



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO. 249 OF 1994 AND 252 OF 1994**  
**(CONSOLIDATED)**

**(From Original Conviction and Sentence in Criminal Case No. 7390 of 1992  
of the Principal Magistrate's Court at Nairobi: F.A. Mabele Esq.)**

**GILBERT NYONGESA OLOO.....1ST APPELLANT**  
**JULIUS EMASE ODANGA.....2ND APPELLANT**  
**- Versus-**  
**REPUBLIC.....RESPONDENT**

**Coram: OSIEMO J.**  
**ONDEYO J.**

**Appellant 1 in person - unrepresented**  
**Mr. Akhaabi advocate for 2nd appellant - present**  
**Mr. Onduma - Court Clerk**

**JUDGEMENT**

Criminal appeals No. 249 of 1994 and No. 252 of 1994 were consolidated. In this judgement we shall refer to the appellant in Criminal Appeal No. 249/94 as the 1st appellant, and the appellant in Criminal Appeal No. 252/94 as the 2nd appellant. The appellants were charged with robbery with violence contrary to Section 296(2) of the Penal Code. They were convicted and sentenced to death. Their appeals to this court are against both convictions and sentences.

Briefly the prosecution case was that on the 19.12.92 at around 7.30 p.m. while PW1 was watching T.V. with a friend, he suddenly saw two people inside the room. Those two people had come through the front door. He identified one of those two men as his watchman the 1st appellant who was armed with a panga which was produced as Exhibit 1. Lights were on and he saw the 1st appellant carry away a tape recorder which was later recovered at the gate at the watchman's shed.

The other man was armed with an iron bar. The robbers ordered them to lie down. While they were down a telephone rang and when he tried to take it, that other robber cut him on the hand. Those robbers ransacked the house and took Sh.600,000/- in cash as well as his watch, that of his friend and that of his wife as well as his wife's bangles.

Before the robbers left PW3 arrived at the gate and rang the bell. PW1 shouted that police had arrived and the robbers ran out.

When PW3 rang the bell he (PW3) said it was the 1st appellant, the watchman who opened the gate for him and he disappeared. A few minutes later when PW3 knocked at the inner door, he saw people hurrying out. He confronted one of them who cut him and escaped. Police were called but the robbers had already left. PW1 told police that the watchman was among the robbers. After the 1st appellant had been

arrested he mentioned that he was with the 2nd appellant and he was also arrested.

The learned state counsel does not support the conviction against the 2nd appellant and rightly so on the ground that the only evidence against him was that of the 1st appellant who had been arrested and mentioned that he was with the 2nd appellant. After he had been arrested, the complainant was called to the police station but said that he was not able to identify him.

There was no independent evidence connecting him to this offence and no identification parade was conducted.

But the learned state counsel supported the conviction and sentence of the 1st appellant. She submitted that during the robbery the complainant was able to recognise the 1st appellant who was his watchman and was armed with a panga. There was also the evidence of PW2, a worker of PW1 who said he saw the 1st appellant cooking for the dogs and later he saw him lead a group of people to PW1's house. She also confirmed the evidence of PW3, a brother to PW1, who said in his evidence that on the material date he had come to visit his brother, the complainant, and when he hooted at the gate the 1st appellant opened for him and disappeared. It is also in evidence that after the 1st appellant had disappeared, a radio which had been robbed from PW1 was recovered from the watchman's shed near the gate.

We have re-evaluated the evidence on record of the lower court as we are required to do and we find that the prosecution evidence is riddled with flaws and contradictions which raised a doubt which doubt ought to have been resolved in favour of the appellant. PW1, the complainant in his evidence told the court that when the robbers struck at 7.30 p.m. the day watchman whose name was given as Fred had reported off-duty. PW2 a worker of PW1 said when the robbery took place the day watchman had reported off and that it was the 1st appellant who was on duty and he saw him participate in the robbery. But in cross-examination he admitted that the said day watchman Fred was present and he was the one who led the police to the house of the 1st appellant, while PW5 Pc. Kotut said in his evidence that when they visited the scene of robbery he was informed that the watchman who was on duty then (1st appellant) had disappeared and when he asked where he lived, he was informed that he lived either in Ngei or Huruma. They went up to Mathare North and as they were returning they met with the appellant on the way whom they were able to recognise from the description they had been given and they arrested him. This was at around 9.30 p.m. and he does not say how he was able to recognise the appellant in darkness nor does he state who gave him the description of the appellant.

The appellant in his defence stated that he worked for the complainant as a watchman and that on the material date he reported on duty at 6 a.m. up to 6.30 p.m. when he was relieved by the night watchman known as Fred. He went to his house and at about 9.30 p.m., he saw 2 policemen led by the said Fred come to his house and arrested him.

With due respect we do not agree with the evidence of PW1 and that of PW5 that the watchman Fred was not there. PW2 a worker of PW1 and who was present said that it was Fred who escorted the police to the house of the 1st appellant and this is confirmed by the 1st appellant himself who said that it was Fred who led the 2 policemen to his house who arrested him. We find it difficult to believe PW5's evidence that he went and met the appellant on the way in darkness and was able to recognise him from the description he had been given. A witness in a criminal case should not create an impression in the mind of the court that he is not a straight forward person, or raise suspicion about his trust worthiness or do or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence. (See NDUNGU KINYANJUI V. THE REPUBLIC (1979) KLR 282)

The 1st appellant in his defence stated that when the robbery took place at 7.30 p.m. he was not on duty. He said he had reported off duty at 6.30 p.m. and one Fred had taken over night duties. This watchman featured prominently both in the defence and prosecution evidence. PW2 stated that it was that Fred who led the police to the 1st appellant's house when he was arrested. This was also confirmed by the 1st appellant himself when he stated that it was Fred who led 2 policemen to his house when he was arrested. Fred's evidence was crucial in this case. But for some unknown reason he was not called to

testify. Although the prosecution is not required to call a superfluity of witnesses, if it calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence to draw an inference that the evidence of those witnesses, if called, would have been, or would have tended to be adverse to the prosecution case. If this watchman Fred had disappeared, the prosecution would easily have called evidence to show that reasonable exhaustive enquiries had been made to trace him without success.

For these reasons, we consider it would be unsafe to allow the 1st appellant's conviction to stand. We allow the appeal, quash the conviction and set aside the death sentences imposed on the appellants.

We order that the appellants be set at liberty forthwith unless held for any other lawful cause.

Dated and delivered at Nairobi this 21st day of July, 1998.

J.L.A. OSIEMO

JUDGE

21.7.1998

S.C. ONDEYO

JUDGE

21.7.1998