



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: OMOLO, O'KUBASU, J.J.A. & DEVERELL, AG. J.A.**

**CRIMINAL APPEAL NO. 1303 OF 1998**

**From Original Conviction and Sentence in Criminal Case No. 1313 of 1997**

**of the Chief Magistrate's Court at Kisii**

**HARON THOMAS NYANDORO ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at**

**Nairobi (Oguk & Mitey JJ) dated 2 nd August, 2003**

**in**

**H.C.C.R.A. NO. 1303 OF 1998)**

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

**JUDGMENT OF THE COURT**

The appellant, *HARON THOMAS NYANDORO* , was convicted by the Senior Resident Magistrate at Kisii of the offence of robbery with violence contrary to *section 296(2)* of the Penal Code and sentenced to death as mandatorily provided by the law. The particulars of the charge were that during the night of 17th and 18th April 1997 at Buboti Sub-location, Sengene Location in Gucha District within Nyanza Province, jointly with others not before the court, while armed with offensive weapons, namely, pistols, bolted *rungus* robbed Lucia Burunda Omwega of Kshs.75,670/= and at or immediately after the time of such robbery wounded the said Lucia Burunda Omwega.

The appellant was also convicted by the same court of the offence of personating a public officer contrary to section 105 (b) of the Penal Code and sentenced to 15 months imprisonment.

The appellant's appeal to the High Court was dismissed and hence he now comes to this Court by way of second appeal.

The prosecution case was that on 17th April, 1997 at about 10.00 p.m. the complainant Lucia Burunda

Omwega (PW1) was outside her husband's house washing her legs when about seven people emerged and introduced themselves as police officers. Two of these people had hats. While this was happening outside the house Omwega Mbaka (PW2) the husband of Lucia (PW1) was inside the house. The intruders took Lucia to the house where her husband was. These people asked Lucia and her husband (PW2) to produce a stolen cow. When PW2 answered them that he was not aware of any stolen cow these people informed PW2 that he (PW2) was a prisoner. As if to prove their threat they tied up PW2 to a tree outside the house and assaulted him.

It was the evidence of PW2 that on the material day he had Kshs.75,670/= being the proceeds from the sale of cows. He had this money on him when the robbers struck but handed over the money to his wife who kept it in her headscarf.

After the robbers had tied up PW2 to a tree outside the house they went back to the house where they assaulted PW1 and took the money, which PW2 had handed over to her. PW1 said there was light in the room and from that lantern light PW1 was able to identify the appellant as the person who took the money from her and then threw it to one of the robbers (who was the appellant's co-accused during the trial but died while in prison). PW1 also stated that the appellant was wearing a black coat and a "hat with a crown". These items were produced as exhibits. During the robbery PW1 grabbed the appellant while she screamed for assistance. Her sons Andrew Omwega (PW3) and Elijah Omwega (PW4) heard the screams and rushed to the scene only to find PW1 – holding the appellant. The appellant was apprehended and tied up with a rope. A neighbour of the complainant Paul Nyangau Nyakowa (PW5) heard the screams and when he rushed to the scene he found the appellant already apprehended. The incident was reported to the chief, who proceeded to the scene in the company of police officers who arrested the appellant.

When put to his defence the appellant stated that on the morning of 18th April, 1997 he was near Sangana Market when he met people who stopped him. These people arrested him and took him to the home of the complainant. Police officers then came and collected him from that home. It was the appellant's defence that he was not involved in the robbery.

The learned trial magistrate considered the evidence before her and came to the conclusion that the appellant and his co-accused (now deceased) were involved in the robbery as there was the evidence of the complainant (PW1) her husband (PW2) their sons (PW3 and PW4) and a neighbour (PW5). These witnesses answered the complainant's screams and found the appellant under the tight grip of the complainant. The appellant was clearly a member of the gang but was unlucky to have been held tightly by the complainant until the other witnesses came to the scene.

In dismissing the appellant's appeal the learned Judges of the superior court (Oguk and Mitey JJ.) expressed themselves thus:-

*"We have scrutinized the recorded evidence.*

*We have also considered the grounds of appeal set out in the Petition of Appeal filed on behalf of the Appellant on 11 th February, 1999. The evidence against the Appellant is overwhelming. He was identified by PW1 and PW2 as one of the robbers who attacked them at their home in the night of 1 7th and 18th April, 1997. The Appellant was grabbed by PW1 as the other robbers fled from the scene. He was kept under restriction till the arrival of the police who took him away."*

In arguing the appeal before us Mr. Kiage for the appellant submitted that the learned Judges of superior court fell into error in failing to subject the evidence as a whole to a fresh and exhaustive scrutiny and resolve the contradictions. It was Mr. Kiage's submission that the appellant was not at the scene and that his defence was not sufficiently considered.

The learned State Counsel (Mr. Kaigai Karundu) asked us to dismiss the appeal as in his view the appellant was caught red handed since the evidence of PW1 was well supported by the evidence of PW3, PW4 and PW5.

We have now carefully considered rival submissions made before us and in our view the superior court adopted a correct approach in dealing with the evidence adduced in the trial court. In *OKENO v. R* [1972] E.A. 32 at p.36 the predecessor of this Court state inter alia:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*PANDYA v. R* [1957] E.A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*SHANTILAL M. RUWALA v. R* [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions.

Only then can it decide whether the magistrate’s findings should be supported.

In doing so, it should make allowance for the fact that the trial has had the advantage of hearing and seeing the witnesses – see *PETERS v. SUNDAY POST* [1958] E.A. 426.”

The learned Judges of the superior court clearly made an independent evaluation of the evidence on record and came to the conclusion that the appellant was convicted on overwhelming evidence. On our part we would observe that the appellant was not only positively identified by the complainant (PW1) but rather grabbed tightly until other witnesses arrived on the scene. These other witnesses (PW3, PW4 and PW5) testified to the effect that they found the appellant being held by the complainant. Hence apart from identification evidence the appellant was held by the complainant while the other robbers made good their escape. Looked at differently we think it can safely be said that the appellant was caught red handed.

We wish to point out that the State Counsel (Mr. Ondari) conceded the appellant’s appeal in the superior court but when the matter came before us by way of second appeal the State Counsel (Mr. Kaigai Karundu) took a different stand from that taken by Mr. Ondari. This is rather an unhappy situation but on our part we wish to point out that while the State Counsel may state what he thinks on an appeal the final decision rests with the Court.

In this appeal we observe that the first appellate court considered and re-evaluated the evidence in accordance with the decision in *OKENO v. R (Supra)* and came to the conclusion that the appellant had been properly convicted. We are in entire agreement with the first appellate court. Hence although the first appellate court never commented on the fact that Mr. Ondari had conceded the appeal we take it that the first appellate court rejected Mr. Ondari’s stand. It was entitled to reject it.

For the foregoing reasons, we are satisfied that the appellant was convicted on overwhelming evidence and consequently, we find no merit in this appeal. The same is hereby dismissed.

**Dated and delivered at Nairobi this 17th day of September, 2004.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**E. O. O’KUBASU**

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**JUDGE OF APPEAL**

**W. S. DEVERELL**

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**AG. JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**