



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

**Criminal Appeal 176 of 2006**

**NATHAN KAMAU MUGWE.....APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

***(An appeal from the Judgement of Senior Resident Magistrate S.A. Okato dated 6<sup>th</sup> December, 2006 in Criminal Case No. 1475 of 2005 at Machakos Law Courts)***

**JUDGEMENT OF THE COURT**

The appellant, **Nathan Kamau Mugwe**, was charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The charge was detailed out as follows. The appellant, on 5<sup>th</sup> May, 2005 at Athi River in Machakos District, within Eastern Province, jointly with others not before the Court, and while armed with dangerous or offensive weapons, namely a hammer and screw-drivers, robbed **James Mungai Ngumba** of his motor vehicle registration No. KWF 837A, Toyota Corolla; a cellphone, of make Motorola T-192; a cellphone charger; a torch; cash in the sum of Kshs.600 – all bearing a value of Kshs.205,000/= ? and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence upon the said **James Mungai Ngumba**.

PW1, the complainant, testified that he is a taxi operator at Athi River, and usually parks his taxi at Cheers Bar, in that town. On 5<sup>th</sup> May, 2005 at 2.00 a.m. the witness arrived from Kitengela, and parked his taxi at Cheers Bar. The Bar's guard, one **Mwendo** (PW2) thereupon came along to ask PW1 if he wanted a customer. As PW1 gave an affirmative answer, the guard went into the Bar, and came out with the appellant herein. PW1 talked to the appellant, who asked to be taken to Makadara Primary School, within Athi River town. In the electric lighting of the Bar's environs, PW1 and his prospective customer negotiated the fare, and it was PW1's testimony that he had taken a good look at the appellant, on that occasion. A fare of Kshs.100/= was agreed, though PW1 expressed his concern that the environs of Makadara Primary School were muddy, and so it might prove difficult to access the school itself; whereupon the customer convinced him that his specific destination was not muddy. With this assurance, PW1 turned on the engine, and drove on; and when he came by a certain gate, the appellant asked him to peep out; and he peeped out thrice, even as the appellant made an attempt to reach out for fare-money tucked away in his (appellant's) pocket; in the meantime, a man emerged, bearing luggage, and approaching PW1's car. The moment the appellant saw this man with luggage, he turned against PW1; from his position in the passenger seat, the appellant held PW1 by the neck, and announced to him that he (PW1) had been being stalked; and in the meantime, the unauthorized "luggage man" entered PW1's motor vehicle. The appellant then ordered PW1 to relocate from the driver's seat to the rear seat; which PW1 did by jumping from the front to the back, and lying down. The "luggage man" stepped on PW1, as

the appellant drove the car away. Later on, PW1 was ordered to raise his head, and he realized that the car was being driven towards the Kenya-Tanzania border town of Namanga. The appellant sought to know if Policemen would be manning a checkpoint in the area, and, with the answer in the affirmative, the appellant reversed the car and entered a dirt road. Meanwhile, the “luggage man” took out a rope from his luggage, and used it to tie PW1’s hands together, behind his back. The two robbers then searched PW1, and stole his wallet which contained Kshs.600/=; his personal identity card; his voter’s card; his driving licence; and his bank card. They also grabbed PW1’s Motorola T-192 cellphone; his cellphone charger; and his torch. Thereafter, the appellant stopped the car, and the two robbers forced PW1 out, and pushed him into a road-side ditch.

PW1’s calls for help attracted no response; and he remained at the scene until 6.00 a.m., when a Good Samaritan, a guard at a local EPZ outfit, came along and untied him, setting him free. PW1 first made a report of the incident at Kitengela Police Post, and then at Athi River Police Station, where he recorded a statement. At 1.00 p.m., as he was resting at his home, PW1 received word that his car had been recovered, and was being held at Athi River Police Station. PW1 went thither, and found not only his car, but also his smaller effects: Motorola cellphone, T-192; torch; cellphone charger. He learned from the Police officers that the motor vehicle thief had been arrested with the car, and the smaller effects were recovered from the car.

After one week, an identification parade was conducted at Athi River Police Station, at which *PW1 identified the appellant* herein. PW1 said he recognized the appellant because he had “talked at length” with the appellant at Cheers Bar, on the material night.

On cross-examination by the appellant, PW1 confirmed that the appellant was the one who had hired his taxi on the material night, and that he had negotiated the price, in an electrically-lit area, for about five minutes; he said he had seen the appellant clearly, at the time of negotiation.

PW2, **Mwendo Munyao**, a night guard at Cheers Bar, was on duty from 6.00 p.m. on the material night, and he remained at his post till the following morning. There were many patrons at the bar, and one of them, the *appellant* herein, came to PW2 at the gate at 1.00 a.m. and requested him to call a taxi. In “very bright security lights at the gate,” PW2 spoke to the patron asking for a taxi, and “was able to see him clearly”. At the time, there was no taxi on stand-by, and so the patron returned to the bar. After some time, a taxi bearing registration letters KZS, came along, and PW2 called the patron who requested a taxi; he came out, but *declined this particular taxi*. In the words of PW2, “The [appellant herein] told me he wanted taxi registration No. KWF and I knew the taxi. It belonged to **Mungai** and he is PW1.” The patron returned to the bar, but soon returned to the gate, finding that PW1’s taxi had just arrived. PW2 directed the patron to PW1, and *the two (patron and PW1) began talking*. They negotiated the taxi fare in a *well-lit place*, and in the meantime, PW2 was seeing them. The two came to an agreement, and the patron entered the taxi; they drove away. PW2 went into the bar, and found that the said patron’s companion with whom the appellant had all along been drinking together, was no longer in the bar; he had “disappeared.”

PW2 continued with his guard duties for the rest of the night; and on the following day he reported for his next shift at 6.00 p.m., and found one **Mwangala** (not called as a witness), the owner of the KZS-lettered taxi which the patron had rejected the previous night; and **Mwangala** told him that the said patron had robbed PW1 of his taxi, moments after entering this taxi at Cheers Bar, the previous night. Criminal investigation officers later recorded PW2’s statement at Athi River Police Station; and subsequently, PW2 identified the appellant herein on an *identification parade* mounted by the Police. He had not known the appellant before the material night.

On cross-examination by the appellant herein PW2 testified that he had talked to the appellant thrice, when the appellant was inquiring about a taxi, on the material night; and that each occasion, such conversation took place at a place *well lighted*, with electric security lights. The appellant had come to Cheers Bar on 4<sup>th</sup> May, 2005 and was the only patron on the material night who requested PW2 to find a taxi for him. Taxis usually park just 5 metres from the bar-building, and it was normal for patrons to seek PW2’s help to obtain a taxi.

PW3, Police Force No. 230323, **Inspector of Police George Mutonga** of CID, Athi River, was asked by **Police Constable James Mwangi** (PW4) on 10<sup>th</sup> May, 2005 to conduct an *identification parade*, for a suspect who was being held at the Police station. PW4 gave the name of the suspect as **Nathan Kamau Mugwe**, a suspect in a robbery case. PW3 went to the Police cells and called out the suspect, the appellant herein. He introduced himself to the suspect, and informed the suspect that he wanted to conduct an identification parade; the suspect agreed to participate in the parade. PW3 then organized parade members, from the cells and from members of the public, numbering *eight, excluding the suspect*. He asked the suspect to choose the position in the parade to occupy; and he chose to stand between parade members No.4 and No.5. The parade was being conducted inside the Police Report Office; and in the meantime, the witness **James Mungai Ngumba** (PW1) was kept in the CID offices, 50 metres away. PW3 then sent for PW1, introduced himself to PW1, and explained to PW1 the reason for the parade. The witness (PW1) walked around the parade, and *identified* the appellant herein, by touching the appellant's shoulders. PW3 then completed the parade identification forms, which both the witness and the appellant herein signed, acknowledging satisfaction with the manner in which the parade had been conducted. PW3 countersigned the identification-parade form. The members of the parade were *similar in height and body-build to the appellant* herein. The complainant had not seen the suspect before the parade-identification itself began.

The OCS at Athi River Police Station conducted an *identification parade* for the appellant herein on 16<sup>th</sup> May, 2005 in which the identifying witness was **Mwende Munyao** (PW2). PW3, who testified that he was familiar with the signature of the said OCS, produced as an exhibit the parade form prepared by the OCS. The suspect in that identification parade was still the appellant herein. The parade had *eight members – apart from the appellant herein*. The appellant had elected to stand between parade member No. 3 and No. 4; and the witness identified him by a touch on the shoulder. The appellant had said he was satisfied with the parade, and had duly signed the parade form, which was countersigned by the OCS who has since been transferred to another station.

On cross-examination by the appellant, PW3 testified that he had called the appellant from the cells after he (PW3) had been given the appellant's name, just before the identification parade. The appellant had willingly participated in the parade, and had raised no complaint about his condition while in the police cells.

PW4, Police Force No. 63737 **Police Constable James Mwangi** of CID Athi River Police Station, was at his office on 5<sup>th</sup> May, 2005 at 10.00 a.m. when he received a report which had been made at 8.00 a.m., on the robbery of a motor vehicle. After PW4 and other officers went out on patrol, with the said robbery as a matter to be solved, they were called back, by signal from the Police base. PW4 and his colleagues were informed that the Kitengela OCPP had sent word that one of his officers had already arrested a suspect. PW4, one **Cpl. Ndegwa**, and Police driver **P.C. Kamanda** then drove to Kitengela Police Post, and were shown the suspect, being the appellant herein. PW4 and his colleagues interviewed the appellant, who indicated the location of the subject motor vehicle – some 2 km away; and at that locus, the Police officers found the motor vehicle, Toyota Saloon Reg. No. KWF 837, stuck in the mud. A break-down vehicle was used to tow the subject motor vehicle up to the Police station. PW4 recovered different number plates, in a set of two, bearing No. KWC 502 which he believed were intended to be substituted for the valid, registered number plates for the subject motor vehicle. The OCPP Kitengela handed over to PW4 a pair of pliers, screw-drivers, an adjustable spanner, a hammer and a wrist-watch, which the appellant said were his effects. The OCPP Kitengela also handed over to PW4 a cellphone charger, a cellphone and a torch, which had been found in the subject motor vehicle.

PW4 did not know how the appellant herein had been arrested, as the arresting officer had now left the Police Force and was no longer available.

The appellant herein when put to his defence, made a sworn statement, in which he said that on the material date, at 7.00 a.m. he had gone to Kitengela to deliver a battery to a customer, but as he did not find the customer, he was endeavouring to sell his battery to somebody else when people from a stationery lorry alighted and descended upon him and arrested him, following which he was immediately re-arrested by Police officers on patrol. These officers took him to Kitengela Police Post; and Athi River

Police Station officers then came for him, and it is while he was being driven to Athi River, that the subject motor vehicle was found stuck in the mud. He said he knew nothing about the offences, but acknowledged he had been taken to two separate identification parades, where he had been identified by witnesses, and that he had signed the parade forms.

On cross-examination, the appellant said he was a resident of Kayole in Nairobi; used to deal in batteries though he had no business permit; had no motor vehicle to ferry his batteries; was in the company of his wife on the material night – but he was not calling her as a witness; had signed the identification parade forms; the Police officers had framed him, and he knew nothing about the offence charged.

The learned Magistrate in his judgement, found that the appellant herein had been positively identified by both PW1 and PW2, as one of the two robbers who had stolen the complainant's motor vehicle. He found the appellant's evidence incredible, found him guilty, convicted the appellant, and sentenced the appellant to death, as provided by law.

In his appeal, the appellant contended that the conditions for identification at the material time were not favourable, and he had not been positively identified. He contended that the arresting officer ought to have been called as a witness. And the appellant contended that the trial Magistrate was in error, in rejecting his defence.

The appellant based his oral submissions on the foregoing grounds, and on a set of written submissions which he brought before the Court, on hearing day. He contended he had not known the meaning and purpose of the identification parade, and that he had been forced to sign the parade forms. He said it was not true he was found with the motor vehicle in question, and that the several items recovered had been not on his person, but in the subject car.

Learned respondent's counsel, **Mr. Wang'odu** urged that conviction be upheld, on the strength of the evidence of both *identification* and *recovery*.

We have considered all the evidence, as it was our duty to do, as a first appellate Court. This is a case, in our assessment, in which the prosecution evidence is clear-cut and uncompromised; it points to the appellant as one of the two persons who robbed the complainant of his car, on the material night. The complainant's evidence even by itself, is both candid and forthright, in pointing the accusing finger at the appellant. In full electrical lighting, the complainant negotiated taxi fare with the appellant over a continuous period of some five minutes, and this enabled him to see the complainant very well; this explains the ease with which the complainant identified the appellant at a duly-conducted identification parade. Had there been any doubts at all as to the complainant's identification – which we find not to be the case – such was, in our opinion, absolutely dispelled by the especially-poignant evidence of PW2, the guard at Cheers Bar. PW2 is the witness who noted that the appellant, for undisclosed reasons, would not take any taxi other than that of the complainant; and that the appellant had nervously engaged him in conversation – and in a brightly-lit environment – at least three different times, when following up on the whereabouts of the complainant and his taxi. PW2, too, had absolutely no difficulty in identifying the appellant at the identification parade.

The appellant contended that the complainant's stolen effects were recovered in the abandoned car, and not from him personally, and so such things had no evidentiary value in showing him to have been the thief. While it is true that the arresting officer did not come before the Court to testify on how he conducted the arrest of the appellant, we would start from the premise that the appellant was *positively identified* as the car-thief; and therefore, if the complainant's effects were subsequently recovered from the abandoned car, this would only be *additional proof* of the robbery which had been committed by the appellant.

The appellant's *animus furandi* is, moreover, well proved by the fact that, while claiming he was badly in need of a taxi, he rejected a taxi availed to him, and chose to wait for the complainant's taxi specifically; there was no reason to do so, for the complainant testified that he hadn't met the appellant

before – so there was no social or other related connection to dictate that the appellant should specifically seek the complainant's taxi. *The motive to steal* is fully disclosed, and it was, in the event, consummated in the robbery attack upon the appellant.

We hold that the theft which took place on the material night fell squarely within the terms of s.296(2) of the Penal Code, and qualified to be described as robbery with violence.

We dismiss the appellant's appeal; uphold conviction; and affirm the sentence meted out 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: Mueni**

**For the Respondent: Mr. Wang'ond**

**Applicant in person**