

**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: MUSINGA (P), KIAGE & ODUNGA,

JJ.A.) CRIMINAL APPEAL NO. E046 OF 2023

BETWEEN

**WYCLIFF OKELLO 1ST APPELLANT
DAVID ONYANGO.....2ND
APPELLANT SAMUEL OCHIENG alias
DADY.....3RD APPELLANT FREDRICK
NYANJE.....4TH APPELLANT PROTUS
OBALA.....5TH APPELLANT PAUL
NYANGWESO OPANY.....6TH APPELLANT**

AND

REPUBLIC.....RESPONDENT

*(An appeal against the judgment of the High Court of Kenya at
Kakamega (F. N. Muchemi & Said Chitembwe, JJ.) dated 4th June,
2009*

in

HCCRA No. 36 of 2005)

JUDGMENT OF THE

COURT

On 16th May 2004, at around 10.45 pm, **Armstrong Pino (PW1)** was in the house of **Pamela Atieno (PW2)**, his first wife, preparing to sleep when he heard their gate being tampered with, as if it was being cut. A few seconds later, he heard the door to

the house of his second wife, **Halima Atieno (PW3)**, also being cut. He then overheard some people say, '*Ofisa leo tuko na wewe*'
[Officer

today we are with you]. PW1 was known as 'Ofisa' [Officer] back at home. When he peeped through the window, he saw many torches. PW3's house was then invaded and three minutes later, the invaders broke into PW2's house. PW1 decided to hide in the ceiling of the house. With the help of their gas lamp which was lighting the sitting room, he saw the 6th appellant, whom he had known since 1994, holding an axe which he had used to hit the door open. The 6th appellant was clothed in a short sleeved green shirt with red match at the front.

PW1 also saw one Owino Rasta who had a *jembe* [hoe] and one **Nixon Oduori**, whom he had known since 1988, holding a *panga* [machete]. Other people who PW1 identified in the group of assailants were the 1st appellant, the 2nd and 4th appellants, who were his son's friends, and the 3rd appellant. They were armed with a hoe, a machete and an arrow which they had stolen from **Margaret Aura Opondo, (PW5)**. As the assailants made their way into the bedroom through a corridor, PW1 saw one 'Cobra' flashing a torch and telling the 6th appellant to lead the way since he was armed with a gun. When they entered the bedroom, they started beating PW2 as they asked for PW1's whereabouts. Meanwhile,

PW1 climbed down the ceiling but was met with a flashlight from a torch. He shouted saying, '*Ndiye huyo*' [Here he is], catching the attention of the 5th appellant, who beamed a torch at him. The assailants started chasing after him and as he climbed up a tank ladder, the 6th appellant hit his legs with a stick. He overheard the 1st appellant asking the 6th appellant to shoot him or they would die in jail since he had seen them.

PW1 managed to crawl to a nearby maize plantation where he hid. After about 20 minutes, he saw PW2 with the gas light, accompanied by the assailants, heading to PW3's shop which was in the compound. The assailants forced PW2 and PW3 to open the shop and they started carrying goods out of the shop. Soon thereafter, gun shots rent the air, prompting the assailants to take flight, leaving behind their weapons and some of the items that they had stolen. When PW1 returned to his house, he found it damaged with various items missing, including cash Ksh.54,000, three (3) cameras, a mobile phone, shoes, clothes, and an electric iron. Items that were stolen from the shop but recovered included; rice, Ng'ombe oil, Ufuta oil, mosquito coil, bulbs and cigarettes.

PW2 and **PW3** corroborated PW1's account, adding that identification parades were held where PW2 identified the 3rd, 5th and 6th appellants, while PW3 identified the 4th, 5th and 6th appellants. **Benjamin Oloo Oluoch (PW4)** testified that on the material night he was in his house sleeping when he heard noise from his neighbour's place. He decided to go out and find out what was happening. On lighting his torch, he saw the 1st appellant who was his nephew, at the gate. A torch was equally shone his way, causing him to run to the AP Post at the Shopping Centre, where he reported the matter. Accompanied by **No. 979070957 John Ayoo (PW6)** and another police officer, they returned to PW1's home where they found the assailants stealing from the shop. The police shot in the air 5 times, prompting the assailants to run away. PW6 and his colleagues recovered some of the items that had been stolen, as well as the weapons that the robbers had brandished. One of the assailants, one Nixon, was killed by the police in the course of the commotion.

William Masinde, (PW8), of Imanga Patrol Base, recalled that on 16th May, 2004 at about 11.30pm, he was informed that there had been a robbery in Otiato area. He asked the OCS for Mumias

area to send a vehicle, officers and dog handlers and they proceeded to PW1's home where they found his houses and shop had been broken into. On tracking the area using a dog, they found the 1st appellant hiding under the bed and arrested him.

No. 219968 I.P Gideon Kivaa, (PW9), of Mumias Police Station conducted, an identification parade for the suspects on 5th June, 2004, under the instructions of one I.P Onyango, the investigating officer. He stated that the 4th appellant was identified by PW2, while the 3rd and 6th appellants were identified by both PW2 and PW3. **Isaac Mukhwana, (PW7)**, of Makunga Health Centre, examined the injuries that PW1, PW2 and PW3 had and filled their P3 forms on 18th January, 2005. He observed that PW2 had injuries on the right leg, abdomen and back. PW1 had injuries on the right leg and a swollen tender left foot. X-rays conducted showed that he had a fracture of the tibia/fibular on the left foot. On the other hand, PW3 had a bruised tender neck, tenderness on the back and a swollen tender left foot. When PW7 examined PW1, PW2, and PW3, the injuries were 8 months old but they had received earlier treatment.

Those are the facts that were established by the prosecution when the appellants were arrested, charged and tried on three (3)

counts of robbery with violence before the Senior Resident Magistrates' Court at Mumias. The trial magistrate found that the appellants had a case to answer and placed them on their defence.

The appellants gave unsworn evidence and called no witness. They all denied committing the offence. The 6th appellant, who was the 1st accused during the trial, claimed that on 18th May 2004, a police officer locked him up after a quarrel with him over money that he was owed. He was later transferred to Butere Police Station, then to Kakamega and finally to Mumias Police station where on 5th June 2004, he was taken to an identification parade. Two women identified him and he was later charged in court. The 1st appellant stated that on the fateful night at about 4.00am, he saw torch lights before being asked to open his door. People entered and searched his house but they found nothing. He was asked whether he knew PW1 and he told them that he was his relative. He was then taken to Mumias Police Station and later charged. The 1st appellant claimed that he had problems with PW1 who was like his step-father because he had taken land from them.

The 4th appellant stated that on 23rd at about 9.00pm he was

at home when police officers knocked at his door. They searched
his

house but recovered nothing before arresting him and taking him to the police station. The 1st appellant similarly claimed that on that night at about 4.00am people went to his house and searched it but nothing was found. He was then taken to Mumias Police Station. The 1st appellant admitted that PW1 was his relative. The 2nd appellant stated that on 23rd May, 2004, while on his way from work, he met two police officers who asked him where he was from. They then took him to Musanda and later to Mumias Police Station where he was charged on 14th June 2004 with people he did not know. The 3rd appellant alleged that on 19th May 2004, at about 6.00am, he was in his house when his door was unlocked by police who asked for his ID then arrested him. The 5th appellant claimed that on 18th May 2004 while leaving a funeral at his brother's place, he was arrested on allegation of being drunk and taken to Mumias Police Station.

At the end of trial, the learned Magistrate (P. K. Sultan, SRM) found the three (3) counts of the offence proved, convicted the appellants and sentenced them to suffer death on each of the three (3) counts. The sentences were to run concurrently. (sic).

Aggrieved by that decision, the appellants appealed before the High Court at Kakamega. The appeal was heard by Muchemi and Chitembwe, JJ., who by a judgment dated 4th June 2009, dismissed it in its entirety, provoking the present appeal captured in a 'supplementary memorandum of appeal' lodged by **Nancy Apondi & Company Advocates** on behalf of the appellants. There is also a 'memorandum of appeal' fingerprinted by the 6th appellant, an 'amended memorandum of appeal' with the finger print of the 2nd appellant, and 'supplementary grounds' finger printed by the 4th appellant.

In summary the appellants complain that the learned Judges erred by:

1. Failing to observe that the prosecution case was not proved beyond reasonable doubt.
2. Failing to observe that the trial proceedings were conducted in a manner that violated the constitutional rights of the appellants.
3. Relying on contradictory evidence.
4. Relying on the identification parade that was full of discrepancies and contravened rule 6(iv), (v) and (vi) of the force standing orders.
5. Admitting evidence of identification and the P3 form in contravention of Article 50(4) of the Constitution.

6. Ignoring the defence of the appellants.

7. Upholding the mandatory death sentence which was harsh, excessive, unjust and unconstitutional.

During the hearing, learned counsel **Ms. Owiti** appeared for the appellants while **Ms. Busienei**, Assistant Director of Public Prosecutions, appeared for the respondent. Counsel highlighted submissions which they had filed prior.

The gist of the appellants' submissions is that while the investigating officer produced various exhibits, no inventory was produced to confirm whether the appellants had said items. Accordingly, the absence of such evidence contravenes the law and does not satisfy the conditions for proof of the offence of robbery with violence as encapsulated in **JEREMIAH OLOO ODIRA Vs. REPUBLIC [2018]** and **OLUOCH Vs. R [1985] KLR**. The appellants contend that the prosecution failed to discharge its duty as envisaged under **section 107(1)** of the **Evidence Act**. Further, there were discrepancies in the way exhibits were produced and the way the first report was made. The fact that the P3 form was filled 8 months later is also questioned. It is urged that it is not the duty of the court to stage manage cases for the

prosecution, nor is it the

duty of the court to endeavour to make a case against the accused where there is none.

The appellants contend that the identification parade was not conducted in accordance with the stipulated requirements. Reference is made to the evidence of PW3 who, on cross-examination by the 6th appellant, stated that the number of people who were placed in the parade was either 10 or more, and they were of different physical appearance. It is urged that the Identification Parade Guidelines require that the accused be placed among at least 8 people who are as similar as possible in height, age, general appearance and class of life as that of the suspect, to ensure fair identification. Moreover, there is no evidence on record indicating that the appellants were identified at the identification parade through touching, as provided under the National Police Standing Orders. On reliance of the decisions in ***HASSAN ABDALLAH MOHAMMED Vs. R [2017] eKLR***, and ***R Vs.***

TURNBULL & OTHERS [1973] 3 ALL ER 549, it is posited that

the light intensity on the material night was unfavourable for identification of the appellants.

The appellants assert that they were convicted on the basis of contradictory evidence, for instance, PW1's statement that he didn't give the names of the 6th appellant in the first report but later claiming that he actually gave the police his names. Further, while PW2 informed the court that the 3rd appellant had a machete on the material night, PW1 said he had an arrow. It is argued that failure to avail the arresting officer to testify offended **Article 50** of the **Constitution**. The appellants contend that the prosecution failed to satisfy the ingredients of the offence of robbery with violence as stipulated in **section 296(2)** of the **Penal Code**.

On sentencing, it is submitted that the indeterminate nature of the sentence meted out is prejudicial and against international principles of law. Moreover, the sentence is indignifying and contravenes the freedom and security of the person. We are urged to take into consideration the period that the appellants have already served in custody, that is 21 years, and substitute the sentence imposed with a lenient one.

In opposition to the appeal, **Ms. Busienei** submits that the prosecution proved its case against the appellants beyond reasonable doubt. She enumerates the three (3) ingredients of

the

offence of robbery with violence, as set down in many authorities of this Court and argues that the prosecution only needed to prove one of the ingredients but it proved two, that is, the appellants were in the company of others while armed with a gun and other weapons, when they robbed the complainants. As to whether identification of the appellants was proper, this Court's decision in **CLEOPHAS OTIENO WAMUNGA Vs. REPUBLIC [1989] eKLR** and **ABDALLAH BIN WENDO Vs. R 20 EACA 166** at page 168, are

cited for the proposition that where the only evidence against a defendant is that of identification or recognition, a trial court is enjoined to examine such evidence carefully to be satisfied that the circumstances of identification were favourable and free from the possibility of error. Concerning the argument that the identification parades were not conducted according to the required standards, counsel referred us to page 60 of the record where the learned Judges evaluated that issue in detail.

Counsel submits that this was a case of both recognition and identification. PW1 recognised the appellants visually and by name; some of them were friends of his son, one a relative and others were neighbours. Further, PW2 and PW3 who moved

around with the

appellants carrying gas lamps identified them and described how they were armed and what each did during the incident. **Ms. Busienei** added that there was ample lighting in the houses and outside, sufficient time and close distances between the appellants and the witnesses that aided in the identification. Moreover, according to PW9, the identification parade was properly done in compliance with the Police Force Standing orders.

On sentencing, counsel defended the decision of the trial court, arguing that the death penalty is lawful and still applicable as a discretionary maximum punishment, as per the directions in **MURUATETU & ANOTHER Vs. REPUBLIC; KATIBA INSTITUTE & 5 OTHERS (Amicus Curiae) [2021] KESC 31 (KLR)** (MURUATETU

II). It was urged that the trial court heard the mitigation of the appellants and applying its discretion it was convinced that the death penalty was the most appropriate sentence under the circumstances. In the end we were implored to uphold both the conviction and the sentence meted out.

As this is a second appeal, our jurisdiction is confined to a consideration of questions of law only by dint of **section 361(1)**

of the **Criminal Procedure Code**. This has been restated in many

decisions of the Court including **DAVID NJOROGE MACHARIA**

Vs. REPUBLIC [2011] eKLR in which the Court stated: -

“That being so only matters of law fall for consideration-see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings - see Chemagong Vs. R [1984] KLR 611.”

Bearing the above in mind, the issues that fall for our consideration in the main are whether the prosecution proved its case against the appellants beyond reasonable doubt, and whether this Court is vested with the powers to review the sentence meted out.

This Court has defined what constitutes the offence of robbery with violence in a litany of decisions including in **JACKSON OLUOCH & ANOTHER Vs. REPUBLIC [1984]eKLR**, where the

Court stated;

“Under section 296 (2) of the Penal Code robbery with violence is committed in any of the following circumstances:

- 1. The offender is armed with any dangerous or offensive weapon or instrument, or***

- 2. The offender is in company with one or more other person or persons or**
- 3. At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.”**

It is trite that any one of the above three (3) elements which are disjunctive, is enough to found the offence of robbery with violence, once proved. In the instant case it is evident that the offence of robbery with violence was committed against PW1 and his two wives, PW2 and PW3 on the material night. PW1 testified that on the night in issue he was in PW2's house when he heard their gate being tampered with. Shortly after, a group of people invaded PW3's house and then moved to PW2's house. He explained that he hid in the ceiling of the house and observed the invaders who were armed with a gun, a machete, an axe and a hoe as they moved around the house. The attackers were known to him and he identified them by name and the weapons that each of them was carrying. PW1 narrated how while he was running away, he was beaten on the legs with a big stick by the 6th appellant. PW2 corroborated PW1's evidence, stating how she was beaten by the assailants on the material night as they asked for PW1's whereabouts. She explained

that they broke her drawer and took money from it as well as other

household items. The robbers then escorted her to PW3's shop, forced her to open it and stole more items. PW3 similarly supported the account of PW1 and PW2. PW4, who was a neighbour to the complainants and witnessed the commotion, testified that he reported the robbery to the Administration Police when he became aware of it. PW6 confirmed receiving the report of the robbery from PW4 and stated that when they arrived at the scene, they heard people talking in the complainants' shop. They shot 5 bullets in the air and the robbers fled leaving behind some of the stolen items and the weapons that they wielded. PW7 of Makunga Health Centre testified on the nature of injuries that PW1, PW2 and PW3 suffered. From the foregoing facts it is discernible that the complainants herein endured robbery with violence on the material night and we have no basis for interfering with the concurrent findings of the two courts below.

The appellants also argue that they were not properly identified as the perpetrators of the crime, since the light intensity on the night in issue was inadequate for a correct identification. On this question of identification, we find guidance in the oft-cited decision

in **R Vs. TURNBULL & OTHERS** (supra) where the English court rendered itself as follows:

“...the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance.”

In considering the issue of identification in the present case, the learned Judges observed, in part, as follows:

“PW1 did not attend the parade because he knew most of the attackers by their names. He testified that he identified the 1st appellant known as Nyangweso who was armed with an axe as he broke the door. 2nd and 4th appellants who he called Fredrick and Onyango were friends to his son. He identified the 3rd appellant as Wycliffe Okello. The witness saw 5th accused armed with an arrow as the 6th accused had a big torch. In cross-examination, PW1 said he knew them before the incident and gave name of 6th accused as Obala. PW2, identified the 1st, 2nd and 5th accused in an identification parade. She had seen the 1st accused breaking the drawers in her house. The witness had seen the 4th accused in her house at the matrimonial time (sic). Earlier at Imanga market the witness said she had seen the 4th accused although she did not know his name. PW3, saw the 1st accused armed with an axe, while 2nd accused and 4th accused took

her purse containing sh.200/=. She identified the 1st and 2nd accused at the parade.

The light which helped the witnesses to see their attackers was a torch and gas lamps.”

We note that the trial Magistrate made a finding in his judgement that he observed that PW1 knew all the appellants. Further, it was PW5's evidence that on the material night, at about 9.00pm, some five (5) people went to her house and asked for her store from where they took 2 hoes, a machete, a slasher, an axe and a cooking stick. She indicated that among the five people were the 5th and 6th appellants. The following morning, she learnt that PW1, who was her in-law, had been robbed. PW5 was able to identify the items used as weapons that the robbers had left behind as belonging to her. In view of this evidence, along with the testimony that on the material night there was ample light which included the torches that the assailants carried and gas lamps that were lighting the houses of the complainants, together with the evidence that the assailants were at the scene of crime for almost two(2) hours, and they had close proximity with PW2 and PW3 as they stole from them and moved from their houses to the shop, we agree with the two courts below that the circumstances on the

material night were conducive for a positive identification and recognition of the appellants.

The appellants contend that the identification parade was not conducted in accordance with the prescribed standards, in terms of the number of people who attended the parade and their physical appearance. As rightly argued by the respondent, this aspect of the identification parade does not seem to have been raised in the two courts below. More importantly, we note that PW9, the officer who conducted the identification parades, explained that eight (8) people of almost similar size participated in the parades. He also explained the position at which each of the two (2) suspects were identified by PW2 and PW3. We are, therefore, not persuaded that PW9 did not comply with the requisite procedure on identification parades. The appellants also contend that their defence was not considered. To the contrary, the trial court considered the defences but he was of the view, as we are, that the evidence against the appellants was overwhelming as compared to their defences, which were mere denials.

On sentencing, it has been urged that the indeterminate nature of the death sentence contravenes international law

principles.

Further that, we should consider the period that the appellants have already served in custody and mete out a more lenient sentence. While we take cognisance of the appellants' plea, we are precluded from addressing it following the Supreme Court's directions in **MURUATETU II** to the effect that its decision on the mandatory nature of the death sentence being unconstitutional was not applicable to the offence of robbery with violence.

In the result, the appeal before us lacks merit and is dismissed in its entirety.

Dated and delivered at Kisumu this 30th day of January, 2026.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR