



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

**CRIMINAL APPEAL NO. 82 OF 2014**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 83 OF 2014**

**BETWEEN**

**PETER NJERU NDWIGA .....1<sup>ST</sup> APPELLANT**

**FRANCIS MUTUKU MUSYOKA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. G. Mmasi, Ag SPM dated 10<sup>th</sup> July 2015 at the Senior Principal Magistrates Court at Vihiga in Criminal Case No. 72 of 2014)***

**JUDGMENT**

1. The appellants, **PETER NJIRU NDWIGA** and **FRANCIS MUTUKU MUSYOKA** were charged, convicted and sentenced to death for the offence of robbery with violence contrary to **section 295** as read with **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the charge were that on 31<sup>st</sup> December 2013 at Luanda Township within Vihiga County jointly with others not before the court and armed with dangerous weapons namely metal bars, robbed **KENNEDY OKANGO OBUNGO** of Kshs. 111,000/- cash, a Kenya Commercial Bank ATM Card, a Cooperative Bank ATM Card and a Huawei U2800 mobile phone valued at Kshs. 3200 all valued at Kshs. 114,200/- and immediately at the time of the said robbery, injured the said **KENNEDY OKANGO OBUNGO**.

2. As this is the first appeal, I am enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether I should uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify (see **Okeno v Republic [1972] EA 32**).

3. The material facts emerging from trial were that on 31<sup>st</sup> December 2013 at about 10.00am, Kennedy Okango Obungo (PW 1) went with his wife to the Luanda branch of the Kenya Commercial Bank where he withdrew Kshs. 106,000/- from the banking hall counter. This transaction was confirmed by Patrick Ojango (PW 10), the branch manager at the material time, who was working with KCB Luanda branch and who produced the bank statement. As PW 1 proceeded home on foot, a white saloon car registration number KBS 332L passed him as he neared his house. One of the occupants in the car greeted him and he responded. The car went ahead, abruptly stopped and made a three-point turn. 4 people came out of the car and the person who had greeted him introduced them as police officers looking for a suspect. One of the men who was wearing a jungle green jacket told him that he was the suspect and proceeded to

handcuff him and place him under arrest. PW 1 was shoved into the rear of the car and told to lie on the floor.

4. PW 1's neighbour, Nelson Hezekiah Alumere (PW 7), recalled that on the material day, he saw a white vehicle headed towards his homestead. He saw 3 people emerge from the vehicle and talk to PW 1. He saw them push PW 1 in the rear seat and drive off. Police officers later came to his home to inquire about the incident but he could not recall the identity of the people who abducted PW 1.

5. PW 1 further testified that as they drove off, the men started beating him with a blunt weapon while demanding money and his valuables. He initially told them he had Kshs. 6,000/- in his wallet but when they threatened to kill him he revealed he had Kshs. 100,000/- cash in the breast pocket of his coat. They took his money, his KCB and Co-operative Bank ATM cards and demanded his PIN number. The assailants drive off until they reached a trading centre where one of them alighted and went to withdraw some money. After withdrawing the money, he came back to the car and they drove off. A while later, PW 1 was uncuffed and thrown off the vehicle.

6. After PW 1 was thrown off the vehicle, he went to report the incident at Gisambai Administration Police Post where he was referred to Vihiga Police Station. He went to the KCB Mbale branch and requested for his bank statement which showed that Ksh. 5,000/- had been withdrawn in his name within the previous 45 minutes. Boniface Mido Azenga (PW 11), the manager of the KCB Mbale branch confirmed that on 31<sup>st</sup> December 2013, Kshs. 5,000/- was withdrawn from PW 1's account at 12.01pm.

7. PW 1 further testified that following the injuries he had sustained on the elbow, wrists and fingers, he went to seek treatment. Sammy Chelule (PW 3), a clinical officer at Vihiga District Hospital, confirmed that PW 1 came to the hospital about 8 hours after the incident in soiled and torn clothes. Both hands were swollen and tender with reddening on the elbow and wrist which had visible handcuff mark. There was swelling and numbness on the digital finger. He opined that the injuries were caused by a weapon with blunt and sharp edges and classified the injuries as harm in the P3 form.

8. PW 1 attended an identification parade was conducted by Inspector Pius Nzioki (PW 4) on 15<sup>th</sup> January 2014. PW 1 where he identified both appellants. As regards the 2<sup>nd</sup> appellant, he stated that he was the one wearing a jungle green jacket while the 1<sup>st</sup> appellant was the one who waved at him and greeted him before as he was going home from the bank.

9. The investigating officer, PC Jillo Kombo (PW 9), recalled that a robbery incident was reported on 31<sup>st</sup> December 2013 from Gisambai AP Post. He was instructed to investigate the incident and on the same day he met PW 1, he interrogated him, took his statement and referred him to the hospital for treatment. After about 2 weeks, a similar robbery was committed in Yala Dudi area involving 5 men in a motor vehicle. Police from that area intercepted a vehicle and arrested 2 suspects. The suspects were brought to Vihiga Police Station and an identification parade conducted by PW 5. PW 9 later learnt that the motor vehicle had been released to the owner who had hired it to a third party. PC Alfred Kutol (PW 8) produced a photograph of the motor vehicle KBS 332L.

10. PC Julius Bogonko (PW 6), was one of the police officers manning a road block at Yala Dudi on 14<sup>th</sup> January 2014. He told the court that they received information about a robbery that had taken place in the area involving people in a motor vehicle. After the communication, they stopped a white Toyota vehicle going to Busia from Siaya. PW 6 recalled that the occupants ran out. He shot in the air and as he pursued them, he managed to arrest one of the suspects, whom he identified as the 2<sup>nd</sup> appellant, hiding in a nearby Banana plantation. When the vehicle at the road block was searched, the officers found an AP beret, smoke jacket, jungle belt, trousers and shirt.

11. On 14<sup>th</sup> January 2014 at about 11.30am, APC Ann Ahenda (PW 5), attached to Nyawara AP Camp told the court that they were informed of a robbery in the area and that the suspects were at large. They spread word among *boda boda* riders and in due course an informer told them that a suspect had been seen walking with a villager, wearing a yellow t-shirt belonging to the villager. They located the suspect,

who turned out to be the 1<sup>st</sup> appellant wearing the yellow t-shirt and arrested him. They also located the owner of the yellow t-shirt, Onyango Sijeny (PW 2) who confirmed that the yellow t-shirt was his. He testified that he had given it to the 1<sup>st</sup> appellant when they met after the 1<sup>st</sup> appellant told him that he had been carjacked and wanted to go to the nearest centre to renew his mobile phone. As PW 2 was escorting him to Nyawara Centre, the 1<sup>st</sup> appellant requested PW 2 for the yellow t-shirt he was wearing beneath his overalls. PW 2 gave him the t-shirt whereupon, he removed his soiled white shirt. When they reached Nyawara, the 1<sup>st</sup> appellant changed his sim card, withdrew kshs. 5000/- and paid him Kshs. 500/- and they parted. PW 2 was arrested and taken Yala Police Station. He identified the 1<sup>st</sup> appellant as the stranger whom he gave the yellow t-shirt and who gave him Kshs. 500/-.

12. In his sworn defence, the 1<sup>st</sup> appellant testified that he was a businessman working in Nairobi supplying fresh fish. He denied the offence and told the court that on 31<sup>st</sup> December 2013 he was at his home in Kirote, Embu County celebrating the end of the year. He further testified that on 15<sup>th</sup> January 2014, he was at the Siaya Law Courts when he was informed that he was wanted by CID officers from Vihiga. He was taken to Vihiga Police Station and requested to participate in an identification parade where he was identified by a witness.

13. In his sworn testimony, the 2<sup>nd</sup> appellant denied the charge against him. He told the court that he was a police officer and that on 31<sup>st</sup> December 2013, he was on duty at Rumuruti in Laikipia West. He testified that on 15<sup>th</sup> January 2014 he was at the Siaya Law Courts when he was requested to go to Vihiga Police Station. he was remanded in custody and requested to participate in an identification parade where he was identified by a witness.

14. The trial magistrate found that the prosecution had proved all the elements of the offence of robbery with violence and that the appellants were properly identified as assailants. In their respective petitions of appeal and written submissions, the appellants raised the issue of identification. They contended that the trial magistrate erred in law and in fact in convicting them on the evidence of a single identifying witness without corroboration and that the witness did not describe the assailants in the first report to the police. They noted that the prosecution did not provide any tangible evidence to link them to the offence. They submitted that the identification parade was conducted in contravention of the law. The appellants also contended that the trial magistrate failed to consider the respective alibi defences.

15. Counsel for the respondent, Mr Ng'etich, opposed the appeal and supported the conviction. He submitted that the identification was sound and the identification parade was conducted in accordance with the law. He pointed out that although the rank of the officer who conducted the identification parade was unknown, this was a mere irregularity that did not affect the outcome of the parade.

16. In order to succeed, the prosecution must prove the elements of the offence of robbery which the Court of Appeal in *Ganzi & 2 Others v Republic* [2005] 1 KLR 52 elaborated as follows:

***The offence of robbery with violence under section 296(2) of the Penal Code is committed in any of the following circumstances namely: -***

***(a) The offender is armed with any dangerous or offensive weapon or instrument; or***

***(b) The offender is in company with one or more other person or persons or***

***(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.***

17. The word “or” contained in **section 296(2)** above must be read disjunctively so that the prosecution need only prove that the stealing, which is the central element of robbery, took place in any of the circumstances that are set out in the subsection. In *Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, the Court of Appeal held that:

*The elements of the offence under section 296(2) are three in number and they are to be read, not conjunctively, but disjunctively. One element is enough to found a conviction.*

18. From the facts I have outlined, I have no doubt that the prosecution established the offence of robbery with violence through the clear and credible testimony of PW 1. His testimony was corroborated by other evidence. On the material day, on his way home after withdrawing money from the bank, PW 1 was abducted by 5 men in a motor vehicle. This incident was witnessed by PW 7. He was assaulted and injured while crammed in the rear of the car. His injuries were confirmed by PW 3 who examined and treated him on the same day. Apart from the fact that his phone and ATM cards were stolen, the fact that his money was stolen was corroborated by PW 10 who confirmed that he had withdrawn Kshs. 106,000/- which was stolen immediately thereafter. PW 11 also corroborated the fact that one of the assailants withdrew Kshs. 5,000/- from PW 1's account.

19. I now turn to the key issue in this appeal which is whether the appellants were identified by PW 1 as the assailants. This question revolves around identification of persons, particularly strangers, in difficult conditions. The trial magistrate appreciated the principles governing identification. She cited **Anjononi v Republic [1980] KLR 54** where the Court of Appeal stated that, "*Proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present on where no stolen property is found in possession of the accused.*" The court also cited the case of **Regina v Turnbull [1976] 3 ALL ER 549** where it was held that;

*First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance.*

20. In a plethora of authorities; **Maitanyi v Republic [1986] 2 KLR 75**, **Karanja & Another v Republic [2004] 2 KLR 140** and **Wanjohi & Others v Republic [1989] KLR 415**, the Court of Appeal has held that the court must examine all facts and weigh the evidence in order to determine whether the identification is free from error.

21. In this case, the incident occurred in the mid-morning hours in broad daylight. PW 1 told the court that he was able to see the 2<sup>nd</sup> appellant who greeted him. He also stated that the 1<sup>st</sup> appellant, who was wearing a jungle jacket, is the one who handcuffed him. After the assailants confronted him, they talked to him to inquire whether he was a suspect and then bundled him at the back of the vehicle where they continued to assault him while riding with him in the car. The assailants were not masked and given the time, which was over an hour, they were together with PW 1, I find and hold these circumstances were favourable for positive identification.

22. When cross-examined on the issue of identification, PW 1 told the court that he never gave a description of the assailants when he recorded his statement on the same day of the incident. Although he mentioned that one of them had a jungle jacket, he told the court that when he was handcuffed and pushed into the vehicle, he was not scared as he thought that the assailants were policemen. When cross-examined by the 1<sup>st</sup> appellant, PW 9 explained that PW 1 never gave a description of the robbers but stated that he could identify the assailants if he saw them. When cross-examined by the 2<sup>nd</sup> appellant, PW 9, stated that PW 1 told him that he could remember the 5 assailants as he was with them for some time.

PW 1 also told him that he heard one of the assailants being referred to as Mutuku and when the robbery in Siaya took place he connected it to PW 1's case.

23. It is apparent from the evidence that PW 1 did not name the assailants when he made his first report but according to PW 9, he was able to confirm that he knew the assailants and that he could recall their appearance and could remember them if he saw them. The appellants submit that PW 1 did not give a description of the appellants to the police in his first report hence their subsequent identification at the parade could not be relied upon to support the conviction.

24. In the case of *Simiyu and Another v Republic* [2005] 1 KLR 192, the Court of Appeal held that in every case where there is a question of identity of the accused, the fact that the accused having given a description of the assailant and the terms of that description are matters of highest importance. Evidence ought to be given first of all, by person or persons who gave the description and purported to identify the accused and then by the person or persons to whom the description was given. It is on the basis of this description that an identification parade will be conducted to test the veracity and correctness of witness description of a suspect. In *Gabriel Kamau Njoroge v Republic* [1982-1988] 1 KAR 1134, the Court of Appeal observed:

*A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.*

25. Does failure to give a description of the assailants render the identification parade unreliable and useless? On this issue, I would do no better than quote the Court of Appeal in the case of *Nathan Kamau Mugwe v Republic* NRB CA CRA No. 63 of 2008[2009] eKLR where it observed as follows;

*James swore he saw the appellant from the time they met and negotiated the fare and was with him from the place of hiring upto the place where he was attacked and tied up. The appellant was sitting next to him on the front passenger seat. The trial Magistrate and the first appellate court were satisfied that James had ample time to see the appellant during the period the two were alone in the vehicle and also at the beginning of the journey. James had no difficulty in identifying him at a properly conducted identification parade.... We think the identification of the appellant was, in all the circumstances of the case, sound and even if the two courts below had excluded the evidence of Mwendo with regard to the parade, they would have inevitably come to the conclusion that the appellant had been properly and correctly identified as the person who had hired James at Cheers Makuti Bar and subsequently robbed him in the company of another person..... As to the complaint in ground six that the witnesses had not given to the police a description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in Gabriel KamauNjoroge v Republic (1982 – 1988) 1 KAR 1134, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness "SHOULD" be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him. In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.[Emphasis mine]*

26. This is a case where, as I have found, the conditions obtaining were favourable for positive identification and although PW 1 did not give the assailants' description to the police in the first instance, he was sure that if he saw them, he could identify them. PW 4 conducted two separate parades for each appellant. The identification parade for the 2<sup>nd</sup> appellant had 8 people and the 2<sup>nd</sup> appellant placed himself between numbers 3 and 4. PW 1 who was then at the CID office was called and identified the 2<sup>nd</sup> appellant straightaway. The 2<sup>nd</sup> appellant signed that he was satisfied by the manner the parade was conducted. PW 4 also arranged a parade for the 1<sup>st</sup> appellant with completely different members. The 1<sup>st</sup> appellant placed himself between number 7 and 8. PW 1 looked at the members and was able to pick out the 1<sup>st</sup> appellant. Having considered the evidence, I am satisfied both identification parades were conducted in accordance with the ***Force Standing Orders***.

27. At the end of the day, the cases I have cited emphasise the duty of the court to carefully weigh the entirety of the evidence and before convicting an accused be sure that the circumstances of identification are free from error. In ***Wamunga v Republic [1989] KLR 424*** the Court of Appeal warned that;

***[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.***

28. The sum total of the evidence is that PW 1 positively identified the appellants on the date he was robbed. Although he did not describe them to the police in his first report, he was sure that he could clearly identify them if he saw them. When the police arrested persons in a robbery similar to the one which PW 1 was involved in, the suspects were subjected to an identification parade a fortnight after the incident and PW 1 was able to pick them out without difficulty.

29. The appellant's both raised alibis in their defence. The law is settled that an accused person who raises the defence of alibi does not assume the burden of proving it. It is sufficient if the alibi raises reasonable doubt as to whether or not the accused was at the scene of the crime (see ***Kiarie v Republic [1984] KLR 739***). This means that the burden always remains with the prosecution to prove that the accused committed the crime under trial. The appellants did not give notice of their alibi in order for the prosecution to call evidence in rebuttal. In such a case, the duty of the court is to consider the alibi alongside the prosecution case.

30. Based on all the evidence of positive and affirmative identification of the appellants at the scene of the robbery by PW 1, I find and hold that the appellants' defences, being mere statements, are without merit.

31. The conviction was safe and it is affirmed and so is the sentence.

32. The appeal is dismissed.

**SIGNED AND DATED AT KISUMU**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KAKAMEGA this \_\_\_13<sup>th</sup>\_\_\_ day of \_\_\_October\_\_\_ 2017.**

**R. N. SITATI**

**JUDGE**

Appellants in person.

Mr Ng'etich, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.