



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL 30 OF 2013

MUSEE MUSILI.....1ST APPELLANT

ISAACK KIMANZI.....2ND APPELLANT

JOSEPH MUTIO MBUKO.....3RD APPELLANT

JULIUS NYERERE MUNYOKI.....4TH APPELLANT

ERICK MWANZIA MBITI.....5TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 858 of 2010 in the Principal Magistrate's court at Mwingi – H.M. Nyaberi (Ag. SPM) on 21st February, 2013)

JUDGEMENT

Joseph Mutio Mbuko, Musee Musili, Isaack Kimanzi Musee, Julius Nyerere Munyoki and Erick Mwanzia Mbiti were the 1st to 5th accused persons respectively in Mwingi Senior Resident Magistrate's Court Criminal Case No. 858 of 2010 in which they had been charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. In the particulars of the offence it had been alleged that on 22nd August, 2010 at Nuu Market in Mathuki District within Eastern Province they jointly, with others not before the court, while armed with crude weapons namely pangas and knives robbed Eliud Kavuvu Mulwa of Kshs.350,000/= and at the time of such robbery used actual violence on the said Eliud Kavuvu Mulwa.

At the conclusion of the trial, the magistrate (H.M. Nyaberi, Acting SPM) convicted each one of them and imposed the sentence of death. The appellants being dissatisfied with both the conviction and sentence filed appeals in this court.

Joseph Mutio Mbuko filed Garissa High Court Criminal Appeal No. 31 of 2013. Musee Musili's appeal is No.30 of 2013. Isaack Kimanzi Musee first filed Criminal Appeal No. 18 of 2013 at the High Court at Machakos which was later transferred to this court and registered as Criminal Appeal No. 27 of 2013. Julius Nyerere Munyoki's appeal was registered as No. 32 of 2013 and Erick Mwanzia Mbiti's appeal was registered as No. 42 of 2013. Through an order issued by this Court (S.N. Mutuku, J) on 30th September, 2013 all the five appeals were consolidated under Garissa High Court Criminal Appeal No. 30 of 2013 with the appellants appearing in the following order:-

- a. Musee Musili.....1st Appellant
- b. Isaack Kimanzi.....2nd Appellant
- c. Joseph Mutio Mbuko.....3rd Appellant
- d. Julius Nyerere Munyoki...4th Appellant
- e. Erick Mwanzia Mbiti.....5th Appellant

The 2nd Appellant was represented by Mr. Muinde whereas the 3rd Appellant was represented by Mr. Mbaluka. Mr. Mailanyi appeared for the state. The 1st, 4th and 5th appellants were unrepresented.

We have gone through the petitions and submissions filed by the appellants and find that they have essentially raised common grounds of appeal which can be summarized as follows:-

- a. THAT the conviction was based on a charge whose ingredients were not proved;
- b. That the conviction was based on unreliable evidence of identification;
- c. That the prosecution case was not proved beyond reasonable doubt and hearsay evidence was used to arrive at their conviction; and
- d. That the identification parades did not meet the legal standards.

There are three grounds of appeal specific to the 3rd Appellant namely that the sentence imposed was excessive and no reasons were given for the imposition of such a sentence. Secondly, the 3rd Appellant contends that his constitutional right to representation by counsel was breached since at times the trial proceeded in the absence of his counsel. Thirdly, it was argued that the court record does not disclose the trial language of choice for the 3rd Appellant.

The appeal was opposed by the state.

This being a first appeal, our duty was summarized by the Court of Appeal (Sir William Duffus, P., Law and Lutta, JJ.A.) in **OKENO v REPUBLIC [1972] E.A. 32** thus:-

“The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions, in deciding whether the judgement of the trial court should be upheld, as well as deal with any questions of law raised on appeal.”

In doing so we must give due allowance to the fact that we neither saw nor heard the witnesses—see **OGETO v REPUBLIC [2004] 2 KLR 16**.

After perusing the record of the lower court, the evidence that emerges is that on 22nd August, 2010 the complainant (PW3 Eliud Kavuvu Mulwa) was asleep, in his house at Nuu Trading Centre, with his wife (PW2 Elizabeth), Mutisya the house-help (PW1 Mbutie Mwenga) and the children who included PW5 Mulwa Kavuvu. At about 1.00 a.m. they were woken up by people breaking the window panes of the house. The people commanded them to open the door quickly or else the house would be set on fire. They could smell petrol and one of the people was threatening to strike a match stick and set the house ablaze. The complainant went and opened the door. Three people entered the house. The first person to enter the house went straight and cut PW2 while demanding for money in the process. He was also asking for the whereabouts of the complainant. The complainant had at the time of opening the door hid behind the door. The people noticed the complainant in his hideout and the complainant started struggling with the person who was second to enter the house. That is when the third person entered the house and the two men cut the complainant and left him for death. Meanwhile the other man was demanding for money. He entered the bedroom and ransacked it and took away kshs.350,000/= which the complainant had hidden inside clothes. The men then left hurriedly saying they would be found. PW4 Katiwa Mutisya was the first to arrive at the scene. He organized for the complainant, PW2 and PW5, who had been injured, to be taken to hospital.

The occupants of the house informed the court that the people who entered the house had a panga and a

knife. In fact PW2 talked of hearing a gunshot at one time.

The complainant and PW2 told the court that they are businessmen. PW3 testified that as the thugs were breaking the window panes he took kshs.487,000/= from a ciondo so as to hide it. He hid Kshs. 350,000/= in clothes. He kept the balance under a mattress. The complainant and PW2 testified that the Kshs.350,000/= was taken by their attackers.

We pose at this stage to ask one question: Was the offence of robbery with violence committed on the material night? The ingredients of the offence of robbery with violence are that a theft must occur and in the course of the theft the thief should be armed with an offensive weapon and or be in the company of other persons and or actual violence is used on the complainant. In the case before us, there is undisputed evidence that the sum of kshs.350,000/= was stolen from the complainant on the material night. These are business people and it would not be farfetched to conclude that they had close to half a million Kenyan shillings on the material night. The thieves were armed with a panga and a knife. Although these are ordinary household tools, they become offensive or dangerous weapons when used in the circumstances in which they were used in this case. The thieves were more than one and actual violence was used on the complainant. The prosecution proved all the three alternatives which must be proved for an offence of robbery with violence to be established. The prosecution only needed to prove one of the three. The appellants did not challenge the fact that the said offence was committed. We therefore find that the prosecution proved beyond reasonable doubt that the complainant was robbed of his money on the material night. That takes care of the appellants' claim that the prosecution had failed to prove that the offence for which they were charged and convicted.

Were the appellants among the people who robbed the complainants? The complainant, PW1, PW2 and PW5 testified that the robbers were many. Their number was estimated at eight. PW1 told the court she identified Erick Mwanzia Mbiti (5th Appellant) by appearance and later picked him out at an identification parade. On cross-examination, PW1 stated that she clearly saw the 5th Appellant in the bedroom and he had a headscarf.

On her part, PW2 told the court that the 1st Accused (Joseph Mutio Mbuko) was the first to enter the house when the door was opened. He went and cut her with a panga on her head and ordered her to lie down. She told the court that the 1st Accused was followed by the 3rd Accused (Isaac Kimanzi Musee) who was holding a knife with his armpit. It was then that a struggle ensued between her husband and the 3rd Accused. The 1st Accused went to the aid of the 3rd Accused and the started cutting her husband who ran out of the house as they continued cutting him. As her husband was leaving he was met by the 2nd Accused (Musee Musili) who also cut him with a panga. She tried following her husband but the 2nd Accused and the 5th Accused (Erick Mwanzia Mbiti) pushed her back to the house and demanded for money. They went to the bedroom where upon searching they retrieved Kshs.350,000/- from a petty coat. It was then that the 2nd Accused cut her son (PW5). PW2 told the court that she used light from a hurricane lamp to identify the robbers. She also told the court that the moon was bright and one could see over 10 metres using the moonlight. PW2 testified that 1st Accused was her nephew while the 2nd Appellant comes from the neighbourhood. She told the court that she had never seen 3rd, 4th and 5th accused persons prior to the incident. She testified that she identified 3rd, 4th and 5th accused persons in identification parades.

When the complainant testified, the court noted that he had poor speech coordination. The prosecutor informed the magistrate that the problem was as a result of the injuries sustained in the robbery. The complainant told the court that he identified 1st, 2nd and 3rd accused persons during the robbery. His evidence was that his nephew Mutio Mbuko (1st Accused) was the first one to enter the house and he went straight towards his wife (PW2) and cut her as he ordered her to lie down. The 1st Accused was followed by the 3rd Accused who had a knife. The complainant peeped out through the space between the door shutter and the door frame and that is when he saw the 2nd Accused. It was then that he emerged from his hideout and held the 3rd Accused. A struggle ensued and the 3rd Accused cut him in the

process. As he was running out of the house the 2nd Accused also cut him. They then worked on him until he became unconscious. The complainant confirmed that there was light from a lantern lamp and the moon.

PW5 told the court that the 2nd Accused is the person who cut him. He told the court that he knew him as he used to work at a bar near their plot. He told the court that the lamp was on.

The other evidence to note is that of PW8 John Kitwengine Natu. He testified that he was the watchman of the complainant on the material night when he was swarmed by people with torches who ordered him to remain silent. They tied him with ropes and went to rob the complainant as two of them stood guard over him. He told the court that he did not identify any of the robbers. He however identified the 1st and 2nd accused persons as people known to him prior to the incident.

PW9 Jacob Kimanzi Titus told the court that he was a boda boda (motorbike) transporter and on the material night he had dropped a customer at a place called Miambani. On his way back he was stopped by two people who asked him to transport them. On the way they were stopped by police officers. As he was slowing down one of them whom he identified as the 4th Accused tried to escape but he was apprehended by police officers. He testified that the other passenger was the 3rd Accused and he knew him prior to that date since he used to see him in Mwingi.

PW10 Chief Inspector Munyoki told the court that upon receiving a report from one Sergeant Nyambane that a robbery had taken place in Nuu and the robbers were riding towards Matulani in two motor bikes using Kimongo – Matuki road, he led a team of police officers to the road where they laid an ambush. At about 3.00 a.m. he saw the headlamp of a motorbike. He went to the road and stopped it but it did not stop. He shot in the air but it never stopped. They then shot at the motorbike and it eventually hit a tree. Two people escaped but they found one lying on the ground. They arrested him. PW1 identified the man they arrested as the 5th Accused. He identified the motorbike as KMCK 072C. This motorbike belonged to PW6 Teresia Muthoni Maringa and was in the custody of PW7 Joseph Muthuni Mutemi who told the court that one Mwangi Mutua had borrowed the motorbike at about 8.30 p.m. to use it to visit a witchdoctor.

PW10 further told the court that about 10-15 minutes after they had dealt with the first motorbike another motorbike registration number KMCG 777J came. It had three people. They stopped it and it refused to stop. They shot at it but it disappeared. He then alerted the OCPD, Mwingi about the incident. PW10 testified that at the place where the first motorbike had landed they recovered a torch, a panga and a mobile phone. He told the court that the second motorbike also hit a tree but managed to escape. A panga however dropped from this motorbike. He also told the court that they recovered a Muslim hat. On cross-examination, PW10 testified that he did not identify the registration number of the second motorbike but he was later shown the second motorbike at Mwingi Police Station.

PW11 Chief Inspector David Waweru told the court that on 31st August, 2010 at the request of the investigating officer Police Constable John Njuguna he conducted identification parades for the 3rd, 4th and 5th accused persons. There were three witnesses namely Mulwa Kavuvu, Elizabeth Mutisya and Mbuthia Mwenga. He started with the 3rd Accused who was identified in the parade by Mulwa Kavuvu and Elizabeth Mutisya. Mbuthia Mwenga did not identify him. He then conducted an identification parade for the 4th Accused. He was identified by Elizabeth Mutisya but Mbuthia Mwenga did not identify him.

One line jumps out of the evidence of PW11 at this stage. He told the court that: **“I used the same members of the parade as those of the 3rd accused.”** As for 5th Accused he stated that:

“...between 10.30 to 10.40 a.m. I performed an identification parade for the 5th accused. His witnesses were like those of the 4th accused. I explained to him I was about to conduct an ID parade on him. He said he had no objection. Using the same members of

the parade and explaining to him rights he chose position 6 and 7.”

PW11 continued to testify that Mbuthia Mwenga and Elizabeth Mbuthia identified the 5th Accused.

We will do some analysis at this stage. The identification parades for 4th and 5th accused persons were rendered valueless the moment PW11 opted to use the same members of the parade he had used for the 3rd Accused. An identification parade requires that members should be of the same height, same size and complexion. In the first place, the 3rd, 4th and 5th accused persons do not share common physical features. Secondly, it was easy for witnesses to pick out the 4th and 5th appellants because the witnesses had already seen the other members of the parade in the parade for the 3rd Accused. It is only logical that the identification parade for each suspect ought to have been made up of different people.

PW12 Fredrick Mutua a clinical officer testified that he examined PW2, PW3 and PW5 and confirmed that they had injuries. He produced medical reports in support of his evidence.

PW13 Joseph Munyoki Musyimi the chief of Nuu Location was informed of the robbery by PW8. When preparing to leave for the scene of crime he heard two motorcycles coming from Nuu and heading towards Mathuki. He suspected those were the robbers and he alerted one Sergeant Nyambane of Nuu D.O.'s office. He then proceeded to Nuu Hospital where he found PW2 who told him that one of the attackers was Mutio Mbuko. He later led police officers to the house of Mutio Mbuko from where he was arrested.

PW16 Chief Inspector Stephen Owino told the court that on 21st August, 2010 at around 2.00 a.m. he was informed by the OCS, Mwingi Police Station that a robbery had occurred at Nuu and the suspects were seen heading to Mwingi. He was directed to lay an ambush. They proceeded to Lundi junction. While there he saw the headlight of a motorbike. He stopped it but the motorbike failed to stop. They gave chase and after about one kilometre the motorbike hit the pavement of the road and overturned. They arrested the rider plus the two passengers. One of the three had tried to escape but he was arrested about ten metres from the scene. About 200 metres backwards they recovered a long knife which they had seen one of the passengers drop. The two passengers said they were coming from the home of a witchdoctor. PW16 identified the passengers as the 3rd and 4th accused persons. The rider informed them that he had been hired. PW16 also informed the court that on 22nd August, 2010 at 8.00 a.m. he participated in the arrest of the 2nd Accused. On cross-examination PW16 stated that Inspector Kombo who was with him at the time of the arrest of the 2nd Accused had telephoned a certain number and the phone that rang belonged to the 2nd Accused.

PW17 Police Constable John Njuguna told the court that he was among the officers who arrested the 3rd and 4th accused persons. This witness indicated that he was one of the investigating officers. He confirmed the evidence PW16 as to what happened at the scene of arrest. When he was put under intense cross-examination PW17 admitted that the identification parades were conducted in a flawed manner.

PW18 Chief Inspector Harrison Kombo narrated how he arrested the 2nd Accused from a bus christened Nuu Express after being instructed to do so by the Mwingi D.C.I.O. Chief Inspector Lutta. He had been given the telephone number of the suspect and he called the number and when it rang he picked the suspect.

The 1st Accused testified as DW1 and told the court on the material night he slept at his house at Katulani village with his wife DW6 Regina Makena Mutio. The following day at about 7.00 a.m. the chief led police officers to his house and identified him to the police officers who arrested him. During cross-examination he appeared to point at a grudge between him, his brother and the chief (PW13 Joseph Munyoki Musyimi). His wife (DW6) confirmed that the 1st Accused never left the house on the night of the alleged robbery. In cross-examination she denied knowledge of the existence of a grudge between her husband, her brother-in-law and the chief and told the court that if there was any such a grudge she would

have known.

The 2nd Accused testified as DW2 and denied participating in the robbery. He told the court that he was asleep in his house on the night of the alleged robbery. He stated that he had good relations with the complainant. His evidence was that his troubles were linked to PW4 who had misappropriated rent he was collecting from their rental houses. He even fingered PW4 as the person who had given his telephone number to the police. When cross-examined by the prosecutor, he admitted that he did not cross-examine PW4 about the alleged misappropriation of their rental income.

DW7 Anna Musili Musee told the court that her husband (2nd Accused) never left the house on the night of the alleged robbery.

The 3rd Accused testified as DW3 and told the court that on the material night he was at the house of a witchdoctor called Katina Mutemi at Rundi area. He was attended to at around 11.00 p.m. for close to 40 minutes. At around 3.00 a.m. he was escorted to the matatu stage by DW8 Mutemi Mulya the husband of the witchdoctor. He found other people at the stage waiting for transport since that was the time the matatu was expected at that particular stage. A motorbike transporter arrived and on stopping he identified the rider as PW9 Titus Jacob Kimanzi. The rider asked for another passenger and rejected a woman who had two children. It was then that the 4th Accused stepped out of the crowd and joined him for the ride. As they were approaching the Garissa-Mwingi highway they were stopped by police officers. He was arrested and escorted to Mwingi Police Station. He told the court that neither PW1 nor PW2 identified him in an identification parade. He testified that nobody tried to escape at the time of their arrest.

DW8 Mutemi Mulya the husband of Kathina Mutemi confirmed that the 3rd Accused had actually visited their home for traditional medicine on one night in the year 2010. He was not sure about the date of the visit.

The 4th Accused testified as DW4 and told the court that he travelled to Rundi on the material day to buy charcoal but did not get a vehicle to transport the 50 bags of charcoal. He slept at the home of Anne Mwikali who had sold him the charcoal. At about 2.40 a.m. he woke up and proceeded to the road to board a matatu. While at the stage a motorbike arrived and he joined the 3rd Accused for the journey to Mwingi. They were arrested on the way and taken to Mwingi Police Station. He denied being picked by any witness in an identification parade. He also denied trying to run away when they were stopped by the police. He stated that he did not tell the police that he had escorted the 3rd Accused to go and get charms from a witchdoctor.

The 5th Accused testified as DW5 and told the court that on the material night at around 2.00 a.m. he was at a matatu stage waiting to board a vehicle to take him to Thika. He was with another person. He saw two administration police officers he knew pass by. Shortly thereafter he saw light from a motorbike. As he was trying to stop the motorbike, it hit him and he lost consciousness.

We have restated the evidence at length so that any person reading this judgment will understand why we have arrived at our decision.

So far we have referred to the appellants in the order in which they were presented to the trial court. We will now engage our appellate gear and refer to them in the order in which they are listed in this appeal. Musee Mulili who was the 2nd Accused is the 1st Appellant. Isaack Kimanzi was the 3rd Accused and is the 2nd Appellant. Joseph Mutio Mbuko who was the 1st Accused is the 3rd Appellant. Julius Nyerere was the 4th Accused and is the 4th Appellant whereas Erick Mwanzia Mbithi who was the 5th Accused is the 5th Appellant.

We have already stated that the identification parades for the 4th and 5th appellants were bungled by PW11. We have also indicated that the investigating officer (PW17) admitted that the entire

identification parade may have been flawed. PW11 himself under intense cross-examination admitted that there were discrepancies between the copies of the identification parade forms supplied to the appellants and the ones produced in court as exhibits. We will therefore not rely on the evidence gathered from the identification parades. We have no doubt that had proper parades been conducted, the results of the parades may have been of assistance to the court. We also note from the entire proceedings that the 1st and 3rd appellants were known to the witnesses prior to the robbery and we agree with the prosecution that there was indeed no need to conduct identification parades for these appellants.

We now proceed to look at the evidence as adduced against each appellant. The 3rd Appellant was placed at the scene of crime by PW2 and PW3 (the complainant). He was identified as a relative. PW2 and PW3 told the court that a lantern lamp was on. They said they use to sleep with the lamp on as the children would cry if it was switch off. PW1 and PW5 confirmed this evidence. PW2 and PW3 also talked of light from the moon. We find the evidence of PW2 and PW3 to be cogent in relation to the identification of the 3rd Appellant at the scene of crime. When the chief (PW13) arrived PW2 gave him the name of the 3rd Appellant. He was arrested immediately.

The 3rd Appellant told the court that he was at home on the night of the robbery. He appeared to imply that he was arrested because of a grudge between his brother and the chief. His wife (DW6), however, told the court there was no such grudge. In our view, there was therefore no ulterior motive in the naming of the 3rd Appellant by the witnesses. We are satisfied by the evidence and agree with the trial magistrate that the 3rd Appellant was identified at the scene of robbery. The complainant may have been affected by the injuries suffered in the robbery but we do not find anything in the proceedings to show that this could have impaired his memory to the extent that he could not recall what happened on the material night.

The 1st Appellant was also placed at the scene of crime by PW2, PW3 and PW5. The evidence of PW5 being that of a minor was corroborated by that of PW2 and PW3. The 1st Appellant was known to the witnesses prior to the incident. He was arrested immediately after the incident. PW2 told the court that she gave the name of the 1st Appellant to the police. We acknowledge that there is indeed confusion as to who exactly was given the name of the 1st Appellant by PW2. There is, however, evidence that PW18 arrested the 1st Appellant after calling his number when the bus he was travelling in had been impounded by the police. It cannot be true that the 1st Appellant was traveling with the relatives of the complainant otherwise there would have been no need to call the 1st Appellant's number as a gimmick of identifying him.

The 1st Appellant's claim that he had differences with PW4 who had allegedly embezzled their rental income was indeed an afterthought. No questions were put to the PW4 about the alleged misappropriation of funds. Indeed PW4 never testified that he identified any of the robbers. He never participated in the arrest of any of the appellants. The 1st Appellant's defence cannot be believed when the same is weighed against the evidence of the prosecution witnesses.

Turning to the 2nd Appellant, we note that PW2 and PW3 identified him at the scene of crime. They had never seen him before the material night. We are satisfied from the evidence on record that PW2 and PW3 had sufficient time within which to identify the 2nd Appellant. The robbery is estimated to have taken between 30 minutes and one hour. This was enough time for the witnesses to identify the robbers. The complainant told the court that the 2nd Appellant entered the house as he was hiding behind the door shutter. He also told the court that he struggled with the 2nd Appellant. The situation in which the 2nd Appellant was arrested also goes to corroborate the evidence of identification. We will come to the evidence of arrest later in this judgment.

The 4th and 5th Appellants were also identified at the scene of crime by PW2. PW1 also placed the 5th Appellant at the scene of crime. This evidence was corroborated by PW10. He stated that after the motorcycle carrying the 5th Appellant defied his orders they shot at it. The motorcycle went and hit a

tree. He arrested the 5th Appellant, with injuries, from the scene of accident and recovered among other items a panga which was later identified by PW2. He also recovered a Muslim cap. That tallies with the evidence of PW1 who told the court that the 5th Appellant had a Muslim headgear. We do not find any reason to doubt the evidence of PW10. The 5th Appellant's claim that he was hit by a motorbike as he was waiting for a matatu at a certain stage is farfetched. He never bothered to explain the presence of the panga and the headgear at the place he was arrested from. We therefore find that the clear identification of the 5th Appellant at the scene of crime was corroborated by the circumstances of his arrest a few hours after the robbery.

We now turn back to the case of the 2nd and 4th Appellants. These two were arrested by PW16 and PW17. They told the court that the motorcycle they were riding defied their stop orders and the 4th Appellant even attempted to escape. The evidence that the 4th Appellant tried to escape was supported by PW9 who told the court that in the process of stopping the 4th Appellant tried to escape. We will treat PW9's evidence with a lot of circumspection for he might as well have been an accomplice who was trying to save his skin. We, however, have no doubt about the evidence of PW16 and PW17. They told the court that they recovered a knife which they had seen one of the passengers drop as PW16 and his team pursued the motorbike which had refused to stop. That is the motorbike that was blocked by PW17 and his team. The 2nd and 4th appellants did not offer any explanation about this knife. In fact the 2nd and 4th appellants recorded statements with the police saying that they were coming from seeing a witchdoctor. This story changed when they testified in court and told the court they had not known each other prior to the incident. The 2nd Appellant admitted during cross-examination that he had paid the 4th Appellant's fare. How could he pay fare for a stranger? We do not find the evidence of the 2nd and 4th appellants credible. The evidence of DW8 did not add any value to the case of the 2nd Appellant. This witness admitted that he did not know the date the 2nd Appellant visited his witchdoctor wife. The circumstances of the arrest of the 2nd and 4th appellants and the unbelievable stories they gave to the arresting officers only leads us to conclude that they participated in the robbery. After all they were identified at the scene of crime.

We found the evidence on identification credible since the witnesses were consistent and their stories tallied on the sequence of the events during the robbery. Indeed they all told the court that the 3rd Appellant was the first to enter the house followed by the 2nd Appellant and then the 1st Appellant.

We therefore hold and find that the trial magistrate arrived at the correct decision in finding that the appellants were among those who committed the robbery. There could be one or two contradictions here and there but that does not in any way change the story as to what happened during the robbery.

There was a complaint by the 4th Appellant that he was denied a chance to cross-examine PW17. This complaint has no basis for the record clearly shows otherwise. From the record it is clear that this witness testified on three different occasions. He gave his evidence-in-chief on 20th February, 2012 and cross-examination was adjourned to 24th February, 2012. On that day he was cross-examined by Mr. Mbaluka for the 2nd and 3rd Appellants and Mr. Nzili for 1st Appellant. Cross-examination was once again adjourned to 5th March, 2012. The court record of 5th March, 2012 shows that PW17 was cross-examined by the 4th and 5th appellants. We do not understand why the 4th Appellant is now saying that he did not cross-examine PW17.

There was also a complaint by the 3rd Appellant that he was denied the constitutional right to be represented by counsel. He submitted that there were times when the matter proceeded in the absence of his counsel. No specific instance was pointed out to us. The 3rd Appellant needed to pinpoint the instances when the trial allegedly proceeded in the absence of his counsel. He also ought to have established that he sought an adjournment and the same was unreasonably denied. After reviewing the proceedings, the overall picture we get is that the trial was conducted procedurally and fairly.

In conclusion, we find that each appellant was properly convicted and given the sentence provided by the law for the offence they had committed. We find no merit in the appeal before us and we dismiss the same.

We make orders accordingly.

Signed and dated this 22nd November 2013

S. N. MUTUKU,

W. KORIR,

JUDGE

JUDGE

Dated and delivered this 9th day December 2013

S. N. MUTUKU,

JUDGE