



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA PEAL AT NAIROBI**

**Criminal Appeal 275 of 2006**

**CLIFF ONYANGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from conviction and sentence of the High Court of Kenya  
Nairobi (Lesiit & Ochieng, JJ) dated 28<sup>th</sup> September, 2004 in H.C.CR.A. NO. 834 OF  
2002)**

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**JUDGMENT OF THE COURT**

The appellant was convicted by the Senior Resident Magistrate, Kibera for the offence of attempted robbery with violence contrary to *section 297 (2)* of the Penal Code and sentenced to death. His first appeal to the superior court against conviction and sentence was dismissed. This is therefore, a second appeal.

On 16<sup>th</sup> January, 2002, at about 7.30 p.m. five robbers raided the home of the complainant *Peter Muturi* at Ongata Rongai. The complainant was inside the house with his wife *Josephine Nyokabi* and their child. The electricity lights were on. The robbers who were armed with pangas ordered the complainant to produce money. When the complainant said that he had no money, he was slapped and told to lie down. The child started crying and the complainant's wife started screaming. The robbers panicked. The complainant tried to rise up but he was cut with a panga on the back of the head, face and on the knee. The complainant held one of the robbers who was identified as the appellant and they started struggling. The complainant's wife rushed to help the complainant and held the appellant by the neck. The appellant was still holding a panga. The other four robbers ran away. The complainant's neighbour *Suleiman Wanjohi*, ran to the complainant's house after hearing the screams. He found the complainant struggling with the appellant and knocked the appellant down. The other neighbours of the complainant including *George Keriga Kalonyi* and *Daniel Muthuku* went to the complainant's house and found the appellant still at the home of the complainant. The appellant was beaten by the members of public and later handed over to the police.

The appellant stated at the trial that he was coming from a shop at 7 p.m. on the material day when he met a group of people who said that he was among the people who had robbed the complainant and took him to the police station. He stated that he knew nothing about the offence.

The trial magistrate evaluated the evidence against the appellant and concluded:

***“The evidence on record against accused is weighty and is clear that accused 2 never had a chance to***

**escape. It also controverts accused 2's defence that he was innocently walking from the shop when he was arrested for no apparent reason. I find that there is (sic) no chance for accused 2 to escape from the scene and therefore there is no possibility that accused 2 was mistakenly identified to be one of the robbers. I am satisfied beyond all reasonable doubt that his guilt has been proved beyond all reasonable doubt .....**".

The superior court considered the appeal which was mainly based on identification and concluded:

**"..... It is quite evident that the 2<sup>nd</sup> appellant was arrested 'red – handed'. He was attacking PW1 with a panga, in an attempt to extort money from him. A struggle ensued and he was overpowered. He therefore had no chance to escape. In the circumstances, we have no doubt whatsoever that the 2<sup>nd</sup> appellant was one of the persons who were involved in the attempt to rob the complainant .....**".

There are five grounds of appeal in the supplementary memorandum of appeal. The first two grounds show that the present appeal is again based on identification. They state:

**"1. THAT the learned Judges of the High Court erred in law in affirming the conviction of the appellant based on identification whereas the said identification was dock identification which is not identification at all.**

**2. THAT the learned Judges of the High Court erred in law in affirming the conviction of the appellant whereas the trial magistrate failed to warn herself on the dangers of convicting the appellant on evidence in difficult circumstances".**

Thus the point of law relied on by the appellant in this appeal, as in the superior court is the identification of the appellant by the complainant and his wife. The question of the identification of the appellant does not however arise because the prosecution case was based on the fact of arrest of the appellant in the complainant's house during the attempted robbery by the complainant and his wife. There were concurrent findings of fact by the two courts below that the appellant was arrested by the complainant and his wife inside the house and during the attempted robbery.

This Court cannot interfere with that concurrent finding of fact unless it is shown that the finding was based on no evidence. There was the evidence of Suleiman Wanjohi who found the complainant and the appellant struggling inside the complainant's house and the complainant still holding the appellant. There was also the evidence of **George Keriga Kelonyi** and **Cpl. Kamau Kungu** who found the appellant under guard in the complainant's compound having been beaten. It is clear therefore, that the concurrent findings of the two courts below was supported by overwhelming evidence.

The third ground of appeal, too has no merit. The appellant's defence was an alibi. The alibi was clearly displaced by the fact that the appellant was arrested inside the complainant's house and he had no opportunity of escaping.

As for the 4<sup>th</sup> ground, the prosecution case was not based on circumstantial evidence. The appellant was arrested at the locus in quo and at least two witnesses testified to that effect. That was direct evidence and there was no reason for the court to consider circumstantial evidence with regard to the appellant's involvement in the robbery.

The fifth ground of appeal does not raise any point of law. Moreover, we find no serious discrepancies, contradictions or inconsistencies in the prosecution case.

In the result, we do not find any merit in the appeal. The appeal is dismissed.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of March, 2007.**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR