



IN THE COURT OF APPEAL  
AT KISUMU

(CORAM: OMOLO, VISRAM & NYAMU, J.J.A)

CRIMINAL APPEAL NO. 517 OF 2010

BETWEEN

JOHN OMONDI OKOTH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(An appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ) dated 9<sup>th</sup> June, 2009*

In

**H.C. Cr. A. Nos. 118 & 127 of 2008)**

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JUDGMENT OF THE COURT

John Omondi Okoth, the appellant herein, was tried and convicted on one count of robbery with violence contrary to **section 296 (2)** of the Penal Code, the particulars of the charge being that on the 30<sup>th</sup> day of December, 2007 at Ugunja Township in Siaya District of Nyanza Province, the appellant, jointly with others not before the court, and while armed with dangerous weapons namely guns, robbed Lukas Omondi Rakama of K.Shs.12,000/- and one mobile telephone make Nokia 2600 S/No. 355669008223938 valued at K.Shs.8,600/- and at or immediately before or immediately after the time of the robbery, threatened to use actual violence to the said Lukas Omondi Rakama. Upon his conviction, the appellant was sentenced to death. He appealed to the High Court at Kisumu, but that court (Mwera and Karanja, JJ), by its judgment dated and delivered on 9<sup>th</sup> June, 2009, dismissed the appeal. The appellant now appeals to the Court and since the appeal to the Court is a second one, the Court can only deal with issues of Law.

The first issue of law which Mr. Onsongo, learned counsel, argued on behalf of the appellant is to be found in ground two of the appellant's grounds of appeal, namely:-

***“The superior court erred in law in relying on the doctrine of recent possession to dismiss the Appellant’s appeal when the evidence on this issue was conflicting, unsatisfactory and in relation to fast moving item (mobile phone) when a period of almost two months had passed.”***

On this ground, Mr. Onsongo submitted that the complainant Rakama (PW1) was attacked during the

evening of 30<sup>th</sup> December, 2007, but he did not report to the police, his reason for not doing so being that it was during the post-election violence. Rakama was eventually summoned and went to the police station on 19<sup>th</sup> February, 2008 when he was shown his recovered telephone. It was not clear from the recorded evidence who had taken the telephone to the police station. Raphael Odhiambo Ochieng' (PW2) said that the appellant went to him with three mobile telephones, among them a Nokia 2600. While inspecting the telephones, Ainea Odhiambo Onyango (PW3) approached and on seeing him, the appellant disappeared. It appears that at the time Raphael was receiving the telephone another person called Reagan was present. Reagan was never called to come and testify. Raphael received the three telephones on 17<sup>th</sup> January, 2008; it appears he took them to the police station on 19<sup>th</sup> February, 2008, and during that period, i.e. from the time he received the telephones to the time he took them to the station, he did not seek to trace the appellant and return the phones to him. It is to be remembered that Ainea whose approach had made the appellant disappear from the scene was involved in community policing and that ought to have put Rakama on his guard. In the end, Mr. Onsongo submitted that the prosecution had failed to satisfactorily prove that the appellant had been found in recent possession of Rakama's telephone and since that was the only basis upon which the superior court confirmed the conviction of the appellant, the appellant ought not to have been convicted. Mr. Gumo, the learned Assistant Director of Public Prosecutions, agreed with Mr. Onsongo and conceded the appeal. Taking into account all factors surrounding the appellant's alleged recent possession of the telephone, we are satisfied that the appellant's conviction was, in all the circumstances, unsafe and that Mr. Gumo was right to concede the appeal. We accordingly allow the appeal, quash the conviction, set aside the sentence of death and order that the appellant shall be released from prison unless he is held for some other lawful cause. Those shall be our orders.

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

**R.S.C. OMOLO**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

**J.G. NYAMU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**