



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 315 & 346 of 1993**

**JOSEPH AKETCH OMORO..... APPELLANT**

**versus**

**REPUBLIC.....RESPONDENT**

**(From Original Conviction and Sentence in Criminal Case No. 997 of 1992 of the Senior Resident Magistrate's Court at Maseno: Alex Anambo Esq.)**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO, 346 OF 1993**

**JAMES ACHACHA AMANGALA.....APPELLANT**

**-versus-**

**REPUBLIC.....RESPONDENT**

**(From Original Conviction and Sentence in Criminal Case No. 997 of 1992 of the Senior Resident Magistrate's Court at Maseno: Alex Anambo Esq.)**

**Coram; Owuor, -J.**

**Oguk, J.**

**1st and 2nd Appellants in person (un-represented)**

**Mrs. Oduor (state counsel) for state**

**JUDGMENT**

Criminal Appeal No. 315/93 and Cr. Appeal Ho. 346/93 have been consolidated.

The 1st Appellant, Joseph Akech Omoro (original A4) and the 2nd Appellant, James Achacha Amangala (original A1), were jointly convicted by the learned Senior Resident Magistrate, Maseno of the offence of

robbery with violence contrary to section 296(2) of the Penal Code. Upon their conviction, each of them was sentenced to death. Their appeals to this court are against conviction and sentence.

Briefly the prosecution case was that on the night of 23rd/24th July, 1992 at about 1 a.m while Alice Ogilo Okonqo (PW3), who was staying in a church house at Uranga Sub-Location, East Gem Location, Siaya District was breast feeding her baby, she saw some torch light through the window and roof of the house. She started raising an alarm shouting for help as she feared for her safety. Soon thereafter, the house was broken into and many people with torches which were being flashed directly onto her face asked her the whereabouts of her husband and she replied that he had died long time ago. They warned her and her child who was then crying to keep Quiet and ordered her to cover herself with a blanket.

The screams of Alice (PW3) were heard by Sella Auma Amukoa (PW1) who was then sleeping with her husband, Jacktone Amukoya (now deceased) in the back room of their shop near the said church. She woke up her husband telling him that it appeared that Alice (PW3) was being attacked. They both woke up from bed and she put on a hurricane lamp. Her husband got out of the house to find out what was happening only to come back soon thereafter closing the door behind him saying that there were bad people outside their gate who appeared to be robbers. The said people soon broke the gate and some of them went to the room where the deceased and his wife were while others went and broke open the door to their son's room. The deceased's son, Ronald Ngala Amukoa (PW2) tried to resist the entry of the said men into his room by placing a table against the door to reinforce it but to no avail. There was no light inside the said room except from the torches which the said gangsters had. He stated that by means of such light which was being flashed into the room, he was able to see and recognise one of the robbers whom he had known by the name "mzee" whom he alleged was the 1st Appellant herein. Before then, he had been beaten by the robbers and made to sit on the floor. They took away some two bicycles from that house.

As Ronald (PW2) was being attacked and robbed, those gangsters who went to the room where his parents were, demanded from his father (now deceased) to be given some money. Sella Auma (PW1) stated that her husband gave them Shs. 1,500/- through the window before they entered their room. They took the money and asked for more which he said he did not have. They then forcefully broke the door using axes and many people entered the room that Sella told the court were wearing masks and Jackets. The lamp inside the room was still on. They cut her husband with a panga and pulled him outside the house. Before running out of the house. Sella states that she managed to see and recognise one of the said attackers who were the 2nd Appellant whom she had known before. Her attempt to escape was futile as she was confronted by many other gangsters outside the house who chased her and caught her. They beat her as they demanded to be given some money but she had none. They then tied her with a rope on both hands and around the stomach to the pillar at the verandah of the shop. It was then dark. In the meantime, some of the gangsters were beating her husband.

P.C Mbogo (PW 5) of Uranga Police Patrol base who was asleep in his house heard of the noise at the shop of the deceased. He woke up, dressed himself and woke up his colleague, P.C Gathuri whom he asked to follow him. He was armed with a rifle and carried his torch. As he approached the shop of the deceased, he saw many people and when he flashed his torch towards them, one of the said men demanded to know who he was and he replied that he was a police officer. Someone then threw a stone at him which he missed. He then saw some people coming out of the shop carrying shop goods and suspected them to be robberies. He also heard Sella (PW1) saying that she had been tied. He then fired a single shot towards the direction of the said gangsters who were then running away. They dropped down the goods they were carrying as they fled. He then went and untied Sella (PW1) and she told him that her husband was on the other side of the shop. By then he had been joined by P.C Gathuri. They found Jacktone Amukoa (deceased) having been seriously injured and was then unconscious. They then got assistance from members of the public and they rushed both Sella and her husband to Kima Mission hospital where Amukoa later died on the same day but Sella remained admitted for 7 days.

P.C Mbogo (PW5) states that during the incident, he was able to see one of the robbers when he flashed his torch towards them and saw a man carrying a sack from the shop of the deceased whom he identified as the 1st Appellant. However, neither Sella (PW1) nor her son, Ronald (PW2) informed the police

officers when they came to the scene that they had seen and recognise any of the said gangsters. No such report was made to the police by Ronald at the earliest opportunity. It was not until much later on the 27th July, 1992 while they were burying his deceased father that he (PW2) claimed that the 1st Appellant who was at the same funeral was among the people he had seen on the night his father was attacked and robbed. He passed such information to his relatives who went to Luanda Police Station and reported the matter to P.C Musyimi. He accompanied them back to the funeral where they found the 1st Appellant still there and he was pointed out to the police officer by Ronald (PW2). The 1st Appellant was then arrested and taken to Luanda Police Station. Two days later, on the 29th of July, 1992, P.C. Mbogo (PW5) went to the police station principally to enquire from his OCS when he could proceed to Kiganjo Police College Training. It is then that by chance he saw the 1st Appellant amongst other remand prisoners who were being escorted to the toilets and he claimed that he was one of the robbers he had spotted on the material night outside the shop of the Amukoa (deceased) and he passed the information to the OCS.

Later on the 4th of August, 1992, Sgt. Wachira (PW4) of Luanda Police Station received information from one lady, Achienq Amukoa that she had seen one of the suspects in the robbery in which Amukoa was killed. They then proceeded to Esiandumba Sub-Location where the 2nd Appellant who was then in a certain hut was pointed out to them and he was arrested. The said Achienq Amukoa never gave evidence in the court below.

On the 20<sup>Th</sup> of August, 1992, I.P Mati (PW8) conducted identification parades at Yala Police Station when the 1st Appellant was alleged to have been identified by Sella Auma Amukoa {PW1}. On the 5th of August, he conducted another parade at which the 2nd Appellant was also identified by Sella (PW1). He produced the parade forms (ex/ 3 & 1) respectively.

The two Appellants were then jointly charged together with three other suspects who were acquitted during the trial in the court below. Both Appellants gave sworn testimony and denied any involvement in the said crime.

The 1st Appellant, in his defence stated that Amukoa (deceased) was his uncle and he could not have killed him. He went on to testify that on the 24th of July, 1992, while going to Luanda Market to sell some potatoes, he learnt that Amukoa had been attacked during the night and had been taken to hospital. He saw a police land-rover going towards the home of Amukoa and he learnt that he had died. He proceeded to the said home and they started mourning. As the secretary of the local Youth Association they started collecting money for the funeral and he took part in splitting firewood at the said homestead. Later on the 27th of July, 1992 while he was at the funeral ceremony, police officers came and the son of the deceased known as Mweso pointed him out and they arrested him and took to the police station where he was interrogated about the death of the deceased but he had no knowledge about it. Later the wife of the deceased, Sella (PW1) came to an identification parade and touched him saying that he was the person she knew.

The 2nd Appellant also stated that the deceased was his brother-in-law. When he learnt of the incident, he proceeded to his house immediately and he assisted in taking the deceased to Kima Mission hospital. When the deceased later died that morning he collected a mattress, a blanket and a bed sheet and they removed his body to the mortuary at Kisumu. They later buried the deceased. Some two weeks later, the son of the deceased came to call him saying that his mother wanted him to assist in splitting some firewood as they were expecting some visitors. He proceeded to the house of the deceased and on arrival joined the other people he found in the house of the 2nd wife of the deceased in taking some local brew. Later police officers came to the said house and arrested him and he thought it was because of the liquor they were consuming only to learn on arrival at the police station that it was for a different matter as they started to interrogate him about the robbery at the shop of the deceased. He denied any knowledge. Later his sister-in-law, Sella (PW1) was called to an identification parade and asked whether she could identify the robbers and she replied that she only knew the 2nd Appellant as he was married to his sister.

There is no dispute on the recorded evidence that on the night of 23rd/24th July, 1992, a gang of robbers went to the shop of the deceased, Jacktone Amukoa at Uranga Sub-Location of East Gem Location, Siaya District and seriously attacked him together with his wife Sella Auma (PW1) and their son Ronald

Amukoya (PW2) who was then sleeping in one of the rooms behind their shop. Before them, they attacked a widow, Alice Ogilo (PW3) who was sleeping in a church house nearby but they stole nothing from her. The deceased gave the said gangsters Shs. 1,500/- when they demanded money from him but they descended on him and his wife while claiming more money. They later started ransacking his shop as they tied his wife to the pillar at the verandah of the shop while he was left unconscious outside his shop. The said gangsters never managed to get away with the looted shop goods as P.C Mbogo (PW5) who was sleeping at the nearby Police Post was awakened by the disturbance at the deceased shop and when he went there armed with his rifle, he saw people carrying away some goods from his shop. As he fired a warning shot towards them, they dropped down their loot and took to their heels. No one was arrested at the scene of crime and no one was found in possession of any of the items which had been stolen either from the house or shop of the deceased.

The main issue that was before the court for determination was that of identification at the scene of crime.

The learned trial magistrate gave a careful analysis of the evidence that was adduced before him. What must be appreciated is that circumstances for identification were quite difficult. Alice Ogilo (PW3) in whose house the gangsters first went to had no light at all in her house. The only source of light in her house was that from the torches which the said gangsters had. They quickly silenced her as they entered her house and ordered her to cover herself with her blanket. Nothing was stolen from her and she was never injured. The gangsters then proceeded to their real destination which was the shop of the deceased. He and his wife Sella (PW1) were living in one of the back rooms of the shop while their son Ronald (PW2) was also sleeping in one of the rooms at the back. The gangsters were quite many. As some of them attacked Ronald, the others were attacking the deceased and his wife while others stood guard outside the shop.

There was no light inside the house of Ronald (PW2) except from the torches of the said intruders. In the house of the deceased, Sella had put on a hurricane lamp that was on. However, it is clear that the couple were already gripped with fear when the deceased who had attempted to go out to answer the screams of Alice Ogilo (PW3) quickly came back and locked himself in the house telling his wife that there were some bad people outside. Indeed they were bad people as they started demanding money from the deceased even before they entered the house. He gave them cash. 1,500/- through the window which they thought was not enough. Once they broke and entered the house, the situation was chaotic as the said gangsters started beating both the complainant and his wife asking for money. It is in these circumstances that Sella testified that she was able to see and recognise the 2nd Appellant whom she had known before. She testified that the said gangsters wore masks and jackets but does not go further to explain whether the 2nd Appellant also had a mask or how she was able to see him.

Ronald Mbogo (PW2) also testified that among those who had gone to attack him, he saw and recognised one of them whom he knew as "Mzee", this man, he stated was the 1st Appellant. He saw him when the torch light of one of the gangsters was accidentally flashed on his face. In the circumstances of this case, it is reasonable to say that he merely had a fleeting glance at the said man. He did not go further to explain any features of the man whom he saw, but he took refuge in saying that he had known him before. P.C Mbogo (PW5) who had gone to their rescue also stated that he saw the 1st Appellant as he approached the scene and flashed his torch on the said gangsters.

It is not disputed that both Appellants were related to Jacktone Amukoya (deceased). He was an uncle to the 1st Appellant and he and the deceased were married at the same home. He married a sister to Sella (PW1). We can therefore not doubt Sella and Ronald when they testified that they had known both Appellants before the said incident. What is surprising is that when the police officers, among them P.C Mbogo (PW5) arrived at the scene just as the robbery was going on, none of them told him that they were able to recognise any of the said attackers who were in fact related to them. Even soon after the incident as police officers came to the scene, none of them reported that they knew any of the said gangsters. Quite surprisingly, P.C Mbogo (PW5) who claims to have seen the 1st Appellant never told anyone that he had seen and recognised any of the said attackers. He only bumped on the 1st Appellant some two weeks later after he had been arrested when he saw him and other prisoners at Yala police station while being led to the toilets.

It is not disputed that both Appellants took part in the burial arrangements of the deceased Jacktone Amukoya. In fact the 1st Appellant was arrested on the burial day at the home of the deceased. Before then, as we have stated, neither Sella nor Ronald had ever hinted to anyone that he was among those who had attacked and robbed the deceased on the material night and yet he was their neighbour who was always present.

Upon our consideration and evaluation of the recorded evidence, we are not inclined to believe Sella (PW1), Ronald (PW2) and P.C Mbogo (PW5) that they were able to accurately identify any of the gangsters on the material night. We are far from satisfaction that any of the Appellants was ever identified at the scene of crime in the absence of any early report either to the police or any other person. If anything, we consider that the evidence of Sella (PW1) and Ronald (PW2) regarding identification was untrustworthy and could not safely have been acted upon to convict in the absence of any corroboration.

The evidence of P.C Mbogo (PW5) was of little assistance to the court in as much as he made no effort to assist in the investigations of the case if ever he had seen and recognised any of the robbers at the scene of crime.

We are of the respectful view that there was insufficient evidence on record upon which the conviction of the 1st and 2nd Appellants could be sustained. For reasons given, we allow these appeals; quash the conviction of the 1st and 2nd Appellants and set aside the sentence that was imposed on each of them. We order that each of them shall be set at liberty and be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 14th day of September, 1998.

O. OWUOR (MRS.)

JUDGE

S.O. OGUK

JUDGE