



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CR. APPEAL NO. 60 OF 2012**  
**(CONSOLIDATED WITH 59/2012 & 92/2008)**

MUTISYA NGULU.....1<sup>ST</sup> APPELLANT

KYALO MWANGANGI.....2<sup>ND</sup> APPELLANT

BENARD MUSYOKI MULWA.....3<sup>RD</sup> APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

*(An Appeal from the conviction and sentence in Criminal Case No. 205/2006 in the Principal Magistrate's Court at Kitui (Hon. J. Ombura, SRM))*

**Judgment**

1. The three Appellants – Mutisya Ngulu (“1<sup>st</sup> Appellant”); Kyalo Mwangangi (“2<sup>nd</sup> Appellant”); and Benard Musyoki Mulwa (“3<sup>rd</sup> Appellant”) —were charged in the Senior Principal Magistrate’s Court at Kitui with a single count of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars were that, on the 13<sup>th</sup> January, 2006 at around 1:00 am at Sooma village, Kavuta sub-location, Itoleka location in Kitui District within Eastern Province jointly with another not before court, while armed with dangerous weapons namely pangas and rungas, they robbed Isaack Kimeu Syengo cash Kshs. 1,100, 20 kgs of Maize, 10kgs of cooking fat, 2 jackets, one radio cassette make National, one pair of bed sheets all valued at Kshs. 11,750 and immediately before or immediately after the time of such robbery used actual violence to the said Isaac Kimeu Syengo.
2. After a fully-fledged trial in which the Prosecution called eight witnesses and the three Appellants gave unsworn statements, the Learned Trial Magistrate convicted the Appellants of the charged offence and sentenced them to death. The Appellants are dissatisfied with both the conviction and sentence and have appealed to this Court. The grounds of appeal upon which each of the Appellants rely on are nearly identical. They can be grouped into three:
  - a. That the Learned Trial Magistrate erred in law and fact in relying on the evidence of identification when the circumstances suggested that it was not error-free;
  - b. That the Learned Trial Magistrate erred in law and fact in convicting despite the fact that crucial witnesses were not called by the Prosecution;
  - c. That the Learned Trial Magistrate erred in law and fact in rejecting the defences of the Appellants outright and in finding that the Prosecution case had been proved beyond reasonable doubt.
3. The evidence upon which the Prosecution relied on for the conviction is as follows. Isaac Kimeu

Syengo (“Isaac”), is the complainant in the case. He testified as PW1. On 16<sup>th</sup> January, 2006, at about 1:00 am, he was in his house at Kavuta village asleep when a loud sound awoke him. It soon became clear that the sound was caused by assailants who were trying to gain ingress into this house. By his reckoning at the time, there were at least four people outside his house, strategically standing at the two doors and windows to ensure that no one would escape from the house. The assailants called upon him to open the door. Isaac declined. He raised alarm instead hoping that his neighbours would come to his rescue. That was cue for the assailants to finally break into the house. They used a large rock to hit the wooden door and it caved in. The assailants rushed in.

4. Isaac thought he clearly recognized the 1<sup>st</sup> Appellant as the first assailant to rush in carrying a panga. The 1<sup>st</sup> Appellant is his brother-in-law. He testified that the 1<sup>st</sup> Appellant slashed his elbow as he attacked him and pushed him aside. He then slashed his head and neck in a frenzy all the while demanding for money. Two other men came into the house. They attacked Isaac with rungu as they too demanded money clearly irked that the Kshs. 1,100 they had found in Isaac’s shirt pocket was insufficient. They left for a short period of time to go to try their luck in the other rooms of the house – particularly at Isaac’s daughter’s room.
5. Isaac’s daughter is Judy Kimeu. She, too, testified about awakening to the loud sounds outside their house and calls for her father to open the door. She recalled how one of the assailants opened the door to her bedroom. The assailant summoned Judy to where he was standing by the door and he hit her with the face of the *panga*. Judy recognized him at this point. Through the light coming of the flashlight the assailant had and the moonlight coming through the window to her bedroom, she identified him as the 3<sup>rd</sup> Appellant. She had known him for more than two years prior to the incident as she had seen him severally at his mother’s kiosk buying *mandazi*.
6. According to Judy, the 3<sup>rd</sup> Appellant took her by the hand and led her outside the house. Two other assailants joined them outside after a while. They demanded that she shows them where the money was. At this time, through the illumination from the moonlight, Judy identified the 2<sup>nd</sup> Appellant and the 1<sup>st</sup> Appellant. She knew them before; the 1<sup>st</sup> Appellant as a relative and the 2<sup>nd</sup> Appellant as an acquaintance who had, for about three years, lived at a neighbour’s house. According to Judy, the Appellants spent some time with her outside apparently not convinced that she did not know where her father hid money. They searched in several places including inside some broken pots in the compound. The assailants then led Judy back to her room and locked it from the outside.
7. They returned to Isaac’s room where they inflicted more physical injury on him in a bid to get more information on where he kept money. When he fell down, they picked him up scruffly and frog-matched him outside to disclose where the money was hidden. Ultimately, they could not get any more money. They slashed him severally with pangas and a sharp object he did not see and left him for the dead as they fled.
8. Isaac’s neighbour, Simeon Mutua Muthengi (“Simeon”) is a charcoal burner by occupation. He was out at night checking on the progress of his charcoal pit around the same time when Isaac’s house was attacked. He heard the screams and the banging. Then, he heard some voices of people near where he was. He hid so that the people, who were in Isaac’s compound would not see him. He was about eight metres away by his reckoning. He recognized the voice of the 3<sup>rd</sup> Appellant, who he had known for a long time since he was a neighbour in the village. He also recognized the voice of a second person by the name Mutisya Musyoka who was never arrested. The conversation he heard was about finding money, which the two interlocutors thought was near a pit latrine.
9. When Simeon suspected that the assailants had seen him, he changed positions. He finally hid in a place where he had vintage point of view to see them as they fled from the scene of crime. He testified that he hid about 4 metres away from a path leading from Isaac’s house. There, he was able to clearly identify the three Appellants as they filed past. They each were carrying some luggage – including a briefcase and a sack.
10. After witnessing this, Simeon rushed to the home of another neighbour – Francis Kiima Kamwana (“Francis”) – whom he woke up and told about what he had seen and heard. They both rushed to Isaac’s house. They found him badly injured; he was unconscious and bleeding profusely. Together with Cosmas Ngei Syengo (“Cosmas”) who joined them at the scene later, they administered first aid and later found a motor vehicle to transport Isaac to Kitui General Hospital.

11. This was the core of the Prosecution case. The only other witnesses were the Clinical Officer who treated Isaac and confirmed the injuries; and the Investigating Officer, PC Joseph Karanja, who testified about the report of the crime and how the arrests were made.
12. Against this evidence, put on their defence, the three Appellants offered unsworn evidence. Each of them flatly denied any knowledge of the crime. They each gave accounts of how they were arrested. The 1<sup>st</sup> Appellant testified that he was at this home on 1<sup>st</sup> February, 2006 at 6:30 pm when he was arrested by armed Police Officers who assaulted him and told him that he had stolen. He says he was only charged because he has a grudge with Isaac. According to the 1<sup>st</sup> Appellant, the grudge is borne out of the troubled marriage between Isaac and his wife who is the 1<sup>st</sup> Appellant's relative. The 2<sup>nd</sup> Appellant testified that he was arrested on 4<sup>th</sup> April, 2006 at a club in Kitui town after a fracas. He says he was requested by the Police to agree to be "charged with peace bond case" and when he refused, the Police retaliated by framing him with the present charges. Finally, the 3<sup>rd</sup> Appellant testified that he was away in Nairobi between January 6, 2006 and 19<sup>th</sup> April, 2006. He was arrested when he next went home on 19<sup>th</sup> April, 2006 after he ventured to Katulani to take a letter on 22<sup>nd</sup> April, 2006.
13. We begin by observing that as a first appellate court, we have an obligation to re-evaluate all the evidence given at trial and come to our own independent conclusions. We are not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, we must be acutely aware that we never saw nor heard the witnesses as they testified and, therefore, we must make an allowance for that. See *Okeno v R* [1972] EA 32 and *Kariuki Karanja v R* [1986] KLR 190.
14. We have given our account of the Prosecution and Defence cases as gleaned from the record of the Trial Court. Looking at the evidence presented, as all the three Appellants concede, it is beyond doubt that the Isaac was attacked at his house in Sooma Village, Kavuta sub-location on 13<sup>th</sup> January, 2006. During the attack, the assailants, who numbered at least four, badly injured Isaac and used violence on his daughter, Judy. They also stole a number of items including those listed in the charge sheet.
15. It is, therefore, established that an offence of robbery with violence was committed on the material day. The main question is whether there is enough evidence to connect the three Appellants to the crime. The Learned Trial Magistrate believed that the identification evidence was sufficient to prove the involvement of the three Appellants beyond reasonable doubt.
16. Before us, each of the Appellants disputes that the identification evidence was sufficiently watertight to sustain a conviction. They point out that the circumstances were difficult for error-free identification. In aid of their argument, they also argue that we should draw a negative inference from the fact that the complainant took at least three days to identify them to the Police. Additionally, they fault the Prosecution case because there is no evidence that the witnesses gave descriptions of the assailants to the Police.
17. Our case law calls for caution in receiving identification evidence because of the grave possibility of a miscarriage of justice occasioned by misidentification. The predecessor to the Court of Appeal plainly stated in *Roria v R* [1967] EA 583, that "**a conviction resting entirely on identity invariably causes a degree of uneasiness.**" And, the Court of Appeal reminded us in *Kiarie v Republic* that "**it is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken.**" Finally, the famous *Charles Maitanyi v R* [1986] 1 KLR 198 admonished courts to exercise the greatest caution and circumspection before convicting on testimony of identification especially where the evidence is that of a single identifying witness.
18. To aid in the exercise of this "circumspection" our courts have adopted the guidelines for receiving and considering identification evidence set out in the famous English case of *Regina v Turnbull* [1976] 3WLR 445 are considered very comprehensive. They are nine in number and they instruct a judicial officer who is considering evidence on identification to ask the following questions:
  - a. How long did the witnesses have the accused under their observation?
  - b. What was the distance between the witnesses and the accused person?
  - c. What was the lighting situation?
  - d. Was the observation impeded in any way, as for example, by passing traffic or press of the people?

- e. Had the witnesses ever seen the accused person?
  - f. If the witnesses knew the accused prior to the current transaction, how often?
  - g. If the witnesses had seen the accused only occasionally prior to the current transaction, did the witness have any specific reason for remembering the accused?
  - h. How long elapsed between the original observation and the subsequent identification to the police?
  - i. Was there any material discrepancy between the description of the accused given to the Police by the witnesses when first seen by them and his actual appearance?
19. In the instant case, we are persuaded that after exercising circumspection, the evidence of recognition given by Judy Kimeu (PW2) as corroborated with the evidence of Simeon (PW3) and Cosmas (PW5) is sufficiently watertight to establish the guilt of the Appellants beyond reasonable doubt, and that it is the three Appellants who attacked Isaac and Judy on the 13<sup>th</sup> January, 2006, at around 1:00 am.
20. We note that the evidence in this case was one of recognition not just mere identification and that the case of identification by recognition, generally, evidence of recognition is more reliable; more satisfactory; and more assuring than identification of a mere stranger (see *Anjononi v R* [1980] KLR 59).
21. Judy was quite categorical that she identified the 3<sup>rd</sup> Appellant first when she was in her bedroom when the 3<sup>rd</sup> Appellant opened the door and summoned her to come to where he was standing. She testified that there was a combination of light from the flashlight and the moonlight beaming through the window. What is more, the 3<sup>rd</sup> Appellant held her by the hand and led her outside the house. There, they spent quite some time in close quarters as the Appellants tried to establish if Judy knew where money had been hidden. Judy also testified that there was a bright moon outside and through its illumination she was clearly able to see the 1<sup>st</sup> and 2<sup>nd</sup> Appellants. Again, she spent quite a little bit of time with them as they asked her questions about where the money was hidden. As outlined above, Judy knew each of the Appellants for a long time prior to the incident and this greatly reduces the possibility of error.
22. Simeon corroborated Judy's identification evidence and offered his own independent account about how he identified each of the three Appellants on two separate occasions. He first recognized the 3<sup>rd</sup> Appellant through voice recognition as he listened to them talk about the possibility that money was hidden near a pit latrine. At the time, he was merely eight metres away. When relocated and hid near the path as the assailants fled, he was able to see each of the Appellants from a mere four metres away.
23. This identification by recognition evidence is buttressed by the fact that both Simeon and Judy informed Cosmas who the assailants were at the first opportunity by calling them by name. The immediacy of these reports greatly diminishes the possibility that the identification of the Appellants was an afterthought. We think there is a perfectly explanation as to why it took more than three days for the complainant to make his report to the Police: he was admitted to hospital after the attack. Indeed, it is a ridiculous argument that a negative inference should be drawn from the delay by the complainant to make a report to the Police under these circumstances.
24. In our view, therefore, the identification evidence was free from error and was sufficiently corroborated to be safe to sustain the convictions.
25. The Appellants complain, however, that some crucial witnesses should have been called and were not called and this renders the conviction unsustainable. We do not agree. It is true that the Prosecution has a duty to call all essential witnesses necessary to establish the truth even if their testimony would be adverse to the Prosecution case (see *Bukenya v Uganda* 1967 EACA.) The operative word here, though, is "essential." It is true that the members of the public who participated in arresting the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were not called to testify but this would have been unnecessary. This is because there is no issue or doubts about the fact of their arrests. The witnesses had identified the Appellants with specificity hence removing any issues about how the members of the public or the Police connected the Appellants with the crime committed. To this extent, the decisions cited by the Appellants are not applicable here. As *Peter Wekesa & Another v Republic* Crim. App. No. 144 of 1995 stated, testimony of the arresting members of the public or officer is essential where the arrests are triggered not by the description, identification or pointing out by the witnesses but by an informer who was not at the scene of the crime. Here, the

situation is vastly different: the arrests were triggered by the identification by eyewitnesses to the crime. Neither was it necessary for both Police Officers who arrested the 1<sup>st</sup> Appellant to testify about the mode of arrest.

26. Lastly, we are unable to agree with the Appellants that the Learned Trial Magistrate failed to consider their defences. We too have had an opportunity to sift through the evidence and confirm for ourselves that there was ample evidence to sustain the convictions. The Learned Trial Magistrate was, in our view, quite entitled to disbelieve the accounts presented by the Appellants in the face of the unshaken identification evidence by the Prosecution witnesses.

27. Consequently, we find the appeals by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants unmeritorious. We dismiss them and affirm the decision of the lower court on both conviction and sentence.

**DATED, SIGNED AND DELIVERED this 10<sup>th</sup> day of December 2013.**

**JOEL NGUGI, Judge**

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**B. T. JADEN, Judge**

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