



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Ojwang & Lenaola, JJ.)

CRIMINAL APPEAL NOS. 56 OF 2006; 57 OF 2006; 58 OF 2006; 59 OF 2006

(CONSOLIDATED)

BETWEEN

MAKAU NGULUNI.....1ST APPELLANT

PAUL KITAVI.....2ND APPELLANT

JOHN MUTINDA.....3RD APPELLANT

WAMBUA MUTIKA MUE.....4TH APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Chief Magistrate Mrs. H.A. Omondi delivered on 24th May, 2006 in Criminal Case No. 1068 of 2004 at Machakos Law Courts)

JUDGEMENT OF THE COURT

The four appellants herein were jointly charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellants, on the night of 29th February, 2004-to-1st March, 2004 at Mutitu Village, Mbee Sub-Location, Kathiani Location in Machakos District, Eastern Province, jointly with others not before the Court, and while armed with dangerous weapons, namely machetes, bows-and-arrows, metal bars, and explosives, robbed **Mary Nzisa Muthini** of cash, in the sum of Kshs.40,000/=, and one mobile phone, Samsung by make, valued at Kshs.4,000/=, and at, or immediately before, or immediately after the time of such robbery, used actual violence upon the said **Mary Nzisa Muthini** and her night-watchman, one **Saitoti Ole Lerumu**.

The learned Chief Magistrate, after hearing the prosecution's five witnesses, put the appellants herein to their defence; whereupon the appellants each made an unsworn defence.

The trial Court found the charges sufficiently proved, convicted and sentenced the appellants as provided for by law.

Learned counsel **Mr. Nduva Kitonga** came in to represent the appellants after their grounds of appeal had

been filed; and these grounds were, in each case, as follows: the appellants had not been positively identified at the *locus in quo*; arresting officers had not been called as witnesses; the prosecution evidence contained contradictions; proof-beyond-reasonable-doubt had not been achieved.

Before the appellants' case could be made, however, learned respondent's counsel, **Mr. Wang'ond** rose to concede to the appeal, while simultaneously seeking a *retrial*. The reason, as counsel urged, was that "*the Court below did not show which language was used, in some cases.*"

We did check the record, on this point about language, and it shows as follows: (i) PW1 gave her testimony in Kiswahili; (ii) For PW2, Police Force No. 58557, **Sgt. Justus Njue**, it is not recorded what language he used; but it is shown that he was *cross-examined* by Accused 1, Accused 2, Accused 3 and by counsel (**Mr. Nduva**) for accused 4; (iii) PW3 is shown to have given his testimony in Kiswahili; (iv) PW4 is shown to have given his testimony in Kiswahili.

A record of language used during trial is a matter of legal requirement, for the reason that, by s. 77(b) and (f) of the Constitution and s.198 of the Criminal Procedure Code, it is to be clear that the accused person has understood the languages used in the trial and, in effect, that he or she has been *a participant in an open, accessible and fair hearing process*. This is the principle that, in our opinion, must inform any genuine contention by an appellant that the language used in Court was not recorded; and consequently this perception is to be taken into account in considering the merits of an appeal such as the instant one.

As already noted, learned counsel, **Mr. Wang'ond** has, with alacrity, conceded to the appeal because, as he says, "the Court below did not show which language was used, in some cases." But, in which cases? PW2, the Police officer in respect of whom the record does not state if he spoke in English or Kiswahili, was exhaustively cross-examined by counsel, and by three of the appellants herein in person. How would they achieve that, if some recognized medium of communication was not being employed? We hold, on the facts of this case and on the merits, that the trial Court when it heard the testimony of PW2, was by no means in departure from the requirements as to Court language, as contemplated in both s.77 of the Constitution and s.198 of the Criminal Procedure Code (Cap. 75, Laws of Kenya).

Consequently, we overrule the concession to appeal made by learned counsel, **Mr. Wang'ond**; and we proceed to assess the appeal *on its merits*.

PW1, **Mary Nzisa Muthini**, of Mutitu Village, Mbee Sub-Location, Kathiani Location, was in her house with her children, asleep, on 1st March, 2004 when, at about 1.00 a.m. she was awakened by a loud bang on the children's window. This was followed by another loud bang on PW1's bedroom window, and then a systematic cutting and destruction of the window grilles. PW1 crawled out of her bedroom, lighting up her way with a torch, cuddled her baby in her arms, and sat on the children's bed awaiting the worst. Amid destructive bangs and thuds upon her house, PW1 cowered in terror, for some fifteen minutes before sensing that people were inside the house and were walking along the inner corridor and in the kitchen. These attackers soon got to the children's room, opened the door, and promptly assaulted PW1, with a hit on the shoulder with the flat side of a machete. The machete-attacker had a torch, which he flashed before the assault and a demand-for-money, and coming behind him were other members of the gang. They already had been through PW1's bedroom, which they ransacked and grabbed Kshs.15,000/= which PW1 had kept there. They now demanded Kshs.1,000,000/=, but she (PW1) could only produce another Kshs.15,000/=, and then found a further Kshs.5,000/=. The attackers assaulted her, and demanded PW1's bank statement to show where her money was kept. She found another Kshs.3,500/=. which she surrendered to the intruders. They then took her on a merry-go-round in the house, with all the intruders trailing her, but suddenly, they took off, and PW1 realised she was alone. They had also grabbed her Sagem cellphone as they went. When PW1 peeped out through the sitting-room window, she saw a motor vehicle with its lights on, some 30 metres away; as the lights of the motor vehicle illuminated the direction of the sitting room window, PW1 saw people running away towards the road.

Was PW1 able to identify these people who were running away from the *locus in quo*? In her words:

"I recognized them as **Makau Nguluni** [1st appellant] – that was the first time I saw him – Kitavi

[2nd appellant] – it was the first time I saw him – **Mutinda** [3rd appellant] – it was the first time I saw him – and **Wambua Mukita** – it was the first time I saw him. The motor vehicle was [Reg. No.] KAH 599E, belonging to **Ngengi** Safaris [mine]... [Those taking the motor vehicle]...took the ...keys from the table where I always [left] them.”

It was PW1’s testimony that the attackers were unable to move the said motor vehicle forward; it moved in reverse direction and hit a wall; and in the meantime, one of PW1’s guards raised alarm by blowing a whistle, attracting members of the public to the scene. The attackers then sensed danger, and fled. **Mutua Mutuota** was the guard who blew the whistle, while the second guard, **Saitoti**, engaged and fought the robbers. As members of the public arrived, PW1 gathered courage and opened her doors. She found that **Saitoti** had been struck with an arrow and was bleeding; she and others took **Saitoti** to Hospital and, on the way back, were accompanied by Police officers from Machakos.

After the Police made arrests, an identification parade was organized, which PW1 attended and identified the four appellants herein. How was PW1 able to identify the four? In her words:

“I was able to identify them because of their feet, faces, and backs. I saw the 4th accused’s face as he fled, and turned to look at me; it’s the same with [2nd accused].”

Responding to cross-examination by 1st appellant herein, PW1 confirmed that this appellant had never been her employee, and she did not know him at all.

For 2nd appellant, who was represented by counsel, PW1 stated in cross-examination that this appellant had not been her employee, and she only saw him as a robber on the material night.

PW1, on the issue of early identification of her robbers by name, thus testified:

“I never mentioned the names of my attackers in the statement [made to the Police]. I named them later after carrying out investigations. Nowhere in the statement do I say I was able to identify the people who robbed me nor did I describe them by appearance anywhere [when] I described the attackers to the Police....”

Of the identification parade at which PW1 said she identified the appellants herein, she, in answer to questions in cross-examination, made remarks which we should herein set out:

“I was later called to [the Police station] after the accused [persons] had been arrested. The Police [officers] said: ‘We have arrested the people who robbed you; come to the Police [station] and identify them’. And I identified accused No.2 on 4th March, 2004 and then recorded a subsequent statement on 4th March, 2004. [This statement] has accused No.2’s names. I got his names from the Police officers...”

Responding to cross-examination by 3rd appellant, PW1 had made remarks which, once again, we should set out here:

“I identified you by your feet and face.”

PW1 said she had told the Police officers she had recognized her attackers, except that she now realised, this was not recorded in the Police Occurrence Book. What was the mode of identification before arrest? PW1’s response to 3rd appellant’s cross-examination, in this regard, may be set out:

“You were arrested by the Police; they are the ones who know where they found you. I saw you at a distance of 50 metres as you were leaving – I just remember your face; there is no special identification or distinguishing mark on your face. I saw you on the night of [the] robbery as the car lights shone on you....The identification parade was on 9th March, [2004], and I picked out the

people I knew. *I failed to say I recognized you [or to] describe you in the initial report because I was in a state of shock, fear, anxiety and pain.*”

Mr. Nduva, on behalf of 4th appellant, cross-examined PW1, who thus responded. She *had not informed the Police officers* at the time of reporting the robbery, that she identified any of the robbers. The 4th appellant during the robbery, like the other robbers, was *wearing a jacket, and a hat that concealed his face*. PW1 said the night robbers *could have numbered 30*. This was the first time PW1 ever saw the accused persons.

But in the re-examination, PW1 *denied* some of her earlier statements. These are her words:

“I was able to recognize the attackers because *I knew some of them earlier...I knew [them] by their physical appearance* and they are the ones before [the] Court....I can remember how each person was dressed.”

This differing account is then confirmed in responses to examination by the Court. PW1 thus responded:

“The [guard] gave me the names of the accused [persons] [on] the next day. Before the incident I had seen accused 1 and accused 2. *I had seen accused 1 in a nearby market known as Kariobangi wa Mtito. I had also seen accused 2 at Kwa-Laban Market. I had seen accused 1 and accused 2 many times. I had seen [them] two days before the incident.*”

PW2, Police Force No. 58557 **Sgt. Justus Njue**, who had been attached to Machakos Police Station at the material time, had been on duty and received a report of the robbery at 3.30 a.m., from PW1 who was in the company of her guards (PW3, **Saitoti Ole Lelogumu** and PW4, **Dominic Mutua Mutuota**). By the said report, the sum of Kshs.40,000/=, a Sagem cellphone, and car ignition keys had been stolen by the robbers.

PW2 visited the *locus in quo*, and found that the robbers had gained entry through the window of the master bedroom. After booking the incident in the Police Occurrence Book, PW2 continued with investigations and, relying on a tip-off on 3rd March, 2004, was able to arrest 1st and 2nd appellants herein, in a hide-out at a Machakos garage.

Then in the case of 3rd appellant herein, arrest was effected by one **Cpl. Noor** (not called as a witness) on 5th March, 2004 after *PW1 identified this appellant in an identification parade*.

The fourth appellant was arrested by members of the public who were keeping vigil in Mbee Sub-Location following the robbery in question. About the material time, there had been a spate of robberies in the Mbee area; and *PW1 is the one who had identified 4th appellant* as one of those who had robbed her; this led to his arrest, before being re-arrested by PW2.

Now that PW2 was holding several suspects, he asked one **Inspector of Police Wambua** (not called as a witness) to conduct identification parades for them.

Was PW2 satisfied with the *quality of identification* which had been realized, in relation to the appellants herein? His own words, in that regard, may here be set out:

“I later prepared a charge sheet and [the accused persons] were charged. *[The] complainant was the one showing me the suspects...*; I came to learn that [the guards] were able to identify some of the attackers with the aid of their torches and, when [one of the robbers] was trying to reverse the motor vehicle, he accidentally switched on the motor vehicle head-lights, giving a good chance for identification.”

On cross-examination by 1st appellant, PW2 stated that *it was PW1 who had identified this appellant for arrest*. The answer was similar, to the cross-examination by 2nd appellant herein. As for 3rd appellant, the

answer was that *PW1 had identified him for arrest* by members of the public, before **Cpl. Noor** re-arrested him and brought him to Machakos Police Station.

To cross-examination by **Mr. Nduva**, learned counsel for 4th accused at the trial, PW2 said that the complainant in her initial recorded statement, “*did not say that she recognized any of her attackers*”; and he admitted a *fault in the investigations*: “*It was an error for one not to inquire from [the] complainant whether she recognized her attackers, because she was in panic and in pain...*”

PW2 testified that he had not associated himself with three identification parades which were held at his request. So, apart from handing in the parade forms, he was not in a position to answer *questions relating to the conduct of the identification parades*.

PW3, **Saitoti Ole Lelogumu** and his fellow guard (PW4) were on guard duties on 1st March, 2004 at 1.00 a.m., when they heard a commotion in the parking area, and they then saw some *six intruders*. The two guards blew their whistles and flashed torches, even as the dogs barked in alarm. The attackers, *numbering 30*, came along and surrounded the guards, striking PW3 with an *arrow in the neck*. PW3 escaped into a neighbouring bush, and could perceive the gang break into his employer’s house, through the window. When the attackers came out, some entered PW3’s employer’s parked motor vehicle, one of them reversing it into a wall. The head-lights of the motor vehicle were on, and PW3 saw some of the thugs milling around it. He picked up a stone from the bush, and threw it at the robbers, who fled. Neighbours approached the scene, and the injured were then taken to hospital.

PW3 recorded a statement with the Police on 9th March, 2004 and, with his fellow-guard (PW4), came to the Police station when he heard that certain arrests of suspects had been made. PW3 attended at the *identification parade*, and identified 1st and 2nd appellants as having been among the robbers. Of these two, PW3 said:

“[They are] the ones who walked in front of the motor vehicle headlamps...; I am certain they are the ones....”

And with regard to the other appellants, PW3 said:

“I also identified accused 3 and accused 4 at an identification parade; I saw their faces. I had never seen the accused [persons] before the robbery.”

On cross-examination by 1st accused, PW3 testified that he had described this accused to the Police officers *by giving the precise name* of the 1st appellant herein; but he said he *had not known the 1st appellant before the robbery incident*. PW3 said he had not been coached by the complainant on what to say in Court.

To cross-examination by 2nd appellant, PW3 said he did not know this appellant, and that he had recognized the robbers by their *facial appearances*; he said he did recognize 2nd appellant: “as you passed in front of the motor vehicle....I was behind the motor vehicle, hiding in a bush.” PW3 said the robbers “*were not wearing hats or caps*”, and that there was *no distinguishing mark* on 2nd appellant’s face.

What was PW3’s condition when he would have seen 2nd appellant’s face? In the words of this witness:

“*I was not too scared. I was bleeding; but I had removed the arrow-head from my neck, and was holding it in my hands. I saw you, and described your face to the Police.*”

Responding to cross-examination by 3rd appellant herein, PW3 said he was able to see the face of this appellant at a time when a motor vehicle being stolen had crashed into a wall, and its head-lights had fallen on some 30 robbers who were scampering away. The response shows that this witness had, in fact,

not attempted to describe to the Police the 3rd appellant's appearance; in the words of the witness:

"I saw people walking hurriedly in front of the motor vehicle, and the lights illuminated your face. I do not know what you mean [when you say I had not described you to the Police]; *I saw your face, and this is the face I am seeing here today, and your face is just your face. It's you I saw, I am not making a mistake.*"

The witness now said he *had* seen the 3rd appellant before the material night; in his words:

"Yes, before the incident I used to see you roaming about at the local market...."

On cross-examination by **Mr. Nduva** (on behalf of 4th appellant herein), PW3 said most of the 30 robbers of the material night *were dressed in black great-coats and black caps*, and that the four appellants herein wore black caps but their faces were not masked.

PW4, **Dominic Mutua Mutuota** testified that he had continuously blown his whistle, when robbers attacked his employer's house on the night of 29th February, 2004 – 1st March, 2004. Although the alarm attracted neighbours to the *locus in quo*, the robbers were then already gone. The faces of these robbers, upon which the witness had flashed his torch, were *unknown to him*.

Did PW4 identify the appellants, among the robbers? When cross-examined by 1st appellant, PW4 said:

"I shone my torch on your faces and *saw you very well.*"

The witness gave a similar answer, when cross-examined by 2nd appellant:

"I had my torch which I shone on you...*I saw your face..... I did not know you.*"

And he thus responded, on cross-examination by 3rd appellant:

"I saw you during the robbery. Four people came into the compound – [I mean] the ones who went through the gate; there were others who jumped over the fence. I was ...30ft away [from you]. You had torches which you shone on me. I saw your face. Yes, people may look alike; but I have not likened you to somebody [else], *it was you.*"

On cross-examination by **Mr. Nduva** for the 4th appellant, PW4 said he did not know the names of the appellants herein, even though they came from the same village as he; he had *seen them for the first time at the time of the robbery attack*. When the attack was launched, and PW3 was shot with an arrow, according to PW4, *both these guards had run away for safety*; PW3 jumped over the wire-fence, into the farm, and PW4 fled. PW4 said even though he is unable to name the Good Samaritans of the neighbourhood who responded to the alarm, he had seen "the faces of the attackers."

Was PW4 able, in the prevailing conditions, to identify the appellants herein as members of the gang of robbers? These are the words of the witness, expressed during re-examination:

"Prior to the robbery, I did not know any of the [accused persons]....I had a torch which I shone on them and they also shone [theirs] on me and I saw their faces. I picked [out the accused persons] at [the] identification parade *by their facial appearance....*"

After the learned Magistrate ruled that there was a case to answer, each appellant elected to make an unsworn statement. The 1st appellant said he was an employee of the complainant (PW1), and had continued to work normally until one day in 2004, when he was arrested in Machakos Town, and charged with the offence of robbery. The 2nd appellant too, denied any knowledge of the circumstances leading to the offence with which he was charged. A similar denial came from the 3rd appellant who said he was an

employee of the complainant, and also from 4th appellant who said he knew nothing about the robbery attack of the material night.

The 1st appellant called a witness, one **Phillip Mutisya Sauli**, who was sworn, and testified as follows. On the date of the robbery attack on PW1, 1st appellant came to the home of the witness, at night. The 1st appellant reported to the witness that his employer had been attacked, and that the night robbery was still going on. The witness came out, and was one of the Good Samaritans, though he found the robbers already gone. The witness said he was one of those who accompanied the complainant to report the robbery incident to the Police station, on the material night.

On cross-examination by the prosecutor, the witness said both PW1 and 1st appellant are his neighbours. He did not know if 1st appellant herein had been part of the gang of robbers on the material night. On cross-examination by **Mr. Nduva** for the 4th appellant, the witness said this appellant was his neighbour, and he and this appellant had been away at a bar, at about 7.30 p.m. on the material night.

After considering all the evidence, the learned Chief Magistrate assessed its tenor and effect thus:

“...it’s not so much the giving of names and [the] description of the accused [persons] that confirm their participation in the robbery – it’s the opportunity for identification, and the circumstances [attendant] thereupon] that are pivotal. Why does [learned counsel] consider it an exaggeration that PW1 was able to identify the attackers by their feet, back or face? Feet, yes, that one is questionable; but back and face? What is so obvious is, it is not true PW1 said she could remember each one of the 30 attackers; she said she could only identify the ones who came into the compound, and that there were others who were outside.

“There is no contradiction in the evidence of PW1 and PW3 regarding the attackers’ manner of dress; PW3 clarified that they had worn facial jackets with hoods and caps, but that in [the course of the robbery], some of the attackers removed their caps and hoods...

“I am satisfied as regards the circumstances surrounding identification.... I find that the evidence on record sufficiently proves the charge, and the accused [persons’] defences are rejected, and each is convicted as charged.”

Identification is the main issue in the grounds of appeal, for each of the appellants. The grounds are thus stated:

- i. the trial Magistrate erred in both law and fact, in holding that each of the appellants was positively identified at the *locus in quo* by PW1 and PW3; such alleged identification would have been made by witnesses in a state of stress; and no record of such identification is found in the Police Occurrence Book;
- ii. there was no proof of the circumstances attending the arrest of the appellants;
- iii. the prosecution evidence was marred with inconsistencies and doubts;
- iv. the defence evidence was wrongly rejected;
- v. the prosecution evidence bore doubts that should have been resolved in favour of the accused persons.

It is our considered opinion that the consolidated appeals herein, will stand or fall on a careful assessment of the evidence, in the light of the foregoing grounds of appeal. It was, therefore, and with due respect, inapposite for the respondent’s counsel not only to concede to the appeal as a pure *formality*, but also to ask that this Court should then order a *retrial*. There are well known grounds for ordering a *retrial*. We may state these grounds from the relevant case law. In **Ahmed Ali Dharamsi Sumar v. Republic** [1964]

E.A. 481 the Court of Appeal for Eastern Africa thus held (*per Duffus, J.A.*, at p. 483):

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered. Clearly, of course, each case must depend on its particular facts and circumstances but in this present case where the conviction was quashed because the Magistrate had misdirected himself as to the onus of proof, it would be most unjust to compel the accused to stand another trial.”

Since we have discounted learned counsel’s basis for conceding to the appeal, it follows that the appeal stands or falls on *substantive grounds*; and we have already recorded that the crucial ground in this regard is the question of *identification*. Suppose we found that the trial Court fell into misapprehension as regards *identification*, would it at all be proper to order a *retrial*? The answer, we feel certain, is *no*. It will not be possible to convict, if there is no proper identification. Therefore, we must caution against rather *formal* requests by State counsel to order retrials; a retrial cannot be ordered, unless it is clear there is a *cogent case embedded in the evidence*. In criminal trial, *identification* is a fundamental issue of merit, predisposing the outcome one way or the other.

In our analysis of the evidence, the basic question in reference is: *Were the four appellants herein, or any of them, identified in accordance with the applicable standards*, as part of the gang of robbers which attacked the complainant on the material night?

The most crucial witnesses on identification are PW1 (the complainant), PW3 and PW4. These witnesses are in agreement that there were something like *30 robbers* at the *locus in quo*, on the material night. It is apparent that, in the reports made to the Police by each of the three witnesses, no question had been raised as to the appearances of the robbers ? and in particular, as to the *descriptions of the appellants* herein. No such descriptions were recorded; and the three witnesses have, in their testimonies, both spoken and unspoken, on whether they proffered any descriptions at all, to the Police officers. We believe the truth to be that the three witnesses had given *no descriptions of the attackers*: for a Police officer (PW2) admitted that: *“it was an error for one not to inquire from [the] complainant whether she recognized her attackers...”*

PW1 could not have plainly perceived her attackers; she testified that she did not mention the names of the robbers until later, *“after carrying out investigations.”* Where could she have carried out such investigations? It is clear that her investigations would probably be limited to *interviewing her guards* – PW3 and PW4; and so one expects a *standard flow* of account, from PW1 to PW3 to PW4, and the reverse order; what results, is not *evidentiary testimony* based on *perception*, but a stereotyped story. Such was destined to lessen the probative force of the accounts given by PW1, PW3 and PW4 – all at the same time.

Of the identification parade at which PW1, PW3 and PW4 are said to have identified the appellants herein, we have doubts as to its standards, as a proper forum at which the appellants would have been identified. PW1 herself testified that *Police officers told her*: *“We have arrested the people who robbed you, come...and identify them.”* We cannot doubt the veracity of that statement – and it immediately disqualifies the said parade as a lawful identification parade. We note, in this regard, that PW2 who had asked his superior officer to call the parade, *did not wish to be associated with the parade*; and the Inspector of Police who mounted the parade was *not called as a witness*.

Certain elements in PW1’s testimony, in our opinion, cast doubt on her claim that she had identified the appellants herein; for example, in her response to cross-examination by 3rd appellant she disclaims: *“I identified you by your feet and face.”*

While the Police officer (PW2) attributes the identification leading to the arrests, to *the complainant*, PW1 testifies quite counter to that claim; she says: *“You were arrested by the Police; they are the ones who know where they found you.”*

PW1, just as PW3 and PW4, insisted that they remembered 3rd appellant (and other appellants) *by their faces*, but they would not mention any distinguishing mark which would identify those faces from many other faces. In certain particulars, the three key witnesses *contradicted* themselves: at one remove, they had *never seen* the faces of the appellants before the material time; but, at another remove, they have seen the appellants *several times before*; indeed 1st appellant's witness was clear, that the complainant and the appellants are *neighbours*, and on this account, would have met one another. Some of the appellants stated that they were *employees* of the complainant herself. So the truth, on this point, did not quite come out – and this must lessen the *quality of the identification evidence*.

Although PW2, at some point, testified that he had relied on some undisclosed source for tip-off, when he arrested both 1st and 2nd appellant, it later became clear, from his own testimony, that his source of information was none but *PW1*; and *PW1* is the one who identified 3rd appellant to **Cpl. Noor**, before that appellant was arrested. It was PW2's testimony that it was also *PW1* who identified 4th appellant as one of the robbers of the material night, and so he re-arrested that appellant.

It is clear then, that the basis of all the arrests was information coming from *one person*, namely *the complainant*. Her original perception on the material night, as already remarked, would have been anything but reliable; and so, on its own, that perception was not, in our view, *safe evidence* for the purpose of entering a conviction. From our observations already recorded, it is the *same story* of the complainant which expressed itself through the other key witnesses, PW3 and PW4; and, in law, in those circumstances, the testimonies of both PW3 and PW4 lacked the *corroborative force* they should have carried.

The testimonies of PW1, PW3 and PW4 did not, in our opinion, emanate from a transparent perception by them, of the robbers of the material night.

Visual perception at night is well recognized to be problematic, and we cannot hold any such perception achieved by PW1, PW3 and PW4 to have been faultless. The guiding principle is set out in **Blackstone's Criminal Practice 2002**, 12th ed. By *Peter Murphy* and *Eric Stockdale* (Oxford: Oxford U.P. 2002) (p.2304, para. F18.2):

“The visual identification of suspects or defendants by witnesses has for many years been recognized as problematic and potentially unreliable. It is easy for an honest witness to make a confident, but false, identification of a subject, even in some cases where the suspect is well known to him. There are several possible reasons for errors of this kind. Some persons may have difficulties in distinguishing between different subjects of only moderately similar appearance, and many witnesses to crime are able to see the perpetrators only fleetingly, often in stressful circumstances....[such] problems may then be compounded by the understandable, but often misguided, eagerness of many witnesses to help the Police by making a positive identification.”

This pitfall, in our opinion, very well catches the kind of identification expressed in the testimonies of all the key witnesses in the instant matter. There was no proper lighting, by means of which the complainant could have perceived the faces of the appellants herein. PW3 did not convince us he truly perceived the appearances of the robbers – and PW4 convinced us of the same much less. Neither PW3 nor PW4 can be said to have corroborated the complainant's testimony; and so, we must hold that *none* of the four appellants was safely identified among the gang of robbers.

Consequently, we hereby allow the consolidated appeals, and set aside the convictions and sentences entered against the appellants. We acquit the appellants, and order that each one of them shall forthwith be set at liberty, unless otherwise lawfully held.

It is so ordered.

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

J.B. OJWANG

I. LENAOLA

JUDGE

JUDGE

Coram: Ojwang & Lenaola, JJ.

Court Clerk: Mueni

For Appellants: Mr. Kitonga

For Respondent: Mr. Wang'onde