



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAKURU**  
**CORAM: KWACH, OMOLO & BOSIRE, J.J.A.**  
**CRIMINAL APPEAL NO. 179 OF 2000**  
**BETWEEN**

**JARED OUMA OKONG'O**  
**JOHN ONYANGO AWITCH ..... APPELLANTS**  
**AND**  
**REPUBLIC ..... RESPONDENT**

**(Appeal from a conviction of the High Court of Kenya  
at Kericho (Hon. Mr. D.M. Rimita) dated 24th July, 2000**

**in**  
**H.C.CR.A. NO. 13 & 14 OF 1999)**

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**JUDGMENT OF THE COURT**

Jared Ouma Okong'o and John Onyango Awich (the appellants) were convicted by the Principal Magistrate's Court at Kericho of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the charge stated that on 9th April, 1999 at Thesalia village in Kericho District within Rift Valley Province jointly being armed with a dangerous weapon namely a panga robbed Reuben Malakwen Birgen of Shs 6,870/- in cash and a wrist watch and in the course of the robbery used or threatened violence against Birgen (the complainant) .

Although the appellants were convicted of robbery with violence under **section 296(2)** of the Penal Code they escaped the mandatory death penalty because they were found to be below the age of majority at the time they committed the offence. The magistrate ordered an inquiry under section 25 of Penal Code to be made into the ages of the appellants which confirmed they were below the age of 18 years. The appellants were then ordered to be detained during the President's pleasure.

The prosecution's case was that at or about 7.05 a.m the complainant left his home to go to Muhoroni Sugar Company where he had a contract to weed sugarcane. After turning a corner he saw the two appellants, whom he knew, ahead of him. He noticed the second appellant was wearing a mask. As he got closer to them the first appellant disappeared into the plantation leaving the second appellant behind. The second appellant grabbed the complainant and as he did so, he was joined by the first appellant who was armed with a panga. He hit the complainant with the panga on his back and they dragged him screaming into the plantation. The second appellant held him by the throat and twisted his neck. The complainant pleaded with the robbers just to take the money and spare his life. That is exactly what they did. They opened the appellant's coat, took all the money he had and also took his watch.

Later that day the first appellant appeared at the shamba where the complainant was paying his workers their wages and he immediately fingered the first appellant as one of the persons who had robbed him that morning. He was arrested by the complainant's workers and handed over to the police. The second appellant was arrested a little later and found in possession of the complainant's watch.

The appellants denied the charge against them. The first appellant said he was arrested on mere suspicion; the second appellant claimed that the watch alleged to have been found in his possession was planted by the police. Their appeals to the High Court against both conviction and sentence were dismissed giving rise to this second appeal to this Court.

The two lower courts made a concurrent finding that the appellants were properly identified and it is this finding that Mr Odhiambo, for the appellants, submitted was erroneous on the grounds that the crime

was committed very early in the morning and the second appellant was wearing a mask. He said there was no evidence whether it was dark or light at that time and also that the complainant could not have easily identified the second appellant as he was wearing a mask.

We would have been inclined to agree with Mr Odhiambo if the only evidence against the first appellant was that the only time the complainant saw him was when he left the second appellant and disappeared into the plantation. But he did return and actually joined the second appellant in the attack and together dragged the complainant into the plantation to complete the robbery. This was an attack by persons the complainant knew very well, and during the robbery he spoke to them and had ample opportunity to recognise them. We are satisfied that the first appellant was properly identified by the complainant and the circumstances of his identification were free from any possibility of error.

The identification of the second appellant was even more watertight because he was found in possession of the complainant's watch recently stolen from him and he gave no account as to how he came by it. In the absence of such an explanation there is a presumption that the second appellant was the robber. On the evidence, the second appellant was the robber because the complainant said this appellant took the watch from him during the robbery. We have no doubt in our minds that the second appellant was properly identified. The net result is that we agree with Mr Onyango Oriri , for the State, that there is no merit in these appeals and they are accordingly dismissed.

**Dated and delivered at Nakuru this 23rd day of February, 2001.**

**R. O. KWACH**  
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**JUDGE OF APPEAL**

**R. S. C. OMOLO**  
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**JUDGE OF APPEAL**

**S. E. O. BOSIRE**  
.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**