



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 79 of 2007**

DANIEL KIOKO MBUVA..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Chief Magistrate Mrs. H.A. Omondi dated 18th April, 2007 in Criminal Case No. 4953 of 2004 at Machakos Law Courts)

JUDGEMENT OF THE COURT

The appellant faced six counts of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). This plurality of charges arose from robberies staged against different complainants on the same night, on 30th September, 2004 at Kingatwani, along the Machakos-Kitui Road, in Machakos District, Eastern Province.

The learned trial Magistrate, after analyzing all the evidence, came to the following conclusion:

“I am convinced that [the] accused was among the persons who attacked passengers in the motor vehicle, robbed them, and escaped with [a] bullet wound fired from *P.C. Wambugu’s* gun. Consequently, the evidence proves charges No.1, 2, 3 and 5, and the accused’s defence is rejected, and he is convicted as charged. Counts 4 and 6 [are] not proved, as no one testified on these, and so [as regards the two counts] ...he is acquitted under s.215 of the Criminal Procedure Code [Cap.75, Laws of Kenya].

The appellant had several grounds of appeal, which he amended in a new document attached to written submissions which he brought before the Court, on the occasion of hearing this appeal.

It will not, however, at this stage, be necessary to consider the grounds of appeal, since learned counsel for the Respondent, *Mr. Wang’ondu*, sought to change the format of this appeal by conceding. We will first consider the merits of the said concession.

Mr. Wangondu submitted that there was a fundamental defect in the trial process: the appellant had not been accorded an opportunity to cross-examine PW10. PW10, a clinical officer from Masii Health, thus testified:

“I know *Dr. Wazome*; I worked with him; I [am familiar with] his hand-writing and signature, and it appears on this document, i.e., [the] treatment card in respect of *Kioko Mbuva*, a 22-year-old male from Kisau who had a history of having been assaulted on the left leg. On examination the leg was swollen, and the impression [recorded] was [that the complainant had sustained] a fractured femur; and an X-ray showed a bullet lodged in the mid-leg, but bone was intact. He was treated for the septic bullet wound. On 6th October, 2004 a minor operation was done, and [a] bullet removed from the left thigh and kept as

exhibit...and the notes are signed by *Dr. Wazome* who did the surgery. I now produce the treatment as Exh.6, as *Dr. Wazome* [has since] retired.”

Contrary to the point made by learned counsel, that there was no opportunity for the accused to cross-examine PW10, the record shows that he *did* cross-examine the witness. The appellant did indeed cross-examine, and PW10’s answers are thus set out:

“You were brought to hospital on 1st October, 2004 ..., Makueni District Hospital. I cannot tell where *Dr. Wazome* carried out the surgery. I may not know whether *Dr. Wazome* travelled to Makueni but he was based in Machakos and carried out the surgery to remove [the bullet] as per his notes.”

This was followed by *re-examination*, during which PW10 confirmed that *Dr. Wazome* worked at Machakos General Hospital, and that it is at that hospital he had conducted the surgery.

After the re-examination, the appellant herein said:

“I need ten minutes to form out my questions before cross-examining PW10 further.”

The learned Magistrate did not allow such further cross-examination, and an order was made to that effect. In the words of the trial Court:

“I made it clear at the beginning [PW10] was urgently required at the hospital. These are delaying tactics and I will not recall the witness for further cross-examination.”

It must be this order by the trial Magistrate which is the basis of the concession being made by learned counsel *Mr. Wang’ondu*. But, as we see it, the total process of examination was already *complete*, when the appellant stated he wanted to conduct a second cross-examination. In terms of trial procedure, the appellant was not, as of right, *entitled* to a second round of cross-examination; indeed to demand such a second opportunity could well have been an abuse of the process of the Court; whatever the case, however, the Court had the discretion to allow or disallow such further cross-examination; and in this case the Court considered the matter and *disallowed* the request. Such an exercise of discretion by the trial Court is to be upheld by this Court.

Consequently, we hold to be invalid the concession to this appeal made by *Mr. Wang’ondu*. We will assess the appeal on the merits, on the basis of the principle that governs a first appellate Court hearing. That principle is well set out in the English case *Coghlan v. Cumberland* [1898] 1 Ch. 704:

“...*the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgement appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong.*”

This takes us back to the particulars of the several charges brought against the appellant herein:

- (i) On 30th September, 2004, jointly with others not before the Court and while armed with dangerous weapons, namely iron bars, the appellant robbed *Martin Mutua Mwasya* of one Nissan mini-bus, Reg. No. KAP 873 L; one wallet; cash in Kshs.500/=; and one jacket – all valued at Kshs.601,600/= ? and at, or immediately before, or immediately after the time of such robbery, used actual violence upon the said *Martin Mutua Mwasya*;
- (ii) On 30th September, 2004 the appellant, jointly with others not before the Court, and while armed with dangerous weapons, namely iron bars, robbed *Fredrick Mulyungi Nzou* of cash in the sum of Kshs.5,200/=, and at, or immediately before, or immediately after the time of such robbery, used actual violence upon the said *Fredrick Mulyungi Nzou*;

(iii) On 30th September, 2004 the appellant, jointly with others not before the Court and while armed with dangerous weapons, namely iron bars, robbed *Veronica Kalekye Nzilu* of one handbag, one cellphone, one identity card, one ATM card and cash in the sum of Kshs.2100/= ? all bearing a total value of Kshs.11,200/= ? and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence upon the said *Veronica Kalekye Nzilu*;

(iv) On 30th September, 2004 the appellant, jointly with others not before the Court and while armed with dangerous weapons, namely iron bars, robbed *Benedeta Mutisya* of one national identity card, elector's card, and cash in the sum of Kshs.12,050/=, and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence upon the said *Benedeta Mutisya*;

(v) On 30th September, 2004 the appellant, jointly with others not before the Court, and while armed with dangerous weapons, namely iron bars, robbed *Hellen Kageni Nthiga* of one handbag, one cellphone, one pair of spectacles, one jacket, and cash in the sum of Kshs.1760/= ? all bearing the value of Kshs.13,660/= ? and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence upon the said *Hellen Kageni Nthiga*;

(vi) On 30th September, 2004 the appellant, jointly with others not before the Court, and while armed with dangerous weapons, namely iron bars, robbed *Francis Kyai Mutei* of one cellphone, one encyclopedia, three iron bars and cash ? all bearing a value of Kshs.17,600/= ? and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence upon the said *Francis Kyai Mutei*.

PW1, *Hellen Kageni Nthiga* who lives in Kitui Town, testified that on 30th September, 2004 at about 5.00 p.m. she boarded a mini-bus headed for Kitui, at Afya Centre in Nairobi. This was a 14-seater mini-bus, and it had at the time only one passenger, sitting in the co-driver's seat. PW1 sat on the second row of seats behind the driver's cabin. Gradually, the mini-bus had the full complement of passengers, and it departed for Kitui, via Machakos Town. As the mini-bus moved on, the conductor asked PW1 to change seats with a certain fidgety passenger seated next to her, so that PW1 now took the window seat. When the mini-bus reached a road junction (Muthetheni-Wote), at about 7.30 p.m. a passenger asked to be dropped off. This passenger was seated in a row behind PW1, and PW1 is unable to say exactly where his seat had been. The driver started slowing down; but before the mini-bus came to a halt, PW1 noticed that two passengers in front of her were bending over. She paid no attention until she sensed that there was a commotion, and the said front-row passengers were taking baggage, and alighting. A voice then raised alarm, that there were thieves, and that there was an attack from the outside. PW1 saw the man seated in front of him jump out through the window. Even as somebody banged the mini-bus from the outside, and PW1 gripped her handbag, looking to exit, a passenger in front of her threw a punch at her, and ordered her to sit down. So PW1 sat in her seat. The interior lights had been switched on, when a passenger had asked to be dropped off; and they were still on. Attackers ordered the passengers to lie down, which was not possible due to space-limitation; so they bowed their heads down. The one passenger who had earlier changed places with PW1, now took the conductor's seat (behind); the conductor himself had found his way out of the vehicle after the door was opened. Those who had been sitting in the driver's cabin were moved back, and others took charge of the driver's cabin. These attackers assaulted the driver as they demanded money.

The man who *had earlier swapped seats with PW1*, and was now occupying the conductor's seat, ordered PW1 to hand over her handbag. She surrendered the handbag, with its contents ? medications, mobile phone ? Nokia 3310, diary, and spectacles. The attackers demanded to know how much money PW1 had; she said she had Kshs.750/=, even though she had Kshs.1,760/= inside her handbag. The thief ordered PW1 to remove her jacket; and he took it and wore it straightaway. *The man who had swapped seats with her* grabbed a paper-bag which she had.

The thieves drove the vehicle away from the main road, and on until about 8.00 p.m. They then ordered the passengers to get out of the motor vehicle and lie down; in the meantime, the thieves drove off in the mini-bus, all by themselves.

The abandoned passengers started walking in the direction they had followed while they were in the mini-bus. They met three men who called for them Muthetheni Police Post. PW1 boarded the Police motor vehicle, and went up to Kitui. The following day she recorded a statement at Masii Police Station. At Masii Police Station, PW1 saw items of hers which had been stolen: handbag, jacket, phone-charger, diary, keys. PW1 later learned that the Police had tracked the stolen minibus, and one of the thieves had been arrested.

Of the appellant herein, PW1 thus testified:

“I see the accused. He is the one who removed my jacket from me, and was dressed like a conductor; he came from the back row and joined me in my row, and sat in the middle seat.”

On cross-examination, PW1 testified that the robbery had taken place at about 7.30 p.m., and that it was a time of darkness. PW1, in relation to visual recognition at the time of robbery, said: “The first time to look at you properly is here in Court.”

PW2, *Fredrick Mulyungi Nzoi*, was the conductor in the ill-fated mini-bus, Reg. No. KAP 873L, plying the Nairobi-Kitui route. He was at Afya Centre in Nairobi on 30th September, 2004 at 5.00 p.m., as the conductor, and *Mutua* (PW3) as the driver of the said mini-bus.

As the mini-bus made progress towards Kitui, it came to the Masii Police check-point, where it was found that one of the passengers was carrying a hammer. The Police officers questioned the bearer of the hammer, and confiscated the same. The man who had the hammer, who is the appellant herein, told the Police officers that he was travelling to Wamunyu, along the Kitui road, where he was going to visit his aunt. The mini-bus was allowed to proceed, and as it approached the Muthetheni junction, a passenger indicated that he was alighting. PW2 signalled to the driver to stop; and as he was slowing down, PW2 noticed that there were two passengers who had entered the driver’s cabin. Two thugs were seated in the row just behind the driver’s cabin; one was in the second row behind the driver’s cabin, sitting next to a female passenger; and another thug (the appellant herein) was sitting behind PW2: this last one was in the last row, and was wearing a shirt of the same colour as that worn by conductors. The thug in the conductor’s row got hold of PW2; earlier on, PW2 had *ordered him to change places with a female passenger (PW1)* because he kept fiddling with some objects on the floor – and so PW1 sat next to the window, and the thug sat in the middle. This particular thug began the attack, by hitting the motor vehicle, and then the appellant herein, who sat behind, hit the conductor. There was a struggle, during which the conductor opened the door, and jumped out of the motor vehicle while it was in motion. In the meantime, there were other passengers-turned-thugs struggling with the driver for the control of the steering wheel. During the struggle, PW2 was robbed of Kshs.5000/=. Two of the passengers, a man and a woman, were able to jump out of the beleaguered mini-bus through the windows. In the meantime, one of the thugs took control of the motor vehicle, and drove it away.

PW2 who was left along the road, saw an on-coming motor vehicle and stopped it. It turned out to be a vehicle of the Kenya Power & Lighting Co. Ltd. The man and woman who had jumped out of the stolen mini-bus also came along – and the three were taken in the KP & L motor vehicle up to Wamunyu Police Post. Those in charge of the KP & L motor vehicle alerted the Police on phone, and a message was later received, to the effect that the stolen motor vehicle had been traced and recovered, and two people had been killed in the process.

PW2 had been injured on his head when he was struck by two of the thugs who had sat in front of him. He now obtained hospital treatment, before recording a statement at Masii Police Station.

Later on, on 9th November, 2004 PW2 was called to an identification parade at Masii Police Station. He was able to recognize a man who had been in the motor vehicle during the robbery and was one of the robbers; he touched this man, who is the appellant herein.

On cross-examination, PW2 testified that when he had jumped out of the moving motor vehicle he was defying the orders of the robbers. The robbery attack was sudden, and PW2 had not anticipated it.

He said he had seen the appellant's face and clothing, during the attack – even though he had not given such details in the statement he recorded with the Police. PW2 said he had been in much pain at the time he recorded a statement with the Police, and it was not possible for him to record everything about the robbery. He said he had described to the Police the appellant's appearance, even though the record does not show this. Did PW2 pick out the correct person, on parade? In PW2's words:

“You were not the youngest-looking person in the parade. I did not choose in terms of age; I picked you out because I saw you in my car.”

In the re-examination, PW2 said: *“I was able to identify the accused by his facial appearance because from Nairobi to Machakos he had been talking, and I had turned several times to look at him. When we left Nairobi it wasn't dark, so I could see him. The Police asked me to describe my attackers, and I described him.”*

PW3, *Martin Mutua Muasya*, the driver of the mini-bus involved in this case, testified that he had driven a mini-bus, Toyota Shuttle, Reg. No. KAP 873L from Kitui to Nairobi on 30th September, 2004, and he left Nairobi for Kitui, with a full complement of passengers at 5.30 p.m. the same day. All the passengers were recorded as destined for Kitui ? and “there was no one alighting midway.” At about 7.30 p.m., PW3's mini-bus came up to the Masii Police checkpoint; the Police inspected the mini-bus, and confiscated a hammer in the possession of one of the passengers. As the bus was approaching the Muthetheni junction, the conductor said there was a passenger alighting. This surprised PW3, since he was not expecting alighting passengers. PW3 was suspicious; and so he stopped right in the middle of the road; and suddenly he heard orders communicated in Kiswahili, from the back seats: *“Ruka nyuma!”* ? or *“Move to the back seats!”* ? and at the same time, there was a commotion, with passengers being battered. Immediately behind the driver were some of the thugs who, however, he did not look at; one of them held PW3 by the neck and started wrestling him down. Some passengers opened the door and jumped out. PW3 lost control of the steering wheel. One of the thugs entered the driver's cabin, assaulted PW3 and the passengers, and ordered PW3 and others to climb over to the passenger cabin. This particular thug dishing out orders, took over the steering wheel and drove away, with his accomplices ransacking the clothing and the pockets of passengers still on board ? for valuables. PW3 was hit on the left cheek with an iron bar, and relieved of his wallet which contained Kshs.500/= and his driving licence.

Away from the first scene of attack, all passengers on board were ordered out, and forced to lie down, lest they be *shot*. In the meantime, the thugs drove away in the mini-bus.

PW3 realized that the conductor (PW2) and two passengers (a man and a woman) had managed to get out of the vehicle when the robbery attack was launched. Those left lying down as the thugs drove off were six people. They walked along, and met cyclists who contacted Muthetheni Police Post for them by mobile phone. For three hours, the marooned passengers and their driver walked on, to Wamunyu. At Wamunyu, the Police gave help, by taking the more seriously-injured to Kitui Hospital. PW3 and his passengers learned from the Police officers that the stolen motor vehicle had been recovered, and two of the robbers had been shot dead. PW3 later saw the mini-bus at Masii Police Station, with many clothes and cellphone sim-cards strewn around. Five days later, the mini-bus was released to the owner, and PW3 drove it away.

On 9th November, 2004 PW3 was called to an identification parade, and he identified the appellant herein as having been one of the robbers of the material night. PW3 said he recognized the appellant's face.

On cross-examination PW3 confirmed that when the robbery was staged, one of the robbers grabbed him by the neck, and at the same time passengers in the back seats were being battered. On identification, PW3 said: *“I saw you inside that motor vehicle; I saw your face; you were seated, so I could see the rest of your body.... And you ordered me to remove my jacket and kept issuing orders in a Kikamba-accented Kiswahili.”*

On further examination, PW3 recalled that the appellant was the man the Police officers found with a

hammer at the Masii checkpoint. In PW3's own words: "When I heard the Police asking a passenger about the hammer, I went round to where they stood, and saw it was the accused."

PW3 further said that the appellant had been sitting in the last row of seats in the mini-bus; and he had seen the appellant's face while the vehicle's interior lights were switched on, as he climbed out from the driver's seat to the middle row, at the command of the robbers.

PW4, *Dr. John Mutunga*, a senior medical officer at Machakos General Hospital, came to give testimony by virtue of s.77 of the Evidence Act (Cap. 80, Laws of Kenya). He came to produce a report made by *Dr. Mbuva*, who had conducted a post-mortem examination on *Dickson Maara Gacheru* (deceased). The death of the said *Dickson Maara Gacheru* was linked to the mini-bus robbery incident which is the basis of the appeal herein. Also shot dead at the same time was one *Wakeyi Mwenda*, and PW4 now produced *Dr. Mbuva's* post-mortem report in that regard.

PW5, *Emmanuel Lagat*, a forensic firearms examiner based at CID Headquarters Forensic Laboratories, on 11th December, 2004 received from *Police Constable David Wambugu* the following items: one Smith & Wesson Revolver SNV 241076; three spent cartridge cases; and one fired bullet. He was requested to ascertain if a specified bullet was fired from the revolver, and if the cartridges in question could fit the said revolver. PW5 found that the revolver was a .38-calibre Wesson Revolver SNV 241076; in good general and mechanical condition; complete in all its component parts. PW5 formed the opinion that the revolver was capable of being fired, and was a firearm under the Firearms Act (Cap.114, Laws of Kenya).

On cross-examination, PW5 testified that there are many .38 Smith & Wesson Revolvers in Kenya and can be found in any Police Station; but robbers also had such guns.

PW6, Police Force No. 38817, *Agip Peterson Ngare*, had been stationed at Makueni Police Station in October, 2004 and on 1st October, 2004 at 7.00 p.m., as he was in the Report Office, he received a report from a doctor at Makueni Hospital: that someone had been received at the hospital with a bullet lodged in his left thigh. The person concerned had just been to Makueni Police Station where he reported an assault case ? whereupon he was referred to the hospital. When PW6 learned that the patient had a bullet in his thigh, PW6, accompanied by another Police officer, one *Mugoyo*, proceeded to the hospital and arrested the patient. PW6 took the patient (the appellant herein) to Makueni Police Station; and soon thereafter PW6 received communication from Masii Police Station, that a robbery had been committed in the Masii area. Officers from Masii Police Station collected the appellant herein from Makueni Police Station, for further investigation. PW6 identified a scar in the appellant's left thigh.

On cross-examination, PW6 testified that at the time he collected the appellant from Makueni Hospital, a bullet was still lodged in his left thigh. An x-ray had been done on the said affected part of the body, and this showed a bullet head inside the appellant's thigh; and PW6 had then booked the appellant in the Makueni Police Station Occurrence Book as a robbery suspect ? OB No. 39 dated 1st October, 2004. PW6 did not know when the bullet had been removed, as Masii Police Station when contacted, had collected the appellant with the bullet still lodged in his left thigh. Before the arrest and transfer of the appellant to Masii Police Station, he had himself gone to Makueni Police Station, and made a report that he had been assaulted "by persons in Nairobi", and so he was given a note to enable him to get treatment in hospital. PW6 had, at the time, asked the appellant why he had not made a report in Nairobi, but he had no answer. In the circumstances, officers at Makueni Police Station suspected the appellant to have been a robber, and communicated appropriately with Masii Police Station which then sent officers to collect the appellant. The appellant was held at Makueni Police Station from 1st – 5th October, 2004 before he was transferred to Masii.

On re-examination, PW6 testified that when reporting about the Nairobi assault upon him, at Makueni Police Station, he did not mention that a bullet had hit him during that assault; he did not even say that his attackers had been armed. PW6 had later learned that the appellant herein had been shot by the Police, during a robbery.

PW7, *Patrick Nzilu Munywoki*, had been one of the passengers in the Nairobi-Kitui mini-bus on 30th September, 2004. He and his wife, *Veronicah Nzilu* (PW8), entered the mini-bus at Afya Centre, along with some four-five other travellers, also going to Kitui. The mini-bus departed at 5.30 p.m., and moved steadily up to a Police check-point; and when the Police officers carried out a search, they found one passenger in possession of a hammer; the officers questioned him, and confiscated the hammer. All the passengers indicated to the Police officers that they were journeying to Kitui; and the Police officers “gave instructions that the driver should not stop on the way.” But, as the mini-bus came close to Kithangaini, one passenger suddenly announced that he wanted to alight, and the conductor signalled the driver to stop. Suddenly, there was a commotion, and a young man seated in the same row as PW7, aimed an iron bar at him. It was not completely dark, and PW7 *saw the thrust of the iron bar, and dodged it*. In the meantime, the attacker jumped to the seat ahead, and a struggle ensued. PW7 knew everyone in the mini-bus, they were all co-workers ? except for some four (who included the young man with the iron bar). The four-some strangers were armed with iron bars and beverage-bottles, which they used to launch their assault. One of these “strangers” went up to the driver’s door, and began a struggle for the steering wheel. At this point, the mini-bus came to a stop; and PW7 jumped out through the window. He urged his wife also to jump out, and at this moment the stranger struggling for the steering wheel, confronted PW7. As this attacker engaged PW7, PW7’s wife saw an opportunity to jump out of the window; and now the two ran backwards, even as the motor vehicle was driven forward and away. A Kenya Power & Lighting Co. Ltd. vehicle coming from the Machakos direction stopped for PW7 and his wife who got in. At this moment, PW7 saw the conductor of the ill-fated mini-bus who had also escaped, and the KP & L motor vehicle stopped for the conductor to enter. The conductor had been seriously injured. PW7 personally lost nothing to the robbers; but his wife lost her handbag and money to the thugs. In PW7’s testimony, his wife’s belongings had been grabbed by the young man who had been wielding an iron bar. PW7 identified the appellant herein as the young man who had attacked him with an iron bar, during the robbery; this young man had sat *next to PW7’s wife*.

It was PW7’s testimony that he had been able to see the appellant herein very well, during the mini-bus trip from Nairobi, on the material date. The appellant had got into the mini-bus at Afya Centre in Nairobi in broad day-light, *finding PW7 already seated in the motor vehicle*.

On cross-examination, PW7 testified that when he recorded a statement at the Police station, he had indicated that he recognized the appellant herein as one of the robbers. Although PW7 had given to the Police officer, at the time of recording a statement, a physical description of the four attackers, these details had not been included.

On re-examination, PW7 said: “I am certain [the] accused is one of the people who attacked us. There is no mistaking.”

PW8, *Veronicah Kalekye Nzilu*, a clerical officer at Kitui Municipal Council, together with her husband (PW7) and several friends, boarded a Kitui-bound mini-bus at Afya Centre in Nairobi, on 30th September, 2004. The mini-bus made good progress, and went past a Police check-point; then, as it approached the Muthetheni junction, a passenger’s signal that he was alighting, was accompanied by a commotion which marked the launch of a robbery assault on the bus.

A young man seated next to PW8 ordered her to surrender all her belongings. She surrendered her handbag, her cellphone, an Ericsson 220, her KCB ATM-card, and cash in the sum of Kshs.2,100/=. In the meantime, PW8 saw that her husband had already jumped out through the window and was standing outside. PW8 too jumped out through the window, and ran into the bushes, her husband following behind. The two returned to the road, just in time to catch up with a motor vehicle being driven from the Machakos direction. After the two got on board, they saw their conductor of the stolen mini-bus, badly injured; he too was taken on board.

At about 1.00 a.m. PW8 and her husband got word that the robbers had been caught, and some of them had been killed by the Police.

PW8 testified that the appellant herein had been one of the robbers; he had sat *right next to her*; he is

the one who ordered her to surrender her belongings. In PW8's words: "*I am sure he is the one.*"

On cross-examination, PW8 thus said of the appellant herein:

"I can describe you as short, dark with big eyes and a hooked nose; slim body frame, and certainly younger than me. I did not give the Police a physical description of you. [But] I told the Police if I [were] to see my attacker again, I [would] identify him... Yes, people look alike, but they are not identical, and I am not mistaken about your identity... The incident [took place] at about 7.30 p.m."

PW9, Police Force No. 50227 *Police Constable David Wambugu* of Masii Police Station, a Police driver, testified that on 30th September, 2004 at 8.30 pm he was at Muthetheni Patrol Base, in the company of other officers. At that time, PW9 received a telephone call from a member of the public, with the message that a mini-bus had been car-jacked along the Kitui Road and was in the hands of robbers headed in the direction of Muthetheni; and that passengers had been removed from the motor vehicle and it was *now ferrying only the robbers*. PW9, accompanied by *Police Constable Sitienei* and *Police Constable Kosgei* armed themselves, and headed towards Muthetheni. Soon thereafter, the officers saw a motor vehicle with very bright headlights being driven towards Muthetheni market; and suddenly, these lights were switched off. PW9 and his colleagues followed in the direction in which the said vehicle lights had pointed; and after about 1 ½ km, they found the said motor vehicle diverted to a road leading towards a seasonal river. The officers approached the said motor vehicle; its interior lights were on, as was the radio too. There was much blood in the motor vehicle, especially on the driver's seat; and there were documents and other property strewn all over the inside of the motor vehicle, Reg. No. KAP 873L, a mini-bus.

As PW9 suspected that the robbers were not far away, he decided to track them. Using his torch, he identified footprints – and these led down to the seasonal river. The Police officers realized that some people had walked along the dry river-bed; and on close scrutiny, they sensed that there were several people sneaking away – some 12 metres ahead. Upon PW9 ordering them to surrender, they threatened to kill the officers; and immediately, there was gun-fire from the gang; and the officers responded with gun-fire. After several shots had been fired by the officers, and things calmed down, three members of the gang fled – a tall man, and two medium-height ones. When the Police officers examined the scene, they found they had shot two men dead. He suspected that those who fled, would have sustained gun-shot injuries.

PW9 called for reinforcement, while the scene was being guarded. On a closer search at the scene of shooting, several significant things were found: Kshs.43,000/=; clothes; personal documents related to the car-jackers' victims; an iron bar.

PW9 later learned that someone had been arrested in Makueni, with gun-shot wounds. PW9 was later instructed to take his revolver, the spent cartridges, and one bullet head for further examination by a ballistics expert.

The appellant, when put to his defence, made an unsworn statement, in which he said that, on the material date, he was working from morning to 5.30 pm as a casual worker for a firm known as H-Young & Co. *in Nairobi*. Thereafter he had gone to queue up for his pay, which he got at 7.00 pm. And then he went to his dwelling at Mukuru Kwa Njenga in Nairobi. On his way home, the appellant said, he met "a group of three people" who ordered him to stop, but he avoided them by running away. The three people gave chase, caught the appellant, and *hit his left leg with an iron bar*. They robbed him of his money, his identification card, his jacket, and his shoes. Later on, the appellant said, he rose to his feet and headed for home, arriving there at 7.50 p.m. He said he was *unfamiliar with the city*, so he just went to sleep; and his intention was to seek help with regard to the assault *in his rural home*, and so he went there on *1st October, 2004*. On that day he travelled to Makueni, where his sister gave him a massage. He remained under the care of his sister at Makueni until *4.00 p.m. on 1st October, 2004 when his left leg began swelling* significantly; and it is this development that forced him to go to *Makueni Hospital*, where he had to explain to the doctor how he had sustained such injuries. The doctor did not then embark upon treatment; he advised the appellant herein to first go and report the matter at the Police station.

The appellant stated that upon leaving Makueni Police Station, he met a Police officer, *Agip Peterson Ngare* (PW6) who stopped him and questioned him about the identity of his attackers. In relation to the meeting with PW6, the appellant herein said:

“He asked why I have not reported in Nairobi, and I told him I was new in Nairobi and I did not even know where the Police [station] in Nairobi was. He did not believe me and he locked me up in [the] cells without being taken to hospital. I complained to [the] OCS Makueni, who then ordered [that] I be taken to hospital; so I was taken to hospital and my leg was bandaged, and I was returned to [the] cells until 5th October [2004].”

The appellant said in his statement that it was his persistent questioning of his detention, that led to him being *transferred* in a Police motor vehicle to Masii Police Station. He was held at Masii until 9th November, 2004 when he was taken to an identification parade, where he was identified, and then charged in Court on 11th November, 2004.

The appellant said he knew nothing about the offence he was charged with. He said he had not been shot with a gun at any time.

The learned Chief Magistrate in her analysis of all the evidence, noted certain facts emerging from the testimonies. Some of these may be noted here:

1. The public service vehicle in which the robberies detailed in the charges took place, was parked in Nairobi, at Afya Centre as early as 5.00 pm; within half an hour it had its full complement of passengers; this mini-bus left for Kitui at 5.30 pm; all the passengers were destined for Kitui, and none was to alight before the Kitui terminus.
2. The mini-bus reached the Masii Police check-point at about 7.30 pm, and at this point, the Police officers found *one of the passengers with a hammer*, which they confiscated.
3. At Muthetheni, a passenger indicated he wanted to alight, and the surprised driver's response by slowing down, was the occasion for an all-out attack upon passengers by some *five out of their number*; these five took charge of the bus and drove it as they chose, with the remaining passengers – save for three who escaped – assaulted, cowed and terrified.
4. The robbers forced the passengers out of the mini-bus, forced them to lie down, and drove off in the motor vehicle.
5. The stolen motor vehicle was traced to a rough road leading towards a dry river-bed; and Police officers, by means of torch-light, were able to see a gang of men somewhere along the river-bed. The Police officers engaged the gang in gunfire, killing two of its members instantly, and the rest (three) fleeing in a hail of gunfire. Among those who fled was *one tall man, and two medium-height ones*.
6. As the Police officers suspected that the gangsters who fled would have been wounded, information was conveyed to several Police stations, regarding persons who might be found with *bullet-wounds*.
7. At the scene of the shoot-out, items associated with the car-jacking incident, and with the victims, were found.
8. Several hours later someone (who turned out to be the *appellant* herein) was arrested at Makueni, with *gun-shot wounds*.
9. PW1 had testified that the man who had *sat next to her* in the mini-bus, at the time of the robbery, had moved and occupied the conductor's seat in the back; and it is this man *who ordered her to surrender to him her personal effects*.
10. It was during the commotion and the robbery, according to PW1, that the attackers *cut off the interior*

lighting connection in the mini-bus.

11. PW1 testified that the appellant herein is the one who ordered her *to remove her jacket and surrender it to him*; at this stage, the appellant had *moved from the back seat and come to the middle seat where PW1 sat*; and the appellant was dressed like a bus conductor.

12. At the time the appellant moved from the back seat to get close to PW1, the *interior lights were still working*, and she could see the appellant well.

13. PW2, the conductor, corroborated PW1's evidence. He described how the robbers had *taken positions on each row of seats*. PW2 had later identified the appellant herein as one of the robbers, at an *identification parade* held at Masii Police Station; he recalled clearly observing the appellant's face and clothing. PW2 had noted that, all the way on the mini-bus route from Nairobi to Machakos, the appellant *had been talking*, and he had turned back several times to see the interlocutor (the appellant). PW2 noted that the mini-bus *departed from Nairobi in broad daylight* – and he clearly saw the appellant.

14. PW3 too, testified that he saw the appellant, who *donned a hat*, and repeatedly *spoke in Kikamba-accented Kiswahili*, and ordered him (PW3) to remove his jacket. PW3, the driver, said the *interior lights had been on*, and had enabled him to see the appellant clearly as he sat in the last row of seats. PW3 also saw when, at the Masii Police check-point, the Police officers *confiscated a hammer which the appellant had*.

15. The evidence of PW1, PW2 and PW3 is confirmed by PW7 and his wife (PW8). PW7 remembered that, in broad daylight, at Afya Centre in Nairobi, *a young man*, the appellant herein, entered the ill-fated mini-bus and found him and his wife already seated, and he was able to observe the appellant at the time.

16. PW10, *Mary Musau*, a clinical officer, produced the report of *Dr. Wazome* which showed that while the history given by the appellant herein was that he had been *assaulted* on the left leg, the medical finding was that there was a *bullet lodged in the mid-leg*, even though the bone was intact; and the treatment actually given was for *bullet-wound*. On 6th October, 2004 the appellant had undergone a *minor operation*, and a *bullet extracted* from his left thigh.

17. Ballistics evidence (PW9, PW11) showed that the bullet extracted from the appellant's thigh was *one of those fired by PW9* in the gunfire which he and his fellow-officers had launched against the gang of robbers on the material night.

The facts as assessed by the learned Chief Magistrate, and as enumerated hereinabove, are, in our opinion, a balanced and accurate perception of the evidence.

On the basis of the evidence, the trial Court discounted – in our opinion, rightly – the appellant's contention that the several witnesses (in particular, PW1, PW2, PW3, PW7, PW8) were so *shocked* by the attack, they were not in a position to make a correct identification of the appellant as one of the robbers.

In the words of the learned Magistrate,

“...the accused did not just suddenly appear from the shadows to attack the passengers. They had been with him at Afya Centre in Nairobi, sat with him, travelled with him for some distance, before he attacked. So they had time to see and recognize his face. Indeed, each prosecution witness consistently describes his position in the motor vehicle as the man who was seated in the last row in the motor vehicle. The fear during attack could not affect identification as there had been ample time....”

The learned Chief Magistrate did not believe – just as we also don't – the appellant's account that he *lives and works in Nairobi*, and got injured there, but could find not the *Nairobi Police stations*, and had to travel all the way to *Makueni* to report the assault to the Police station there! The learned Magistrate wondered, as we also do: “Just how does the accused [now appellant] explain the presence of the bullet head in his body fired from a gun which *P.C. Wambugu* [PW9] had used on the night of the robbery?” It

is strange, and, in our opinion, signals only lack of truth, that the appellant denied having a gun-shot wound, despite the *medical evidence* tendered before the Court.

The learned Chief Magistrate held:

“I am convinced that the accused was among the persons who attacked passengers in the motor vehicle and robbed them, and escaped with a bullet wound [caused by] *P.C. Wambugu’s* [PW9] gun. Consequently, the evidence proves the charges [in counts] 1, 2, 3 and 5, and the accused’s defence is rejected and he is convicted as charged.”

In his grounds of appeal the appellant contended: that he should not have been convicted on circumstantial evidence; that he was denied his rights under s.77(2) of the Constitution; that the identification of him as one of the car-jackers and robbers, at night, was defective; that the trial Court had violated his rights under s.72(3) of the Constitution.

The foregoing points were taken up only in written submissions which had been prepared and which the appellant handed in on the occasion of hearing the appeal. He was content with the written submissions, and had nothing to add, on the occasion of hearing. In certain respects, the written submissions are not, in our view, well guided on points of law. The appellant, for instance, challenges the presentation of a doctor’s report by PW10; but this is a matter that was duly considered by the trial Court, and resolved on the basis of s.77(3) of the Evidence Act (Cap.80, Laws of Kenya). The appellant disputes the evidence that a bullet-head had been surgically extracted from his left thigh – on the ground that no blood tests were conducted on the said bullet-head, to show that it had been through his body. He makes the bare allegation that the evidence relied upon by the trial Court was “uncorroborated”, and even cites the case, *Abel Monari Nyanamba and Others v. Republic*, Cr. App. No. 86 of 1994 as conveying a background principle, in aid.

Learned counsel for the respondent, *Mr. Wangondu*, to our surprise, would concede to the appeal on the ground stated in the appellant’s submission paper: that there was a violation of his rights under s.77(2) of the Constitution, as he was not allowed to *cross-examine PW10*. As we stated at the beginning, PW10 had been fully examined, and it was perfectly within the trial Court’s discretion to allow a belated request to carry out fresh cross-examination of that witness.

After a careful review of all the evidence taken before the trial Court, and of the submissions made before the trial Court and before this Court, we have come to the conclusion that the trial had been properly conducted, and the judgement and orders of the Court properly delivered. There is no basis for the respondent’s concession to the appeal, and the said concession is hereby rejected. We dismiss the appellant’s appeal, uphold conviction on counts 1, 2, 3 and 5 of the charge, and affirm sentence as imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Machakos this 22nd day of April, 2008.

J. B. OJWANG

I. LENAOLA

JUDGE

JUDGE

Coram: Ojwang & Lenaola, JJ.

Court Clerk: Mweni

For the Respondent: Mr. Wangondu

Appellant in person