



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CRIMINAL APPEAL NO. 43A, 43B, AND 43C OF 2017**

**(Being an appeal from the court of the Acting Principal**

**Magistrate at Narok in Criminal Case No.773 of 2012,**

**R. v. Moses Mwangi, Daniel Njenga and Peter Nduati)**

**MOSES MWANGI.....1<sup>ST</sup> APPELLANT**

**DANIEL NJENGA.....2<sup>ND</sup> APPELLANT**

**PETER NDUATI.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The 3 appellants have appealed against their conviction and sentence of death in respect of robbery with violence contrary to section 296 (2) of the Penal Code (Cap 63) Laws of Kenya.
2. The respondent has conceded the conviction and sentence of all the 3 appellants.
3. The appellants were convicted on the evidence of Ann Sintamei Karia (PW 1), the complainant. PW 1 testified that on 4/7/2012 at about 7 p.m. she had closed her business and was heading to her home. On her way she met 2 people whom she knew well. These 2 people were Moses Mwangi and Peter Nduati, who are the 1<sup>st</sup> and 3<sup>rd</sup> appellants respectively. She further testified that it was not dark and that darkness was just setting in. She also testified that she knew their voices. Immediately the 3<sup>rd</sup> appellant greeted her and as she was answering, he jumped on her and pushed her down. The 3<sup>rd</sup> appellant then sat on her and held her mouth. She then screamed. The 1<sup>st</sup> appellant took her handbag and sweater. In that handbag, there was a phone Nokia 1110 and cash Shs.10,000. Again, in that sweater she had keys to her shop. Thereafter they left and as a result PW 1 rushed to her home and informed her husband about this robbery. She reported the matter to the police and the 3 appellants were arrested. The law requires that the evidence in respect of each appellant should be re-assessed separately. And for that reason I will consider the evidence in respect of each appellant separately.

**MOSES MWANGI: 1<sup>ST</sup> APPELLANT**

4. The 1<sup>st</sup> appellant (Moses Mwangi) has in his amended petition of appeal raised 3 grounds of appeal. In ground 1, he has faulted the trial court both in law and fact for convicting him on the evidence of a single witness (PW 1), which was based on him being recognized. Additionally, he has stated that the evidence of PW 1 was not supported by the provisions of section 137 (d) of the Criminal Procedure Code (Cap 75) Laws of Kenya. In this regard, I find that the complainant was able to recognize this appellant because it was not dark. She further testified that darkness was just setting in, and further the time was about 7 p.m. It was also her evidence that she knew the 1<sup>st</sup> appellant before the commission of this offence. Under cross examination, she testified that it is this 1<sup>st</sup> appellant who threatened to cut her with a knife if she screamed. She also testified that this 1<sup>st</sup> appellant was a cobbler. I find that the provisions of section 137 (d) of Criminal Procedure Code are inapplicable in this appeal, because they are in relation to consultation between the prosecution and the victim of the crime at the stage of plea bargaining. In the circumstances, I find that the complainant positively identified the 1<sup>st</sup> appellant as one of the 2 robbers. This ground of appeal is without merit and is hereby dismissed.

5. I will consider grounds 2 and 3 together. The appellants have faulted the trial court both in law and fact in failing to find that the prosecution had proved their case beyond reasonable doubt due to lack of vital witnesses and that his defence was not fully considered. In this regard, I find that the defence of the appellant was that of an alibi. He testified that on 4/7/2012 he closed his business at 7.p.m. and went to a club owned by one Susan. He further testified that he was in that club until 9.30 p.m. and thereafter went to sleep. He also testified that he had never had any differences with the complainant, adding that the complainant was her customer. Finally he also testified that he had no grudge against the complainant. In the light of the recognition evidence of the complainant and his defence of alibi, I find that the prosecution had proved their case against the 1<sup>st</sup> appellant beyond reasonable doubt. I do not agree with prosecution that the offence was not proved against the 1<sup>st</sup> appellant.

6. This is a first appeal. As a first appeal court, according to *Okeno v. R. (1972) E. A 32*, I am required to reassess the entire evidence produced at trial and come to my own conclusion based on that evidence. I have done so and I find that the 1<sup>st</sup> appellant was convicted on sound evidence. I therefore confirm his conviction.

#### **DANIEL NJENGA: 2<sup>ND</sup> APPELLANT**

7. The 2<sup>nd</sup> appellant (Daniel Njenga) has raised 3 grounds in his amended grounds of appeal. In ground 1, he has faulted the trial court in both law and fact for convicting him on the evidence of visual identification/recognition and in the absence of an initial report of the police in which he was not mentioned. In this regard, I find that the complainant (PW 1) did not mention this 2<sup>nd</sup> appellant as one of the robbers who attacked her on 4/7/2012. Her evidence is that she was attacked and robbed by the 1<sup>st</sup> and 3<sup>rd</sup> appellants. The evidence connecting this 2<sup>nd</sup> appellant with this offence is that of Ledama Ole Karia (PW 3). It was the evidence of this witness that the complainant had told him that she had bitten one of the thugs on his hands as they struggled. This 2<sup>nd</sup> appellant was arrested on the basis that he had bite marks on his fingers. While under cross-examination, this witness testified that he identified the 2<sup>nd</sup> appellant by the marks on his face and hand, and went further to add that the 2<sup>nd</sup> appellant's right thumb had been bitten by the complainant. Additionally, there is also the evidence of the investigating police officer No. 67045 PC Charles Obade (PW 6). According to the evidence of PW 6, the complainant told him that she knew the 3 robbers before. He also testified that there was moonlight which enabled the complainant to recognize the appellant. PW 6 further testified that the 3<sup>rd</sup> appellant (Peter Nduati) relocated to Eldoret after the commission of this offence but the police were able to trace him there and then had him arrested. It was also his evidence that the complainant identified this 2<sup>nd</sup> appellant as one of the robbers. I have considered this evidence of recognition and the evidence of the 2<sup>nd</sup> appellant in which he raised the defence of an alibi. In his unsworn statement, the 2<sup>nd</sup> appellant stated that he was in his home on 4/7/2012, and that he was arrested on 3/7/2012. In the light of this evidence, I find that the complainant did not identify this 2<sup>nd</sup> appellant as one of her robbers. Her evidence in this regard is that she met 2 people on her way home, who she positively identified as the 1<sup>st</sup> and 3<sup>rd</sup> appellant. I therefore

find that this ground of appeal has merit. I therefore allow the 2<sup>nd</sup> appellant's appeal against both conviction and sentence. I do not find it necessary to consider his other grounds of appeal. The prosecution rightly conceded his appeal. This appellant is therefore set free unless otherwise held on other lawful warrants.

### **PETER NDUATI: 3<sup>RD</sup> APPELLANT**

8. The 3<sup>rd</sup> appellant (Peter Nduati) has raised 4 grounds in his petition to this court. I will start with ground 2 in which the 3<sup>rd</sup> appellant has faulted the trial court both in law and fact in finding that the complainant positively identified him as one of the robbers. The evidence of the complainant in this regard is that she knew this 3<sup>rd</sup> appellant before the commission of this offence. It was her evidence that this 3<sup>rd</sup> appellant is the one who knocked her down to the ground, sat on her and then held her mouth. It was also the evidence of the complainant that this appellant greeted her before knocking her down. Furthermore, she also testified that she knew the 3<sup>rd</sup> appellant before the commission of this offence as a person who repairs umbrellas. She also testified that she had given this 3<sup>rd</sup> appellant her umbrella for repair. More importantly, she also testified that she knew the voice of this 3<sup>rd</sup> appellant very well and recognized his voice when this 3<sup>rd</sup> appellant greeted her.

9. The defence of this 3<sup>rd</sup> appellant was that he was with his family at home on 4/7/2012. He further stated in his unsworn statement that he knew the complainant. This 3<sup>rd</sup> appellant admitted being a person who repairs umbrellas and the complainant had given him his umbrella for repair. He further stated that he had no issues with the complainant and that they relate very well. He positively stated that: "*she could not fix me.*" He also admitted having been arrested in Eldoret. I find from the evidence of the complainant and that of this 3<sup>rd</sup> appellant that the complainant positively identified this 3<sup>rd</sup> appellant as one of his robbers. In the circumstances, I find that this ground of appeal is lacking in merit and is hereby dismissed.

10. In ground 3, this 3<sup>rd</sup> appellant has faulted the trial court both in law and fact in failing to find that there were contradictions in the evidence of the complainant (PW 1) in respect of the place where she was attacked. The evidence of the complainant in this regard is that she was attacked while going to her home. The evidence of Ledama Ole Karia (PW 3) is that the complainant told her that she had been attacked by robbers while at her shop in Orenkitok Centre. PW 3 rushed to the scene along with other neighbours and found the shop goods of the complainant having been stolen. I find this contradiction as one that is not material. The reason being that the complainant was attacked while en-route to her house. In the circumstances, I find no merit in this ground of appeal.

11. In ground 1, the 3<sup>rd</sup> appellant has faulted the trial court both in law and fact for not according him a fair trial as required by the 2010 Constitution of Kenya in Article 50 (2) (6) (f). In this regard, I find that the accused was given an opportunity to cross-examine all the prosecution witnesses and he did so. He was also given an opportunity to make his defence. He chose to make an unsworn statement and called no witnesses. Furthermore, I find from the original proceedings of 2/10/2012 that the court read over the charge to each of the accused in Kiswahili. The record shows:

*"A 1 – Not true*

*A 2 – Not true*

*Ct – PONGE."*

It is clear that this 3<sup>rd</sup> appellant was not given the opportunity to deny or admit the charge, which opportunity was accorded to the 1<sup>st</sup> and 2<sup>nd</sup> appellant. However, the record shows that the court entered a plea of not guilty in respect of all the accused persons. In response to this the 3<sup>rd</sup> appellant is recorded as having told the court that he needed statements which was then followed by an order of the court

adjourning the case for hearing on 31/12/2012 with a mention on 16/10/2012. Thereafter, there were several adjournments until 19/2/2013 when this 3<sup>rd</sup> appellant along with the co-appellants told the court that he was ready for trial. The record of the trial proceedings shows that he thereafter fully participated in the trial. In the circumstances, I find that the omission by the court to record what this 3<sup>rd</sup> appellant did or did not do in response to the charge on 2/10/2012 is an omission that is curable in terms of section 382 of the Criminal Procedure Code (Cap 75) Laws of Kenya. In other words, it is a curable defect.

12. Furthermore, in ground 4, the 3<sup>rd</sup> appellant has faulted the trial court both in law and fact in failing to find that he had not escaped to Eldoret. In this regard, I find that this 3<sup>rd</sup> appellant was arrested in Eldoret after running away from Nakuru in terms of the evidence of No. 67045 P.C Charles Obade (PW6) under cross-examination. In the circumstances, I find no merit in this ground of appeal. I hereby dismiss it. This is 1<sup>st</sup> appeal court. I have reassessed the evidence produced at the trial and I find that the alibi defence of this 3<sup>rd</sup> appellant was rightly rejected in view of the recognition evidence of the complainant (PW 1). For this reason, I do not agree with the prosecution counsel that the evidence produced did not support the conviction. I therefore confirm this 3<sup>rd</sup> appellant's conviction.

13. In the light of the foregoing, I hereby dismiss the 1<sup>st</sup> and 3<sup>rd</sup> appellants' appeals in their entirety. I hereby allow the appeal of the 2<sup>nd</sup> appellant with the result that his conviction and sentence are hereby set aside and he is set free unless otherwise held on other lawful warrants.

Judgement delivered in open court this 31<sup>st</sup> day of March, 2017 in the presence of Appellants and Mr. Mwangi for Respondent.

**J. M. Bwonwonga**

**Judge**

**31/03/2017**