



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Madan, Law & Potter JJ A)**

**CRIMINAL APPEALS NOS 480, 208 AND 209 OF 1978**

**BETWEEN**

**REUBEN TAABU ANJONONI ..... 1 ST APPELLANT**

**BENJAMIN AKISA ANJONONI .....2ND APPELLANT**

**MONYA ANJONONI .....3RD APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

These three appellants whose appeals we have consolidated appeal against the dismissal of their appeals by the High Court from the conviction of the first appellant and the findings of guilt against the second and third appellants (they being under the age of eighteen years on the date of the commission of the offence) for capital robbery, contrary to section 296(2) of the Penal Code. In addition, the second appellant (the third appellant in the High Court) was convicted of assault causing actual bodily harm contrary to section 251 of the Penal Code, and ordered to receive two strokes corporal punishment.

A disconcerting feature of this case is the delay of about seven and a half months in the opening of the trial (although the appellants were arrested on the morning of the next day) due to lack of instructions from the Attorney-General's chambers, as stated in Court on repeated occasions by the prosecutor.

The appellants' victims were Wanyoni Rebela and his wife, Joice Nangila Wanyoni. Wanyoni was forcibly robbed of Shs 3900 cash and other property during the course of which Joice was unlawfully assaulted and cut with a panga by the second appellant, causing her actual bodily harm.

At about 2·00 am on 11th June 1977 the three appellants burst with a loud bang into Wanyoni's home where he was sleeping in a room with his wife and three children. All three appellants were recognised by both Wanyoni and Joice, who had known them well previously for about two years and five years respectively, in the bright light of two torches which the first and third appellants were flashing in the room. The first appellant had married and divorced Wanyoni and Joice's daughter. The other two appellants were his brothers, all three being sons of Anjononi. According to the complainant, the first appellant was carrying what appeared to be a gun and a *panga* and a torch, the second appellant what appeared to be a rifle and a *panga*, and the third appellant a torch and a *panga*.

Mr Barasa for the appellants argued as his main ground of appeal the question of identification. The

proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported).

We consider that in the present case the recognition of the appellants by Wanyoni and Joice to whom they were previously well known personally, the first appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyoni reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three appellants to the police as the robbers who had robbed him.

We are satisfied that there was no mistake as to the identity of the three appellants and they were properly found guilty of the offence with which they were charged in count 1.

Mr Barasa further submitted with regard to count 2, which charged the second appellant alone with assaulting Joice and causing her actual bodily harm, consisting of a superficial wound from a single *panga* slash, that harm had not been proved by expert evidence as required by section 48 of the Evidence Act, as the medical witness called by the prosecution was a "clinical officer" and not a registered medical practitioner. We do not feel it necessary to deal with this submission, because in our view count 2 should not have been brought at all, except possibly as an alternative charge. The violence which was the subject of count 2 was the same violence as that relied on by the prosecution as constituting the capital robbery charged in count 1, an offence of which the second appellant has been convicted. If his conviction on count 2 is allowed to stand, the second appellant will have been punished twice for the same act committed in the course of the robbery charged in count 1. Mrs Chana for the Republic very properly did not support the finding of guilt of the second appellant on count 2. We agree, and quash that finding of guilt and set aside the order of two strokes corporal punishment imposed on him.

Save to this limited extent of allowing the second appellant's appeal against his finding of guilt on count 2, these appeals fail, and the appeals of all three appellants against conviction and findings of guilt on count 1 are dismissed.

Finally, we would mention for consideration by the executive authority that there had been both matrimonial and financial disputes between the first appellant and the complainant's family; also, the violence used during the course of the robbery was of a comparatively trivial nature.

*Second appellant's appeal on count 2 allowed.*

*Appeals on count 1 dismissed.*

**Dated and delivered at Nairobi this 8th day of January 1980.**

**C.B MADAN**

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**JUDGE OF APPEAL**

**E.J.E LAW**

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**JUDGE OF APPEAL**

**K.D POTTER**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

**DEPUTY REGISTRAR**