REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 453 of 2007

MARTIN ODHIAMBO OCHIENG ………………………………APPELLANT

AND

REPUBLIC……………………………………............……..RESPONDENT

(*Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Mugo, JJ.) dated 20th November, 2007*

in

H.C.CR. A. No. 128 of 2006)

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JUDGMENT OF THE COURT

The appellant, Martin Odhiambo Ochieng was the first accused in the Principal Magistrate's Court in Siaya Criminal Case No. 85 of 2002. He, together with two others faced 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. The particulars of the charges were, on first count, that between the nights of 11th and 12th January, 2002, at Jina sublocation within Siaya District of Nyanza Province, they jointly with others not before court while armed with offensive weapons namely simis, pangas and rungus robbed Florence Omukholo of assorted clothes and cash money Kshs.1,500/= all valued at Kshs.5,000/=, and at or immediately before or immediately, after the time of such robbery wounded the said Florence Omukholo. On the second count, the date of robbery was the same as the date of the first count except that the victim was Adiba Myoga from whom they allegedly stole assorted clothes all valued at Kshs.2,000/= and who was killed during, or immediately before or immediately after such robbery. On the third count, the particulars were that between the nights of 11th and 12th January 2002 at Jina sub location within Nyanza Province, they jointly with others not before court unlawfully assaulted John Opiyo Oyali thereby occasioning him actual bodily harm and in respect of the fourth and last count, the particulars of the assault charge were the same as in third count except that the victim was Joseph Otieno Rabillo.

The three pleaded not guilty of all the charges. As the trial was proceeding before the learned Senior Resident Magistrate (Omenta), the second accused in that case passed on and the case proceeded to conclusion with the appellant and the third accused only. At the end of the entire trial the learned Senior Resident Magistrate, in a judgment dated and delivered on 15th September 2003, found the appellant guilty of all the offences as charged, convicted him and sentenced him to death in respect of the two

counts of robbery with violence and to three years imprisonment in respect of each of the assault charges, the imprisonment sentences to come into effect after the death sentences in counts 1 and 2. We understand this to mean that the trial Magistrate put the sentences of imprisonment in abeyance pending the fate of the death sentences. In convicting the appellant, the learned Senior Resident Magistrate stated *inter alia* as follows:

"**The accused persons have denied committing these offences and have implied they are being framed up. I do not agree with accused persons i.e. accused 1 and 3 as no grudge was implied or shown between them and complainants. I shall dismiss the defence as a fabrication intended to dissuade this court from the truth.**

On the other hand evidence adduced by prosecution is systematic and clearly points at the accused persons. First, the complainants saw and identified accused 1 that night of the robbery. Accused 1 in his statement under inquiry admitted committing the offences and gave the names of his co-accused persons. Though co-accused persons are said to have been with accused 1, no evidence was adduced to implicate then (*sic*) other that (*sic*) the evidence that was actually a confession by accused 1. I do not find it safe to convict accused 2 and 3 on the evidence of their co-accused hence I will find the two i.e. accused 2 and 3 not guilty of the offence and acquit them accordingly under section 215 of the Criminal Procedure Code. Accused 2 who has since died is posthumously acquitted along with accused 3. However case against (sic) of the offences and I find accused 1 guilty of the offences as charged and I shall convict him accordingly."

We observe that the learned Senior Resident Magistrate, in acquitting second accused posthumously, was in error as before the prosecution case was closed and specifically before PW6, PW7 and PW8 gave evidence before him the prosecution made an application before him on 12th June 2003, to withdraw the case against the second accused under **section 87(a)** on grounds that that accused died on 27th April 2003 and the court's response to that application was:

"***Court: So be it."***

Thus the case against the deceased had been withdrawn long before the prosecution closed its case and that accused was not and could not be called upon to defend himself. There was thus no more case against the second accused in respect of which he could be acquitted posthumously.

Be that as it may, the appellant was not satisfied with the conviction that was entered against him and the sentences meted out to him. He appealed against both conviction and sentence in the superior court by way of **Criminal Appeal No. 128 of 2006**. The learned Judges of the superior court (Mwera and Mugo, JJ.) after hearing and considering the appeal, dismissed it on conviction but set aside the sentences of death and substituted them with that of detention during the President's Pleasure. They upheld the prison terms for the assault charges but ordered that the same be held in abeyance. In coming to that conclusion, they had the following to say:

"**On our part we went over the evidence of *Florence Odonde* (PW1), her grandson *John Opiyo* (PW2), *Millicent Adhiambo* (PW3) another grandchild of PW1 and we were satisfied that robbers attacked their home, harassed, beat and injured them. They stole goods from the home. At the same time and place they attacked and killed that family's worker whose name neither witnesses (*sic*) would recall well, but was given as *Adiba Myoga* in the charge sheet (count 2). The thugs slit his throat. We were also satisfied with the evidence from those witnesses that the appellant was among the robbers. They identified/recognized on the material night was credible (*sic*). He had once been employed in PW1's house, so the family members/witnesses knew the appellant. The ordeal took three (3) hours as the thugs went from room to room demanding money, beating up the witnesses and even at some point the appellant wanted to rape Millicent Adhiambo (PW3). So there was talking etc going on. The thugs had many torches. They must have been flashing them about and that is how PW1,2,3 saw and recognized their former employee.**

The evidence of *John Opiyo* (PW2) and *Joseph Rabilo* (PW5) was that they were assaulted on the

material night. They were injured. Medical evidence supported all the cases of injuries and the death of *Adiba Myoga* (see *Dr. Kelly Aloo Okumu* PW8). So all in all the lower court had sufficient evidence on which the conviction on all four counts (two of violent robbery and 2 of assault causing actual bodily harm) was based."

The above decision of the superior court is what prompted the appeal before us. The appellant was not satisfied. He moved to this Court and lodged a memorandum of appeal filed by himself in person in which he raised three grounds of appeal. Later when counsel was assigned to him by the court, the learned counsel, Mr. Obuo filed a supplementary memorandum of appeal citing three grounds that were:

"**1. That the learned Judges erred in not finding that the record did not indicate whether the prosecutor was competent and qualified to conduct prosecution of the case.**

2. That the learned Judges erred in not finding that the identification was made under unfavourable conditions and the same could not form basis for conviction.

3. That the learned Judges erred in not finding that the statement of inquiry was admitted without conducting trial within a trial after the appellant objected to its production."

The facts giving rise to all the above can be briefly stated: **Florence Emma Odonde** (PW1) (*Florence*) lives at Jina sub location of Yala Division. On 11th January 2002 at about 9.00 p.m. she was in her house together with her grandson **John Opiyo** (PW2) (*John*) and her granddaughters **Millicent Adhiambo** (PW3) (*Millicent*) and another also Adhiambo. They were sleeping. She was woken up by screams from her son's house where their employee Adiba was sleeping. She went to the sitting room and woke up the grandchildren but as she was waking them up, she heard a bang on the main door. She tried to hold the door but it was broken and thugs rushed into the sitting room. She ran back into her bedroom and locked herself therein. One of the attackers who she later identified as the appellant scaled the wall and entered into the bedroom. The appellants had several torches. Once in the bedroom, Florence says, the appellant hit her twice on the head and hand. She fell down. The appellant then opened the bedroom and some of his colleagues entered the bedroom. Florence said the attackers were armed with swords and had torches. They cut her on the left cheek and hit her on the right eye, right shoulder, right leg and inflicted several cuts on her back and chest. They then ordered her to rise up and climb on to her bed. The person she identified as the appellant (*with the help of torches the thieves carried and were flashing*) together with another, removed all utensils from the cupboard. They also took fifteen (15) hens. They demanded Kshs.25,000/= or else they would kill Florence. That was, however not available. They left the bedroom and went to the sitting room. **John Opiyo** (PW2) (*John*) who was sleeping in the sitting room was as we have started woken up by Florence. As he was standing by the main door trying to hear what was happening to their worker Adiba (now deceased), about seven people armed with pangas, rungus and torches broke the door and entered the sitting room. John identified one of the invaders as the appellant. He was cut and injured, but he did not know who among the attackers had cut him. John confirmed Florence's evidence that the appellant climbed the sofa set and wall and accessed Florence's bedroom. **Millicent Adhiambo** (PW3) was also sleeping in the sitting room where John was sleeping. She was also woken up by her grandmother Florence and confirmed the evidence of Florence and that of John except that according to her, two people climbed the wall and went to Florence's room. She confirmed further that she saw the appellant who approached her and told her not to look at him and asked her to remove her pants in an attempt to rape her. She told the appellant not to rape her as she was still a child. Those thugs, according to Millicent, took many household goods away. Millicent said the attackers were using torches which they were flashing. That enabled her to recognize the appellant. All those three witnesses were firm on their evidence that they recognized the appellant as he had worked for Florence as a herds boy previously and they saw him by use of the torches the appellant and his colleagues were flashing around the sitting room and in case of Florence, in her bedroom.

Joseph Otieno Rabilo (PW5) (*Rabilo*), was a neighbour of Florence. He heard a loud bang from Florence's house. He woke up, went to **Eliazer Otieno** (PW4) (*Eliazer*), woke him up and having realized that robbery was taking place at the house of Florence, they decided to scare away the thieves by

throwing stones on to the roof of Florence's house. They did so and were successful. The thugs got scared and ran away but one of them charged at Rabilo and Eliazer but did not injure them. Rabilo and Eliazer witnessed the thieves running away carrying a sack containing hens and other items stolen from Florence's house. Later, that night the witnesses, found the body of Florence's employee, Adiba Myoga, in the house of Florence's son. He had been killed by the thugs. Florence was taken to Yala sub district hospital but before that Florence and Eliazer reported the incident to Sinaga police post and later to Yala police station. As **PC John Tununya** (PW3) (*PC John*) and others were preparing to visit the scene, the appellant was taken to the police station by **APC Erick Okumbo** and **APC Makumi** who had arrested him for the offence. The appellant was placed in the cells and PC John and others proceeded with their visit to the scene of the robbery i.e. Florence's house. They removed the body of Adiba Myoga to Yala police station and later to Siaya Hospital mortuary. Later other accused persons were arrested allegedly with the help of the appellant. The post-mortem examination on the body of Adiba Myoga was done by **Dr. Wainaina**, but his report was produced in court by **Dr. Kelly Aloo Okumu** (PW8)(*Dr. Okumu*) as by the time evidence was adduced in court, Dr. Wainaina had ceased being a civil servant. The report confirmed that the cause of death was due to cardio-respiratory arrest due to severe bleeding secondary to cut wounds. Dr. Okumu also produced P3 form in respect of the injuries to Florence. The appellant was thereafter charged with the offences as we have stated hereinabove.

In his defence, the appellant stated that on 11th January 2002 police officers went to his house, ordered him to open the door to his house. He did. The officers ordered him to sit down as others searched the house. They recovered nothing. They tied him and ordered him to lead them to his mother's house. Eventually, he was taken to Yala police station and was placed in the cells. He was asked whether he was still staying with Florence but he said he had stopped being with her as his parents wanted him to go back to school. They then told him that Florence had been robbed and asked him to assist them getting the robbers or else he would face it. He admitted that he worked for Florence for one year but denied the offences.

We have exhaustively considered the evidence most of which we have set out above, the decision of the learned Senior Resident Magistrate, the decision of the superior court, the grounds of appeal, the submission of both learned counsel and the law. The appellant was convicted as we have stated, on two offences of robbery with violence contrary to **section 296(2)** of the Penal Code and two offences of assault causing actual bodily harm contrary to **section 251** of the Penal Code. In respect of the fourth count, the complainant was **Joseph Otieno Rabilo**. He gave evidence as PW5. We have carefully perused his evidence. With respect, we have been unable to connect the offence to his evidence. He in fact does not state in his evidence that he was attacked or in any way assaulted by any of the robbers. What he said in the pertinent part of his evidence was as follows:

"**One of my brothers – Lazarus Otieno got injured during the incident on the left arm. I did not get hurt."**

Further, only Florence and John Opiyo went to the hospital as a result of the injuries they had received during the robbery and the record shows that only two P3 forms one for Florence and the other for Opiyo together with postmortem report of Adiba Myogo were produced by Dr. Okumu during the trial. The Judges of the superior court stated in their judgment that:

"**The evidence of** *John Opiyo* **(PW2) and** *Joseph Rabilo* **(PW5) was that they were assaulted on the material night, they were injured. Medical evidence supported all the cases of injuries and death of** *Adiba Myoga* **(see** *Dr. Kelly Aloo Okumu*)."

Whereas we do agree that Opiyo gave evidence that he was assaulted and medical evidence produced by Dr. Okumu confirmed that, we do not with respect, agree that Rabilo said in evidence that he was assaulted. We have reproduced what he said above. We do not also agree that there was any medical evidence supporting any injuries inflicted on Rabilo. In those circumstances, though this was not a matter raised in the grounds of appeal, we are not satisfied that the conviction of the appellant on that charge – count IV was based on sound evidence. We do not need to add that a court of law can only convict on proper evidence that proves the case beyond reasonable doubt. We allow the appeal in respect of that

offence, quash the conviction and set aside the sentence that was imposed in respect of that count – count IV.

That leaves us with the two counts of robbery with violence and one count of assault. The first ground of appeal set out in the supplementary memorandum of appeal is that the learned Judges erred in not finding that the record did not indicate whether the prosecutor was competent and qualified to conduct prosecution of the case. We note that the appellant is not stating that the prosecutor was incompetent. All he is saying is that the learned Judges should have ascertained that the prosecutor was competent. The record shows that the prosecutor at one stage of the case was one Chabari. Although at the early stages of the proceedings, his rank was not recorded, in the proceedings, on 18th March 2003, the record shows that he was referred to as IP Chabari. On 5th June 2003 and on 12th June when PW6, PW7 and PW8 were heard, the prosecutor was CIP Okoth. The record shows that only those two prosecutors conducted prosecution of the entire case. They are of the rank of Inspector of Police and above. They were competent to conduct the prosecution. Nothing turns on that ground of appeal.

The second ground was on identification. The appellant claimed that identification was made under unfavourable conditions such that no conviction could be based on the same. We do agree that Florence, in answer to the appellant in cross examination said that the batteries of the appellant's torch were low. But that was in reference to the torch the appellant had and not to the other torches held by other attackers. There was evidence that the thieves had many torches whose torch light the witnesses used to recognize the appellant. Further, this was a matter of recognition and not identification of a stranger. Florence, John and Millicent, all stated that they recognized the appellant who had worked for them previously and who they knew only too well. The appellant admitted in his defence that he worked for Florence for one year. The witnesses were with the appellant for three hours and that was a long time for recognizing a person who had worked and lived with them at their home and with whom they had interacted for so long. Further and even more important on the question of recognition, the appellant talked to Millicent telling her not to look at him and also asked her to remove her pants as he wanted to rape her. His response when Millicent told him not to rape her as she was still a child is telling as it appears that she understood that response as coming from a person who he knew was telling the truth and so he did not proceed with his intention to rape Millicent. In the circumstances prevailing at the house of Florence when the robbery took place there, we are satisfied that identification of the appellant by recognition was watertight. In the case of **ANJONONI & OTHERS vs. REPUBLIC [1980] KLR, 59**, this Court stated:

"**The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was however, a case of recognition not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro ole Giteya vs The Republic (*unreported*).**"

That is the position in law. We have no doubt in our minds that the identification of the appellant by recognition was a sound basis for conviction of the appellant in respect of the two robbery charges and assault charge in count III.

The last complaint is that the statement under inquiry was wrongly admitted as no trial within trial was held to investigate whether or not it was voluntarily given to IP Ezekiel Kiche Onyango, (PW6)(*IP Ezekiel*). We have perused the judgment of the superior court carefully. It is correct as the appellant says that the superior court, which was the first appellate court and which was in law duty bound to analyse the evidence a fresh, evaluate it and make its own decision but giving allowance for the fact that the trial court saw the witnesses, heard them and noted their demeanour, - see case of **OKENO vs. R. (1972) E.A, 32**, did not direct its attention to the statement that was allegedly given to IP Ezekiel. It did not comment on it at any stage in its judgment. This was not proper. We have considered the record. Two aspects concerning the admission of that statement are disturbing. First IP Ezekiel who took the statement refers

to it as a charge and caution statement in his evidence, whereas the statement itself is headed "**statement under inquiry**." Secondly, the appellant objected to the production of the statement stating.

"**Accused – I object to the production of the statement as it was not voluntarily given. I gave the statement as I was tortured/beaten. I did not know what I was saying then. May I record a new statement."**

The court is recorded as having responded as follows:

"**Who beat you."**

and the appellant's reply was:

"**I do not know the name of the one who beat me. The witness did not assault me. He was alone at the office. He did not promise me anything."**

and the court concluded

Court – upon hearing accused – statement be produced."

It will be noted that the appellant was clearly not alleging that IP Ezekiel beat him. He was saying that he was beaten by other police officers and by the time he was giving statement, the effect of that beating may not have subsided in his mind and so he claimed he did not know what he was saying then. Later this allegation becomes clearer, when PC John Tununya gave evidence. He was the police officer who re-arrested the appellant on 12th January 2002, one day before the statement was taken, who investigated the case partly and who claimed that the appellant led them to the house of the other co-accused. It would appear that in cross examination, the appellant put it to him that he assaulted the appellant to which he is recorded to have stated:

"**I did not assault you. You led us voluntarily to the house of all those we arrested."**

It would appear to us that the allegation by the appellant that he was tortured before the statement was taken and that as a result of the same, he was unable to voluntarily give a statement required investigation before the decision could be made whether or not to admit the statement. That investigation called for a trial within a trial where the appellant could have been afforded an opportunity to give a sworn evidence on why he objected to the statement and the prosecution witnesses could also have been cross examined on their evidence on that aspect before an informed decision could be made on the admissibility or otherwise of that statement. On these grounds we feel this ground of appeal has merit. That statement was improperly admitted.

However, one other question still stands out. That is that having disregarded that inquiry statement from the record as we have done, is the evidence that remains on the record enough to sustain a conviction? As we have stated hereinabove, the appellant was properly identified by recognition as having been one of the assailants of Florence and Opiyo and as among the robbers who killed Adiba Myoga. That evidence is in our view enough to support a conviction of the appellant on the two counts or robbery with violence and the remaining one count of assault causing actual bodily harm.

In conclusion, having considered the appeal before us fully, we have no reason to disturb the conviction on the two counts of robbery with violence contrary to **section 296(2)** of the Penal Code and the conviction on count 3 of assault causing actual bodily harm. The appeal on conviction as to those counts is dismissed and the sentences as spelt out by the superior court in those counts are confirmed. On count 4, as we have stated, the appeal succeeds, conviction is quashed and the sentence set aside.

Dated and delivered at Kisumu this 27th day of March 2009.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR