



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: OMOLO, WAKI & VISRAM, JJ.A)**

**CRIMINAL APPEAL NOS. 274 & 275 OF 2009**

**BETWEEN**

**PETER OKEE OMUKAGA**

**CHARLES A. MURUNGA .....APPELLANTS**

**AND**

**REPUBLIC .....RESPONDENT**

***(An appeal from the Judgment of the High Court of Kenya at Bungoma (Mbogholi Msagha & Ochieng, JJ) dated 31<sup>st</sup> July, 2009***

***in***

***H. C. CR. A. No. 28 & 29 of 2006)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

On the evening of 14<sup>th</sup> September, 2003 at about 8.00 pm Oroni Francis Okisa (PW 1) (Francis) was relaxing in his house with his wife, brother, and children when suddenly he heard his son, who had just left them to go out, screaming. He looked out of the window and saw people flashing torch lights, then his door was smashed open, and three people entered the house. They ordered him to keep quiet. One had a rifle, and whip, while the other carried a sword, torch and *rungu*. He recognized two of the intruders as “George Onyik Odel” and “Peter Oke”, who, he said, were neighbours from the village. He could not recognize the third person. They tore up the curtains, and used them to tie his hands. Then they beat him causing him to bleed all over his body. As they began ransacking the house, he managed to escape to the road, fell down, and lost consciousness. Later, people came over, took him to the sub-chief, and to the police station at Busia, where he reported the matter. In his report to the police, he named the two attackers, identifying them as people he knew from his village, and with whom he used to play football. Meanwhile, back in the house, his wife had hidden herself under the bed, while his brother John Okisa (PW 2) (John) was also beaten up, and hurt himself as he attempted to escape. The robbers escaped with several household goods listed in the charge sheet, including clothes and utensils. This evidence was corroborated by John, as well as Francis’s wife Rose (PW 3) who had hidden under the bed. John also recognized the two robbers as his village mates, and gave an account of how they beat him up and ordered them around, as a result of which he also recognized them from their voices. One of the alleged robbers was arrested the same night, while the other after four days, and both were charged before the Principal Magistrate’s Court at Busia with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. After the trial, in which nine witnesses testified, the two appellants were convicted and sentenced to death. Their appeals to the superior court (Mbogholi Msagha & Ochieng, JJ), were dismissed, hence this second and last appeal before us.

The appeal, as the law requires, may only raise issues of law – see **section 361**, Criminal Procedure

Code. The appellants drew up their home-made grounds of appeal, both dated and filed 11<sup>th</sup> August, 2009, in almost identical terms. Their learned counsel, Mr. J. K. Korir relied essentially on one ground of appeal – identification, which, indeed, is a point of law. He argued that the incident took place at 8.00 pm; that there was no electricity lights in the house; that the only source of light was a small lamp, torches, and moonlight, and that this was insufficient to positively identify the two appellants. He further argued that there was no identification parade held; that none of the stolen items were recovered; and that the investigating officer was not called to testify.

Mr. A. O. Oluoch, learned Senior Deputy Prosecution Counsel, for the respondent, submitted that the evidence regarding identification was watertight, as it was based on “recognition” of the appellants; and that all the ingredients of the offence had been established to support the conviction.

Both the courts below were alive to the fact that the prosecution case stood or fell on the evidence relating to identification of the appellants. In this case it was not that of a stranger, but of a person previously known and, therefore, it was identification by recognition. As this Court stated before in Anjononi v Republic [1980] KLR 59 at page 60:

***“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 vs. Republic (unreported).”***

In considering the issue of identification, the learned magistrate stated as follows:

***“The second point for determination is on the identification of the people who executed the actus reus. That is, were the accused persons among the people who invaded the home of PW 1 and robbed and assaulted the complainants? PW 1 said that he was able to see and recognize the two accused for they are people he knew. That he was able to recognize them and talk to them. That he said he was facilitated by a combination of moonlight, torch light and light from a lamp that was in his house.***

***In his statement to the police, it was recorded that he identified Onyike (the second accused) who was armed with a panga and Odel (first accused) who was armed with a rifle. He has also told the assistant chief (PW 7) that it is the two accused persons who attacked him. Generally, it is evident that PW 1 was sure that it is the two people who attacked him and beat him and that the second accused used the panga to cut him.***

***PW 2 (John Okisa) told the court that he saw the two accused well because there was light provided by the lamp in the house. He added that the first accused ordered him to lie down therefore he identified his voice and that of the second accused who cut him using a panga. They are village mates therefore he recognized them. His evidence respecting to identification and recognition of the two accused persons is based on both visual and voice identification. He however recorded his statement on 19<sup>th</sup> September, 2003 after the two accused had been arrested. He however told PW 4 as they went to hospital the same night that it is Onyike (the second accused who cut him).***

***On identification, Rose Atiang (PW 3) told the court that she and (sic) recognized the two accused because there was light in the house provided by a tin lamp. She was left in the house when PW 1 and PW 2 saw the robbers gathering household goods before she fled.***

***On identification, Denis Okisa (PW 5) stated that he went close to the house and heard PW 1 asking the second accused why he was killing him. He was thereafter chased and cut on the leg. With other villagers, they returned to the home and found the second accused hiding next to a fence. They chased and arrested him. His evidence has one strong element which is the fact that the second accused was actually arrested in the vicinity soon after the robbers chased and cut him. The evidence is however***

*weak with regard to Count IV for it is not very clear if it is actually the second accused who cut him, even though he was among those who chased him.*

*PW 1, PW 2 and PW 3 described the robbers' attire without contradicting. They were also in agreement on the type of weapons each accused had. None of the weapons was however recovered.*

*The accused persons' defence that they were in their respective houses sleeping cannot be believed. Those are plain statements that have failed to shake the evidence adduced. In the case of the second accused, he was arrested immediately, infact before the events ceased and at the scene of robbery itself. The other thing that lends credence to the evidence by the prosecution is that the robbers had not and made no effort to conceal their appearances. That made it quite easy for the victims who knew them very well to recognize their appearances and voices. There is evidence that the tin lamp was lit throughout. My finding thereon is that the two accused persons were positively identified to be in the gang that robbed and assaulted the complainants. The accuseds (sic) supposed alibis that they were in their houses has no impact at all and has been rendered to be completely false."*

The superior court went through similar analysis of evidence before stating as follows:

**"We bear in mind that this offence took place at night. But there is evidence which was not seriously controverted that the two appellants were known to the witnesses who gave evidence. In particular, PW 1, PW 2 and PW 3 were villagemates. It is also clear that there was light at the homestead of PW 1 in the form of a lantern which remained on throughout this time.**

**There is also evidence that in the process of this raid, the two appellants communicated with the witnesses ordering them to lie down. It is our judgment that all these factors provided conditions for positive identification of the appellants. It is true that the 1<sup>st</sup> appellant herein, was not arrested with any offending items stolen from PW 1 but, that is not to say that he was not involved in this robbery as evidence points out to more than two people who raided the home of PW 1.**

**The names of the two appellants were given to the police and to the Assistant Chief immediately after the raid. This was when the memory of the witnesses who did so was still fresh and there was no question of mistaken identity. There was also consistency in the description of the clothing the appellants were wearing on that night. When that is considered against the defence of the two appellants, it becomes clear that their defences cannot withstand the weight of the prosecution case."**

There are, therefore, concurrent findings made by the two courts below that the appellants were properly identified as the robbers. We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as "neighbours from the village"; that they had played football with them long time ago; and that their voices were also familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen articles did not in any way point to the innocence of the appellants

In conclusion, we agree with the learned Senior Deputy Prosecution Counsel that the offence charged was proved beyond reasonable doubt, and the convictions of the two appellants were safe in all the circumstances. The appeals have no merit, and are dismissed. We so order.

**Dated and delivered at Eldoret this 25<sup>th</sup> day of March, 2011.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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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**