



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

Criminal Appeal 1040 of 1993

(From Original Conviction and Sentence in Criminal Case No.319 of 1992 of the Chief Magistrate's Court at Kisumu: CO. Ongudi Esq.)

MORRIS OGOT KISERO.....APPELLANT

-versus-

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO, 1041 OF 1993

(From Original Conviction and Sentence in Criminal Case No.319 of 1992 of the Chief Magistrate's Court at Kisumu: CO. Ongudi Esq.)

PETER OUMA OCHIENG APPELLANT

—versus—

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO, 1042 OF 1993

(From Original Conviction and Sentence in Criminal Case No.319 of 1992 of the Chief Magistrate's Court at Kisumu: CO. Ongudi Esq.)

JOHN OPI.....APPELLANT

-versus-

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO, 1053 OF 1993

(From Original Conviction and Sentence in Criminal Case No.319 of 1992 of the Chief

Magistrate's Court at Kisumu: CO. Ongudi Esq.)

LUCAS OUMA OGOT..... APPELLANT

-versus—

REPUBLIC RESPONDENT

Coram;-OWUOR.J

Oguk,

1st, 2nd, 3rd & 4th Appellants - present in person

(un-represented)

Mrs. Ondieki (state counsel) for the state.

JUDGMENT

Criminal Appeal No. 1040/93. Cr. Appeal 1041/93; Cr. Appeal No. 1042/93 and Criminal Appeal No. 1053/97 are hereby consolidated.

The 1st Appellant, Morris Ogot Kisero (original A1); 2nd Appellant, Peter Ouma Ochieng original A4); 3rd Appellant, John Opiyo Oswiya (original A3); and 4th Appellant, Lucas Ouma Ogot (original A2), were jointly convicted by the Learned Chief Magistrate, Kisumu of the offence robbery with violence contrary to section 296(2) of the Penal Code. Upon their conviction, the 1st, 2nd and 3rd Appellants were sentenced to death; while the 4th Appellant, who was found to have been aged 17 years at the time of the commission of the offence was ordered under section 25 (2) of the Penal Code to be detained at the President's pleasure. Their appeals to this Court are against their conviction and sentence.

Briefly, the prosecution case was that on the evening of 20th of November, 1992, the complainant, Martin Antony Theophilo (PW1) and his wife, Estella Martin (PW7), left their residence at Tom Mboya Estate Kisumu to visit friends. It was then 8 p.m. The mother of the complainant remained in the house while his security guard, Morris Ogot (1st Appellant) remained guarding the compound. He was a hired security guard supplied to the complainant by the Manager of Shields Security Services, Mr. Opi (PW8). He had been attached to the complainant's house for about 5 days prior to the incident.

At about 11 p.m, the complainant (PW1) and his wife (PW7) came back to their house. As usual, the security guard (1st Appellant) opened the gate for them and the complainant drove his car Reg. No. KUS 982 a Toyota to its parking. The guard then locked the gate. As the couple came out of the car to go to the house, they were confronted by four armed men who were strangers to them who were apparently laying in wait for them within the compound. The said men were armed with somali swords, simis, pangas and iron rods. They ordered the complainant to sit down near his car. His guard, Morris Ogot (1st Appellant) then came and joined the said gangsters. The security lights inside the compound was on and covered the place quite well. Electric lights from his house were still on from a fluorescent tube. They tied the hands of the complainant with a piece of rope and took his car keys. His guard (1st Appellant then ushered his wife (PW7) into the house through the kitchen door. The complainant was also led into the house by the said gangsters who ordered him to lie down on his carpet at the sitting room. The gangsters demanded money from him and his wife. They replied that they had no money other than shs. 200/- in the purse of his wife. They grabbed the said purse and removed the money. As they were led into their bedroom, two of the said gangsters started dismantling the T.V. and Video in the room. The 2nd and 4th Appellants were the ones who took them to their bedroom while demanding money. The lights in the bedroom were switched on and the gangsters opened the cupboard from where they took shs. 900/-. They then started ransacking the bedroom and carried away his personal effects and valuables as the complainant and his wife watched. The said gangsters then loaded the said goods into the complainant's car which they drove

away. The evidence of Estella (PW7) was similar to that of her husband. After the gangsters had gone, they found that they had taken away the T.V set, Video, Hi-fi Music System, a small music system, electric guitar, a fan, electric iron box, several suits, shirts, shoes, jackets, trousers a set of wine glasses, large suit carrier bag, a large suit case and many other items all valued at shs. 280,000/-.

The incident was reported to the police who visited the scene. In the course of their investigations, they went to the 1st Appellant's place of work at Shields Security Services on the following day to look for him but he was nowhere to be seen. Records held at the office and which were produced in Court indicated that he was on the previous day assigned duties at the complainant's house in Kisumu. He was nowhere to be found at his house. However, the police officers were able to get his son, the 4th Appellant. He was asked by the police officers to take them to their rural home and they found his father, the 1st Appellant who was a guard at the compound of the complainant on the material night. He and his son were arrested by the police officers. Nothing was recovered from any of them.

On the 5th of December, 1992, A.P. Asemo (PW5) acting on a tip off, arrested the 2nd and 3rd Appellants. They were taken to Nyabera Chief's Camp. Their respective houses were then searched by the police officers and from the house of the 3rd Appellant several clothes were found which were later identified by the complainant as belonging to him. Nothing was recovered from the 2nd Appellant's house. They were interrogated by the police officers and upon such interrogation, the 3rd Appellant led police officers to a certain house at Ringa area. He showed them a place on the ground which the police officers dug up and uncovered a motor vehicle engine, gear box and other accessories in a sack. He further showed them the place where the shell of the said vehicle had been set on fire. Asked how they had dismantled the said vehicle, led the police officers to a Jua Kali garage at Kisumu where one mechanic Ogada (PW3) was arrested.

Ogada (PW3) testified that it was on the 23rd of November, 1992 while he was at his Jua Kali garage; the 3rd Appellant hired him to go and repair for him a certain vehicle. He went with him up to centre market in Kabondo area and showed a Toyota car Reg. No. KUS 982. The 3rd Appellant had the keys. He was asked to dismantle the said car and remove the engine from the car. He did so. The 3rd Appellant and his group later brought a Matatu vehicle and they carried away the engine, gearbox and the radiator. The 3rd Appellant then paid him shs. 500/- for his services promising pay him the balance later.

A statement under inquiry was later taken from the 3rd Appellant which although repudiated, was admitted in evidence after a trial within trial was held (ex.18). It amounted to a confession regarding his involvement in the said robbery. He set out in detail in that statement how they had hatched the said offence in a certain house in Kondele Estate, Kisumu. A similar statement was also recorded from the 2nd Appellant which was repudiated but was admitted in evidence after a trial within trial was held (ex.17). They were then jointly charged with the offence of robbery and in the alternative, they were separately charged with offence of handling stolen property contrary to section 322(1) of the Penal Code.

All the Appellants denied any involvement in the said robbery.

The 1st Appellant in his defence testified that he was a guard with Shields Security Services. He worked for 5 days and then got news from home that his mother was dead. He left duty on the 17th of November, 1992 and travelled home. On the 24th of November, 1992, police officers came with his son the 4th Appellant and he was arrested.

The 2nd Appellant, in his defence maintained that he knew nothing about the offence. He stated that he had simply been arrested by an Administration police officer and taken to the Chief's Camp from where the police officers re-arrested him.

The 3rd Appellant, testified that he was arrested on the 6th of December, 1992 and taken to his rural home which was searched but nothing was recovered. He was later charged with the offence of robbery which he knew nothing about.

The 4th Appellant, in his defence testified that he had been simply called by the Manager of the Security

Company where his father (1st Appellant) was working. He wanted him to take the police officers to their rural home and he did so. They found his father and arrested him. He too was arrested and yet he knew nothing at all about the alleged robbery.

In their respective Petitions of appeal, the following grounds are common to all or most of the Appellants.

1. That the Learned Trial Magistrate erred by relying on the evidence of visual identification by the complainant (PW1) and his wife (PW7) which was not preceded with any formal identification parades.
2. That the Learned Trial Magistrate erred by relying on the repudiated statement of 2nd and 3rd Appellants.
3. That the Learned Magistrate erred by failing to consider the defence raised by the Appellants/
4. That the facts proved did not support the offence charged but a lesser offence of simple robbery contrary to section 296(1) of the Penal Code.

We have scrutinised, evaluated and considered the evidence as set out above. There is no dispute on the recorded evidence that armed gangsters had found their way into the compound of the complainant on the evening of 20th of November 1992 while he was away with his wife. We are satisfied that their guard, the 1st Appellant had connived with the said gangsters despite his denial. This is clear from the testimony of the complainant supported by that of his wife (PW7) that after opening the gate for them, he joined the gangsters who had by then ordered the complainant to sit down near his car and tied him up. He was the one who led the complainant's wife to open the kitchen door through which the gangsters entered the house. Both the complainant and his wife had known the 1st Appellant before then as he had been their guard for 5 days. The security lights outside the house was then on and they saw him quite well. Moreover, he was the one who had opened the gate for them that evening while going out and coming back. He disappeared soon after the robbery as he went away with the said gangsters in the complainant's vehicle.

The 1st Appellant had raised an alibi defence that on the material night he was never in Kisumu but was at his rural home where he had gone to attend the funeral of his mother who had died. This defence was considered by the Learned Trial Magistrate and disbelieved. Apart from the evidence of the complainant and his wife, that he was on duty on the material day at their compound, there was further evidence from his employer, that he was actually on duty at the residence of the complainant on the material day. Mr. Opi (PW8) who was the Manager of Shields Security Services went further to produce his records for that day showing that the 1st Appellant was on duty on that day at the complainant's home. He was the one who could have given the 1st Appellant permission to be away if ever he was bereaved, but had received no request from the 1st Appellant to be away from duty. If ever he was away from duty as from the 17th of November, 1992 as he wanted the court to believe, the records produced in court, which was a register of employees on duty and their places of work could not have consistently shown that he was on duty every day till the 20th of November, 1992. We are satisfied that the Learned Trial Magistrate correctly disbelieved the defence of the 1st Appellant. We find that he had joined the gangsters who had raided the house of the complainant which he was supposed to guard and that there is considerable truth in the statement of the 2nd and 3rd Appellants that he was deeply involved in the planning and execution of the said robbery. We make a finding that the 1st Appellant was satisfactorily proved beyond all reasonable doubt to have been involved in the said robbery.

As for the rest of the Appellants, we observe that they were all strangers to the complainant and his wife. They first came to see them during the said robbery. Although the security lights were on outside the house, none of them claims to have identified any of the said men outside the house. Circumstances for positive identification existed even inside the house as the electric lights both in the sitting room and in the bedroom were on. Regrettably, neither, the complainant nor his wife was able to describe to the police who arrived at the scene soon after the robbery any features of the said gangsters except to say that their watchman had been involved.

Nowhere in her evidence does the complainant's wife claim to have been able to identify any of the said gangsters. The same applies to the complainant who only identified the 2nd and 4th Appellants in the dock and insisted that they were the ones who had taken them to their bedroom to demand some money. No identification parade was held by the police officers after the arrest of the Appellants at which his evidence could have been tested. We place no reliance on his dock identification of the 2nd and 4th Appellants and we find support for this in the case of Gabriel Njoroge -vs- R.

Apart from the 1st Appellant, the evidence against the rest of the Appellants largely turns out on their alleged possession or handling of the stolen goods.

There was evidence adduced by the prosecution witnesses heavily incriminating the 3rd Appellant with the said robbery. Immediately after his arrest, his house was searched and several clothes were found which were later identified by the complainant as among the clothes he had been robbed of. During his interrogation by the police, he volunteered information and led the police to a certain home where the dismantled parts of the complainant's stolen vehicle including the engine, gear box and radiator were found in a sack that was buried under the ground. He later showed the police the body of the vehicle which had been set on fire. This vehicle was dismantled by Ogada (PW3), who is a vehicle mechanic based in Kisumu - Jua Kali garage. He testified that he had been hired by the 3rd Appellant on the 23rd of November, 1992, this was only 2 days of the said robbery to go and repair for him a certain vehicle. He took him all the way from Kisumu to Centre Market in Kabondo in Homa Bay District where he was shown a Toyota car Reg. No. KUS 982. This was the very vehicle which the complainant had been robbed of. Instead of repairing that vehicle, the 3rd Appellant told him (PW3) to dismantle it and remove the engine. The 3rd Appellant gave to him the keys to the car. Later the 3rd Appellant came with a Matatu vehicle belonging to the original A5, who carried away the dismantled parts. He paid Ogada shs. 500/- promising to pay the balance later. It will be recalled that, the 3rd Appellant is the one who led the police to the place where the dismantled parts of this vehicle were recovered, thus corroborating the evidence of Ogada.

Further evidence connecting the 3rd Appellant with the said robbery was his own repudiated statement taken under inquiry (ex.18). Although repudiated, it was such a detailed statement that could only have been made by a person who knew very well the detailed planning of such crime and how it was executed. This statement, taken together with the rest of the evidence against the 3rd Appellant, leaves no doubt that he had participated in the planning and execution of the said robbery. The statement amounted to a complete confession of the 3rd Appellant's participation in the said crime.

We are satisfied that there was sufficient evidence proving beyond doubt that the 3rd Appellant had taken part in the said crime. His defence was duly considered by the Learned Trial Magistrate and was rightly disbelieved.

As for the 2nd Appellant, when his house was visited, nothing was recovered therein which could connect him with the said offence. We have already disregarded the dock identification of the 2nd Appellant by the complainant. His conviction was therefore largely based upon his repudiated statement under inquiry (ex.17). We find nothing in the prosecution case that corroborates the repudiated statement of the 2nd Appellant. We are prepared to give him the benefit of the doubt.

Similarly, we find no evidence connecting the 4th Appellant with the said crime other than that he was the son of the 1st Appellant who was a guard at the complainant's compound on the material day. When the house of the 4th Appellant was searched, nothing was recovered therein. We are satisfied there was insufficient evidence upon which his conviction could safely be based. In our view, he ought to have been given the benefit of the doubt.

In the result, we find that the conviction of the 2nd and 4th Appellants were unsafe. We allow their respective appeals. We quash the conviction of the 2nd and 4th Appellants and set aside the sentence that was imposed. We order that each of them shall be set at liberty and be released forthwith unless otherwise lawfully held.

As for the 1st and 3rd Appellants, we are satisfied, as we have already stated, that they had taken part in the said robbery. Neither the complainant nor his wife was injured during the said incident. They simply tied both hands of the complainant and led him into the house where he was ordered to produce some money. They had only Kshs. 1,100/- which the gangsters took. They then ransacked the house and made away with his goods and the vehicle.

On the facts proved, we find that this is a suitable case where we can safely substitute the conviction of the 1st and 3rd Appellants with that of simple robbery contrary to section 296(1) of the Penal Code. We do substitute the conviction of each of these Appellants with simple robbery contrary to section 296(1) of the Penal Code. We set aside the death sentence that was imposed on each of them and sentence each of the 1st and 3rd Appellants to serve eight (8) years imprisonment with 4 strokes corporal punishment. The sentence to be served effective from 19th of July, 1993.

Dated and delivered at Nairobi this 23rd day of March 1998.

E. OWUOR (MRS.)

S. O. OGUK

JUDGE