Case Number:	Criminal Appeal 130 of 2008
Date Delivered:	05 Dec 2008
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Samuel Elikana Ondari Bosire, Emmanuel Okello O'Kubasu, John walter Onyango Otieno
Citation:	Vitalis Obonyo Onya v Republic [2008] eKLR
Advocates:	Mr. Onalo for the Appellant.
Case Summary:	Evidence - criminal evidence - how a first appellate court is required to deal with the evidence - identification evidence - appeal challenging the strength of the evidence adduced in a trial - whether the evidence was sufficient to support the charge - burden of proof - accused person not under any duty to call a witness to buttress his defence - no general obligation on the accused to prove his defence.
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	H.C.CR.A. NO. 166 OF 2004
Case Outcome:	Appeal dismissed.
History County:	Kisumu
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CRIMINAL APPEAL 130 OF 2008

VITALIS OBONYO ONYANGO……..……..……APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ) dated 22.4.2008

in

H.C.CR.A. NO. 166 OF 2004)

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JUDGMENT OF THE COURT

The appellant, *VITALIS OBONYO ONYANGO* (the appellant) was charged, tried, convicted and sentenced to death for the offence of robbery with violence contrary to *Section 296(2)* of the Penal Code. The trial magistrate, M. Rungare, P.M. based the appellant's conviction substantially on the visual identification evidence of three people, in broad daylight. The appellant's first appeal to the superior court was dismissed on the basis that the trial court fully evaluated the evidence adduced before it and came to the correct conclusion that the evidence against the appellant proved the charge against him within the standard required in criminal cases.

This is the appellant's second appeal, and by dint of the provisions of *section 361* of the Criminal Procedure Code, only issues of law fall for consideration. Two broad issues of law have been raised, as follows:

(1) The superior court did not subject the entire evidence to a fresh and exhaustive scrutiny.

(2) That court erred in law by failing to find that the evidence of identification against the appellant was flawed.

There is a third complaint based on *Section 77(2)(b)* of the constitution, but this ground was abandoned by *Mr. Onalo*, the learned counsel who appeared for the appellant, and properly so in our view as the trial court's record is clear that proceedings were interpreted into the Swahili language for the benefit of the appellant.

Before we consider the above two grounds it is necessary to outline the background facts. *Geoffrey Nganga Mbuthia, (PW1),* a matatu driver who on 5th November, 2002, was the driver of motor vehicle registration NO. KAP 853 X, a Toyota Hiace, was driving the said motor vehicle to Bondo along Kisumu-

Bondo road. At about 11 a.m. he stopped somewhere along that road to pick a passenger. However as he waited for the passenger to board the vehicle he was surprised by a lone gunman who approached him from his side, pointed a gun at him and shouted a command for him to move away from the driver's seat. The gunman settled on the driver's seat and tried to drive the motor vehicle, but unfortunately he was not able to. As it happened, the person who posed as a passenger wishing to board the vehicle was in fact the gunman's accomplice. On realizing that the gunman had found difficulties driving the motor vehicle, that person took over and drove the motor vehicle away. It was not however, before PW1, *Patrick Wainaina, (PW2)* and other passengers jumped out of the motor vehicle. The motor vehicle later lost control, overturned and landed in a ditch.

It was the evidence of PW1, PW2 and *Tom Otieno Onyango, (PW3)* that because it was broad daylight, they were able to observe the gunman and later identified him as the appellant. *Otieno Obonyo (PW6),* a police constable and a dog handler was one of the officers who arrested the appellant. He had with him a tracker dog and with its help he and his colleagues tried to look for the robbers. The dog allegedly picked the scent of the robbers from where the vehicle had overturned. They lost the track but picked it a short distance ahead where they found an abandoned blood-stained red T-shirt. The appellant was arrested a short distance from there. He was bare-chested and when he saw the police he tried to hide among a group of people nearby. According to the witness the appellant had some injuries on him. The appellant explained that he hailed from a nearby village.

We note from the evidence that the witness did not lay a basis for introducing the evidence of the tracker dog. This Court and its predecessor the Court of Appeal for East Africa have consistently held that the experience of tracker dogs and their antecedents should precede the adduction of dog evidence, and in addition such evidence should be treated with caution and appropriate corroboration be looked for before such evidence is acted upon (see *KENNEDY MAINA V. R Criminal Appeal NO. 14 of 2005)*. It is however, clear that the evidence regarding the appellant's arrest was not given significant weight in support of his conviction.

As we stated earlier the appellant's conviction was based on his visual identification by three witnesses. Determination of this appeal will largely depend on the issue of identification. The appellant was unknown to the identifying witnesses. PW1 who was the driver of the vehicle which was stolen, testified that he was able to observe the appellant at close quarters and was thus able to register in his mind his appearance. Likewise PW2, who was seated behind the driver, was also able to witness the events during the robbery. He saw a passenger jump out of the vehicle immediately it stopped, and crossed over to the driver's side. It was his evidence that the passenger was this appellant and he was categorical that he heard the passenger shout a command to the driver to move away from the driver's seat, which the driver did.

A careful reading of the evidence on record reveals that the passenger did not have any covering over his face. It was broad daylight and it cannot be said that the witness had or would have any difficulty identifying that passenger. It is noteworthy that later the same day he pointed him out to the police as one of the robbers.

It is also noteworthy that the witness was close to the passenger, the vehicle was stationary and the shout by the passenger must have drawn the attention of all the people present to that passenger.

PW3 testified that he was seated on the right side of the motor vehicle and like PW2 he was able to observe the appellant and to identify him. It was his evidence that he was able to pick the appellant in an identification parade which the police conducted later. However, the parade forms relating to that parade were not produced in evidence. Those produced concerned the appellant's co-accused, but

who was acquitted for lack of sufficient evidence.

A question we pose is, why were the other witnesses not presented to any identification parade, more so PW1, and PW2" It was their evidence that after the robbery they went to the nearest police station to make a report of the robbery. While there the appellant was brought and was thus exposed to them. With such exposure it could not possibly serve any purpose to make them identifying witnesses in an identification parade. The evidence of the three eye witnesses was not evidence of identification under difficult circumstances. The appellant was arrested only minutes after the robbery, when the memory of the identification witnesses was fresh. Besides, the circumstances in which the appellant was arrested provided ample supporting evidence. A red T-shirt was recovered along the path between where the motor vehicle overturned and where the appellant was arrested. The appellant was arrested a short distance from the vehicle without a shirt. He had some injuries. It was incumbent upon him pursuant to the provisions of *Section 111* of the Evidence Act to explain why he was bare-chested and how he had sustained the injuries on his body. The appellant did not challenge witnesses who testified that he was arrested bare-chested on that evidence. In his defence however, he suggested that he was not arrested bare-chested.

The evidence against the appellant was overwhelming. His conviction was based on clear and ample evidence. The superior court analysed the evidence as it was bound to as a first appellate court, and we have no basis for faulting that court on that score. We however, think that the superior court improperly suggested that the appellant ought to have called a witness to buttress his defence. An accused has no obligation to prove his defences except in limited cases where the law places an evidential burden on him.

The appellant's appeal lacks merit and we accordingly order that it be and is hereby dismissed.

DATED and DELIVERED at KISUMU this 5th day of December, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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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