PW2 took a fleeting glance of the appellant and does not show he saw him again. There was no evidence that the appellant remained with the witnesses throughout. Critically, however, it was not the witnesses who led to the arrest of the appellant. The witnesses did not describe their attackers to police and enable their arrest. (See *Republic .v. Mohaed Bin Aloji (1942) EACA72*)

Our own assessment and evaluation of the evidence would indicate that the prosecution did not prove beyond doubt that the circumstances obtaining were favourable for accurate or proper identification. The convictions were therefore not safe or secure.

In the result, the appeal is allowed. The convictions are quashed and the sentence set aside. The appellants are ordered to be set at liberty forthwith unless they are otherwise being lawfully held.

Dated, signed and delivered this 2nd day of November, 2009

**D.K.MUSINGA**

**A.O.MUCHELULE**

**JUDGE**

**JUDGE**

**2/11/2009**

Before D. Musinga-J

Nyangaga court clerk

Mr. Kemo for the State

Mr. Sagwe for the appellants

Appellants-present

COURT: Judgment delivered in open court.

**D. MUSINGA**

**JUDGE**

**2/11/2009**