



IN THE COURT OF APPEAL  
AT KISUMU

(CORAM: BOSIRE, GITHINJI & VISRAM, JJA)

CRIMINAL APPEAL NO. 197 OF 2008

BETWEEN

E. O.O ..... 1<sup>ST</sup> APPELLANT  
PATRICK MOGAKA ONGUBO ..... 2<sup>ND</sup> APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Kisii (Musinga & Karanja, JJ)  
dated 15<sup>th</sup> July, 2008*

In

**H.C. Cr. A. Nos. 39 & 42 of 2005)**

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**JUDGMENT OF THE COURT**

The appellants, E.O.O and Patrick Mogaka Ongubo, were tried by the Senior Principal Magistrate's Court at Kisii (Mbogo, SPM) on a charge of robbery with violence contrary to **section 296 (2)** of the Penal Code. The second appellant, Patrick Mogaka Ongubo, , was also charged with a second count of assault causing actual bodily harm contrary to **section 251** of the Penal Code. The particulars of the charge were that on the night of 2<sup>nd</sup> September, 2004 at Nyansiongo/Gesima sub-location in Nyamira District within Nyanza Province, jointly with others not before court, while armed with pangas, robbed Eric Onami Nyaribo Shs.3800/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Erick Onami Nyaribo.

The evidence adduced against the appellants was that on 2<sup>nd</sup> September, 2004, at about 8.30 p.m. Erick Onami Nyaribo (PW2), (the complainant), his wife Gillian Moraa (PW3) (Moraa), and his cousin Justin Mokuia (PW4) (Justin ) were seated in their house when suddenly the door was broken into, and three men entered, armed with pangas. The only light was a small lantern which the intruders smashed within one minute of their arrival, and ordered everyone to lie down. Two of the intruders then escorted Moraa outside the house, leaving the third man behind. At this point the complainant hit the intruder inside the house, causing him to fall down. He raised alarm, and many members of the public arrived, and promptly lynched the intruder inside the house to a point that he died. The other two men disappeared. The complainant and his family who allegedly "saw" and "recognized" two of the intruders, did not mention the names or the identities of the robbers to the neighbours at that time. They did not do so even when the police arrived to collect the body of the deceased intruder. The injured members of the complainant's family were taken to the hospital for treatment, and then to the police station to file the report. It is at the police station that they gave the names of the two appellants as being part of the gang that had attacked

and robbed them. Both the complainant and Moraa related how they recognized the two appellants as being people they had seen around for 10 to 15 times, while the second appellant was related to the complainant. Mokuia also testified that he knew both the appellants and admitted that in his statement to the police, he did not indicate that he was able to identify the intruders.

Based on this report, and the description given by the complainant and Moraa, the two appellants were arrested and charged as aforesaid.

The Senior Principal Magistrate heard and recorded the evidence from six prosecution witnesses, while both the appellants gave unsworn statements, denying the charge, and raising alibi. The 1<sup>st</sup> appellant, a student at Nyansare Primary School, claimed that he was arrested as he arrived at school, and charged when he refused to testify against the 2<sup>nd</sup> appellant. The 2<sup>nd</sup> appellant said that he was arrested for failing to appear in court in respect of an unrelated offence, and then charged with this offence that he knew nothing about.

However, at the end of it all the Senior Principal Magistrate believed the prosecution case; rejected the appellants' testimony; convicted both the appellants and duly sentenced them to death.

The appellants appealed to the superior court, and by its judgment dated 15<sup>th</sup> July, 2008, that court (Musunga and Karanja, JJ) dismissed the appeals against conviction and confirmed the sentences of death.

The appellants are now before us on this second and final appeal and that being so the jurisdiction of this Court is confined to considering only issues of law – see **section 361** of the Criminal Procedure Code. The appellants drew up home-made memoranda of appeal. The first appellant raised three grounds of appeal as follows:-

***“(1) THAT the honourable trial court failed to observe that the appellant was a minor (12 years old) at the time of trial and was unrepresented during trial and therefore could not defend himself properly against a capital charge.***

***(2) THAT there were no descriptions given by the complainants that aided the arrest of the appellant.***

***(3) THAT the trial court erred in law when it left the burden of proof to the then accused, now appellant.”***

The second appellant, on the other hand, outlined the following seven grounds:-

***“1. That the High Court Judges erred in law and facts for upholding the decision of the lower court without considering whether the appellant understood the proceedings for the language that was used is not indicated.***

***2. That the High Court Judges erred in law and facts for not noticing the contradiction in the evidence of the prosecution witnesses on the purported identification of the appellant.***

***3. That the High Court Judges erred in law and facts for upholding that decision of the lower court without noticing that vital witnesses i.e. the arresting officer was not called to testify as to why he arrested the appellant.***

***4. That the High Court Judges erred in law and facts for failing to notice the irregularities and inconsistencies that marred the evidences (sic) of the prosecution witnesses.***

***5. That the High Court Judges erred in law and facts notice (sic) that the appellant was arrested one and a half months after the alleged robbery, yet the complainant claimed to know the appellant and the appellant was never reported to have been away from his place of resident hence making the whole alledgesion (sic) of identifying the appellant during the robbery an afterthought.***

***6. That the High Court Judges erred in law and facts for not noticing that the duration of the focus on***

***the purported robbers and the source of light was not adequate to warrant a positive identification.***

***7 That the High Court Judges erred in law and fact for not considering the appellant's defence yet it casted a lot of doubts on the prosecution evidence."***

At the hearing before us, Mr. P.J. Otieno, learned counsel for the appellants, chose to combine the grounds and argue them broadly. He argued that the superior court failed to analyze and evaluate the evidence in order to come to its own conclusions; that the identification of the appellants was unreliable; that the appellant's alibi defences were neither investigated nor given due consideration; and finally that the language used in court had not been recorded. With respect specifically to the issue of identification by recognition, Mr. Otieno submitted that given the poor lighting conditions at the material time, there were serious doubts that the appellants were "recognized", and further that the complainant's and Moraa's failure to mention the appellants' names to the neighbours immediately after the incident created a doubt whether they had indeed recognized the appellants.

Mr. Gumo, learned Assistant Director of Public Prosecutions, on the other hand, submitted that there was no error in identification as the incident took place in an area where there was sufficient light; and that the robbers were known to the victims for some time.

The main issues here are identification, whether the alibi defences of the appellants were considered, and the issue of "language" of the court.

With regard to identification, the trial court delivered itself in part as follows:-

***"This case centres on identification. The first complainant says that he had seen the two accused persons 10 and 5 times respectively before the incident took place. The second complainant went further to state that the first accused is a relative of the first complainant. These two complainants as well as Mokuu (PW4) are in agreement that there was a lit lamp when they were attacked by three robbers whom they said included the two accused persons herein. They are also in agreement that they were able to see the faces of the robbers. I do not believe the first accused when he said that he was only informed after his arrest that he had committed this offence. I equally do not believe the second accused who says that the police decided to charge him jointly with the first accused when he refused to become their witness against the first accused. The police had no reason to do so when they had enough witnesses in the persons of the two complainants as well as Mokuu (PW4). If the second accused is to be believed that he was arrested upon his arrival in Keroka from Kabete Approved School after the police moved a round up, then the police would have charged him appropriately or better still released him if he had committed no offence."***

In dismissing the appeal, the superior court stated, in part as follows:-

***"The identification evidence was that of the same complainant (PW2), his wife (PW3) and his cousin (PW4). Such evidence has to be treated with care and caution and more so, if conditions favourable for identification were known to be difficult.***

***In this case, the offence occurred at 8.30 p.m. in the night. However, the aforementioned witnesses stated that their house was lit by a lantern lamp when the three attackers entered therein.***

***The lantern lamp did therefore provide favourable conditions for the identification of the attackers.***

***The complainant (PW1) said that the lantern lamp was on for about one minute before it was hit with a panga and put off by one of the attackers. He said that the two appellants were among the attackers and were people he had previously seen around. He said that the two appellants escorted his wife outside and that is when he found the opportunity to hit and put down their colleague. He said that on raising alarm, members of the public appeared and lynched the appellants' fallen colleague.***

***The complainant's wife (PW3) said that the lantern lamp was on when the three attackers entered the***

*house. She said that she was able to see and identify the two appellants. She said that the second appellant is a relative to her husband and goes by the name Hassan Patrick. She said that she had not previously known the first appellant. She said that the two appellants escorted her outside and demanded money and she was in the process, assaulted by the second appellant. She also said that the incident took about 30 minutes.*

*The complainant's cousin (PW4) said that the lantern lamp was on when he saw the faces of the three attackers who included the two appellants.*

*The foregoing evidence of the identifying witnesses was cogent and corroborative. It did show that not only did favourable conditions for identification exist but also did adequate opportunity.*

*The second appellant was not a stranger to the complainant and his wife. It emerged that he is infact a relative of the complainant and is known by the name Hassan Mogaka.*

*The prosecution's evidence was generally adequate and satisfactory for a holding that the two appellants were involved in the material robbery and further that the second appellant was also involved in assaulting and occasioning bodily injury to the complainant's wife (PW3). It displaced the defence raised by each of the appellants."*

On our reading of the evidence on record, and with great respect to both the courts below, we are of the view that the identification of the appellants as the attackers was doubtful for the following reasons: given that the entire prosecution case rested on the credibility and proper identification by the complainant and two members of his family, the two courts below failed to note two serious issues that compromised the credibility of these witnesses. First, given the poor lighting conditions at the house, (only one lantern which was broken by the intruders within the first minute of their entry into the house), the courts did not inquire into whether one minute was sufficient to properly recognize the intruders, who, the family had seen only ten times prior to the incident. Secondly, the fact that the victims failed to give the names of their attackers to the neighbours who came to their rescue, and did so only to the police much later, lent credence to the appellants' claim that they had been set-up.

With regard to the second issue, both the appellants had an alibi - that they were elsewhere at the time of the incident, and that there were specific reasons why they believed they had been arrested – in the case of the 1<sup>st</sup> appellant that he refused to testify against the 2<sup>nd</sup> appellant, and in the case of the 2<sup>nd</sup> appellant that he had failed to appear in court in an unrelated matter. There was nothing to rebut these defences. The burden is not on the appellants to prove their innocence. It is on the prosecution to prove them guilty beyond reasonable doubt. We are of the view that the prosecution did not discharge this burden. With regard to the complaint that the “*language*” of the court was not recorded, we see no basis to that argument. It has been properly recorded.

Accordingly, we find the convictions to be unsafe, quash the same, set aside the sentences imposed on both the appellants and order that they be released from prison forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 23<sup>rd</sup> day of June, 2011.

**S.E.O. BOSIRE**

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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.**