



REBUPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

**CRIMINAL APPEAL NOS. 236 OF 2009, 238 OF 2009, 240 OF 2009, 237 OF 2009 & 239 OF 2009
(CONSOLIDATED)**

-BETWEEN-

1. PETER KIOKO WAMBUA

2. ALEX KIMANZI MUKUU

3. JAIRUS KITHEKA MUNYOKI

4. MULI MUNGUYE MUTISO

**5. STEPHEN MUTUA NDONYI.....
APPELLANTS**

-AND-

REPUBLICRESPONDENT

(Being an appeal from the Judgment of Principal Magistrate, Mr. D.O. Ogembo dated 26th November, 2009 in Cr. Case No. 1661 of 2006 at Kwale Law Courts)

JUDGMENT

The appellants herein, together with another (one **Moses Ndambuki Mutuku** who was, however, acquitted on all the counts), stood charged with robbery with violence contrary to s.296(2) of the Penal Code (Cap. 63, Laws of Kenya).

It was alleged that the appellants, jointly with others not before the Court, on **26th September, 2006** at 10.30 p.m., in the Makongeni area, along the Msambweni-Diani highway in Kwale District, and while armed with dangerous weapons namely a pistol, machetes, arrows, hammers and nails, robbed Police Constable **Pashua Juma Pashua** of cash in the sum of Kshs.28,250/=, a Samsung cellphone valued at Kshs.10,999/=, a cheque for Kshs.5000/=, and a certificate of appointment – all valued at Kshs.44,249/= – and at or immediately before or immediately after the time of the said robbery, used actual violence to the said **Pashua Juma Pashua**.

It was alleged, in a second count, that the appellants, on the same occasion and at the said place and time, while accompanied as aforesaid, and while armed as aforesaid, had robbed **Khama Abdalla Mbungo** of cash in the sum of Kshs.2400/=, a Nokia 3310 cellphone valued at Kshs.5000/=, an Identity Card, an employment card and an ATM card – all valued at Kshs.7,400/= – and at or immediately before or immediately after the time of the said robbery, used actual violence to the said **Khama Abdalla Mbungo**.

The appellants herein, in a third count, were alleged to have, while in the same company as aforesaid, and while armed in the same way, at the same place and on the same occasion, robbed **Mohamed Doshu** of cash in the sum of Kshs.30,000/= and a Nokia 6230 cellphone valued at Kshs.18,000/= – all valued at Kshs.48,000/= – and at or immediately before or immediately after the time of such robbery, used actual violence to the said **Mohamed Doshu**.

In a fourth count, it was alleged that the appellants herein, while in the company aforesaid and while armed as aforesaid, on the same occasion and at the same *locus in quo*, had robbed **Hadijah Abdalla** of a Nokia 1600 cellphone valued at Kshs.5000/=, and at or immediately after the time of such robbery, used actual violence to the said **Hadijah Abdalla**.

The learned Magistrate, after hearing the testimonies of the prosecution's 11 witnesses, heard the sworn defences of the appellants herein, and came to conclusions founded on a summary of the evidence as is set out hereinbelow. All the four counts of the charge related to one and the same incident, which took place at 10.30 p.m. on **26th September, 2006**; the complainants were travelling in one motor vehicle, Reg. No. KAQ 330P belonging to the **Hon. Abdalla Ngozi**, M.P. for Msambweni, from Vanga to Mombasa, when they had two tyre-punctures; during the process of changing the tyres, eight men emerged from the bushes, firing a gun, and armed with machetes, bows and arrows; these men ordered the complainants to lie down, and robbed them of their personal effects.

Khama Abdallah Mbungo (PW1) gave evidence that there was moonlight at the material time, and that the stationary motor vehicle had its headlights, parking lights and hazard lights switched on, and that the interior car lights were also switched on. PW1 testified that the said sources of lighting enabled him to see two of the attackers – namely 3rd and 4th appellants. The Court found PW1's evidence to have remained consistent, in the face of the cross-examination.

The Court acted on the basis that the appellants herein were not first offenders, and proceeded to convict in respect of counts 1, 2 and 3. The Court imposed the death penalty in respect of each of the appellants.

The appellants filed grounds of appeal which were later amended. These grounds of appeal are very similar, and may be set out as follows:

(i) conviction was based on the evidence of a single identifying witness who would have been afflicted by the difficult circumstances prevailing at the material time;

(ii) identification parade was not properly conducted;

(iii) the evidence of the prosecution witnesses was contradictory, on the issue of identification;

(iv) the sworn defence testimony had been wrongly rejected.

On the occasion of hearing, the appellants chose to rely wholly on pre-written submissions which they had filed in Court; but learned counsel, **Mr. Muteti** made oral submissions contesting the appeals.

Mr. Muteti urged that the identification by PW1 had been accurate: because this witness had given a description of the robbers to the Police, and had also said he would be able to identify them; PW2 had said he would be able to identify 1st and 5th accused; PW7 had also said he would be able to identify 1st and 5th accused. Counsel submitted from the evidence that the appellants had been arrested eight days after the incident, and that they were found carrying arms, in a public transport motor vehicle.

The crucial question in the fate of this appeal, in our opinion, is **identification**, in view of the time of night when the incident occurred, and the fact that there was no electrical lighting of the general area traversed by the road along which the attack took place.

PW1, **Chief Khama Abdallah Mbungu** came out of the car after it had a puncture on two tyres; he was accompanied by some of the passengers; of the lighting condition, this witness testifies:

“Our vehicle had full lights. After 20 minutes, we heard... gun-shots, and within seconds, about eight young men accosted us...Four of the young men came where I was and ordered me to lie down. I duly complied... [After the robbery] the driver and I were ordered to stand up. We stood up...and we were taken to where our colleagues had been forced to lie down. We were ordered to lie down... The vehicle’s lights were on. There was also moonlight. The moonlight was full. After some minutes, a vehicle came to our rescue. I was able to identify my assailants. The robbers disappeared into the forest when they saw a vehicle stop next to ours. I was able to identify 3rd and 4th accused. I saw the said accused through the lights from the vehicle, and the moonlight. I was able to identify 3rd and 4th accused on the Identification Parade. The person who robbed me of my property was the 3rd accused. The 4th accused guarded me while holding bows and arrows.”

PW1 testified that the incident was reported to the Police, and after one week he was called to make an identification of suspects, at Lunga Lunga Police Station – and he was able to identify 3rd accused (**Alex Kimanzi Mukuu**, 2nd appellant herein). Of this appellant, PW1 says: “I touched him. I recalled his face.”

PW1 was called to Msambweni Police Station on **9th October, 2006** where he identified 4th accused (**Jairus Kitheka Munyoki**, 3rd appellant herein).

When 2nd and 3rd appellants cross-examined PW1, he said as follows:

(i) [to **Alex Kimanzi Mukuu**]

“The robbers were armed with dangerous weapons. I was terrified...The thugs came from the right side of the road as you face Mombasa from Lunga Lunga. The vehicle doors were fully open...The lights inside the vehicle were on. I was summoned to the Police station...The parade had about nine members...I gave the descriptions of my assailants to the Police. I recorded my statement. I told the Police that I am able to identify [the] robbers. I don’t know how you were arrested. I stayed with you for about 8-10 minutes...”

(ii) [to **Jairus Kitheka Munyoki**]

“I identified you at Msambweni Police Station. The Identification Parade had 8-10 members. I told the Police that I [was] able to identify [the] assailants...I was told that some suspects had been arrested. I was not dictated on what to say. The lights of the vehicle were on at the time of the robbery.”

Police Constable **Pashua Juma Pashua** (PW2), who was a guard to the **Hon. Abdallah Ngozi**, and was present at the material time, testified that at the time of the robbery attack, **“there was enough light from the vehicle that had all the lights on including the hazard lights.”** PW2 said he had been able to identify the 5th accused (**Muli Munguye Mutiso**, 4th appellant herein). PW2 also said he was able to identify 1st accused (**Peter Kioko Wambua**, 1st appellant herein):

“Before [the robbers] left, I saw [the] driver plead with 1st accused to give him the car keys. The 1st accused threw [the keys] at him. I saw him clearly at this time. I had also seen him well, as he stood at the front of the vehicle. They then disappeared into the bush.”

PW2 was called to an identification parade, of which he testified:

“At the parade, there were not less than nine men, and in the parade I identified [the 1st] accused.”

He was later called to two other parades; and on **9th October, 2006** at Msambweni Police Station, he identified 5th accused (**Muli Munguye Mutiso**, 4th appellant herein).

When cross-examined by 1st appellant herein, PW2 said he had at first run into the bush, when the attackers had fired gun-shots, and he lay on his belly, watching out; he went on to say:

“I lay at a dark place where I could see the lights. I saw you at the vehicle. The attack was first on the driver and the Chief, then me. I identified one of them [as I lay in] the bush. As I rose to walk to the road, I could see him in the vehicle where there was enough light. At that time I did not know what he was doing. I only learned [later] that he had been searching...He was not even three metres away. He was seated or squatting in the vehicle. The doors of the vehicle were all open. I saw [his] face and appearance well.”

Armed with the information described above, PW2 had gone to Lunga Lunga Police Station on **8th October, 2006** at 3.00 p.m., and attended an identification parade which had nine members: and he identified 1st appellant herein. On this point, PW2 thus responded to 1st appellant’s cross-examination: ***“It is you I identified at the parade. I even identified a short black man who is you. You are short and black.”***

When cross-examined by 5th accused (**Muli Munguye Mutiso**, 4th appellant herein), PW2 thus spoke:

“I lay down to avoid being a target. I identified two of them. I was ordered to walk out of where I lay, to join the others on the road and, as I walked, I was seeing well. There was enough light from the vehicle, both front lights, rear lights, and even inside, as the doors were open...I was scared, but I could see well. The parade at Msambweni Police Station was on 9th October, 2006, and that is where I identified you.”

PW5, **Juma Juma Shee**, testified that he had identified 5th accused (**Muli Munguye Mutiso**, 4th appellant herein) on the material night. The evidence runs as follows:

“I know 5th accused; I [saw] him during this incident...As they were still searching us, a vehicle appeared. I was searched by one man. I did not identify him. When the vehicle came with full lights, I identified accused 5 [Muli Munguye Mutiso] who was inside our vehicle searching it. There was light inside our vehicle. Then the attackers ran back into the darkness... Accused 5 whom I saw was carrying a panga.”

PW5 was invited to several identification parades; and on the second occasion, at Msambweni Police Station, he identified 5th accused as one of the attackers of the material night.

On being cross-examined by 4th appellant herein, PW5 thus testified:

“I identified you using the light in the vehicle, and again, light from the vehicle that drove to the scene.”

PW7, **Khama Mohamed Doshu**, was the driver of the **Hon. Abdalla Ngozi**’s Toyota Prado No. KAQ 330P which was the subject of the robbery attack. On the arrival of the rescue motor vehicle from the Diani side, the attackers started fleeing into the bush. PW7, at this time, asked to be given back the car keys, and one of the attackers threw them at him. It is this attacker whom PW7 identified at the identification parade at Lunga Lunga Police Station on **8th October, 2006**; of this attacker, PW7 said:

“He is the one who took money and keys from me and threw back the keys [at] me when I

requested.....Accused 1 [Peter Kioko Wambua, 1st appellant herein] had been armed with a panga.”

PW7 also identified 3rd accused [***Alex Kimanzi Mukuu, 2nd appellant herein***] at the identification parade; and he said 2nd appellant had been armed with a *panga*, and was the man frisking ***Chief Khama Abdallah Mbungu*** (PW1) during the night attack.

PW7 testified that he was called to another identification parade, at Msambweni Police Station, on ***9th October, 2006*** and he, on that occasion, identified 5th accused (***Muli Munguye Mutiso, 4th appellant herein***). PW7 gave particulars on this identification; of ***Muli Munguye Mutiso*** he said:

“He is the one who had been searching inside the vehicle. He [was armed] with a panga. There was enough light.”

PW7 gave evidence on the clothes worn by some of the suspects:

“Accused 1 [Peter Kioko Wambua, 1st appellant herein] [wore] a black jacket and had a black head-scarf. Accused 3 [Alex Kimanzi Mukuu, 2nd appellant herein] had a long, black raincoat. Accused 5 [Muli Munguye Mutiso, 4th appellant herein] had [a] yellow T-shirt with a white line at the shoulder. He was very harsh.”

With the considerable detail contained in PW7’s identification-evidence, the Court has given focused attention to the ensuing cross-examination. To the cross-examination by ***Peter Kioko Wambua*** (1st appellant), PW7 said as follows:

(i) he (PW7) was the one changing the vehicle tyre, when the sound of gunshot rang, and the intruders came along;

(ii) the vehicle lights were switched on; and the attackers approached from the back;

(iii) PW7 lay on his belly, in the road, as ordered by the attackers, facing the back;

(iv) the car’s parking lights, inside lights and hazard lights were all switched on;

(v) the lights of the Toyota Prado motor vehicle lit up as far away as 10 metres from the car;

(vi) the 1st appellant frisked PW7 as he lay face downwards, and ordered him to turn around, and in his words: “This is when I saw you and the other one [frisking] the Chief...The incident took about 5-8 minutes. I was able to see you well despite the threat to cut me. From those I saw, the shortest was accused 5 [Muli Munguye Mutiso, 4th appellant herein],”

(vii) PW7 had given an oral description of the circumstances of the robbery, to the Police, but he was not sure if all things he then said had been recorded; but he believes this does not compromise his testimony; in his words: “I am here giving evidence in Court because the statement may not be conclusive. I have not forgotten anything to-date. By its nature, I cannot forget these details”;

(viii) PW7 thus responded to cross-examination by Peter Kioko Wambua (1st appellant):

(a)“it is because I had identified you, that I picked you out in a parade of nine men. Had you not been one of the attackers, I would not have picked you [out] at the parade”;

(b)PW7 said:

“I wrote a statement after the parade in which I said I had identified you by touching you. I read it and signed it. It says you are short, black and [with a] rough voice. At the parade, I requested that each

person give the order: ‘Kila mmoja atoe chochote’ [Kis. for ‘Surrender all effects!'] All of you in the parade gave the order, and I identified your voice also. I had already identified your appearance.”

Equally lengthy was the cross-examination by 3rd accused [**Alex Kimanzi Mukuu**, 2nd appellant herein]; and PW7 thus responded:

(i) at the material time, PW7 lay on his belly, facing the back direction, and his foot touching the car tyres;

(ii) the car’s hazard lights were flicking “permanently and continuously”;

(iii) it is 2nd appellant herein who was frisking Chief Khama Abdallah Mbungu (PW1);

(iv) PW7 had described 2nd appellant to the Police as a man of brown complexion;

(v) PW7 had attended the identification parade at Lunga Lunga Police Station, and found that “the [9] parade members were almost of the same height”;

(vi) PW7 identified 2nd appellant “by your appearance which I clearly marked.”

To the brief cross-examination by 5th accused [**Muli Munguye Mutiso**, 4th appellant herein], PW7 testified as follows:

(i) “I identified you as you were inside the vehicle. One cannot stand inside the vehicle. I saw you from the chest upwards. The full lights and parking lights were all on”;

(ii) “At Msambweni Police Station, I gave the descriptions of the attackers. The parade was of people of almost the same height. I identified you because I had marked your appearance. The light was enough to [enable me to] identify you.”

The appellants herein gave their evidence on oath, their cases, for the most part, based on **alibi**. The 1st appellant’s evidence was not focused on the events of the material date; 2nd appellant said: **“I do not recall where I was on 26th September, 2006;** 3rd appellant (**Jairus Kitheka Munyoki**) said: **“I was placed in an Identification Parade but was not identified. I do not remember where I was on 26th September, 2006”;** 4th appellant (**Muli Munguye Mutiso**) said: **“I was not identified. The witnesses mistook me. They did not know me”;** 5th appellant said: **“I was not identified at the Identification Parade...I cannot remember where I was on 26th September, 2006.”**

Are the defence statements factual? And what is their impact on the case built through the evidence of the prosecution witnesses? What is the effect of the evidence of the prosecution witnesses?

Before considering the last question, we have endeavoured to perceive any such remarks, or anxieties, as may have been recorded regarding the **demeanour of witnesses**. We do not find such, and on a closer examination of the mode of rendering of evidence, we are unable to make a conclusion that any of the Prosecution’s 11 witnesses had given any testimony but that which they believed to be truthful.

The crucial sphere of evidence that must determine the outcome of this appeal is **identification**: were the applicants, or any of them, identified as having participated in the night-robbery in question?

Chief Khama Abdallah Mbungu (PW1) has given corroborated evidence that the **locus in quo** was sufficiently well-lit to enable him to identify **2nd and 3rd appellants**, and that he later identified them at duly-conducted Identification Parades. **Police Constable Pashua Juma Pashua** (PW2) confirmed that there was sufficient lighting at the **locus in quo**, and that he was able to identify **1st and 4th appellants** herein; and he later attended duly-conducted Identification Parades and, again, identified **1st and 4th**

appellants. Juma Juma Shee (PW5) testified on the circumstances enabling him to identify **4th appellant** at the **locus in quo**, and said he had attended an Identification Parade and formally identified this particular suspect. PW7, **Khama Mohamed Dosho** gave testimony on the circumstances in which he was able to perceive several of the appellants, at the **locus in quo**, and subsequently he attended duly-conducted Identification Parades, and identified **1st appellant, 2nd appellant and 4th appellant**.

While noting that the criminal incident in question took place in the night, we observe that there is overwhelming evidence that there was **sufficient light** at the **locus in quo**, to facilitate the identification of the suspects. Focused evidence has been given, particularly by PW1, PW2, PW5 and PW7, showing **the activities of the robbers** on that occasion, and illuminating the **circumstances in which they were identified**, firstly **at the scene**, and later, **at the several Identification Parades** which were duly conducted (evidence of PW8 and PW11).

All such evidence, which in our opinion is unshaken by the cases of the appellants, shows guilt on the part of the **first four appellants**, though it does not speak equally clearly in respect of the fifth appellant, **Stephen Mutua Ndonyi**. Of this appellant, the trial Court thus stated its finding of guilt:

“And for accused 6 [Stephen Mutua Ndonyi, 5th appellant herein], his defence was that he was arrested [for not] having any identification documents. He never challenged in any way the evidence presented by the prosecution witnesses herein at all, leaving his defence without merit. I dismiss [the] same accordingly.”

The foregoing holding by the trial Court, in our opinion, has one point of difficulty, in **law**. Suppose **6th accused** (**5th appellant herein**) **chose** to remain plain mute, during the trial; would this ordain that he be found guilty, irrespective of the merits of the prosecution case? In law, the answer is **no**; for the trite principle, that the prosecution must prove their case beyond all reasonable doubts, is to be upheld.

So the next question is whether, in this instance, the prosecution case so far as it goes, did present a water-tight charge against **6th accused**. As we have stated, the burden of the prosecution’s entire case rests on **identification**. There is focused evidence showing **1st accused** (**1st appellant herein**), **3rd accused** (**2nd appellant herein**), **4th accused** (**3rd appellant herein**) and **5th accused** (**4th appellant herein**) to have been identified, both at the **locus in quo** and at Identification Parades, as the suspects on the material occasion. But there is no such evidence on record, as regards the identity of the **6th accused** (**5th appellant herein**). **Stephen Mutua Ndonyi** (**5th appellant**) himself knows whether he was part of the gang of robbers of the material night; but the criminal law safeguards his position, by its design of laying the **obligation of proof** squarely on the shoulders of the prosecutor.

In the outcome, therefore, we find and hold as follows:

(1) We dismiss the appeals by 1st appellant, 2nd appellant, 3rd appellant and 4th appellant.

(2) We uphold the conviction on counts 1, 2 and 3 of each of the following appellants: 1st appellant; 2nd appellant; 3rd appellant; and 4th appellant.

(3) We affirm the sentences imposed by the trial Court against 1st appellant, 2nd appellant, 3rd appellant, and 4th appellant; save that all the sentences in respect of counts 2 and 3, for these appellants, shall rest in abeyance pending execution of the sentences in respect of count 1.

(4) We acquit 5th appellant, Stephen Mutua Ndonyi, of all the counts of the charge, and order that this appellant shall be set at liberty forthwith, unless he stands lawfully held in a different cause.

Orders accordingly.

SIGNED:

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J.B. OJWANG

F. AZANGALALA

JUDGE

JUDGE

DATED and DELIVERED at MOMBASA this 22nd day of August, 2011.

M.A. ODERO

JUDGE