



**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: BOSIRE, WAKI & AGANYANYA J.J.A)
CRIMINAL APPEAL NO. 491 OF 2007
BETWEEN

CHARLES ONYANGO OTIENO APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Mugo J.J.) dated 24th
July 2007.**

in

H.C.CR. A. NO. 63 OF 2004)

JUDGMENT OF THE COURT

Following his conviction and sentence by the **Senior Resident Magistrate**, at **Bondo**, on two counts of robbery with violence contrary to **section 296(2)** of the Penal Code, and two counts of assault causing actual bodily harm contrary to **section 251** of the Penal Code, **Charles Onyango Otieno**, the appellant, appealed against both conviction and sentence to the High Court which dismissed the same and hence the appeal before us.

In a memorandum and supplementary memorandum of appeal filed on his behalf by his advocate, Mr. Amondi, the main issue of law raised is identification. It was the only ground which Mr. Amondi submitted on when the appellant's appeal came before us for hearing.

The offences for which the appellant was convicted and sentenced were committed at about **9 p.m.** on **17th June 2003**. The prosecution case was that a gang of robbers numbering about ten surprised **Raphael Okwach Ogolla** (PW1) at his house at **Ajigo sub-location in Bondo District**, after forcing open the door into his said house. He was asleep and suddenly a person flashed a torch directly on his eyes. Immediately another person cut him with a sharp weapon, dragged him out of bed and forced him to go under the same bed. After a moment the same person ordered him to come out after which that person and several others demanded some money from him. The appellant directed them to the table which was nearby on which PW1 had left **Kshs.3,300/=**. The robbers got that money and pocketed it.

PW1 was a married man with two wives and each of the wives had her own house. They too were attacked by the same robbers, who, when either of the wives came out to find out what was happening to their husband, she was attacked and beaten thoroughly before being led into PW1's house. The two women, **Florence Okello** (PW4) and **Millicent Adhiambo Okwach** (PW3) were taken to the presence of PW1. In their presence the robbers beat and cut PW1 severally. They also went to the house of one **Frederick Otieno Okwach** (PW2), who was PW4's son and after beating him, they frog-marched him to his father's house where he was made to strip naked and was forced to have sexual intercourse with

Millicent Okwach, who was his step-mother. Some of the robbers wanted him to have sexual intercourse with his own mother, Florence Okello, (PW4) and as soon as his said mother had been made to remove her pants for that purpose, one of the robbers intervened and stopped the move.

The robbers remained in PW1's house for about 3 hours, after which they left with several items, among them, a bicycle, 3 lamps, clothes, a land certificate, an identity card, a radio cassette and radio. PW1 testified that he managed to identify the appellant through his voice and visually with the aid of torch light from a torch the robbers had. PW3 identified the appellant as the person who beat her and frogmarched her to PW1's house. Like PW1 she was able to recognize the appellant, a person she knew well before, through torch light. PW4 identified four robbers who included the appellant. PW2 though at the scene at the material time did not identify the appellant. He identified one of the appellant's six co-accused. The other witness who said that he recognized the appellant was E.O ((PW6) an 11 year old boy who gave his evidence on oath as the trial magistrate was satisfied that he understood the meaning of an oath. On the basis of the decision in the case of **Kibageny v. R.** [1959] EA 92 he was a child of tender age and hence the need for a *voir dire* examination which the trial magistrate properly held and upon which basis he decided that the witness understood the meaning of an oath. The witness picked one of the appellant's co-accused in an identification parade which **Justus Bundi** (PW7) a police inspector then attached to Bondo CID Office, conducted.

The appellant was arrested by **James Obuya Obuya** (PW9) the **Assistant Chief of Ajigo sub-location**, to whom a report of the robbery was made. According to the witness, PW3, PW4 and PW1's children named the appellant among other people, as one of the robbers at PW1's house. He went to the appellant's home where he found him asleep and arrested him. Nothing relevant to this matter was recovered from him.

PW1, his son and two wives were taken to Bondo District Hospital for treatment. A medical examination conducted later on them revealed that PW1 had suffered cut wounds on his head; Florence Okwach, similarly had a cut wound on her head and shoulder, PW2 had a cut wound on his head and Millicent Adhiambo Okwach, too had a cut wound on her head.

The appellant was charged with 8 others with one count of robbery with violence; with seven others with a second count of robbery with violence; with 8 others with two counts of the offence of indecent assault on a female contrary to **section 144(1)** of the Penal Code; and with 8 others of two counts of assault causing actual bodily harm contrary to **section 251** of the Penal code. The trial magistrate was satisfied that the appellant was properly recognized by PW1, PW3, PW4, and PW6 notwithstanding that the offence was committed at night time. It was his view that the torch light they used to recognize the appellant produced ample light, and because the witnesses knew the appellant before, were able to recognize his voice and also gave his name to the Assistant Chief of the area soon after the robbery, the identification was unmistakable. He also considered the length of time the robbers remained with the identification witnesses namely 3 hours and reckoned that within that period the witnesses had ample time to observe the appellant as to be able to recognize him.

In his first appeal the appellant's main points of complaint centered on the failure by PW2 to recognize him either by voice or visually, moreso because PW2 and the appellant had allegedly been friends before the incident. It was also his submission then that conditions favouring a correct identification were difficult. The same arguments were raised before us by Mr. Amondi, for the appellant, but we shall revert to that issue later on in this judgment.

In its judgment the High Court, as material, rendered itself thus:

“The appellant was identified, nay recognized by PW1, 2, 3, 4 and 6, all members of the Okwach family whose home was raided by about ten (10) people, on the night in question. Yes, all took place at night but it went on for 3 hours in one house with the robbers demanding for money, assaulting, ordering son and step-mother to do quite outrageous things and so on and so fourth. These were all villagers. They came with a torch... On the very night the assistant chief (PW9) was informed of the robbery and names given to him including that of the present appellant... So no matter that no

exhibit was found on him he had been seen/recognized at the scene, reported on, tracked and arrested by PW9 and 10”.

It is clear the High Court like the trial court came to the conclusion that the appellant was correctly identified. It should be noted however, that the High Court in its evaluation of the evidence, erred in saying that PW2 recognized the appellant. PW2 in his evidence was categorical that the only person he recognized was one **Naboth**, who was the first accused. He did not mention the name of the appellant. Is the error of a fundamental nature as would affect the appellant’s recognition and conviction? We do not think so. The appellant was recognized by PW3, PW4 and PW6 visually, and by PW1 by voice.

Mr. Amondi submitted before us that the identification of the appellant was under difficult circumstances because of poor lighting in the room where the identification took place. It is true that the only source of light the witnesses relied upon was a torch the robbers had. It is also true that the witnesses did not state how strong the light from that torch was. That notwithstanding, the robbers remained in PW1’s house for long. PW4 and PW6 stood by as PW2 was having sexual intercourse with PW3 at the command of the robbers. The robbers ransacked PW1’s house for valuables and some of them who included the appellant were people the witnesses knew well before. PW3 recognized the appellant as the person who attacked her as she came out of her house through a window to check on her husband. Thereafter they remained together for a relatively long time. For the foregoing reasons, we agree with the High Court that the appellant was correctly identified by PW3, PW4 and PW6 as one of the people who robbed PW1 and his son, and assaulted Millicent Adhiambo and Florence Okello Okwach on **17th June 2003**. We have no basis for interfering with his conviction in all those offences. The sentences imposed on the appellant are lawful, and the High Court was right in suspending the execution of the sentences in **counts 2, 5 and 6**. In conclusion the appellant’s appeal lacks any merit and accordingly it is dismissed. Order accordingly.

Dated and delivered at Kisumu this 3rd day of November, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR