



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 54 OF 2013**

PETER MAINA MUCHIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal from conviction and sentence in Othaya Principal Magistrate's Court (Hon. F.W. Macharia)  
delivered on 17th April, 2013)*

**JUDGMENT OF THE COURT.**

1. The appellant, together with two others who were acquitted at the close of prosecution's case, was charged with the offence of robbery with violence, Contrary to Section 296(2) of the Penal code. Particulars of offence were that on the 16th day of November, 2011 at Kagumo Sub Location in Nyeri county, jointly while armed with pangas, robbed Agnes Gathoni Waikwa of the items listed in the charge sheet, and immediately before or after the time of such robbery, used personal violence on the said complainant.
2. The prosecution called 5 witnesses and at the close of their case, the trial Court found the appellant with a case to answer, requiring his defence. The appellant gave sworn testimony and called 4 witnesses in his defence. At the end of the trial, the lower court found the accused guilty as charged and sentenced him to suffer death as provided by law.
3. The appellant in his appeal against the finding of the trial court complains on the main that:
  - a) The trial court erred in law and in fact in failing to note that the alleged identification was obtained in a difficult circumstance and condition and thus was not free from error.
  - b) The trial court erred in law and in fact in declining to evaluate the defence case alongside the prosecution's contrary to section 169(1) of the CPC.
4. The evidence of identification was one of the complainant (PW1). The abridged version of her testimony is as follows:

“...On 16/11/2011 at 12.30 am, I was at home. I had gone out to the toilet..as I was going back to the house, someone emerged and he was having a torch. He directed the lights towards me. The person ordered me to stop. I had a torch...He ordered me to switch off the torch...he lifted the panga and shouted that I enter the bathroom...he did not close the door to the bathroom...the man entered the house...the door was wide open and electricity light was on. I got out of the bathroom and went behind the kitchen. I was hit by something and I fell down. The man was standing next to me..He started hitting me with a panga on my back. He told me to take him to the house and give him money. I rushed to close the door leading to

the bedrooms but the person rushed back and we struggled with the door. I managed to grab the panga and I cut the man on the forehead and hands as we struggled with the door. It was before I cut him with the panga. The other man was busy taking items from the sitting room...they got out of the house, I locked the main door...I switched on the security light...the man who cut me ran away...I called my employee Muriithi...he was in a different house...my mother in law also came. They stayed with me till 5.00 a.m. I was left with the panga and their torch which fell in the sitting room...I went to Witima Station and reported the matter...on 19/2/2012 the OCS Witima called me. He needed me to participate in an identification parade...the OCS told me the suspect had refused to be in the identification parade. I saw the person who had a panga very well. I saw him very well using the sitting room electricity light. He was about 5 feet tall. I used to see him and even knew where he comes from. He lives on the other side of the valley. We know him as "P.M". His real names are Peter Muchiri. He had no marks. The only mark I put is the cut mark on his left side of the face. He is still having the cut...Muchiri has been on the run. I told the police who he was. The police had gone several times to his home but did not get him.

5. The foregoing is the evidence that the appellant contends did not sufficiently identify him as one of the people that allegedly robbed the complainant. The complainant stated that he knew her attacker and therefore it was more of a question of recognition than identification. It was her evidence that she told the police who her attacker was when she reported the incident and that the appellant had been on the run as the police visited his place severally before finally arresting him.
6. The Court is alive to the possibility that the circumstances of the attack may have been sudden and shocking creating a possibility of mistaken identity. This therefore called for the warning and carefully testing of such evidence by the trial court. As was stated in **Abdala bin Wendo's** case, in such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to the guilt of the accused.
7. It was PW1's testimony that during the attack she managed to wrestle the panga and cut the appellant on the left side of the face. It turned out that the appellant indeed had such a cut on the left side of his face. His attempt to explain how he got cut on the face was rightly rejected by the trial magistrate as the health facility he alleged to have attended after his motorcycle accident, denied through the DW 3, ever treating him. Besides, the appellant's and his mother's (DW2) evidence seemed incoherent as it was not clear whether the motorcycle in question had a windscreen that allegedly cut the appellant during the alleged accident or it had only side mirrors.
8. From the foregoing we are sufficiently persuaded that the trial Court properly exercised its jurisdiction in convicting the appellant in line with the principles governing single identification witness evidence as laid down in **Abdalla bin Wendo's** case.
9. In the circumstance we decline to disturb the conviction and sentence meted by the trial court with the consequence that this appeal is disallowed.
10. It is so ordered.

***Dated and delivered at Nyeri this 19th day of December, 2013.***

**OUGO R.E**

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**JUDGE**

**ABUODHA N.J**

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**JUDGE**

*Delivered in open Court in the presence of..... for the Appellant and.....  
for the Republic.*