



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**[CORAM: KOOME AND AZANGALALA, JJ]**

**CRIMINAL APPEAL NOS. 54 OF 2008, 55 OF 2008, 56 OF 2008 & 57 OF 2008**

**(CONSOLIDATED)**

**BETWEEN**

**JOSEPH AMEDOS OBALE  
PROTUS MIHESO RASA  
FRED HAMISI OKUMU  
PATRICK WAFULA**

**NYONGESA.....APPELLANTS**

**AND**

**REPUBLIC.....RESPONDE**

**NT**

*[Being an appeal from the Judgment of the Principal Magistrate {P.N. Gichohi} dated 23<sup>rd</sup> September 2008 –  
in Criminal Case No. 2026 of 2006 at Kitale]*

**JUDGMENT**

**Joseph Amedos Obale** (hereinafter “**the 1<sup>st</sup> appellant**”), **Protus Miheso Rasa** (hereinafter “**the 2<sup>nd</sup> appellant**”), **Fred Hamisi Okumu**, (hereinafter “**the 3<sup>rd</sup> appellant**”) and **Patrick Wafula Nyongesa** (hereinafter “**the 4<sup>th</sup> appellant**”), were jointly charged, with two (2) counts of Robbery with Violence contrary to section 296(2) of the Penal Code (Cap 63, Laws of Kenya).

It was alleged in count 1, that the appellants herein jointly with another not before the court and while armed with dangerous weapons namely pangas and rungas, in the night of 10<sup>th</sup> June, 2006 at about 10.45 p.m., at Sirende Village, in Trans-Nzoia District within the Rift Valley Province, robbed **Situma Wanjala** of cash in the sum of Kshs 800/= and at or immediately before or immediately after the time of such robbery used personal violence to the said **Situma Wanjala** (hereinafter “**the 1<sup>st</sup> complainant**”).

On the second count, it was alleged that on the date and at the place aforementioned, the appellants while in consort with another not before the court while similarly armed, robbed **Patrick Mutoto** of one torch, a National Identity Card, Elector’s Card and a cash sum of Kshs 2,000/= all valued at Kshs 2,100/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said **Patrick Mutoto** (hereinafter “**the 2<sup>nd</sup> complainant**”).

The prosecution called eight (8) witnesses and after their evidence, the learned Principal Magistrate found that the appellants had a case to answer and put them on their defence. The appellants made unsworn statements in their respective defences. Upon analyzing the evidence of the prosecution witnesses and that of the appellants the learned Principal Magistrate found the appellants guilty as charged. She accordingly convicted and sentenced them to death. Being dissatisfied with their convictions and sentences, the appellants have appealed to this court against both their convictions and sentences.

During the hearing of the appeals, the 1<sup>st</sup> and 3<sup>rd</sup> appellants appeared in person whilst the 2<sup>nd</sup> and 4<sup>th</sup> appellants were represented by **Mr. Wafula** and **Ms Bartoo**, learned State Counsel, appeared for the Republic. Having previously filed written submissions, the 1<sup>st</sup> and 3<sup>rd</sup> appellants opted to wholly rely upon the same while **Mr. Wafula** orally presented the appeals for the 2<sup>nd</sup> and 4<sup>th</sup> appellants. **Ms. Bartoo** responded to the appeals orally. After considering the submissions, we find that the following issues are raised:- whether the appellants were positively identified; whether the ingredients of the offence were proved and whether the defences put forward by the appellants were considered.

As the first appellate court, it is our duty to re-examine and re-evaluate the evidence upon which the appellants were convicted and reach our own independent conclusion bearing in mind that we neither saw nor heard the witnesses testify and must give allowance for that. (See **Okeno –vrs Republic [1972] EA 32**).

The prosecution’s case was briefly as follows: **Situma Wanjala (P.W.2)**, the 1<sup>st</sup> complainant, **Patrick Mutoto (P.W.1)**, the 2<sup>nd</sup> complainant, **Amos Wambani, (P.W.3)** and **Violet Nasimiyu (P.W.4)** were on the material date and time in their houses at Sirende in Trans Nzoia District when they were attacked by about five (5) robbers. The 2<sup>nd</sup> Complainant was with P.W.4 who was his wife. He heard a bang at the door and when he went to investigate, he saw five thugs at his neighbour’s door. The thugs left his neighbour’s door and rushed to his. Three of them entered his house and ordered him to sit down and as they beat him, they demanded beans from him and attempted to steal his bicycle, radio and a sheep which were inside the house. He picked a stool and hit one of the thugs with it on the head. The thugs then rushed out. He followed as he screamed and found that his neighbours including the 1<sup>st</sup> complainant and P.W.3 had been locked in their houses. He opened for them and telephoned police who arrived thirty (30) minutes later. A chase was attempted but yielded nothing. The 1<sup>st</sup> complainant testified that during the robbery, he identified the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants who were the thugs who entered his house. He said he did so with the aid of light from a tin lamp and from the moon. He had previously known the appellants. The 1<sup>st</sup> and 4<sup>th</sup> appellants were his workmates and the 2<sup>nd</sup> appellant was a frequent visitor in the neighbourhood. At the trial, he asked to check whether the 4<sup>th</sup> appellant had a scar on his head. He was allowed to do so and showed the court a scar he stated was inflicted by the stool. According to the 1<sup>st</sup> complainant, the 1<sup>st</sup> appellant was armed with a piece of wood shaped as a gun, and the others were armed with whips. The thugs stole his torch, ID card and a cash sum of Kshs 2,000/=.

The 2<sup>nd</sup> complainant was, as already stated, with his wife **Violet Nasimiyu (P.W.4)**. She gave similar testimony as her husband and like him, stated that she identified the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants during the robbery with the aid of a tin lamp and moonlight. She also had known the appellants prior to the

raid. According to her, the 1<sup>st</sup> and 2<sup>nd</sup> appellants frequently used to visit a carpenter in their plot and the 4<sup>th</sup> appellant resided on the same plot.

The 1<sup>st</sup> complainant Situma **Wanjala** (P.W.2), on the material date and time, went to answer a call of nature outside his house where he lived on the same plot with **Amos Wambani** (P.W.3). He saw four people standing outside the door of his house. He was startled and tried to retreat into the house as he closed the door. The four people told him they were police officers and wanted to search his house. He obliged. One of them pushed him into a corner as another whipped him. He identified them as the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively. He also identified the other two as the 3<sup>rd</sup> and 4<sup>th</sup> appellants respectively. They demanded to know where their foreman was. The entire team ransacked the house looking for money and took Kshs 1,800/= from the 1<sup>st</sup> complainant. They then left and locked the house from outside. They then attacked the 2<sup>nd</sup> complainant and his wife P.W.4 before escaping. The 2<sup>nd</sup> complainant later opened for them. He allegedly identified the appellants using torch light and moonlight.

**Amos Wambani** (P.W.3), who was with the 1<sup>st</sup> complainant, gave similar testimony as the latter. He was however unable to identify any of the thugs during the robbery.

**Chrisantus Masinde** (P.W.5), a Clinical Officer at Kitale District Hospital, examined the complainants and completed the P.3 forms for them assessing the degree of their injuries as harm.

**John Siekisa** (P.W.6), a police reservist, testified that on 11<sup>th</sup> June, 2006, at about 4.30 p.m. as he headed for Maili Saba Patrol Base, he met the complainants who informed him that they had seen their attackers at a market nearby. He accompanied them to the market and arrested the 1<sup>st</sup> and 2<sup>nd</sup> appellants who were pointed out by the complainants. P.W. 6 then took them to the patrol base and placed them in the cells.

**P.C. Franco Tororei**, (P.W. 7) was at the material time attached to Maili Saba Patrol Base. On 11th June 2006, P.W.6 took to the patrol base, the 1<sup>st</sup> and 2<sup>nd</sup> appellants whom he booked. On 13th June, 2006, following a tip off, he arrested the 3<sup>rd</sup> and 4<sup>th</sup> appellants. According to P.W.7, the complainants later went to the station and identified all the appellants who were subsequently charged as already stated.

**P.C. Joseph Nzau** (P.W.8) was then attached to Moi's Bridge Police Station. On 13th June, 2006, he received the appellants from P.W.7 and after investigations charged them as already stated.

In his unsworn statement in his defence, the 1<sup>st</sup> appellant testified that on the material date, he left work at Kibowet at 6.00 p.m. and went home where he stayed until 9.30 a.m. the next day. He then went to Maili Saba Market where he was arrested by P.W.6 and taken to Maili Saba Police Post where he was told that he had killed two people. Later he was taken to Moi's Bridge Police Station and charged with an offence which he denied.

In his unsworn statement, the 2<sup>nd</sup> appellant testified that on 11<sup>th</sup> June, 2006, he went to church and later to Maili Saba Market where he was arrested by P.W.6. He was then taken to Maili Saba Police Post. On 13<sup>th</sup> June, 2006, he was taken to Moi's Bridge Police Station and later charged with an offence which he knew nothing about.

The 4<sup>th</sup> appellant also gave an unsworn statement in his defence. He recalled the 13<sup>th</sup> June, 2006, when he left his home and went to a **Mr. Musoga's** home where he worked. While there, he was arrested by the 1<sup>st</sup> complainant and his wife who then handed him over to (P.W.7). He was then taken to Maili Saba Police Post and subsequently to Moi's bridge Police Station where he was charged with an offence he denied.

In his unsworn statement, the 3<sup>rd</sup> appellant recalled the 13<sup>th</sup> June, 2006 when he woke up at 7.30 a.m. and went to **Musoga's** home where he worked. While there, the 1<sup>st</sup> complainant and his wife arrested him. He was later handed over to Maili Saba Police Officers and subsequently taken to Moi's Bridge Police Station where he was charged with an offence he knew nothing about.

On the above facts, the learned Principal Magistrate found that the offences of robbery with violence had been proved against the appellants as required in law and convicted them as already stated. In convicting the appellants, the learned Principal Magistrate found that the appellants had been positively identified. In her own words:-

**“I am satisfied that there is no possibility of mistaken identity in this case. The evidence of P.W.1, P.W.2, P.W.3 and P.W.4 is properly corroborated. Though the 4<sup>th</sup> accused was not identified by P.W.1, P.W.3 and P.W.4, during the robbery, he was identified by P.W.2 who stood 2<sup>nd</sup> [ft] from them when he opened the door. There was moonlight. They were saying they were police officers but he knew them well as they were his workmates. They also used torches in the house.”**

We have analyzed, re-evaluated and reconsidered the same testimony and note that the robbery was staged at about 10.30 p.m. -11.00 p.m. The 1<sup>st</sup> complainant purportedly identified all the appellants during the robbery. Were the conditions conducive to a positive identification? When the 1<sup>st</sup> complainant left his house at about 11.00 p.m. to answer the call of nature, he had no torch. When he opened his door, he found four (4) people standing near the door. Although he testified that there was moonlight, he could not immediately identify the people. We say so because, when he tried to close the door, the people told him that they were police officers and wanted to search the house. The 1<sup>st</sup> complainant believed them and stopped closing the door. That shows that despite the moonlight, the 1<sup>st</sup> complainant was not able to identify the people when they were at his door. When the people entered the house, the only light in the house came from a torch which one of the attackers had. The 1<sup>st</sup> complainant did not explain how that light could be used to identify the attackers. On his own admission, he was pushed to the corner of his house. The thugs did not also enter at once. They appear to have entered the house at different times. In the absence of any light in the house trained on the incoming attackers, we do not see how the 1<sup>st</sup> complainant could have identified them. The 1<sup>st</sup> complainant may have known the appellants before the robbery but in our view, he could still have been mistaken. In **Kiarie –vrs- Republic, [1984] KLR 739**, the Court of Appeal held that before a conviction can be entered against a suspect on account of visual identification, such evidence must be water tight as it is possible for even an honest witness to make a mistake.

In **Republic –vrs- Turnbull [1976] 3A II ER 349**, it was held as follows regarding recognition:-

**“Recognition may be more reliable than identification of a stranger but even where the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”**

In our view, it was because of difficult conditions obtaining then that **Amos Wambani** (P.W.3), who was with the 1<sup>st</sup> complainant, could not identify any of the thugs. In his own words:-

**“They ordered us to lie on the floor. They locked us from outside. ----**

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**I did not identify the suspects. One was identified by my colleague.**

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**I know all the accused persons in the dock as we were working together at the same construction**  
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Like the 1<sup>st</sup> complainant, P.W.3 knew the appellants as his workmates and yet he could not identify them during the robbery. As the conditions were the same, we have come to the conclusion that the identification of the appellants by the 1<sup>st</sup> complainant was not free from the possibility of error. It is significant that whereas he purported to identify all the appellants at the trial, he had told his colleague (P.W.3) that he could only identify one of the attackers.

We turn now to the purported identification of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants by the 2<sup>nd</sup> complainant, **Patrick Mutoto** (P.W.1). He purportedly identified the said appellants with the aid of light from a tin lamp and from the moon. He even allegedly struck one of the attackers using a stool and identified the scar caused by the strike at the trial. Those findings notwithstanding, the following facts have caused us anxiety.

The 2<sup>nd</sup> appellant produced the O.B. extract of 11<sup>th</sup> June, 2006. The OB indicated that at 11.20 a.m., the police received a report from the complainants that they had been attacked by five (5) people armed with pangas and whips pretending to be police officers. The OB in our view would constitute the first report of the robbery by the complainants. If the complainants had recognized the robbers during the robbery, they would have given their names in their first report to the police. The OB extract revealed that the complainants did not give the appellants' names to the police in their first report. That position was buttressed by the testimony of the 1<sup>st</sup> complainant who in cross-examination by the 1<sup>st</sup> and 4<sup>th</sup> appellants acknowledged that the police had not indicated the names of the appellants in his first report and in his statement. We are surprised that that omission did not elicit any comment from the learned Principal Magistrate.

The 2<sup>nd</sup> complainant was in the house with his wife (P.W.4). She knew all the appellants prior to the robbery and purportedly identified the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants during the robbery since their house was lit by a tin lamp. She however did not know the names of the 1<sup>st</sup> and 2<sup>nd</sup> appellants. In that event, her description of the assailants was therefore crucial. Yet, she made her statement when the appellants had already been arrested. Her description of the appellants did not therefore lead to the arrest of the appellants. The record however suggests that even if she had described the appellants to the police before their arrest, the description of the appellants would not have led to the arrest of the appellants. We say so because, pertinent aspects of her evidence were in conflict with the testimony of the complainant. For instance, when the 2<sup>nd</sup> appellant cross-examined her, she stated that he wore grey clothing during the robbery. However, when cross examined by the 4<sup>th</sup> appellant, the 1<sup>st</sup> complainant stated that the appellants wore black coats and looked like police officers during the robbery. There is doubt therefore as to whether P.W.4 positively identified the attackers. It is significant that she could not also identify the thug who was struck with a stool by her husband during the robbery. She also testified that the 4<sup>th</sup> appellant resided on the same plot, a detail which was not supported by any of the complainants and P.W.3. If indeed the 4<sup>th</sup> appellant resided on the same plot, the immediate action the complainants, P.W.3 and P.W.4 would have done would have been to inspect his house to ascertain whether it was in use and if not, when the 4<sup>th</sup> appellant had last used it. We are puzzled that no attempt was made to do so. That suggests that either P.W.4 was not being truthful or that simple logical steps were ignored by the complaints and the investigating officers. Be that as it may, we have found the testimony of P.W.4 with regard to her identification of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants suspect.

In the end we are not as persuaded as the learned Principal Magistrate that the appellants were positively identified. We are satisfied that had the learned Principal Magistrate analyzed the evidence as we have done, she would, no doubt, have found that the evidence of identification by recognition was

poor. Having found for the appellants on the crucial issue of identification, we need not consider the other complaints made by the appellants. We find that the appellants were not properly convicted. Accordingly, we allow the appeal of each appellant, quash the conviction in respect of each appellant and set aside the respective sentences. Each appellant shall be set at liberty unless otherwise lawfully held.

**DATED AND DELIVERED AT KITALE THIS 13TH DAY OF MAY 2011**

**M. KOOME**

**JUDGE**

**F. AZANGALALA**

**JUDGE**

***Delivered in the presence of:-***

**M. KOOME**

**JUDGE**