



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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 25 & 26 OF 2011**

JOSHUA MUTISO KISESE.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original conviction and sentence in criminal case Number 1509 of 2009 in the Chief Magistrate's Court at Thika – B. A. Owino (SRM) on 20<sup>th</sup> January 2011)*

**JUDGMENT**

**Introduction**

1. The appellant Joshua Mutiso Kiseese was tried and convicted in two counts for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. He was sentenced to suffer death as by law provides.

**Facts of The Case**

2. The brief facts were that on the night of 25<sup>th</sup> - 26<sup>th</sup> March 2009 at Kakumiini Sub-location in Yatta district within Eastern Province, jointly with others not before court, while armed with dangerous weapons to wit pangas (machetes) and rungus (clubs) they robbed Jacinta Muthua Murage of one brown brief case, three pairs of male sports shoes, one pair of eye glasses and one mobile phone make Alcatel all valued at Kshs.18,500/-; and they also robbed one Mary Mueni of one mobile phone make Motorola C118 valued at Kshs.2,500/-. It was alleged that at, or immediately before, or immediately after the time of such robbery they used actual violence against the said victims.

**Grounds of Appeal**

Being aggrieved, he filed an appeal and in the amended grounds of the appeal he faulted the evidence of visual identification and the manner in which the identification parade was conducted. He also asserted that the allegations against him were not proved, and that his defence statement was not considered.

**Respondent's Reply**

3. Miss Maina, learned state counsel, opposed the appeal on behalf of the respondent and supported

both the conviction and sentence of the appellant. She submitted that both **PW2** and **PW4** stated that the appellant was well known to them; that they recognised him during the robbery because they grew up together; and that there was sufficient light from a lamp that had been lit in the room and from the robbers' own torches during the robbery.

### **The Prosecution Case**

4. A summary of the prosecution case was that the first complainant, who testified as **PW5**, was visited by the robbers on the night of 15<sup>th</sup> March 2009 at midnight, at her home in Kakumiini in Matuu. They forced her son to call her out on the pretext of being ill, then they came in and robbed her of the property listed in count I.
5. The intruders ordered her to go back and sleep but she noticed that there were other intruders in her sister-in-law's room which is adjacent to the room from which her son had been removed. She too was being robbed. When her sister-in-law started to scream for help the robbers fled.
6. The second complainant who testified as **PW2** was asleep in her house with her nieces and nephews, on the night of 25<sup>th</sup> - 26<sup>th</sup> March 2009, when she woke up suddenly to find a stranger watching her. She woke her niece up to tell her there was someone in the next room. The stranger shone the torch at her and ordered her to keep quiet.
7. She started to scream but suddenly the door to her room was forced open and two men burst in. They slapped her and her niece to silence them and demanded money. **PW1** showed them her purse and one of the men took Kshs.20/= out of it together with a mobile phone which was on the table.
8. The men got distracted when her mother started calling out her name from outside. **PW2** took the chance and ran out of the house. She left the men confronting her mother. On the 1<sup>st</sup> April 2009 the police came for her from the school where she was working and informed her that some suspects had been arrested and she was required to attend an identification parade. The appellant was charged after **PW2** and **PW5** picked him from an identification parade on 1<sup>st</sup> April 2009.
9. The first appellant gave a sworn statement in his defence and stated that on 26<sup>th</sup> March 2009 he was in Matuu repairing his father's water pump. That at 2 p.m. he was at a stage called Sofia waiting for transport to travel to Nairobi when a police land rover stopped by. Police officers emerged from the land rover and arrested him together with other young men who were at the stage. Further that he was subsequently picked out of identification parades by victims of a robbery he was alleged to have participated in and later charged with the offence. He denied having robbed the complainants.

### **Analysis**

#### **Identification**

10. Indeed, the prosecution case rests on the evidence of visual identification by **PW2** and **PW5**. In considering the evidence of identification we have used the direction of the Court of Appeal in the case of **JOSEPH NGUMBAU NZALO VS. REPUBLIC (1991) 2KAR Pg 212**, and made a:

*“A careful direction regarding the conditions prevailing at the time of identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error was essential.”*

We therefore analysed the evidence of identification from the two identifying witnesses, **PW2** and **PW5** in the context of the evidence tendered in defence.

11. We note that the robbery occurred in the dead of the night between the hours of 12 and 1.30 a.m. Both complainants had retired to bed when the robbers struck. **PW5** said that there was some moonlight and she also had a torch by which she identified the appellant. She told the court that it was the appellant who pushed her back into the house after she opened the door and also ordered her to remain quiet. It was also he who told her to remain in the house after the robbery.
12. **PW5** also testified that in her report to the police, she told them that she had identified one Joseph and one Muli among the robbers. Further, that the two had been known to her since their childhood and that she went looking for them in their homes on the morning after the robbery but did not find them. In cross-examination she stated that she was present during the appellant's arrest and that it was she who identified him from a distance.
13. **PW2** said that she was sleeping in one of the rooms in a two roomed house and that a lantern had been lit in the adjacent room which enabled her to see and identify the appellant.

### **Identification Parade**

14. We observe that it was not necessary to take **PW5** through the process of picking the appellant out of the identification parade because of her own testimony that the appellant was her neighbour and that she knew him before. We observe that she visited his home the morning after the attack but did not find him and that she helped to identify him for purposes of arrest. The appellant was therefore right to protest when **PW5** purported to pick him out of the identification parade.
15. We considered the identification parade evidence with regard to **PW2** who said that she did not know him before the attack, but that she had identified him on the night of the robbery. She also testified that it was the appellant who demanded money from her and who took it out of her purse after she showed it to him. She did not participate in his arrest but said that she picked him out of an identification line-up.
16. **PW1**, Domitila Makau, the matriarch of the home, who ran into the robbers as she was responding to her daughter's screams and **PW3** the 14 year old lad who was first awakened and used to lure his mother **PW5** to open the door, did not identify any of the witnesses.
17. The identification parade was conducted by **PW6**, CIP Elizabeth Murage. Her evidence was however, not of much help to us. From her evidence it is not possible to tell whether she conducted the parade in conformity with the identification parade rules.
18. There was no evidence that she advised the appellant of his right to have his attorney, or a friend present. The officer did not also tell the court where the witnesses were accommodated before they went before the parade. We cannot therefore ascertain whether they did or did not see the parade members before they went to the parade.
19. It also appears that the appellant and his co-accused, who passed away during the trial, were placed in the same line-up and that the witnesses went before that parade one after the other, without the appellant being asked whether he wished to change the position in which he was standing.

### **Findings**

20. After a careful analysis of the evidence we have made the following findings: First that it is not clear how long the robbers remained in **PW2**'s room but the sequence of events seems to suggest that it was a brief moment. Second, that if the burning lantern was in a different room and the intruders who barged into **PW2**'s room were shining torches towards her, it is not evident how she was able to see them clearly enough to be able to identify them.
21. Third, **PW2** testified that the appellant was not known to her before the attack but in cross

examination she said that she identified him by name to the police. **PW5** on her part purported to have identified the appellant by “some moonlight”. The court was not told how the moonlight helped her to identify people who were inside her bedroom. She said that when the men burst into her house they grabbed the torch she had. She did not go further to state by what light she identified the appellant. **PW5** said she had known the appellant from his youth but she does not appear to have given his name to **PW4** when she made her report.

22. We find that there was a possibility of interference and that the witnesses learnt from other persons the names of those thought to have committed the crime and led the police to them. We also find that in the circumstances of this case, the manner in which the identification parade was conducted did not aid the credibility of the identification of the appellant.

23. The upshot of the foregoing is that sufficient doubt has been created in the prosecution case to make it unsafe to uphold the convictions. We give the appellant benefit of that doubt on each of the two counts and allow the appeal. We quash the conviction, set aside sentence and order that the appellant be set at liberty forthwith unless otherwise lawfully held.

**SIGNED DATED and DELIVERED** in open court this **11<sup>th</sup>** day of **December 2013**.

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**MUMBI NGUGI**

**JUDGE**

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**L. A. ACHODE**

**JUDGE**