



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**Criminal Appeal 46  
of 2010**

**ROBERT OWINO OWITI**

**EDWIN MAKUNDA OUTA**

**GODFREY OKOTH OKETCH ..... APPELLANTS**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from a Judgment of the High Court of Kenya at Kisumu (Karanja & Abidah Aroni, JJ.)  
dated 9<sup>th</sup> February, 2010*

**in**

**H. C. CR. A. NO. 4, 5 & 6 OF 2008)**

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**JUDGMENT OF THE COURT**

***Robert Owino Owiti (Robert), Edwin Makunda Outa (Edwin), and Godfrey Okoth Oketch (Godfrey),*** the appellants herein, were jointly charged in the Chief Magistrate's Court in Kisumu with four counts of the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The facts of the offence were that on the 12<sup>th</sup> January, 2007 at Milimani Hospital in Kisumu jointly with others not before the court and while armed with dangerous weapons namely a pistol robbed Tabitha Otieno of a mobile phone (Samsung X640) and cash Kshs.9,500/= in Count 1; Elijah Omondi of a mobile phone (Motorola

T190) and cash Kshs.17,000/= in Count 2; Anthony Otieno Opondo of a mobile phone (Nokia 1600) and cash Kshs.50/= (in Count 3) and Elizabeth Muthoni Kamau of two mobile phones (Nokia 2100 and Nokia 1100) and cash Kshs.5,650/= (in Count 4) and at or immediately before or after the robbery threatened to use actual violence to the said persons.

The prosecution called nine witnesses, and after hearing their evidence, as well as the unsworn evidence of the three appellants, the learned Principal Magistrate (A. C. Onginjo) found them guilty of the offences charged, convicted and sentenced them to death.

Godfrey was also charged with the offence of escape from lawful custody, and convicted of the same under **section 215** of the Criminal Procedure Code. However, there is no record of any sentence given in respect of that offence.

The evidence adduced before the trial court is briefly as follows: At about 7.30 pm on 12<sup>th</sup> January, 2007 the complainants, namely Tabitha Otieno (Tabitha) (PW 1), Elijah Omondi (Omondi) (PW 3) and Elizabeth Muthoni Kamau (Elizabeth) (PW 5) were at the Milimani Hospital in Kisumu for one reason or another – Tabitha was visiting her sick mother, Omondi was having his sick mother admitted into the hospital, while Elizabeth, a nurse, was on duty at the hospital, attending to patients at the material time. Suddenly, three men, brandishing guns, entered the hospital shouting that everyone should hand in their cash and mobile phones. One of the men, who Tabitha later identified as Edwin, the second appellant, pointed the gun at her, and ordered her to hand over her phone and money to him, failing which he threatened to shoot her. She complied with the order, and handed in her phone and money. She stated later that the ward she was in was brightly lit, and she saw Edwin clearly.

Almost at the same time, two other men (one short and one tall), also wielding pistols, confronted Omondi, who had Kshs.17,000/= in his hands, as he was about to pay the same to the hospital cashier for his mother's admission. They threatened to kill him, and he dropped the Kshs.17,000/= he had, on the floor. He also surrendered his phone, and saw the two men clearly, later identifying them as Robert and Godfrey, the 1<sup>st</sup> and 3<sup>rd</sup> appellants, respectively. Thereafter, two men, with pistols, confronted Elizabeth, who, out of fear, surrendered her two phones and cash. She said she could not recognize them.

On the following day, Tabitha learned from a friend of hers, that a phone similar to the one she had, had been spotted at a repair shop. She immediately contacted the Police, and in their company, visited the repair shop. The technician admitted receiving such a phone for repairs from another technician, and led the Police to the latter, who, in turn, led them to the person who had brought in the phone. This person was Edwin, who was found in possession of the phone, and who was promptly arrested, and charged, with the aforesaid offence. Edwin led the police to the two other appellants, who were also arrested, and charged, with the aforesaid offence. Later, Omondi identified the other two appellants namely Robert and Godfrey at the identification parade.

In their unsworn statements, the appellants denied committing the offences, and denied being present at the Milimani Hospital at the material time. After hearing all the evidence before it, the trial court found the appellants guilty as charged, convicted and sentenced them to death.

Their respective appeals to the High Court were not successful, hence, this second, and possibly final, appeal before this Court.

At the hearing before us, Robert and Godfrey were represented by Mr. P. J. O. Otieno while Edwin was represented by Mr. G. O. Oguso. Mr. P. M. Gumo, Assistant Director of Public Prosecutions, appeared for the State. Mr. Otieno's main complaint was with respect to identification; the conduct and procedure at the identification parade; and contradiction of evidence between witnesses. He argued that immediately prior to the holding of the parade, Robert and Godfrey were called into the offices of the O. C. S. where they were "seen" by two people who later 'identified' them at the parade. Mr. Oguso, for Edwin, also complained about identification and the inapplicability of the doctrine of recent possession. Mr. G. M. Gumo, for the State, on the other hand, submitted that the conviction was based on overwhelming evidence, and was safe.

As we have stated, this is a second appeal. By dint of the provisions of **section 361** of the Criminal Procedure Code, we are enjoined to consider only matters of law and not matters of fact.

With regard to the identification of Robert and Godfrey, there were two witnesses who positively identified them, in circumstances where the encounter took place in bright lights and over almost a 15 minute period. These witnesses then identified the two appellants at the identification parade. With respect to the identification of these two appellants the trial court stated as follows:

***“These two suspects were also positively identified in parade as having been among the robbers who committed robbery at Milimani hospital. I think if accused 2 merely brought (sic) phone from accused 1 and 3 he could not have been identified as having been among the robbers if accused 2 mentioned accused 1 and 3 merely to exonerate himself from the offence, again these two suspects could not have been identified when parade was conducted. It is my finding that they were identified on parade due to the lighting system at the hospital. The nurse was attending to a patient when the robbers struck and PW 1, PW 2, PW 3 and PW 5 said there was sufficient lights (sic) at the hospital. The reason PW 5 was not able to identify robbers was due to fear when she turned and met a gun being pointed at him***

***It is this courts considered finding that circumstances for identification were favorable and coupled with the recovery of stolen cell phone from Accused 2 I do find that prosecution has proved beyond all reasonable doubt that accused 1, 2 and 3 committed the offences in count 1, 2 and 4 for which they are found guilty and are convicted under section 215 CPC.”***

The High Court, on its part, stated as follows:

***“In regard to the 1<sup>st</sup> and 3<sup>rd</sup> appellants, PW 3 said that the incident of robbery took 10 – 15 minutes. He also stated that the hospital is well lit with a 5 feet florescent tube, which was very bright and therefore, he was able to see the appellants well. He also stated that he was able to give the police the physical appearance and clothes worn by the assailants. PW 3 was able to identify the 1<sup>st</sup> and 3<sup>rd</sup> appellant at the parade.”***

It is clear from these findings by the two courts below that the evidence regarding the identification of the 1<sup>st</sup> and 3<sup>rd</sup> appellants was accepted by the two courts. There is no legal basis upon which we can interfere.

With regard to Edwin, the 2<sup>nd</sup> appellant herein, his conviction was based not only on the strong evidence of identification by Tabitha, who had an encounter with him for some 15 minutes in bright lights, but also that he was found in possession of the stolen phone, positively identified as belonging to Tabitha, the day following the robbery. This appellant was unable to explain how he came into possession of the same. In the absence of any explanation, the inevitable inference is that he was the thief. We concur with the submission of the Assistant Deputy Director of Public Prosecution that the doctrine of recent possession was properly invoked.

Accordingly, and for the reasons outlined, we find no merit in this appeal, and dismiss the same.

**Dated and delivered at Kisumu this 22<sup>nd</sup> day of March, 2012.**

**R. S. C. OMOLO**  
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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**