**IN THE COURT OF APPEAL**
**AT KISUMU**

**(CORAM: O'KUBASU, WAKI & ONYANGO OTIENO, JJ.A)**
**CRIMINAL APPEAL NO. 173 OF 2006**
**BETWEEN**

**OSBON ONDITI OUKO ..... 1ST APPELLANT**
**DICKSON OKELLO OUKO ..... 2ND APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(An appeal from a judgment of the High Court of Kenya at Kisumu (Bauni & Warsame, JJ.) dated 24th March, 2006***

**in**

**H.C.CR.A. NO. 192 OF 2004)**
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**JUDGMENT OF THE COURT**

The two appellants herein, ***Osbon (Hesborn) Anditi Ouko (Osbon)*** and ***Dickson Okello Ouko (Dickson)*** are brothers. Together with one other person, they were charged before the Senior Resident Magistrate, Homa Bay (B. Ochieng, SRM) on two counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code and, together with a fourth person, on one count of being in possession of a firearm contrary to ***section 4 (3)*** of the Firearms Act Cap 114 Laws of Kenya. The allegation in the first count was that: -

**"1. OSBON ANDITI OUKO, 2. DICKSON OKELLO OUKO 3. CHARLES KICHA OLIMA: On the 13th day of April, 2002, at Ukula Beach, Kaksingri Central Location, In Suba District within Nyanza Province, jointly while armed with a dangerous weapon namely an AK 47 rifle S/No. 4311 robbed ABDI FARAH of Kshs.120,000/= and at or immediate before or immediately after the time of such robbery used personal violence to the said ABDI FARAH."**

The second count was on the same particulars but was related to ***John Odhiambo Okoth*** from whom shs.10,000 was stolen, while the third count related to the firearm found on 29th May, 2002 at North Sakwa Location in Migori. The fourth person enjoined in the third count died in the course of the trial while the third accused was acquitted by the trial magistrate for lack of evidence after trial. The two appellants were however convicted on all counts and were sentenced to serve 5 years imprisonment on the firearm charge, and at the same time, to suffer death by hanging in respect of the two robbery charges. In passing, we must state that those sentences were improper as the appellants could not be hanged twice over and still serve a five year sentence! Only one sentence of death ought to have been imposed while the others would remain in abeyance. That anomaly was not corrected by the superior court and we now do so. The superior court nevertheless re-examined the record and arrived at the same conclusions as the trial court before dismissing the appeals.

Osbon and Dickson now come before us on this second and last appeal which may only lie on matters of law (***Section 361*** Criminal Procedure Code). Osbon was represented before us by learned counsel Mr. L.G. Menezes, while Dickson was represented by learned counsel Mr. J. Musomba. The memorandum of appeal put forward by Mr. Menezes was fairly extensive and contained the following 12 grounds:

*"1. The first appellate court manifested its perfunctory approach to the appeal by not even making itself aware that the 4th accused person SAMWEL KOSWAGO had passed away in prison and that this was duly noted in the court record.*

*2. The first appellate court did not consider at all the fact that the frequent adjournments at the behest of the prosecution, without the appellant allowed to comment infringed his constitutional right to such a degree as to have warranted an acquittal on this ground alone.*

*3. The first appellate court erred in law in not finding that the appellant's constitutional rights were infringed in that he was not supplied with witnesses' statements and other exhibits before the commencement of the trial.*

*4. The first appellate court should have found and held that the identification parades left very much to be desired vis-à-vis the Forces Standing Orders, more particularly as the appellant was an unsophisticated person or (sic) from the rural areas.*

*5. The appellate court failed to find that there was no nexus between the firearm produced in court and the one allegedly used in the alleged robbery.*

*6. That the appellate court abdicated its duty to: -*

*b) Re-evaluate the evidence and draw its own conclusions is manifested in it not evaluating and commenting on the evidence of PW8 Inspector ZABLON SHITANDA with regard to alleged confession of accused DICKSON OKELLO OUKO without any caution being administered to the said accused.*

*b) PW8 carried out the same 'mischief' with regard to the present appellant.*

*7. The appellate court erred in law in not considering the fact that the appellant had given evidence on oath and yet the prosecutor had not cross examined him on the substance of the charges he faced thereby implying that the prosecutor believed the appellant's evidence.*

*8. The appellate court erred in law in not holding that identification of the appellant by PW1 was dock identification – as he had not attended the identification parades.*

*9. The appellate court misdirected itself in law in not considering, or not sufficiently considering the appellant's defence – other than to simply summarise it without more.*

*10. (a) The appellate court erred in treating the charges against the appellant as to be simply glossed over and then ignored. Ingredients of the charges do not conform with the evidence presented.*

*(b) The appellant thereby faced a "triple jeopardy" charge which was not in conformity with the evidence before the court.*

*11. The appellate court erred in law in not finding that the trial magistrate abdicated his duty under section 210 of the Civil (sic) Procedure Code in not acquitting the 3rd accused at close of the prosecution case. This abdication of duty was surely reflected in his approach to the entire case.*

*12. With regard to sentence, this appellate court, if it is minded to dismiss the appeal, should consider options before it in the light of the evidence and the overall behavior of the appellant during the*

*robbery."*

On the other hand, Mr. Musomba put forward six grounds, on behalf of Dickson thus:
*"1. THAT the charges were fatally defective for duplicity.*

*2. THAT the statement of offence and the particulars were not in consonance and the aggravation finally forming the basis of conviction, greatly prejudiced the accused defence.*

*3. THAT the accused were found guilty of offences they were never charged with.*

*4. THAT the evidence did not support the charge of robbery with violence contrary to section 296 (2).*

*5. THAT the constitutional rights of the accused were violated in that the accused were kept in custody way longer that the statutory period permissible.*

*6. THAT the accused's constitutional rights were violated in being charged with a non-specified offence."*

We shall examine those grounds presently.

The facts which came from eight prosecution witnesses and the two appellants are fairly short and straightforward. ***Abdi Farah Mohamed*** (PW1) (***Abdi***) was in the business of buying fish from various fishermen in Lake Victoria for sale to his principals in Nairobi, ***M/S. Wet Fish Processing Factory***. On 13th April, 2002, he was in Mbita area in a medium sized motorboat, 5 – 6 metres long, whose coxswain was ***Jared Omondi Opiyo*** (PW3) ***(Omondi)***, and loader ***William Okello Agunda*** (PW4) ***(Okello)***. They were joined by ***APc. John Odhiambo Okoth*** (PW2) ***(APc. Okoth)*** who was based at Mbita District Headquarters but had sought a lift in the boat. There was also a lady passenger in the boat. At about 8.30 a.m., the group landed in Ukula Beach in Gwassi where Abdi used to buy fish and he distributed some money to his agents. They then prepared to set off to the next stop, Uterere Beach. Just then, some two persons approached Abdi and asked him for a lift. Abdi agreed and they boarded the boat. One of them was carrying a travelling bag. After about 10 minutes and 200 metres into the lake, the bag-carrying man produced a gun, an AK 47 rifle, and commanded everyone to lie down. They all did except Omondi the coxswain. The man then ordered Abdi to remove all the money he had as well as his jacket and Abdi complied. He gave out Kshs.110,000 from his jacket as the other man frisked him and removed Shs.10,000 from his trousers. His two jackets were also taken. The second unarmed man also took Shs.10,000 from APc. Okoth and Shs.7,100 from the woman passenger. The assailants then ordered the coxswain to proceed to Ragwe where they disembarked near Ragwe Primary School and disappeared. One of the victims raised an alarm and some passersby responded but when they saw the gun held by the assailant they fled. The incident lasted about 15 minutes. No shots were fired from the gun.

The victims proceeded to Sindo District Officer's office where they reported the matter and an attempt was made to pursue the assailants but in vain. The report was also made at Mbita Police Station.

About 45 days later on 28th May, 2002, APc. Okoth was at Sindo market when he spotted one of the two assailants at the beach. He rushed to the District Officer's Office and obtained reinforcement of two other officers, including ***APc. Samwel Maiyo*** (PW5) and proceeded to the beach. When the person saw the officers, he took to his heels and the officers gave chase. He was arrested and taken to Mbita Police Station and was handed over to ***IP Zablon Shitanda*** (PW8) who was the investigating officer. That person was Dickson.

On being interrogated by IP Shitanda, Dickson admitted his involvement and implicated his brother Osbon, who was found in his house at Rongo. Osbon gave information which led to the recovery of the gun behind the house of their cousin, 3rd accused, in North Sakwa Location. Osbon and the 3rd accused were arrested. The fourth accused (deceased) who was arrested on information received from Dickson

and Osbon was said to have been a medicine man who gave them charms as they carried out their missions and shared the loot.

The recovered rifle was examined by ***Johnston Musyoki Mungella***, (PW6) a firearms examiner at the CID Laboratory Headquarters, Nairobi, who confirmed that it was an AK 47 rifle 7.2 caliber designed to chamber 7.62 x 39 mm ammunition. It was intact save for the detachable magazine which was replaced by an imitation wooden one, but fitted in the magazine well of the rifle. He successfully test fired the gun by using three rounds of appropriate ammunition and confirmed that it fitted the definition of a firearm.

On 3rd June, 2002, IP Shitanda requested IP Mutweta Kariuki (PW7), the OCS, Mbita Police Station to conduct an identification parade in respect of Osbon. The parade was held at Mbita Police Station and the parade officer invited 12 persons from the police cells and some civilians to take part. The first identifying witness was Okello and he identified Osbon by touching him. The witness Omondi also came along and identified him. Another parade was conducted on the same day in respect of Dickson after the parade members were reshuffled and reduced to eleven and he was picked out by Okello and Omondi. The two appellants signed the parade forms and expressed their satisfaction with the conduct of the parade. The following day, IP Kariuki organised another parade in respect of Osbon who was identified by APc. Okoth.

The two appellants were subsequently arraigned in court for the offences stated earlier. In his defence, Osbon gave sworn testimony that Police Officers from Kamagambo Police Station went to his shop at Rongo at 3 a.m. on 30th May, 2002 and woke him up. They searched his shop and found nothing. They arrested him and took him to Mbita Police Station where he was interrogated over a period of 11 days before being taken to court and charged with a robbery case he knew nothing about. He stated that he was in partnership with his brother Dickson in the business of selling utensils but Dickson was hawking his wares from place to place. Dickson confirmed in his sworn testimony that he was dealing in utensils and that he was in Mbita Market on 29th May, 2002 selling his merchandise. At 7 p.m. he packed his wares and took them to the bus stop but found no transport. While he stood there, two Administration Police officers came along and demanded to know what he was doing there. He told them he was waiting for a matatu but they asked for receipts of his merchandise which he said he did not have. They solicited a bribe which he could not give and he was arrested. They took him to Mbita Police Station where he was interrogated and the following day they brought his brother to the same station. Eventually the two were charged jointly with an offence he knew nothing about. He denied giving information to the police leading to the arrest of his brother or the recovery of the AK 47 rifle.

The trial magistrate evaluated the evidence before him and had no difficulty in finding that the two appellants were involved in the robbery. He expressed himself thus:

"*From the time the said two accused persons approached PW1 at the beach up to the time of the robbery they were in full view of the said prosecution witnesses constantly and none of them made any efforts to cover their faces or try to conceal their identity in any manner. The robbery occurred after 10.00 a.m. in broad daylight on a sunny clear day with good visibility.*

*The said prosecution witnesses evidence relating to the time of day, the close proximity from which they saw the two accused persons and for a considerable length of time and the opportunities that they had to do so in my view completely rules out any possibility of a mistake. PW1 – 4 struck me as credible and reliable witnesses. Their evidence as to the sequence of events and the role each of the two accused persons played was consistent and cogent and they corroborated each others evidence.*"

He also believed the evidence of APc. Okoth that he bumped into Dickson at Sindo township on 28th May, 2002 and identified him before arresting him after a chase. He evaluated the evidence on identification parades which he found were held in accordance with the Force Standing Orders and confirmed the visual identification of the appellants at the scene by the three witnesses. He concluded:

"*Taking into consideration the foregoing, I am satisfied that accused 1 and 2 did rob PW1 and 2 of money as alleged in the particulars of count I and II. At the time of the robbery they were armed with an*

*AK 47 rifle. It is the evidence of PW1 – 4 that no shots were fired during the robbery nor was any of them assaulted by the two thugs. Nevertheless the rifle they were armed with was a dangerous weapon and accused 1 threatened to make use of it by training it at their victims as they robbed them. The victims were certainly apprehensive that accused 1 might use the rifle at the sign of the slightest resistance on their part and they cowered in fear.*

*Pw6 (Ballistic Expert) successfully testified the rifle and confirmed that it was a firearm in terms of the Firearm Act (cap 114) and produced a report and 3 cartridges he used to test fire same as exhibit No. 5 and 6 respectively. The fact that they were more than one person at the time of the robbery (accused) and further that they were armed with a dangerous weapon, to wit a rifle, in my opinion aggravated the offence to that of robbery with violence. I therefore do find both accused 1 and 2 culpable for the first two counts of robbery with violence contrary to section 296 (2) Penal Code as charged."*

For its part, the superior court re-examined the evidence on record and arrived at the same conclusion, stating:

**"The evidence against them was overwhelming and unchallenged. The incident took place in broad daylight. It was at 8.30 a.m. The witnesses PW1, 2, 3 and 4 all told court that they were able to see the two appellants very clearly. The two had not disguised their faces in anyway. PW2 saw the 2nd appellant weeks later and was able to identify him. He identified him to A.P.s who arrested him. Later an identification parade was held and he was identified by PW3 and 4. When the first appellant was arrested another parade was held and he too was identified. PW1 the complainant in count 1 did not take part in the parade but he explained that when they were arrested he was away in Garissa.**

**The appellants were just the two of them when they robbed PW1 and 2. They did not injure them but they were armed with a dangerous weapon an A.K. 47 rifle. They threatened to use violence on their victims.**

**PW1, 2, 3, 4 & 5 all identified the gun produced in court as the one the 1st appellant produced from his bag and threatened them with. It was recovered much later but they were able to identify it. PW2 was a police officer and knew about guns and he confirmed the gun the 1st appellant produced was an A.K. 47 rifle."**

These are the findings which aggrieved the appellants. We shall first deal with the issues raised by Osbon through learned counsel Mr. Menezes. In urging the appeal, Mr. Menezes argued grounds 1, 2, 4, 6, 7, 8 and 9, and abandoned the rest of the grounds. His submissions may be summarised: -

The superior court, he observed, was casual in its evaluation of the record by stating that the trial court had said nothing about the 4th accused when the record was clear that the trial magistrate recorded the death of the 4th accused and terminated his case under ***section 87 (a)*** of the Criminal Procedure Code. That, in his view, was proof that the superior court did not re-evaluate the evidence. Further lack of evaluation was proved by the omission by the superior court to find and hold that the purported confession by Dickson to IP Shitanda that he had participated in the robbery and implicated Osbon was not made under caution and was therefore inadmissible. It was the same officer, Mr. Menezes observed, who had tendered confusing evidence of recovery of the rifle, thus putting his credibility in issue. He further attacked the purported identification of Osbon by Abdi who never attended any identification parade and dubbed it as dock identification. The identification parades themselves were also of no probative value, he submitted, since the appellants were not allowed to have access to advocates, the witnesses simply walked to the suspects without looking at the other members of the parade thus raising suspicion, and also because *"police officers"* were part of the members of the parade. As regards the defence of the appellant, Mr. Menezes contended that it was not considered although it was made on oath and there was no cross-examination by the prosecutor on the rifle which formed part of the charges. Indeed, he submitted, the superior court made no reference to the defence which was further evidence of non-evaluation of the evidence. Finally, Mr. Menezes attacked the long period of four months when the appellant awaited his trial as the prosecution kept on seeking adjournments on the ground that the ballistics expert's report had not been submitted to them. On all those occasions the appellant was not

asked by the court whether he had anything to say on the application for adjournment. There was therefore a violation of the right to fair and quick trial thus entitling the appellant to acquittal on that ground alone.

The submissions of Mr. Musomba may also be summarized. The thrust of his argument, if we understood it, was that the absence of violence in the alleged robbery and the fact that the alleged offensive weapon, the AK 47, had a wooden magazine and therefore not a dangerous weapon, would reduce the offence to one of simple robbery under ***section 295*** as read with ***section 296 (1)*** of the Penal Code. The two sections provide as follows: -

**"295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent of overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.**

**296. (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years."** (Emphasis added).

According to Mr. Musomba, the particulars of the offence facing the appellants in this matter simply referred to use of personal violence on the victims and also referred to a joint enterprise with a dangerous weapon. The evidence however was at variance because the victims did not testify to personal violence having been used against them while the purported weapon was only a fake. To that extent the charge sheet was defective since the facts fit into the definition of robbery under ***section 295***. To put it differently, in his view, ***section 296 (2)*** under which the offence was charged has three elements of aggravated robbery:

- "armed with dangerous weapon"
- "in company with one or more others"
- "wounds, beats, strikes or uses personal violence"

As there was no aggravated violence or dangerous weapon in the case before us, he submitted, the prosecution should simply have charged the element of *"company with one or more others"* if they wanted to rely no ***section 296 (2)***. As it is, they ended up confusing the appellant who thought he was in court because he had used violence and was prepared to meet that charge which can only arise under ***section 295*** of the Penal Code. In the end the prosecution ended up attempting to prove an offence which was not charged contrary to ***section 77 (8)*** of the former Constitution which prohibited conviction for a criminal offence which is undefined and a penalty provided for in written law. The statement of offence, in his view, was also contrary to ***section 137*** of the Criminal Procedure Code which governs the framing of charges since the statement of offence in this case ought to have been *"Robbery"* and not *"Robbery with violence."* Mr. Musomba concluded with the submission that where a person is charged with "Robbery with violence" they cannot be found guilty of gang robbery, but a lesser and cognate offence under ***section 179*** of the Criminal Procedure Code.

Mr. Gumo, the Assistant DPP supported the conviction and sentence and urged us to uphold them.

We have anxiously considered the record before us and the submissions of both counsel on the issues of law raised. We think it would be prudent to deal with the issues raised by Mr. Musomba for the 2nd appellant first as they are not entirely novel but were argued with some dexterity. We say so because Mr. Musomba has advanced similar arguments before in relation to the construction of sections 295 and 296 of the Penal Code, but his construction was overruled. That was in the case of **Joseph Onyango Owuor & Anor. vs. Republic Cr. Appeal No. 353/08 (ur),** which Mr. Musomba did not draw our attention to. We may reproduce the argument advanced at the time and the holding of this Court thereon:

**"In urging the appellants' respective appeals Mr. Musomba put forward various**

**arguments. Firstly, he submitted that *section 296 (2)* of the Penal Code as worded does not create an offence but merely makes provision for punishment for the offence of robbery with violence. *Section 296(2)* of the Penal Code, provides as follows:**

**"296 (2) if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

**Mr. Musomba submitted that unless the aforequoted sub-section is read with *section 295* of the Penal Code, then reliance on *section 296(2)*, above, without more will not disclose the commission of an offence. *Section 295* of the Penal Code defines the offence of robbery. Section 296(1) and 296(2) of the Penal Code, have a common marginal note, namely "*punishment of robbery*". In this country marginal notes are as a general rule, read together with the section. By the *ejusden generis* rule *section 296 (1)* and *296 (2)*, have to be read together. *Section 296(1)*, above, provides that a person who commits the felony of robbery is liable to imprisonment for fourteen years. So that when dealing with the offence under *section 296(2)* of the Penal Code one has to read the statement of the offence as referring to the aggravated circumstances of the offence, or the robbery provided for under *section 296(1)* of the Penal Code. It is no wonder therefore the 2nd schedule of the Criminal Procedure Code, provides for one standard form for an offence under both *section 296(1)* and *296 (2)* of the Penal Code. The Standard Form reads as follows:**

"8 – ROBBERY

Robbery with violence contrary to section 296 of the Penal Code.

PARTICULARS OF OFFENCE.

A.B. , on the ……. Day of …… 19…. in…….. District within the ……. Province, robbed C.D., of a Watch, and at, or immediately before or immediately after the time of such robbery did use personal violence to the serial C.D."

**As we stated earlier, the marginal note provided under *sections 296(1)* and *296 (2)* is one, namely, "*punishment of robbery.*" For the foregoing reasons, it is our view that Mr. Musomba's argument has no merit.**

**Likewise the submission that the violence envisaged under *296 (2)* is different from that envisaged under *section 295* of the Penal Code is untenable. *Section 295*, does not deal with the degree of violence being merely a definition section. It is analogous to *section 268* of the Penal Code which deals with the definition of "*stealing*" and subsequent sections which deal with different categories of the offence of stealing. *Sections 296 (1)* and *296 (2)* of the Penal Code deal with the specific degrees of the offence of robbery and have been framed as such.**

**There was also the related ground that the appellants' Constitutional rights under *section 77 (8)* of the Constitution had been violated. Mr. Musomba submitted that in view of what he termed as a vague statement of the offence of robbery, the appellants were not able to formulate a plausible defence. *Section 77 (8)*, above, provides as follows:**

**"77(8) No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefor is prescribed, in a written law."**

**Following his earlier submission that the statement of the offence for an offence under *section 296 (2)* of the Penal Code did not disclose an offence Mr. Musomba submitted that because of that fact, appellants were prejudiced. In view of what we stated earlier in this judgment this submission is untenable. That is also true concerning the submission that the particulars of the offence for all the robbery counts are duplex. The particulars merely disclose different ways of committing the**

**offence of robbery with violence under *section 296 (2)* of the Penal Code."**

We perceive that the arguments raised in that case are the same in substance to the arguments made before us. That is particularly so on the submission that the *"violence"* envisaged in ***section 295*** is different from that envisaged under ***section 296 (2)***. But, as stated in the earlier decision, ***section 296 (1)*** and ***296 (2)*** deal with the degree of violence which section 295 does not. In answer to the issues raised by Mr. Musomba therefore, we apply the earlier findings of this Court on the law and reject them. The argument, as we see it, was an attempt to escape the rigours of this Court's decision in **Johana Ndungu v Republic Cr. Appeal No. 116/1995 (UR)** without attempting to distinguish that authority. The ***Ndungu Case*** emphasized the three elements of robbery with violence under ***section 296 (2)*** but found no duplicity in charging all three elements in one count, even when the evidence may elicit no connection with one or two of those elements. In the nature of things, all three elements may or may not be present in one robbery incident, but the offence will be complete if only one of those elements is proved. We shall let the court speak for itself:

"**In order to appreciate properly as to what acts constitute an offence under *section 296 (2)* one must consider the sub-section in conjunction with *section 295* of the Penal Code. The essential ingredient of robbery under *section 295* is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:**

**(1) If the offender is armed with any dangerous or offensive weapon or instrument, or**

**(2) If he is in company with one or more other person or persons, or**

**(3) if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."**

The facts in this case establish that the 2nd appellant was in the company of one other person in the joint enterprise of the robbery. That element alone must be read in conjunction with ***section 295*** whose essential ingredient is "*use or threat to use actual violence*." All the victims testified and were believed that they were threatened with the use of a firearm and ordered to lie down in the boat, which orders they complied with. It would be idle to argue that that did not amount to a threat to violence. It was calculated to cause fear and apprehension that immediate and unlawful violence was about to be visited upon then. It was a violation of their right to do what they wanted in the boat and instead had to do what they were commanded to do by the assailants. In **Abubakali & Another v Uganda [1973] EA 230**, the predecessor of this court discussed a parallel argument with respect to ***section 274*** (2) of the Penal Code which is similar to ***section 297*** (2) of the Penal Code except for some textual differences and stated:

**"He then submitted that the evidence in this case showed that there was no actual physical assault but only the use of firearms to intimidate the by-standers and employees of the company.**

**This is not without merit and we have found it difficult to understand exactly what the words in section 274 do mean. The crime defined under section 274 can be divided into three parts. First the assaulting of another person, secondly that this assault is done with an intent to steal and then thirdly that contemporaneously with the assault the offender *"uses or threatens to use actual violence to any person or property in order to obtain the article to be stolen, etc."* this section would appear to envisage two separate acts or two separate assaults. First the assault against the complainant, coupled with the intention to steal, and the "*at, or immediately before, or immediately after*" the use or threat of actual violence in order to carry out the theft. It would appear however that in the majority of cases the assault and the use of actual violence would be done by one and the same act.....**

**"272. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain...."**

**It appears that section 274 could have been considerably shortened and perhaps made more intelligible if the section had said "*any person who assaults any other person with intent to rob commits a felony*." In the present section the addition of the words after *"with intent to stealing any thing"* make it clear that the assault with intent to steal is done under circumstances which would amount to an assault with intent to rob. The essential element of robbery is the stealing against the will of the complainant by the use of force or by putting or seeking to put such person in fear."**

We think we have said enough to satisfy ourselves that the issues of law raised by Mr. Musomba are devoid of merit and we reject them. As there was no other challenge laid on the conviction of the 2nd appellant, it follows that his appeal has no merit and is hereby dismissed.

We now turn to the submissions of Mr. Menezes. The complaint is not without merit that it took four months before commencement of the trial when the prosecution was waiting for a ballistics expert's report. The observation is also correct that the 1st appellant was not asked for his opinion when the court granted adjournments to the prosecution over that period. However, as Mr. Gumo, Assistant DPP observed, correctly in our view, the issue was raised for the first time before this Court although the appellant was represented by counsel in both the trial court and the superior court, and the delay must be taken to have been waived or having caused no prejudice. The more substantial attack was on the evidence relating to identification at the scene and the subsequent identification parades held to test the veracity of such identification. We have no difficulty in finding, as the two courts below did, that the conditions prevailing at the scene of the crime were conducive to positive identification. It was in broad daylight and the victims and the assailants, who were undisguised, were in close proximity in the boat for a considerable period of time and engaged in conversation as they carried out the robbery. We also find little substance in the criticisms leveled at the identification parades. The parade officer (PW7) was believed in the manner in which he organized the parade in accordance with the Force Standing Orders and in the parade membership. The officer testified that he drew the membership "*from the police cells and others civilians from outside.*" and specifically denied in cross-examination by defence counsel that there were "*police officers*" in the parade. The parade forms were also signed by the appellant to confirm his satisfaction with the procedure. We find no reason to differ from the findings of the two courts on identification and affirm them.

As for the submissions that there was failure to re-evaluate, we agree with Mr. Menezes that there was an inexplicable lapse by the superior court in failing to note the recorded fact that the 4th accused had died and his case was terminated. We do not agree however that the omission vitiates the entire record of the superior court which in our view, substantially met the standards of re-evaluation sufficient to resolve the issues of fact and law before that court. As we have said before, there is no set format to which re-evaluation of evidence should conform. It depends on the circumstances of each case and style of the first appellate court, but the test in the end remains a question of substance. See **Uganda Breweries Ltd v Uganda Railways Corporation [2000] 2 EA 635** at page 641.

We also think the defence of the 1st appellant was considered and found wanting in the light of overwhelming prosecution evidence. As correctly observed by Mr. Gumo, it dwelt on the day and circumstances of the appellant's arrest and did nothing to dent the prosecution case.

All in all the appeal of the 1st appellant is similarly wanting in merit and we order that it be and is hereby dismissed.

Orders accordingly.

***Dated and delivered at Kisumu this 28th day of July, 2011.***

**E.O. O'KUBASU**

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

**P.N. WAKI**
**.....**
**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**
**.....**
**JUDGE OF APPEAL**

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

**DEPUTYR EGISTRAR**