



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISUMU

Criminal Appeal 155, 156 & 149 of 2008

PETER OCHIENG TUJU.....1<sup>st</sup> APPELLANT  
FREDRICK OKOTH ARWA.....2<sup>nd</sup> APPELLANT  
MARTIN ONDURU OTIENO.....3<sup>rd</sup> APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*[From original conviction and sentence from SRM'S Court at Bondo*

*Criminal Case No. 69 of 2008]*

Coram

Mwera, Karanja –JJ

Musau for state

Court clerk George /Laban

Appellants in person

**JUDGMENT**

**Peter Ochieng Tuju** (Appellant one), **Fredrick Okoth Arwa** (appellant two) and **Martin Onduru Otieno** (Appellant three) were charged together with two others with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the 7<sup>th</sup> January 2008 at around 2100 hours at Barchando Sub – location Bondo District, jointly while armed with offensive weapons namely panga and rifle robbed **Josephine Atieno Okoth** of ten (10) kgs of sugar, a carton of milk, a carton of soap, a carton of cooking fat, twenty kgs of maize, one radio cassette make Sony, one radio make Sonetic, a wall clock, lessos and cash Kshs. 15,300/= all valued at Kshs. 23,840/= and at or immediately before or immediately after the time of such robbery wounded the said Josephine Atieno Okoth.

The third appellant also faced an alternative charge of handling stolen property contrary to Section 322 (2) of the Penal Code, in that on the 28<sup>th</sup> January 2008 at around 0400 hours at North Ramba Bondo District, otherwise than in the course of stealing dishonestly retained four (4) lessos knowing or having reasons to believe them to be stolen property.

After pleading not guilty before the Senior Resident Magistrate at Bondo, the appellants were tried, convicted and sentenced to death for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

Being dissatisfied with the conviction and sentence the appellants filed separate appeals which were consolidated and heard together.

The respective petitions of appeal were filed herein on the 12<sup>th</sup> November 2008 and 14<sup>th</sup> November 2008. The grounds of appeal are more or less similar and are basically an attack on the prosecution evidence of identification which was relied upon by the trial court to convict the appellants.

The appellants also complain that the prosecution evidence was inconsistent and contradictory to sustain a conviction.

At the hearing of the appeals, the appellants appeared in person and each addressed us in response to the submissions by the Learned Senior Principal State Counsel, **Mr. Musau**, who appeared on behalf of the respondent and called for the dismissal of all the appeals for want of merit.

The first appellant (**Peter**) contended that the identification parade conducted in respect of him was improper as PW1 had earlier seen him at Luala Kotiende Police Station and that the investigating officer (PW8) on his visit to the scene was not given his name by Susan (PW3) who confirmed that she did not give his description to the police.

The first appellant further contended that PW8 was never given a description of himself.

The second appellant (**Fredrick**) contended that the complainant (PW1) did not give the description of the attackers to the police yet she claimed that she had seen him. Further, the second appellant contended that he did not mention names of his alleged accomplices to PW8 and that proper investigation of the case was not carried out.

The third appellant (**Martin**) contended that the case was based on identification and the recovery of stolen goods yet the

complainant did not give a description of the attackers while PW3 said that she came to know him after being informed by the police.

Further, the third appellant contended that he was pointed out in an identification parade by PW1 who said that she had previously known him and had recognized him at the scene of the offence. He wondered what was the purpose of the identification parade if he was previously known to PW1. He also contended that PW8 was never given the description of the attackers and that he (PW8) confirmed that the panga (**machete**) recovered was not examined to show that it was used in the offence. He (third appellant) claimed ownership of the panga and said that the complainant never proved her ownership of the same. He contended that PW8 did not carry out adequate investigations.

The learned Senior Principal State Counsel took us through

specific aspects of the prosecution evidence and contended that the appellants were positively identified at the scene of the offence and during the identification parades. He said that the second appellant was related to the complainant and that all the appellants were found in recent possession of stolen goods and failed to offer explanation for the possession thereof.

Having heard the rival arguments and/or submissions we remind ourselves that our obligation at this juncture is to review the evidence adduced in the trial court and arrive at our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses. **(See Okeno =vs= Republic [1972] E. A. 32 and Achira =vs= Republic [2003] KLR 707).**

The prosecution case was founded on the facts that follow;

On the material date at about 9:00 p.m., the complainant **Josephine Atieno Okoth (PW1)** was in the kitchen of her house together with **Susan (PW3)** and **Joseph Oketch (now deceased)**. Joseph took a torch and proceeded to an outside toilet. After a few minutes three armed people entered the kitchen holding the torch which had just been with Joseph. The three ordered the complainant and Susan to lie down. There was a tin lamp burning.

One of the intruders took the complainant to the main house which was ten (10) metres away while two of them remained in the kitchen with Susan.

In the main house, the complainant said that she was asked for the proceeds of sugar sales and inside her bedroom she recognized Okoth, a son to her brother-in-law whom she identified as accused one (herein appellant two). She handed over Kshs. 15,000/= belonging to her church. The lessos (pieces of cloth material) she traded in were emptied on the floor while the second appellant was removing more from the bedroom.

The complainant said that inside a store, the second appellant and Onduru found some milk. There was a lantern lamp in the sitting room of the main house. She (complainant) stated that Onduru was the person who took her into the main house from the kitchen and was the same person who struck her on the left cheek with a panga (machete) which had a black handle. She identified him as the second accused (herein appellant three). She further identified him at an identification parade conducted on the 29<sup>th</sup> January 2008 at Lwala Kotiende Police Station.

The complainant said that after the intruders left, she raised alarm and ran to a neighbour's house where she took refuge upto the morning. She and others returned to the scene and looked for Joseph whose dead body was found lying in a pool of blood with a deep cut on the neck. Joseph was aged seventeen (17) years old. The complainant was taken for treatment at the Bondo District Hospital. Her property including a radio and pieces of lessos were stolen. The radio and some pieces of lessos were later recovered by the police. She identified them as her stolen property. She was shown a panga with a black handle which she said was the assault weapon.

**Maurice Juma Olang (PW2)**, a clinical officer at the Bondo District Hospital examined the complainant on 28<sup>th</sup> January 2008 and confirmed that she had suffered bodily injuries occasioned by a sharp weapon. He (PW2) completed the necessary P3 form and signed it. The P3 form was tendered in evidence.

**Susan Adhiambo Miyare (PW3)** is a daughter of the complainant and they were together on the material date and at the time when the robbers struck. She said that they were at the time with her brother Joseph baking doughnuts. Her brother then went outside with a torch and after about thirty

minutes a group of three people entered the kitchen and ordered then to lie down. She (PW3) had not known the three people but she identified one as the fifth accused (herein, first appellant). She said that there was a lantern lamp and that she was left behind with the first appellant who went about looking for food. She saw his face and described his physical features as dark and short.

Susan said that the robbers were armed with what she thought was a gun and pangas.

A Sony radio which was in the kitchen was taken away. She (PW3) said that she was taken to a place near a church where she was asked to produce a phone which she did not have. She was threatened with death and was almost killed when a panga raised against her narrowly missed her. She said that after the robbers left she ran back to her home only to find nobody. She went to a neighbour's house where she found her mother. They all returned to the scene in the morning and found that Joseph had been brutally killed.

Susan was later called for an identification parade at Lwala Kotiende Police Station where she again identified the first appellant. She also identified their stolen radio and pieces of lessos.

**Paul Otieno Abuor (PW4)**, a radio technician at Akala market received a radio from one Vitalis Oduor for purposes of repairs on the 13<sup>th</sup> January 2008 but on the 28<sup>th</sup> January 2008 the radio was taken away by the police. The said Vitalis Oduor had led the police to the radio workshop. He (PW4) was then asked to record a statement.

**Dr. Olang Ogutu (PW5)** of the Bondo District Hospital performed a post mortem on the body of the late Joseph Oketch and formed the opinion that his death was caused by loss of blood due to deep cut wound on the neck which severed all the veins.

The Assistant Chief of Barchando Sub – location **Julius Ragot (PW6)** received the robbery report on the material date at 11:45 p.m. Since it was during the post election violence, the assistant chief proceeded to the scene in the morning at 6:00 a.m. People were crying at a scene where the body of the late Joseph was found. The assistant chief saw the body and noticed a serious cut on the neck. He confirmed that robbery had indeed occurred and reported the matter at Lwala Kotiende Police Station. He said that Okoth Fredrick Arwa (second appellant) was named and arrested on 27<sup>th</sup> January 2008 at 2:00 p.m. at Kamariga beach. He (second appellant) was then taken to the Lwala Kotiende Police station where he mentioned others including Martin Onduru (appellant three).

The assistant chief said that the second appellant led them to the house of the third appellant where a panga was found and four pieces of the complainant's stolen lessos recovered.

The other named suspect called Vitalis (who was the appellants' co-accused) mentioned the first appellant who was arrested in his house with a panga having a tyre handle.

The complainant's stolen radio was found at the radio repairer's workshop at Akala market.

**I.P. Samson Kiprop (PW7)** formerly of Bondo Police

Station conducted the identification parades at the Lwala Kotiende Police station. He confirmed that the first and third appellants were identified by the complainant (PW1) and Susan (PW3).

I. P. Kiprop thereafter compiled and signed the necessary identification parade forms.

**Ag I. P. Dickson Maina (PW8)** of Lwala Kotiende Police Station conducted the investigations of the case and was in the process given the name of the second appellant by Susan (PW3). The second appellant was said to be a relative of the complainant.

**I.P. Maina** said that the second appellant was arrested at

Kamariga beach by members of the public and brought to the police station where he mentioned other suspects who included the third appellant.

The police party proceeded to the house of the third appellant and recovered complainant's stolen lessos. A double edged panga was found in a ceiling and was alleged by the second appellant to have been used in killing the deceased Joseph.

The complainant's stolen radio was recovered from a radio-repairer (PW4) where it was taken by the suspect called Vitalis for repairs. After the investigations, I. P. Maina preferred the present charge against the appellants.

In his defence, the first appellant said that he was asleep at home on 28<sup>th</sup> January 2008 when police officers arrived there at 5:00 a.m. and awakened him. He was beaten up and told to produce stolen items. His house was searched but nothing was recovered. Only his panga was taken away by the police. He was taken to Lwala Kotiende Police Station where he was tortured. He was taken to Bondo Police Station on 29<sup>th</sup> January 2008 where he was placed in an identification parade and allegedly identified by Susan (PW3).

The second appellant stated that he was at Kamariga beach on the 26<sup>th</sup> January 2008 when he quarreled with other people who reported to the beach leader. He was later beaten up and handed over to the police who took him to Lwala Kotiende Police Station.

On 28<sup>th</sup> January 2008 he was taken to several destinations by the police and the assistant chief. He was asked whether he knew the complainant and said that they lived in separate homesteads and had no grudges. He was later charged with the present offence together with persons unknown to him.

The third appellant stated that he was a lorry driver and was asleep in his house on 28<sup>th</sup> January 2008 at 4:30 a.m. when the assistant chief and police officers arrived there and conducted a search. They found a panga and two pieces of lessos in a box. They handcuffed and took him to a waiting police vehicle. They all proceeded to Ndori trading centre and to Akala market before proceeding to Lwala Kotiende Police Station where he (appellant three) was booked with other suspects. He was later placed in an identification parade and allegedly identified by the complainant who had said that she had previously known him. He contended that the alleged recovered lessos and panga belonged to him and that his description was not given to the police and also that the second appellant did not make a confession implicating him with the offence.

From all the foregoing evidence it was apparent that the basic issue for determination was whether the offence of robbery with violence was committed against the complainant and if so, whether the appellants were positively identified as having been among the robbers.

The evidence by the complainant (PW1), the clinical officer (PW2), Susan (PW3) as well as that by the Assistant Chief (PW6) and the investigating officer (PW8) established and proved the necessary ingredients of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code in terms of the decision in the case of **Johana Ndugu =vs= Republic Criminal Appeal No. 116 of 1995.**

Indeed, the complainant was attacked and robbed by a group of more than three people who were armed with offensive weapons and who in the process injured the complainant, killed her son and almost killed her daughter (PW3) before stealing property which included a radio and pieces of clothes material (lessos).

The identification of the attackers was the most crucial point for determination and in his judgment, the learned trial magistrate concluded that the appellants were positively identified by the complainant and Susan (PW3).

The learned trial magistrate found that the evidence of the identification of the appellants by the complainant and PW3 was credible and sufficient.

The learned trial magistrate observed that identification was facilitated by the presence of lantern lamps at the scene of the offence.

The defence by the appellants was a denial of their involvement in the offence and a suggestion that they were arrested and implicated with the offence without good cause.

The first appellant contended that he knew nothing about the robbery and that nothing was recovered in his house when it was searched by the police.

The second appellant indicated that he was arrested for being involved in a brawl at Kamariga beach. He was taken to unknown destinations where other persons were arrested.

The third appellant contended that he was arrested in his house and in the process his pieces of lessos and a panga were taken away. He was later placed in identification parades and allegedly identified as one of the robbers. He said that he bought the lessos from hawkers along Kenyatta Avenue Kisumu or given by his member of parliament during the campaigns for the 2007 General Elections. He also said that the panga was his farm tool.

Having carefully reviewed the evidence in the light of the grounds of appeal put forward by all the appellants, we find ourselves in agreement with the learned trial magistrate in holding that there was proper and sufficient evidence of identification against the appellants by the complainant and Susan (PW3). This was identification made at the scene of the offence in difficult circumstances given that the offence occurred in the hours of darkness.

We are also of the view that the presence of light from the lantern lamps provided favourable conditions for identification. The kitchen where it all started had a lamp and so did the main house where the complainant was moved from the kitchen where she had been with PW3 and the deceased Joseph.

The offenders and the victims were in close proximity and it would appear that the offence took sometime.

Besides, the complainant and Susan (PW3) had previously known the second appellant as their relative while the third appellant was previously known by the complainant. The complainant said that she had previously seen the third appellant at Ndori Market for at least one year.

In fact, the name of the second appellant was given to the Assistant Chief by the complainant and it was only after his arrest that the first and third appellants were arrested. The second appellant provided

useful information which led to the arrest and arraignment of his co-appellants.

Therefore, it would be safe to conclude that the identification of the appellants at the scene was solid and without possibility of mistaken identity. The second and third appellants were identified by recognition.

The identification of the third appellant in an identification parade was unnecessary given that he had previously been known to the complainant. The identification of the first appellant in the identification parade was proper and was merely a confirmation of his identification at the scene by Susan ( PW3) Susan said that she clearly saw the first appellant's face while showing him where food had been kept. He remained in the kitchen with Susan and went about looking for food. He was the one who took Susan near a church and almost killed her when his raised panga narrowly missed her when it finally came down. Susan had described him to the police as a short dark person.

Other than direct evidence of identification against the third appellant, there was also indirect identification of his involvement in the offence in that he was found in possession of some of the complainant's stolen lessos. These were identified by the complainant as belonging to herself. She indicated that she traded in lessos and out of the ten pairs stolen from her only four were recovered. We would hold that there was also sufficient evidence to convict the third appellant on the basis of the doctrine of recent possession. His explanation of his possession of the recovered lessos was not convincing.

With regard to the recovered pangas, there was insufficient evidence to hold that they were the weapons used in the offence and more so, in the killing of the deceased Joseph.

All in all, we are satisfied that the conviction of the three appellants was sound and proper.

Consequently, the three appeals lack merit and are hereby dismissed.

**Dated, signed and delivered at Kisumu this 8<sup>th</sup> day of December 2009.**

**J. W. MWERA**

**J. R. KARANJA**

**JUDGE**

**JUDGE**

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