



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

**Criminal Appeal 137,138, 139, 140 & 141 of 2007**

*(From original sentence and conviction in Criminal Case No. 1064 of 2003 of the Chief Magistrate's Court at Malindi)*

**SHINDO KAHINDI KATANA.....1ST APPELLANT  
ONESMUS KATANA NDAA.....2ND APPELLANT  
FOLENI GARAMA.....3RD APPELLANT  
KENGA TAABU KIRAGU.....4TH APPELLANT  
TUTUME PATANANA MWARO .....5TH APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

The appeals were consolidated for ease of hearing – the appellants Shindo Kahindi Katana (1<sup>st</sup> appellant) Onesmus Katana Ndaa (2<sup>nd</sup> appellant) Foleni Garama (3<sup>rd</sup> appellant) Kenga Tabu Kiragu (4<sup>th</sup> appellant) and Tutume Patanani Mwaro (5<sup>th</sup> appellant) were convicted on a charge of robbery with violence contrary to section 296(2) Penal Code and each one was sentenced to death.

The appellants had denied the charge, and after hearing in which prosecution called seven witnesses, they were convicted. Appellants were the only defence witnesses.

The prosecution case was based on particulars that on 12<sup>th</sup> April 2003 at S village, Malindi District, they jointly with others not before court, being armed with pangas, rungas and iron bars, robbed Mr. P T of one music system make AIWA, one Camera make Cannon, five mobile phones make Motorola, Erickson and three Nokias and cash Kshs. 103,000/- all valued at Kshs. 153,000/- and at or immediately before or immediately after the time of such robbery wounded the said PT

P PW1) told the trial court that on 12-4-03, he returned to his home near

S River, with his companion, one E. There were no lights in the compound, so the watchman Sammy went to meet them with a torch and lit the way to the house.

PW1 lit some candles inside the house and went to take a shower. He explained that the compound usually had lights, but on that night, there was no power. E too had a shower, then they went to sleep. Five minutes later, the dogs begun barking, and the couple heard strange voices outside and realized there were people in the compound. PW1 woke up his partner, dressed up and he looked out from the balcony window. He saw a man holding the house girl while another one was pointing at the window as though he was going to cut it. The man started hitting the window while shouting “*open the door....open the door*”

PW1 urged him not to cut the window, he opened the door and gave them Kshs. 20,000/- which one man took. They then cut PW1's right hand with a panga.

They pushed PW1 to the bedroom and cut him on the neck – they cut him a second time, and he lost consciousness. When PW1 came to, he heard the voice of his watchman who had come with police after 5-8 minutes.

Both E and Veronicah (the maid) were injured. Missing from the house was money (as all the safes and boxes had been opened), four mobile phones, one broken mobile phone, two watches, 2 pairs gold earrings, a Canon camera, a music system, one long trouser and a waist purse. PW1 said he saw one person clearly i.e the man who was at the window saying he is the one to whom he gave money and is the one who cut him on the neck and hand. He was able to see him well because;

***“He was under the emergency security light which comes on whenever there is a power failure....one of the lights was on the balcony. The man who was cutting the window was 2 metres away from the light. I had seen his face”***

When an identification parade was held on 29<sup>th</sup> April 2003 PW1 picked out the 2<sup>nd</sup> appellant Onesmas as one of the people who attacked him, saying he had looked at him for a total of 30 seconds during the incident.

On cross-examination by 1<sup>st</sup> appellant PW1 stated:

***“I did not see you actually take part in the robbery. I do not know if you were involved in the robbery. There is no security alarm on the plot. You were also beaten and I had to take you to Malindi Hospital.”***

EW (PW2) who was in the company of PW1 confirmed the incident took place saying after hearing noise outside, she got up, looked outside and realized that people had come to their home. One of the people had a torch – there was no power that night. She noticed that the house girl was being beaten and was crying. PW1 spoke to them, opened the door and gave them Kshs. 20,000/-. They took the money but they wounded PW1 and also beat PW2 up until she lost consciousness – she would regain consciousness then they would beat her till she loses consciousness and this repeated itself about four times and one persistently attempted to rape her. Yet all this time she managed to recognize one man whom she used to see playing cards in town – in total she identified four (4) people – they had a bright torch and after they entered into the house, the electricity was from the outside.

It was PW2's testimony that:

***“I saw them by their own torch and the security light outside.”***

She pointed at 2<sup>nd</sup> appellant, 3<sup>rd</sup> appellant, 4<sup>th</sup> appellant and 5<sup>th</sup> appellant as being among the people she saw during the robbery and that 5<sup>th</sup> appellant was the one who stood over them while 4<sup>th</sup> appellant held the maid, 3<sup>rd</sup> appellant was the one asking the other one to check if PW1 had any weapon. It was her testimony that 2<sup>nd</sup> appellant was the one who tried to rape her and was known to her even before the incident as she used to see him playing cards at S. At an identification parade, she picked 2, 3, 4 and 5<sup>th</sup> appellants.

1<sup>st</sup> appellant had been their watchman. She too maintained that there was the verandah emergency light which was on and by which she was able to see them before they switched off the main switch. She too did not know whether 1<sup>st</sup> appellant who was their watchman, was involved in the robbery.

On cross-examination by 2<sup>nd</sup> appellant, PW2 stated that one of the robbers kept shinning the torch at her and PW1, in a bid to detect whether they had any weapons. She was certain 3<sup>rd</sup> appellant was the one who was at the verandah checking to see whether PW1 had a weapon.

According to PW2, there was electricity at the time the robbers got into the house but after some time, the robbers switched the lights off and continued using torches. She said she looked at 5<sup>th</sup> appellant for more than 30 minutes as he stood guard over them and he was right in front of her – at the time 5<sup>th</sup> appellant was sporting a *rasta* hairstyle, and she saw his face very well.

Veronicah (PW3) who worked as a maid for PW1 was awoken by barking dogs and her rear door which was being shaken violently. Eventually the door was broken down and 4 people entered and begun beating her.

They took away her phone and Kshs. 2,800/- and then dragged her to her employer's house. She confirmed that the gangsters threatened

PW1 through the window and told him to open the door and upon PW1 opening, he gave them money. It was her testimony that when the incident took place, it was dark and

***“The people had a torch, a bag, emergency light. I saw the 4 people very well. I identified them when they were in my room.”***

She then identified appellants No. 2-5 as the people she had seen, saying 2<sup>nd</sup> appellant was the one who cut her on the face, but before hitting her, they had stood face to face. It was her testimony that 2<sup>nd</sup> and 3<sup>rd</sup> and 4<sup>th</sup> appellants had been to their home previously, looking for employment, and on that night 3<sup>rd</sup> appellant sat on her bed, while 4<sup>th</sup> appellant was the one who took away her money and knew him by his nickname *Badi Badi*.

Incidentally one knew all the appellants before the incident and she picked them at the identification parade. She too confirmed that 1<sup>st</sup> appellant had also been beaten during the night of the robbery.

When PW4 (Pc Katuku) received the report about the incident, he arrested the 1<sup>st</sup> appellant who was PW1's watchman. He then took 1<sup>st</sup> appellant to S's Majangaoni area from where 2<sup>nd</sup> and 3<sup>rd</sup> appellant were arrested as they attended a funeral.

Nothing stolen during the robbery was recovered. It was PW4's evidence that 1<sup>st</sup> appellant is the one who led police to the rest of all the other appellants saying they were his accomplices.

On being cross-examined, PW4 said:-

***“You are the one who led us to the rest of the accused...you gave us the names of the rest of the accused”***

This was the same evidence repeated by Pc Ndimu (Pw5).

Dr. Philip Masako (PW6) confirmed examining PW9 and finding that he had injuries on the head and neck and he classified the degree of injury as harm. He also examined E and found she had injuries on the hand and neck amounting to harm. He confirmed that Veronich too had suffered injury amounting to harm.

All the appellants gave unsworn testimony 1<sup>st</sup> appellant told the trial court that he worked for PW1 as a watchman and that while at the home on 14-4-03, there was a power outage at 10.00pm. When PW1 and PW2 got home at 3.00pm, he escorted them up to the house and thirty minutes later, he was surrounded by people who ordered him to lie down. He shouted “thieves” but was hit and fell down unconscious. When he came to, he went to the APs at

S Bridge and reported and was accompanied back by two police officers but by then the robbers had left. He was taken for treatment, then a week later arrested and charged alongside people he had no connection with. It was his testimony that he could not identify anybody on the material night as it was dark and he lost consciousness.

The 2<sup>nd</sup> appellant told the trial court that on 18<sup>th</sup> April 2003 he went to sleep at about 9.00pm. At about 12.00am, there was a knock at his door – it was the police who came in, searched his house then arrested him and eventually he was charged alongside strangers.

3<sup>rd</sup> appellant told the trial court that on 18<sup>th</sup> April 2003, he was at the home of in-laws in Majongoni, where there was a Farigi ceremony. He was with his in-laws until 11.00pm when he went to sleep. He was awoken by police who arrested him and charged him alongside strangers.

The 4<sup>th</sup> appellant's defence was that on 18<sup>th</sup> April 2003 at about 9.00pm, he left a club to go to his home at Sbridge. He was stopped by police officers on the way – they wanted to know where he had come from. The officers accompanied him to his home where they conducted a search, then he was arrested and charged alongside some strangers.

In his judgment, the trial magistrate had no doubt that PW1 was attacked on the night of 12<sup>th</sup> April 2003 and robbed of various items and that during that incident PW1 was injured, alongside PW2, PW3 and 1<sup>st</sup> appellant.

He was satisfied that PW1 properly identified the 2<sup>nd</sup> appellant and that PW2 and PW5 positively identified 2<sup>nd</sup> to 5<sup>th</sup> appellants at the scene

and that the three witnesses' evidence corroborated each other well.

He believed police officers that it was 1<sup>st</sup> appellant who gave the names of all the other appellants, and therefore had conspired with the co-appellants in staging the robbery – saying the police could not just have gone to the village to make random arrests of the very people who were then positively identified by the victims.

He disbelieved 1<sup>st</sup> appellant's defence that he too had been hurt, saying none of the witnesses saw him at the home during the attack, and no one heard him scream, during the attack and he concluded:

***“To me it was a calculated move for accused 1 to disappear and only later emerge with administration police officers after the robbery. Otherwise, how come he raised no alarm at all when he was attacked and yet he was guarding outside? Then he had injuries must have been sustained otherwise then during the robbery...”***

The trial magistrate was persuaded the appellants were positively identified with the aid of the emergency light at the balcony and that PW1 and PW2 and PW3 were in a position to positively see and identify the attackers. He noted that PW3 was with the appellants at close range for a long time and she was in a position to identify the attackers and some of the appellants like 2<sup>nd</sup> and 3<sup>rd</sup> were already known to the victims.

The trial magistrate dismissed the defences as mere denials and that their allegations of being falsely arrested for no reason were simply not true.

The appellants contested those findings and in identical grounds of appeal filed by themselves they challenged the same as follows:

- (1) The circumstances which prevailed at the scene were not conclusive for any opportunity for the victim to come up with positive identification as:
  - (a) It was executed at night
  - (b) The incident was sudden and terrifying
  - (c) The robbers were armed with dangerous weapons which must have caused fright and panic to the victim.
- (2) Although prosecution witnesses claimed to have identified appellants at an identification parade, no parade form was produced.
- (3) The APs who were the first to visit the scene, did not testify
- (4) The defences was not adequately considered.

At the hearing of the appeal, Mr. Angima appeared on behalf of all the appellants. Mr. Ogoti (the ADPP) conceded the appeal on grounds that there was non compliance with the provisions of section 200(3) Criminal Procedure Code. He pointed out that the matter was first heard by J. Manyasi (Chief Magistrate) who heard the evidence of PW1-3. Then K. Ogolla (Senior Resident Magistrate) took over and heard the evidence of PW4, 5, and 6. Then J. Manyasi once again took over the matter and heard the evidence of PW7. At a later stage D. O. Ogembo (Senior Resident Magistrate) took over the matter amidst objection that section 200(3) Criminal Procedure Code had not been complied with. Mr. Ogembo gave his ruling in which he placed the appellants on their defences.

Mr. Ogembo's ruling was that there was no prejudice caused in failure to comply with the provisions as there was no issue raised on the jurisdiction, competence or otherwise on the part of the previous magistrate who handled the matter and the implication was that the court acted competently and procedurally.

It was Mr. Ogoti's submission that the interpretation of the trial magistrate with regard to the provisions of section 200(3) Criminal

Procedure Code were wrong and the matter was handled by three different magistrates, none of whom complied with section 200(3) Criminal Procedure Code and so the appellants were prejudiced.

He further pointed out that the matter first came for plea on 30<sup>th</sup> April 2003 and was well over six years, and taking into account that the key witness was a foreigner who may not easily be found to testify, and given the period that appellants have been incarcerated, then even a retrial would be unjust and unfair.

Mr. Angima supported this position although he then went on into the merits of the evidence. We think that once the procedural issue is dealt with, then the main substantive issues in the appeal will not even come up for consideration.

We have confirmed that the matter was initially handled by J. Manyasi (CM) on 24<sup>th</sup> June 2003 and she indeed recorded the evidence of three prosecution witnesses. Subsequently, the matter was taken over by K. Ogolla on 16<sup>th</sup> September 2003 and he heard the evidence of three witnesses.

On 13<sup>th</sup> May 2004, J. Manyasi again heard the evidence of PW7 – by 7<sup>th</sup> September 2005 when D. Ogembo took over and prosecution closed its case, NONE of the magistrates had recorded their compliance with the provisions of section 200(3) Criminal Procedure Code.

The provisions of section 200(3) Criminal Procedure Code are as follows:

***“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and re-heard and the succeeding magistrate SHALL inform the accused person of that right”***

Obviously this did not happen, but of greater significance, is that when the issue was raised, the final trial magistrate decided that the other magistrates had acted appropriately by not complying with the provision, interpreting that provision to mean competency of the presiding officer. That interpretation was not only misplaced but totally misguided. The prosecutor who had opposed the application did not even say it would be difficult to get witnesses, all he said was that appellants were asking for re-call of witnesses because they knew that chances of getting witnesses was almost zero. He did not inform the trial court that this was information coming from the investigating officer – some how he transformed himself into a mind reader and decided that the recall was being made out of mischievous intent. The learned trial magistrate made a grave error in the manner in which he reasoned. Certainly the appellants were prejudiced – bearing in mind the provisions of section 200(3) Criminal Procedure Code.

We have considered the evidence on record, a retrial would have been the best way to go, but as Mr. Ogoti points out, the appellants have been incarcerated for well over six years, due to the time lapse, the probability of easily getting witnesses to testify is watered down and it would therefore be unfair and unjust to order for a retrial would be oppressive and most unfair to the appellants. We are therefore persuaded that due to this procedural omission, the appellants must benefit from the loophole and be acquitted.

Their appeal is allowed and we order that each appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 15<sup>th</sup> day of **March 2010** at Malindi.

**H. A. OMONDI**  
**JUDGE**

**M. A. ODERO**  
**JUDGE**

Mr. Ikhubi holding brief for Mr. Angima for appellants  
Miss Waigera for State