



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL 312 OF 2007**

**BON DAVID ONYANGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Mugo, JJ.)  
dated 14<sup>th</sup> June, 2007***

***in***

***H.C.C.R.A. NO. 143 OF 2005)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant herein, **BON DAVID ONYANGO**, was jointly charged with one, **SOSPETER GEORGE OTIENO** alias **GEORGE OCHIENG OWINO**, with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code.

The charge sheet in which the offence was particularized stated that the two accused persons with others already in court and while armed with offensive weapons, robbed one, **Ruth Seda** of a mobile phone, a video deck, four television sets, one mattress, assorted types of utensils, two wall clocks, two wrist watches, two pairs of spectacles, one land line telephone receiver, one thermos flask, four suitcases, one gas cylinder, assorted types of clothing, personal documents including a national identity card, a purse containing **K.Shs.800/=** and three pairs of shoes all valued at **K.Shs.132,600/=**.

The offence is said to have been committed at Nyahera Sub-location in Kisumu District within Nyanza Province on the night of **6<sup>th</sup> October, 2002**. The appellant together with others is said to have used actual violence to the said **Ruth Seda** at or immediately before or immediately after the time of the said robbery.

The appellant was separately charged with an alternative charge of handling stolen goods contrary to **section 322(2)** of the Penal Code in that on the **7<sup>th</sup> day of October, 2002** at Nyahera Sub-location in Kisumu District within Nyanza Province other than in the course of stealing "**received and retained**" one mobile phone, four television sets, one mattress, assorted types of utensils, two wall clocks, one landline telephone receiver, one thermos flask, four suit cases, one gas cylinder, assorted types of clothing, personal documents including national identity card, purse and a pair of spectacles knowing or having

reason to believe them to be stolen goods. Both the appellant and **Sospeter George Otieno** (*Sospeter*) were tried together in the Principal Magistrate's Court at Maseno in **Criminal Case No. 765 of 2003** before the learned Senior Resident Magistrate, (Mrs. A.C. Onginjo). In a judgment delivered on 20<sup>th</sup> July, 2005, *Sospeter* who was the 1<sup>st</sup> accused at the trial was acquitted on a benefit of doubt while the appellant who was the 2<sup>nd</sup> accused was found guilty and convicted of the offence of robbery with violence. He was sentenced to death as mandatorily provided by the law.

Being aggrieved by the decision of the trial magistrate, the appellant preferred an appeal to the High Court at Kisumu (Mwera and Mugo, JJ.) who after re-evaluating the evidence dismissed the appeal stating:-

***“Our study of the judgment of the lower court shows that the learned trial magistrate carefully weighed the evidence placed before her before arriving at her decision. We are of the considered view that she was right in finding the appellant as having been properly identified by the victims of the robbery by help of electric lighting and that his defence and alibi were a sham. He was at the Seda family's house when they were robbed, PW1 and PW4 injured, PW and PW (sic) raped and injured in the process as confirmed by the medical evidence of PW9.”***

Still aggrieved by the dismissal of his appeal by the superior court, the appellant now comes to this Court by way of a second and final appeal. That being so, only matters of law fall for consideration by dint of **section 361(1)** of the **Criminal Procedure Code**.

The prosecution's case against the appellant was that on the material day (6<sup>th</sup> October, 2002) at about 7:30 p.m. the complainant **Ruth Ouko Seda** (PW1) was in her house preparing supper when three people knocked at the door and when they were ushered in they ordered her not to talk otherwise she would be killed. These people slapped the complainant and tied her hands as they ransacked the house. The complainant testified that she was able to recognize the appellant since he (appellant) was known to her. In that house there were **George Ouko Seda** (PW4) the complainant's husband, **Seline Obija Seda** (PW2) an 18 year old student at Bar Union Secondary School and a niece to the complainant, **Sylvia Seda** (PW3) another student at the same Bar Union Secondary School and **Phoebe Auma** (PW5) a sister to the two students. These young people were watching television when the robbers struck. All these witnesses told the trial court that they were able to identify or recognize the appellant among the robbers. The incident was reported to the police and investigations commenced. On the following day some of the items stolen during the robbery were found in the home of the appellant but the appellant was not present. He was arrested in Mombasa in *December, 2003* and then brought to Maseno Court where he was charged.

When put to his defence the appellant gave a sworn statement in which he denied having been involved in the said robbery. It was his evidence that at the material time he was working on a five year contract as a Security Officer at the Travellers Beach Hotel Mombasa. He came back home when he heard that his wife had been arrested and when he went to Maseno Police Station to have his wife released there was pressure from his neighbours to have him charged. He returned to Mombasa and his wife was released but he discovered that one, **Police Constable Musa** was having an affair with his wife. He was later arrested and taken to *Maseno Police Station* where he was charged.

We wish to point out that the young ladies (**PW2, PW3** and **PW5**) testified that two of them had been raped but as the appellant was not identified as one of the rapists there were no rape charges preferred against him.

When this appeal came up for hearing on 2<sup>nd</sup> December, 2008 Mr. Ntenga Marube, appeared for the appellant while *Mr. D.I. Musau, the learned Senior Principal State Counsel*, appeared for the State. Mr. Marube's submissions concentrated on three main issues viz, *identification, the appellant's defence of alibi* and *the appellant's constitutional right to be taken to court within the prescribed time*.

On identification of the appellant, Mr. Marube submitted that as the incident took place at night the conditions were not favourable for a correct identification. He further contended that as some of the

witnesses testified that the robbers had masks, this made the identification of the appellant doubtful. Mr. Marube criticized the evidence of identification by voice as, in his view, voices can be similar. He took issue with the fact that none of the witnesses mentioned the names of the suspects when they made the initial report of the incident.

Mr. Marube then considered the defence of the appellant. He faulted the Judges of the superior court for failing to give due consideration to the appellant's defence of alibi.

Finally, Mr. Marube urged the view that the appellant's constitutional rights had been violated. However, when the Court put a few questions to him on this aspect of his submissions, he quickly abandoned that issue.

In opposing the appeal, Mr. Musau submitted that there were concurrent findings by the two courts below to the effect that the appellant was recognized by the witnesses who knew him well prior to the incident. He reminded us that some of the stolen property was found in the home of the appellant the following day. Finally Mr. Mutua submitted that the appellant was convicted on very sound evidence.

As already stated elsewhere in this judgment, this is a second appeal and hence we must be confined to points of law since we have stated on many occasions that this Court would be slow to interfere with concurrent findings of fact of the two courts below unless they are shown to have not been based on evidence – see **KAINGO V. REPUBLIC** [1982] KLR.

In our view this appeal raises mainly two points of law viz *identification* and *the defence of alibi*.

We have concurrent findings of the two courts below that the appellant was identified, nay, recognized by the complainant, **Ruth Seda**, her husband **George** and the three young girls who were present. It was also the finding of the two courts below that the appellant was not a stranger to the complainant and the other witnesses present during the robbery. Although the two courts below were satisfied that the appellant was recognized during the robbery, it must be remembered that the robbery took place at night. There was therefore need for caution as was reiterated by the Court of Appeal for Eastern Africa in **ABDALLA BIN WENDO & ANOTHER V. R.** [1953] 20 E.A.C.A. 166 at p 168 thus:-

***“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error.”***

In this appeal we are dealing with evidence of recognition since all the identifying witnesses were emphatic that they knew the appellant well. For example the complainant **Ruth Seda (PW1)** in the course of her evidence in chief stated, inter alia:-

***“There was electric light in the house. It is when they were leaving that they broke bulb in sitting room bedroom. I was able to identify Bonn Onyango. I recognized him when he came to say he was my relative. They raped two of my nieces. Bonn Onyango is accused 2 in the dock. He was not armed. He was wearing shirt and trouser and a cap that left only his face out. I was able to recognize trouser and shoes he was wearing. Bonn Onyango was known to me prior to this incident. I have known him since his childhood. He operates carpentry shop.”***

And **Seline Obija Seda (PW2)** on being cross examined by the appellant stated:-

***“I know you very well. You are our neighbour and we do visit your sisters who are our friends. I recognized your voice at the time of robbery.”***

When being cross-examined by the appellant, *Sylvia Seda* (PW3) stated:-

***“I know you as our neighbour. I saw you standing in the kitchen and you were telling another robber not to injure my aunt.”***

In his evidence in chief the complainant’s husband, *George Ouko Seda* (PW4) stated inter alia:-

***“My house was lighted with electricity. There was adequate light. I was able to identify one robber who was wearing a jungle jacket. This was 2<sup>nd</sup> accused in the dock. He is Bonn Onyango. I have known him since his childhood. I did not see if he was armed. I recognized him physically.”***

Lastly, *Phoebe Auma* (PW5) in her evidence in chief stated inter alia:-

***“One of the robbers was accused 2 and he was wearing a jungle jacket. Bonn is accused 2 in the dock. There was also another robber who was wearing a jungle jacket and had a pistol. He was tall and he demanded for KShs. 250,000/=. When my uncle said he did not have the money, they threatened to kill him.”***

There was a complaint that these witnesses did not mention the appellant in their initial report to the police. In our appraisal of the evidence we are convinced that the report was actually made to the police and his name was mentioned.

Although it has been held that recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger as was stated in ANJONONI AND ANOTHER VS. THE REPUBLIC [1980] KLR 59, the way to approach evidence of visual identification was succinctly stated by Lord Widgery CJ, in the well known case of R. V. TURNBULL [1976] 3 ALL ER 549 at page 552 where he said:-

***“Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”***

In the present appeal, we note that the learned Judges of the superior court adopted the correct approach when in the course of their judgment they expressed themselves thus:-

***“We have, as required of us, studied the proceedings and judgment of the lower court and considered the same in light of the submissions by both the appellant and the State Counsel. The appellant has attempted to persuade us that there was inadequate lighting and has in the process urged us to make a presumption that since the (sic) PW2, PW3, PW4 and PW5 were found watching television, the lights in the room must have been switched off. We do not share the appellant’s view that such is always the case and that such a presumption should be made. Evidence was led, as is clear from the lower court’s record, by PW1, PW2, PW3, PW4 and PW5 that the home was well lit by means of electricity. All the witnesses told the lower court that they were able to identify the appellant by means of such lighting. They were all able to recognize the appellant who was their neighbour, a fact which he himself confirms in his evidence. PW1 and PW4 testified that they had known the appellant since his childhood. PW2 said she knew him since her own childhood while PW3 testified that she and the appellant had attended the same school. PW5 said she had known him for 10 years.”***

On the issue of identification, we are satisfied that the appellant was recognized by the five identifying witnesses who knew him as a neighbour. The house was lit with electricity and the robbers took quite considerable period of time as they ransacked the house. There can be no question of mistaken identity.

As regards the defence of alibi raised by the appellant, we agree with Mr. Marube that the burden was on the prosecution to displace it. Of course, it is now well settled that an accused person who raises the defence of an alibi does not assume the burden of proving that defence – see SEKITOLEKO V. UGANDA [1967] E.A. 531. Nor does the burden of proof at any stage of the trial shift to an accused

person. On this issue of the appellant's defence the learned Judges of the superior court expressed themselves thus:-

***“The appellant says that his defence, and his alibi in particular were not properly handled by the trial magistrate. Our own finding as to the alibi is that if indeed the appellant was not in the vicinity at the time of the robbery then the evidence of PW6 and PW7 remained to displace that claim. These two witness (sic) had information that the appellant fled to Mombasa after the incident and when investigations were closing on him. He was arrested and brought back to face the charges.***

On our part, we are satisfied that the appellant's defence of alibi was given due consideration and properly rejected.

In the final analysis, we are satisfied that the appellant was convicted upon very sound evidence. This appeal therefore has no merit, and we order that it be dismissed in its entirety.

***Dated and delivered at KISUMU this 5<sup>th</sup> day of December, 2008.***

***S.E.O. BOSIRE***

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***JUDGE OF APPEAL***

***E.O. O'KUBASU***

.....

***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**