



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS  
Criminal Appeal 57 & 58 of 2005

RICHARD MUTUKU MUTISYA.....1<sup>ST</sup> APPELLANT

JOHN NGUMBAO PETER.....2<sup>ND</sup> APPELLANT

-AND-

REPUBLIC.....RESPONDENT

*(An appeal from the Judgement of Senior Resident Magistrate N.N. Njagi dated 23<sup>rd</sup> June,  
2005 in Criminal Case No. 1011 of 2004 at Kangundo Law Courts)*

**JUDGEMENT OF THE COURT**

The appellants herein were charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya).

In the first count, it was stated that the appellants, on 3<sup>rd</sup> August, 2004 at Kangundo Town in Machakos District, in Eastern Province, jointly, and while armed with a dangerous weapon namely a knife, robbed **Albanus Mutisya Mweu** of one jacket valued at Kshs.1,200/=, a pair of leather shoes valued at Kshs.1,500/=, and cash in the sum of Kshs.200/=, and at, or immediately before, or immediately after the time of such robbery, used actual violence upon the said **Albanus Mutisya Mweu**.

To the said first count of the charge, there was an alternative charge: handling suspected stolen property contrary to s.322 (2) of the Penal Code.

In the second count, the appellants were, again, charged with robbery with violence contrary to s.296(2) of the Penal Code. The appellants, it was specified, on 3<sup>rd</sup> August, 2004 at Kangundo Town, jointly, and while armed with a dangerous weapon, namely a knife, robbed **Kiio Mutuku** of cash in the sum of Kshs.280/=, and, at, or immediately before, or immediately after the time of such robbery, used actual violence on the said **Kiio Mutuku**.

In a third count, the appellants were charged with the offence of assault causing actual bodily harm, contrary to s.251 of the Penal Code. The particulars were that on 3<sup>rd</sup> August, 2004 at Kangundo, the appellants jointly and unlawfully assaulted **Francis Ndambuki**, thereby occasioning him actual bodily harm.

PW1, Police Force No. 80921, **Police Constable Urbanus Mutisya** of GSU headquarters in Nairobi, was walking home in Kangundo Town, on 3<sup>rd</sup> August, 2004 between 9.30 pm and 10.15 pm. He did not, in the bright, moon-lit night, get to his home safely. When PW1 got to the electrically-lit end of the tarmac, on Kangundo-Mwala Road, two men emerged from his left-hand side of the road, going in the

direction of Kangundo Town; these men were on the opposite side of the road. One of them reached PW1, grabbed him by the shoulders, and demanded money. The second man joined in, and the two dragged PW1 to the side of the road. When he tried to defend himself, PW1 was stabbed in the hand. One of the attackers, who had a knife, came and stood before PW1, and PW1 saw that this man was **Ngumbao** (2<sup>nd</sup> appellant herein). **Ngumbao** demanded money with menaces, and stabbed PW1 in the stomach. The two attackers engaged PW1 with blows on the head. This forced PW1 to sit, and in this position, he now saw the second attacker as **Mutisya** (1<sup>st</sup> appellant herein). PW1 had known **Ngumbao** for long, as they live in the same area; and he used to see **Mutisya**, over a long period, in the company of **Ngumbao**. These attackers grabbed PW1's KShs.200/= from him, as well as his jacket. The 1<sup>st</sup> appellant herein grabbed PW1's shoes; and the two attackers took off.

As PW1 was leaving the scene of attack, a motorist stopped for him, and took him to Kangundo Hospital for treatment. He was admitted, and kept in hospital for two weeks. This incident was reported to the Police on the same night. PW1 had told his parents that his attackers were the two appellants herein; and 2<sup>nd</sup> appellant was arrested that same night; 1<sup>st</sup> appellant was arrested one week later. PW1's dark-green jacket which had been stolen was recovered, and he identified it in Court. On this jacket, there were blood stains, and the knife-hole from the stab at the *locus in quo*, was shown in the trial Court. Of these items of evidence, PW1 said:

"It is [2<sup>nd</sup> appellant's] knife that cut through the jacket and also cut me. The knife is before the Court.. The shirt I was wearing on [that night] has a knife-hole; [the knife] penetrated...my stomach, and is also blood-stained... The shoes I was wearing on [that night] are before the Court. They are black shoes, size No. 10. I have ...had them since 2002."

On cross-examination by 2<sup>nd</sup> appellant herein, PW1 said he had been alone, at 10.15 p.m. on the material night when he met the appellants herein; and street electric lights were working, and enabled the complainant to see the appellants. PW1 had reported following the attack, that the robbers were people known to him. He said he had known 2<sup>nd</sup> appellant for long, and that his stolen jacket was found in 2<sup>nd</sup> appellant's custody.

In answer to cross-examination by 1<sup>st</sup> appellant, PW1 said his black shoes had been recovered from this appellant.

PW2, **Francis Ndambuki Itusia** of Kangundo, was escorting a relative, by name, **Mwanza Mulwa**, on the material night at 9.00 pm, from Kangundo Town towards the Mwala direction. As he made his way home, PW2, at a point lit from electric lights in neighbouring shops, met men whom he thought to be security officials. They stopped him; and he noticed that one of these men was 1<sup>st</sup> appellant herein. The 1<sup>st</sup> appellant stabbed PW2 with a knife, after which 2<sup>nd</sup> appellant grabbed PW2 by the throat. The 2<sup>nd</sup> appellant was well known to PW2; he thrust a knife at PW2 and this cut PW2 in the throat. PW2 called out to his mother and brothers, and it turned out, these relatives were already holding a man whom they had arrested. PW2 was taken to the hospital; and members of the public later arrested 2<sup>nd</sup> appellant herein. When arrested, 2<sup>nd</sup> appellant was wearing a black jacket, and PW2 later learned that this jacket belonged to PW1.

PW3, **Josephine Mutomo Kitusa**, who is PW2's mother, testified that she was at home on 3<sup>rd</sup> August, 2004 at 9.00 p.m. when her said son escorted a relative. After some 10 minutes, PW3 heard PW2 cry, and she went outside only to find that her son had been stabbed with a knife, on the ribs, hands, throat. When PW3 sought to know who did it, PW2 signified that it was the appellants herein. PW3 and her sons set out to take PW2 to hospital; as they went, they heard a demand for money with menaces being made of a recumbent man, by attackers. PW3 observed the appellants herein, who had knocked down their victim; there was electric lighting, and she could see the unfolding of events. Immediately, the two appellants took off, into the coffee estate. PW3 and her sons let PW2 who was bleeding profusely, sit down and rest. As she did so, she saw 2<sup>nd</sup> appellant coming towards her; she screamed, members of the public came, and 2<sup>nd</sup> appellant was arrested. The 2<sup>nd</sup> appellant was wearing a jacket, which PW3 later

learned was robbed from a Police officer.

In answer to cross-examination by 2<sup>nd</sup> appellant, PW3 said she was the one who arrested this appellant; she said: “I held you. I informed the Police that I had managed to arrest you because you stabbed my son.”

PW4, a brother of PW2, recalled that on 3<sup>rd</sup> August, 2004 at 9.00 pm, he heard PW2 crying outside, and his mother (PW3) was inquiring what had happened to him (PW2). PW4 went outside and also wanted to know what had happened to PW2; and the answer he got was that PW2 had been stabbed with a knife on the ribs, and cut on the fingers and neck. Who did it? PW4 learned that the suspects were the appellants herein. As PW4 and his mother went along with PW2, PW4 saw the appellants herein, assaulting a man lying prostrate on the ground. When the attackers saw PW4, they abandoned the injured man and took off; and PW4 saw 2<sup>nd</sup> appellant abandoning shoes at the *locus in quo*. PW4 ran after 1<sup>st</sup> appellant, who was fleeing; and he fled; but members of the public arrested 2<sup>nd</sup> appellant. This appellant was found with black shoes and a blood-stained jacket; and PW4 learned that the said jacket and shoes belonged to the first complainant (PW1).

On cross-examination by 2<sup>nd</sup> appellant, PW4 said he had been invited to the Police station for identifications, and he had identified this particular appellant as the one who was found with the stolen jacket and shoes – and that he had cast these off when he (2<sup>nd</sup> appellant) had taken to his heels, at the *locus in quo*.

To cross-examination by 1<sup>st</sup> appellant herein, PW4 said he had seen this particular appellant several times before the material evening.

PW5, **Dr. Anne Nairangu**, had seen PW1 who presented with a history of assault by a known person, on 4<sup>th</sup> August, 2004. PW1 had been stabbed with a knife in the stomach, and on the left hand, and robbed of his shoes, jacket, and KShs.200/=. His clothes were blood-stained, and the jacket and shirt were torn, on the side penetrated by the knife. PW1’s small intestines were protruding from the stomach, on the left side. He had a cut on the left palm. The stomach was opened and a stitching-up done. It was PW5’s opinion that a sharp object was used by those who assaulted PW1.

PW6, Police Force No. 47768 **Police Constable Abasaiom Wandabwa Maie** was serving at Kangundo Police Station, on stand-by duty, on 3<sup>rd</sup> August, 2004 at 11.00 pm when he received a telephone call from Kangundo Town. He received the report that two men, in the neighbourhood of ABC Church in the town, were armed with knives and were assaulting people with the same, and that one victim had already been rushed to hospital. PW6 visited the scene, and found one of the suspects already arrested by members of the public. He rearrested this suspect, 2<sup>nd</sup> appellant, and took him to the hospital where the said victim was. The victim (PW1) was able to identify the shoes and the black jacket which had been stolen from him only a short while earlier. PW1 also identified 2<sup>nd</sup> appellant, two hours after the robbery. PW6 took 2<sup>nd</sup> appellant to the Police station, and held him there. Both PW2 and PW3 had given the name of 1<sup>st</sup> appellant herein who, however, had escaped, but was later arrested at Tala Market. PW6 recovered a blood-stained shirt, cut through on the left side, which PW1 had been wearing at the material time. PW1’s black jacket was found being worn by 2<sup>nd</sup> appellant; and it had holes, showing it had been cut through, at the material time. The cut on the jacket was on the lower side, and also on the shoulders.

On cross-examination by 2<sup>nd</sup> appellant, PW6 answered:

“I did search you. You were found with the shoes and jacket [which are] before the Court.”

Both appellants gave unsworn evidence, with no witnesses called. They denied all knowledge of the facts surrounding the commission of the offences charged.

In arriving at its finding of guilt, the trial Court thus proceeded:

**“The Court has taken all the evidence before it, and the Court has also cautioned itself that the burden of proof lies on the prosecution – to prove the case beyond any reasonable doubt. This Court is of the view that, the evidence before the Courts shows that [1<sup>st</sup> and 2<sup>nd</sup> appellants herein] were properly identified by the people they attacked. PW1 was able to see [2<sup>nd</sup> appellant] and [1<sup>st</sup> appellant] on the night they attacked him and stole from him. PW1 told the Court he had seen [1<sup>st</sup> and 2<sup>nd</sup> appellant herein] with the help of electric lights, and this, coupled with the fact that he had seen [both] before, goes a long way to show that [the appellants] were properly identified, and there are no doubts at all that they committed the offence. It is worthy of note that immediately after this [incident], [2<sup>nd</sup> appellant herein], who was with [1<sup>st</sup> appellant hearing], was arrested by members of the public...The evidence of PW2 is that he saw [both appellants] when they stabbed him, and that these are people PW2 had seen before.”**

The learned Magistrate held that the offences charged in the second and third counts had not been proved, and acquitted the appellants in respect of these; but he found the charge in the first count to have been proved beyond any reasonable doubt, convicted them, and imposed the death sentence.

Before this Court, the appellants were represented by learned counsel **Mr. Kitonga**, and he argued the appeal on the basis of grounds originally formulated by the appellants themselves.

Learned counsel contended that his clients had not been positively identified at the *locus in quo*; for, though the complainants aver that sufficient lighting had issued forth from the street light-bulbs specific detail was not given of the position or direction of emission of the street-lighting; it wasn't stated if this lighting had illuminated the appellants' faces; how far was the lighting from the *locus in quo*; was this lighting capable of illuminating the appellants' apparel; what was the duration of the illumination; if the complainant was in pain and fear, how was he able to identify the suspects. Counsel urged that the learned trial Magistrate had not correctly directed himself on the question of identification.

Counsel submitted, on the authority of **Mwenda v. Republic** [1989] KLR 464, that the trial Court convicted on the testimony of a *single identifying witness*, and that it was a misdirection to do so, without specific precaution.

**Mr. Kitonga** also urged that a charge of robbery had not been proved against 1<sup>st</sup> appellant, because nothing had been recovered from him when he was arrested. Counsel called in aid the learned work, **Smith and Hogan's Criminal Law: Cases and Materials** (7<sup>th</sup> ed. By *Sir John Smith*, 1999), in which it is stated that (p.614):

**“Robbery is essentially a form of aggravated stealing so proof of theft is essential to a conviction.”**

Counsel urged that the evidence on recovery had been contradictory; that PW1 said the black jacket had been found with 2<sup>nd</sup> appellant, but the shoes were found with 1<sup>st</sup> appellant; but PW2, on cross-examination, said nothing had been found with 1<sup>st</sup> appellant; PW4 said both items were found with 2<sup>nd</sup> appellants; and the investigating officer (PW6) said nothing had been recovered from 1<sup>st</sup> appellant.

Counsel also urged that the *language* used in Court during the trial had not been recorded, and that the 1<sup>st</sup> appellant had not been arraigned in Court timeously as required by s.72(3) be of the Constitution. **Mr. Kitonga** urged that the prosecution had not proved their case beyond reasonable doubt and that, consequently, the decision to convict had been a misdirection in point of law.

Learned respondent's counsel, **Mr. Omirera** contested the appeal, and urged that the trial had been properly conducted, and the right verdict arrived at. He urged that the evidence of robbery by the appellants from PW1, was clear and cogent, and there was no evidence from any quarters to contradict the same. The essential ingredients of a robbery with violence, counsel urged, had been proved: there were

more than one assailant; the assailants were armed; personal injury was caused to PW1.

**Mr. Omirera** submitted that the evidence on record showed proper lighting at the *locus in quo*, and that PW1 had testified he had seen 1<sup>st</sup> appellant very well, in the company of 2<sup>nd</sup> appellant. PW1's evidence, moreover, counsel urged, was that of recognition, over and above mere identification; and PW1 had given the names of both the appellants as the persons he saw at the *locus in quo*. This evidence, counsel urged, was reinforced by that of PW3 and PW4 who witnessed the attack on PW1, on their way to hospital on the material night; and PW3 at that moment had arrested 2<sup>nd</sup> appellant who was the one found with PW1's personal effects. Even though a lapse in the trial hindered the formal admission of the exhibits, counsel urged, those items formed important and relevant evidence the existence of which was well proven by circumstantial evidence; and so the contention of learned counsel **Mr. Kitonga** that there was no theft from PW1, should not be accepted.

On the question of language used in Court, counsel noted that the record showed there had been interpretation, from English to Kiswahili to Kikamba.

**Mr. Omirera** submitted that there was, in effect, no contradiction in the prosecution evidence, contrary to the contention made for the appellants; for the injured person (PW1 was not available to observe the recovery of the stolen items; and the better evidence on the issue was that from the other witnesses – to the effect that the recoveries were made from 2<sup>nd</sup> appellant.

We have carefully considered all the evidence on record, and in view of the facts proved, and of the circumstances of the case, it is our conviction that the question of merit falling for decision, is whether the appellants herein were *positively identified* as the persons who violently attacked PW1, and robbed him of his personal effects. For the purposes of the law, it is immaterial that a recovery of stolen items was made from *both* appellants, if it is shown that, indeed, the two were the members of the gang of robbers; and on this point we respectfully do not agree with learned counsel **Mr. Kitonga**.

We found no reason to doubt the testimonies of PW1, PW3, PW4 and PW6, that they saw and identified the appellants (or one of them, as the case may be) when the two were in action as robbers on the material night. Most of these witnesses had personal knowledge of the appellants, and did identify them by way of recognition. Once we so hold, then the evidence which we accept to be truthful, that PW1's bloody and holed black jacket, and his shoes were found with 2<sup>nd</sup> appellant, is positive proof that a robbery took place and there was theft, attributable to *both* appellants.

On all the grounds of appeal laid before this Court by proper procedure, grounds which we have carefully considered, we hold that the appellants' appeals must be dismissed. We uphold conviction as recorded by the learned Senior Resident Magistrate. We 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: Mueni**

**For 1<sup>st</sup> Appellant: Mr. Kitonga**

**2<sup>nd</sup> Appellant in person**