



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: TUNOL, O’KUBASU & AGANYANYA, JJ.A.)
CRIMINAL APPEAL NO. 136 OF 2008**

BETWEEN

KENNEDY OCHIENG AMIRIAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisii (Musinga & Karanja, JJ.) dated 31st July, 2008

**in
H.C.Cr.A. No. 99 of 2006)

JUDGMENT OF THE COURT

This is a second appeal from the dismissal of the appellant’s appeal to the superior court at Kisumu (*Musinga & Karanja, JJ*) from the judgment of the Senior Resident Magistrate’s Court at Migori (*Ezra O. Owino*) delivered on 31st July, 2008. In the Senior Resident Magistrate’s Court, the appellant, **Kennedy Ochieng Amiri**, was charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the charge were that on the night of 6th and 7th of October, 2004 at Kanyadieto Sub-Location in Migori District within Nyanza Province with others not before the court, being armed with offensive weapons, namely pangas, robbed **Rhoda Atieno Ochola** of one TV. set Phillips, one Sanyo CD machine, one pressure lamp, one Sony Radio, one briefcase three suitcases with assorted clothes, two watches make Omax and Seiko 5, one pair of gumboots, five sheets, two blankets and cash Kshs.51,000/= all valued at Kshs.104,347/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Rhoda Atieno Ochola.

In the alternative count of handling suspected stolen goods contrary to **section 322(2)** of the Penal Code, the appellant was charged that on 7th day of October, 2004 at Koluoch Sub-Location in Migori District within Nyanza Province, other than in the course of stealing was found in possession of one Sony radio cassette, one briefcase, one pair of gumboots and a bag the property of Rhoda Atieno Ochola knowing or having reason to believe them to have been unlawfully obtained.

On the night of 6th October, 2004 Rhoda Atieno Ochola was sleeping alone at her house at Opapo. She heard footsteps and saw torches being shone outside the house. When she woke up to check what was happening she was hit with a torch through the upper open part of the kitchen door. Robbers then forced their way into the kitchen and chased her to the bedroom where they held her and demanded money from her. Although she gave them Kshs.6,000/= and her mobile phone, the robbers searched the

drawers and took a further Kshs.45,000/=therefrom. Then they ransacked the house and took many items and other household goods as specified in the charge sheet. When they left the house PW1 screamed and many people came around. They included **John Obar Otama** (PW2) and **Lazarus P. Okwanyo** (PW3), the area Assistant Chief. They were informed of what had happened and they divided themselves in different groups to try and track down the robbers. The group which included PW2 and PW3 headed on Nyanjogo route and laid an ambush three kilometres from Opapo. At about 1.00 a.m. the appellant was apprehended. He was in possession of a Sony radio cassette, a briefcase, a bag with clothes inside and gumboots.

Meanwhile PW1 had been taken to Rongo Hospital after the attack. The appellant was taken there with the items he was found in possession of and the complainant identified them as part of the items stolen from her house by the robbers on that night. The appellant was taken to Rongo Police Station from where he was then taken to Migori Magistrate's Court where he was charged with the offence the subject of this appeal.

When he was placed to his defence the appellant gave sworn evidence and stated that he was employed by some person, whose name he did not mention. On 7th October, 2004 he was from a disco at his uncle's place and when he met the Assistant Chief on the way he was interrogated and then framed with the items which the Assistant Chief had. That in the process he was assaulted and his hand was broken. Then he was charged with the offence as herein stated. The learned Magistrate recorded the testimonies of the witnesses and in a judgment delivered on 8th February, 2006 stated, *inter alia*:

“Evidence shows that this robbery was committed after 11p.m. And that the accused was arrested at 1 a.m. that is about 2 hours later. And he was found with some of the stolen items. These items were positively identified by the complainant; in any case, the accused does not claim the items but that he is being framed ...

Evidence shows that they were armed with pangas and that they were many and the complainant recognized him.”

As already stated, the appellant's appeal to the High Court was dismissed.

The appellant was not satisfied with High Court judgment and in a homemade memorandum of appeal lodged in this Court on 28th August, 2008 the appellant raises 4 grounds of appeal as follows:-

“1. THAT the first appellate court erred in finding that the trial court giving effect to the verdict should not be set aside in the presence of many irregularities in the course of trial that remains glaring, that there was no evidence on record that both trial court and the appellant understood the language in which the trial was conducted as provided in the Constitution (C/S 77(2)(f) and section 198 C.P.C.).

2. THAT the first court of appeal in affirming the lower court's decision in this matter, amounted to an error in facts and law without considering that there was lack of case on the part of those prosecuting and trying the case, failure to see that the secondary evidence (exhibit) admitted for court inspection or analysis is not backed by primary evidence, (real exhibits) that is not properly tied up and proof lacking as shown.

3. THAT the order of the appellate court(s) reinforcing the lower court's verdict that had put the integrity of the facts and judicious discretionary powers into question for failure to give an opportunity to prosecution to verify the mentioned information in my alibi defence before fixing of judgment should be set aside on ground of discrepancy shining with malice my Lords.

4. THAT the first appellate court Judges erred in finding it proper not to interfere with the trial court discretion under all the circumstances of the case, in which it was not mentioned whether the torches shown on my face to enable positive identification and trial magistrate's failure to analyse the strength and position of the torches properly before accommodating the evidence as the verdict that

secured my conviction, my Lords.”

When the appeal was argued before us on 15th March, 2011, **Mr. Otieno**, learned counsel for the appellant submitted on grounds 1 and 4 of the memorandum of appeal and abandoned grounds 2 and 3. He stated that although plea in the case was to be taken on 25th April, 2005, it was not taken thus rendering the proceedings a nullity. He submitted further that the appellant’s identification was not positive as he was not described by PW1, PW2 and PW3, that PW1 did not explain how the torches carried by the robbers aided her to identify the appellant.

Mr. Gumo, learned Assistant Deputy Prosecution Counsel for the State opposed the appeal and stated that the complainant knew the appellant before and that the appellant was one of the attackers who remained in the house of PW1 for a considerable period; that he was also found in possession of various items which the complainant identified as those stolen from her house a few hours earlier.

We have heard and considered rival arguments from counsel for the parties on this appeal.

PW1 stated in her evidence that:

“I saw one person who I knew. He is the accused. He used to work at Kegori.”

She also testified that the robbers stayed in her house from 11.00 p.m. to 1.00 a.m. then she continued:

“While in hospital one person was brought to the hospital, this was the accused. He was brought with a briefcase, radio cassette Sony bag and gumboots and shoes. I opened the bag and saw and identified the items.

The accused was brought to Opapo at about 1.30 a.m. at night.

I had recognized the accused in my house.”

PW1 reiterated this when she was cross-examined:

“You were about 8 people. Only yourself is in court. I saw you in my house. I told people that I recognized you and they came after you and the rent (sic) ... The Chief brought you at Opapo and I told the chief that I recognized you.”

And when PW2 and PW3 responded to the screams from PW1 and were told what had happened they laid an ambush on Nyanjogo road. It was about 1.00 a.m. and they arrested the appellant with a briefcase, bag and a Sony radio cassette. He was taken to Rongo Hospital where the complainant had been taken for treatment after the attack and she identified the items as those she had been robbed of that same night. In our view this evidence and the circumstances were sufficient to identify the appellant as one of the group which had a few hours earlier attacked and robbed PW1 of money and the items specified in the charge sheet. The evidence of PW1 and the recovery of some of the stolen goods from the appellant shortly after placed the appellant at the scene of the robbery. In our view the appellant was convicted upon very sound evidence of identification and recent possession.

We have no basis to interfere with the superior court’s judgment. This appeal has no merit. We dismiss it in its entirety.

Dated and delivered at Kisumu this 13th day of April, 2011

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O’KUBASU
.....
JUDGE OF APPEAL

D. K. S. AGANYANYA
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR