

**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: MUSINGA (P), KIAGE & ODUNGA, JJ.A.)

CRIMINAL APPEAL NO. 50 OF 2020

BETWEEN

**JOHN ODHIAMBO OLUOCH.....1ST APPELLANT
DAVID ALUKOYE WASHINGTON 2ND
APPELLANT**

AND

REPUBLIC.....RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya
at Bungoma (A. Aroni, J.) dated 25th September 2014*

in

HCCRC No. 122 of 2016)

JUDGMENT OF THE COURT

The appellants are aggrieved by the judgment of the High Court at Bungoma (Ali-Aroni, J., as she then was) dated 21.9.17 by which their first appeal thereto was dismissed. They had appealed against their conviction and the sentence of death imposed by the Bungoma Principal Magistrate on two counts of the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**.

They were adjudged guilty of having robbed one **Dr. Issa Obore Omera (PW1)** of various household items as set out in

the

charge sheet as well as some Kshs.5,000 in cash. They were in the company of others, including some of their co accused, and armed with offensive weapons namely knives, pangas and rungas, and they did use actual violence on **PW1**. They also robbed one **Caroline Auma Bubulu (PW3)** of her Nokia Mobile phone valued at Kshs.2,000 while so armed, and they threatened to use actual violence on her.

The evidence led, and believed by the courts below, was that on the night of 7th and 8th February, 2013, at about quarter past midnight, **PW1**, who is a medical doctor, was getting to his home at Sinoko in Bungoma town, just behind Bungoma High School, from Elgon View Cottage Hospital where he had been called to go and attend to an emergency case. After he entered his compound and packed his car, he went to lock the gate, only to be confronted by about 6 people who were armed with metal bars, pangas and other crude weapons. The gang immediately set upon him, hacking and hitting him all over the body. He offered them the car so they spare his life but they would hear none of it, as they continued their vicious attack. They had torches and took his national identity card, Bank ATM cards and his mobile phone. Awakened by the commotion, his mother in

law and her maid

(**PW3**), in an adjacent house pointed a torch, saw what was happening and screamed. Two of the robbers rushed to them, took away the torch and ordered the duo to lie down and be silent.

The robbers ordered **PW1** to ask his wife to open the door to the house and when she opened the kitchen door. Four of the robbers entered the house, which had electricity light on, and in **PW1's** bedroom he gave them Kshs.5,000. One of them ordered the others to switch the lights off which they did before taking his 20-inch Panasonic TV set and car keys from the bedroom. **PW1** heard one of them saying they had taken the laptop. They also took remotes for his TV and Zuku decoder. They demanded for more money but **PW1** had none. They left, locking the door from the outside where the security lights were on.

PW1 said he could identify the 1st appellant, who was the 1st accused at the trial, as the one who was making noise. He also identified the 3rd accused at the trial, who is the 2nd appellant, as the one who cut him with a panga on the head. Even though he had never seen them before, and did not know their names, the lights were on and in cross-examination was emphatic he saw the appellant while outside the gate and he

had told the police that he could identify him.

After the robbers left, PW1's wife, **Florence Omeri (PW2)**, who was not attacked, dressed him, and using the spare key, drove him to Elgon View Cottage Hospital where he was taken to theatre and treated before being referred to various hospitals for further treatment and reviews. He referred to the various treatment notes as well as the P3 form issued by the police and filled in by one **Dr. Muhaga Ekesa** and produced by his colleague of 17 years, **Elias Adoke (PW5)**, a clinician at Bungoma District Hospital. The various wounds suffered by **PW1** were recorded as probably caused by sharp and blunt objects, and assessed as grievous harm. **PW1** recorded his statement with the police and was later called and shown various items out of which he was able to identify his Panasonic TV and Zuku remote.

PW2 testified as to how she heard her husband (**PW1**) scream at the gate, and opened the window curtain only to see him soaked in blood and heading to her mother's house in the company of 3 men armed with pangas and rungas. She screamed and opened the window, whereupon **PW1** told her to open the door, which she did. He entered with 4 men. The lights were on and she led them to the bedroom where **PW1** gave

them Kshs.5,000 in an envelope. The robbers stood in front of her and she asked them why they

were killing a doctor, to which they said not a word. She told them to take whatever they wanted and spare their lives. One of them, the 1st appellant, then told one of the attackers; “*Olly kata hiyo taa*” (Olly cut that light) and that other used a panga to slash the light bulb. It is also the 1st appellant who demanded her phone through the window. The 2nd appellant took a Panasonic TV set from the bedroom and she realized they also took another 21 inch television from the sitting room, her house help’s phone, PW1’s laptop, her Total gas cylinder and the Zuku remote. She later identified the Panasonic TV and Zuku remote at the police station after she had taken **PW1** to hospital.

In cross-examination, she told the 1st appellant that she saw him outside the window under a security light and when he came into the bedroom. She said he had a peculiar head which she particularly noted. She was able to identify 3 of the robbers, including the 1st appellant and the 2nd appellant who she had seen both outside and inside the house and is the one who took the Panasonic TV from the bedroom.

PW4 testified that she saw four people hacking her uncle, **PW1**, with pangas but could not identify them as she saw them from their back. They came to the house she shared with her

aged

grandmother and ordered them to lie down then demanded for money which she not did have. They demanded her Nokia phone which they took. She could not identify any of them even though the lights were on.

P.C. Abdi Buru (PW4) investigated the case. He recounted what the witnesses stated but added that acting on information after the report of the robbery was made, he went to the house of the 2nd appellant at Sio Village that very night where, upon conducting a search, a Panasonic TV and Zuku remote were recovered.

At the end of the prosecution case, the learned magistrate found that a *prima facie* case had been made out against all 7 accused persons and placed them on their defence. In a sworn statement, the 1st appellant stated that he was at his house when 2 policemen came and searched his house. Among them was one Bottom Oyungu who had arrested him on a previous occasion and taken a customer's phone. He had "to part with Kshs.2,000 to get it back." The appellant reported the incident to the Deputy Station Commander, who ordered the officer to return the money, but he thereafter kept a grudge and kept threatening that he "had two weeks." He denied any

involvement in the robbery and charged

that **PW1** lied when he implicated him as having been one of the robbers. The 2nd appellant, who for most of the trial refused to co-operate and chose not to participate by refusing to leave the cells for the hearing of the case, declared to the trial court: “I will not defend myself because I did not do the case.”

Following the upholding of their conviction and sentence on first appeal, the appellants’ advocate, **Ms. Winnie Anuro**, filed a memorandum of appeal carrying a single ground for this Court’s consideration, namely:

“1. That the learned Judge erred in points of law and fact by relying on evidence of identification without observing that the prevailing conditions are not suitable for identification.”

Identification is a legitimate matter for our consideration on a second appeal in which, by dint of **section 361** of the **Criminal Procedure Code**, our jurisdiction is limited to matters of law only.

The appellants contend in submissions made on their behalf by their learned counsel, Ms. Anuro that there should have been an identification parade conducted to “provide **PW1** with ample opportunity to properly identify the assailants with utmost certainty.” Counsel cites **NJIHIA Vs. REPUBLIC [1986]**

KLR 422

on the utility and necessity of an identification parade.
She,

however, readily conceded that the 1st appellant refused to attend

an identification parade. She also cites **ABDALLA BIN WENDO & ANOTHER Vs. REPUBLIC [1953] 20 EACA** on the need to test with the greatest care the evidence of a single identifying witnesses, as well as **DANIEL KIPYEGON NGENO Vs. REPUBLIC [2018] eKLR** where the Court listed some of the factors that should be considered in evaluating the accuracy of identification testimony.

On her part, **Ms. Mwaniki**, the learned Assistant Director of Public Prosecutions, stated that the appellants are the ones who refused to attend the identification parade and cannot be heard to complain. Further, the two witnesses who identified them, namely **PW1** and **PW2**, had a long interaction with the appellants to lend credence to their identification as the assailants. She went on to add that for the 2nd appellant, there was the additional corroborative evidence of recent possession of the Panasonic TV and Zuku remote recovered in his house.

Having ourselves considered the judgment of the learned Judge in light of the evidence that was tendered, we think, with respect, that the criticism levelled against her lacks substance. We see that she carefully analysed and re-evaluated the evidence, as was her duty as a first appellate court, and

arrived at her own

independent conclusion that the appellants were properly identified at the scene. We also perceive that the learned Judge applied her mind to the relevant law on identification as established in a long list of authorities including **WAMUNGA Vs. REPUBLIC [1989] KLR 426** and **REPUBLIC Vs. TURNBULL &**

OTHERS [1976] 3 ALL E.R. 549. On the complaint about the

appellants' identification being merely dock identification not having been preceded by an identification parade, she cited and quoted excerpts from this Court's decision in **MUIRURI & 2 OTHERS Vs. REPUBLIC 1 KLR 274** which show that she properly

addressed her mind on the law before arriving at these findings;

14. PW1 and PW2 interacted with the robbers for a while. PW1 said he was cut by the 2nd appellant severally, the 1st appellant made noise (I suppose attracting attention to himself) and had a peculiar physique and there was security light outside and light inside the house which made it possible to identify the appellant. PW2 said she identified the 1st appellant because of the peculiar shape of his head and the 2nd appellant as he is the one who carried the T.V. from the bedroom.

15. It should be noted from the record that the appellants both refused to have an identification parade, that notwithstanding I am

of the view that in this case dock identification of the 1st appellant was sufficient. So was that of the 2nd appellant, who apart from being identified he was found in possession of recently stolen Panasonic TV and a remote and failed to explain the circumstances of how he came to be with the same.”

We think that the undenied peculiarity of the shape of the 1st appellant's head noted by the witnesses after a long interaction with them in the light, allowing the witnesses to give detailed accounts on what he did and said, sets the evidence of identification on a firm and secure footing, and there was no possibility of mistake. The 2nd appellant was also clearly identified at the scene as he attacked **PW1** and as he carried away the Panasonic TV. It is worth noting that **PW2** was very calm as she observed the assailants, and even had the courage to question them as to why they were killing a doctor, to which they did not reply. She even asked them to take whatever they wanted and spare their lives. She was not terrified and there is nothing to suggest that her identification of the appellants was in any way mistaken. As already noted, the appellants refused to attend the identification parades they were invited to and cannot, therefore, be heard to complain about the absence of parade evidence.

There is indisputable evidence that the 2nd appellant was found in possession of the Panasonic TV and Zuku remote shortly after the robbery. These were positively identified by their owners and the 2nd appellant could not make a claim to

them, nor explain his possession thereof. The doctrine of recent possession was

properly applied to lend further credence to the fact of the 2nd appellant being one of the robbers. It is telling that when asked to comment on the Assistant Director of Public Prosecutions' submissions on recent possession, the appellants' learned counsel stated that she had nothing to say. What could she say?

The upshot of our consideration of this appeal is that it must fail as the appellants' conviction was safe. In the result, the appeal is dismissed in its entirety.

Dated and delivered at Kisumu this 19th day of December, 2025.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

P. O. KIAGE

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR