



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAKURU**

**Civil Appeal Appli No.274 of 1998**

**PATRICK MUNENE NCHEBERE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(An appeal from a judgment of J. Omburah S.R.M Meru*

*dated on 7<sup>th</sup> April 2005)*

**JUDGMENT**

The appellant was tried before the court below on two counts of robbery with violence contrary to Section 296(2) of the Penal Code. He was acquitted in count two for lack of evidence, but was, however, convicted and sentenced to death in count one. He was aggrieved and filed the present appeal, relying on seven (7) grounds which challenged the evidence of identification both at the scene of the robbery and at the police-mounted identification parade.

The prosecution evidence has also been attacked as being insufficient and contradictory and therefore incapable of forming a basis for a conviction. That section 2001 of the Criminal Procedure Code was not complied with. He has consequently, on those grounds, sought that we allow the appeal, quash the conviction and set aside the sentence.

Learned counsel for the respondent supported both the conviction and sentence submitting that the prosecution evidence proved the commission of the offence. That the appellant was properly identified by recognition. That the circumstances for a positive identification were favourable as there were security lights which enabled the prosecution witnesses to identify the robbers. The appellant, he added, was also picked out in the identification parade. That, as a matter of fact, that parade was superfluous as there was sufficient evidence of identification.

Before we engage in the consideration of these arguments, it is important that the brief facts of the incident be outlined and the evidence on record subjected to fresh analysis to enable us to arrive at our own independent finding. We are of course alive to the fact that we lack the advantage of the trial court where the evidence was adduced.

It was the prosecution evidence that on the night of 26<sup>th</sup> June 2002 at about 8pm a gang of robbers numbering about nine (9) invaded the home and factory of PW1 Eutycas Muthui (the complainant) armed with a firearm, panga, whips and other weapons. In the course of the invasion, the victims, comprising the complainant, his wife and workers were robbed of money and other valuables. The attackers also inflicted body injuries on their victims before disappearing. It was the evidence of the complainant that when he arrived home with his wife they were confronted by the gang who had covered themselves to avoid identification due to the light in the compound. He was hit with a butt of gun. He identified the appellant who was armed with a panga and a whip and another person who was not in court. The robbers stole Kshs. 57,000/= and a watch worth Kshs. 50,000/= from the complainant. We note, however, that according to the complainant, the make of the stolen watch is Oriental while that in the charge sheet is Rado.

After the robbers left, the complainant, his wife and watchman went to the factory to find out whether the robbery had spread there. At the factory the manager PW4 Jacob Kiremi (Kiremi) confirmed that himself, the watchman, Mwirigi (we suppose PW5) and Gitonga (we suppose the complainant in count 2) had also been robbed. It was Kiremi's evidence that they were all ordered to lie down. But before he did so he identified the appellant who assaulted him, although the appellant was unknown to him prior to this evening. Also robbed at the factory was PW2, Harriet Mukubu.

Similarly she testified that she was able to identify the appellant. Moses Murithi Mwangi (PW3) was in the factory when the robbers struck. He was ordered to lie down and forced into a hole before being marched to the factory corridor. Again, he was able to identify the appellant, even though it was his first time to see him.

PW6, Wilson Namu, a clinical officer treated the complainant. Later an identification parade was conducted by PW7, Cpl. James Ndereva in which four witnesses picked out the appellant. It is PW8, P.C. David Muthuku who received the report of the robbery.

On being required to make his defence the appellant explained that on 13<sup>th</sup> July 2002, approximately two weeks after the robbery he, together with several other people were arrested for being drunk and disorderly. While those others were taken to court he was detained at the police station and later charged with this offence. He swore that he did not commit the offence and that he was being "fixed". It was also his evidence that he was at his work place at Ruiru on the day he was arrested. However, he could not tell where he was on the day of the robbery.

We have most carefully weighed the evidence adduced by the prosecution witnesses and the appellant's defence. We have no doubt and infact find that there was a robbery on 26<sup>th</sup> June 2002 in which the complainant his wife and workers were robbed and injured. The robbery, according to the evidence on record, was committed by a gang of over eight people at about 8pm.

There is also evidence that the gang members were armed with firearm, panga, whip and other weapons. In the course of the robbery the complainant and some of his workers were attacked. The only question, therefore, falling for our determination, is whether the appellant was part of the robbing gang.

The prosecution relies on the evidence, as we have noted earlier, of identification and/or recognition at the scene of the offence and at the identification parade.

There were a total of five (5) prosecution witnesses, the complainant, Harriet Mukubu, Moses Murithi Mwangi, Kiremi and Andrew Mwirigi, who were at the scene of the robbery. They all were unanimous that they were able, with the aid of electricity light and lamp(s) to identify the appellant.

Apart from the complainant and PW5, Andrew Mwirigi, the watchman, the rest of the witnesses confirmed that the appellant was not known to them prior to the night material to this case. The watchman opened the gate for the complainant as the robbers lay in ambush. Immediately the complainant drove in, the watchman was ordered to lie down and his hands tied to the back. According to the watchman, shortly after this, the robbers ran away saying they had seen a flash of light. It was his

testimony that there was light at the gate and in the compound and that he had known the appellant for about three (3) months when he (the appellant) worked for the complainant's wife.

We would like to make two observations with regard to this evidence. The complainant drove home and found his watchman with the robbers, the former having been detained by the robbers. The complainant in his evidence told the court that due to the lighting in his compound the robbers had covered themselves, we believe, to avoid being identified.

It is not clear to us at what stage the gangsters stopped covering themselves to enable the watchman to identify the appellant. It is also strange that, although this witness maintains that the appellant was known to him prior to the night in question, when the police arrived at the scene, in the words of P.C. David Muthuku (PW8), the witnesses at the scene confirmed that they could identify the robbers and give descriptions. What was so difficult, in respect of the complainant and the watchman to simply say that the appellant, Patrick Munene Nchebere and other people they could identify robbed them. The complainant on the other hand told the court that he could identify the appellant and another robber, yet in cross-examination he confirmed that he could not remember the appellant's name and that he only gave the description of their attackers.

He did not disclose what description he gave to the police. When he was recalled on 21.7.2003, he was categorical that he only told the police about the number of robbers and what they did to them and nothing else. Again, although the only nexus, as we see it, between the appellant and the robbery is that the appellant worked for the complainant's wife, who was also attacked and robbed. She did not testify. The watchman confirmed in cross-examination that he never told the police that the appellant was known to him.

The second observation is that the complainant and his watchman said they were able to see the robbers with the aid of electricity light, while Jacob Kiremi who was at the factory stated that he used the light from the lamps to identify the attackers. It has been said many times elsewhere that the more serious the charge the heavier the burden of proof on the prosecution. See Charles Kibara Muraya V. R. Cr. Appl. No. Nyeri 330 of 1989.

In this regard, it has been held in R. V. Turnbull 3 ALL ER 549, Nzaro V. R. (1991) KAR 212 and Kiarie V. R. (1984) KLR 739 that the evidence of identification must be tested with the greatest care and must be absolutely water tight to justify a conviction. Where an offence is committed at night, it is not sufficient to merely state that there was light around where this happened. It is important to adduce evidence of the area, the proximity of the light from the suspect, the intensity of the light and the source. For instance in this case, it is not clear how big the compound was, or how far from the source of light the appellant was.

We come to the conclusion on this aspect of the appeal that the circumstances of positive identification were unfavourable, given that the attack was at night, sudden and executed by many robbers. It would be unsafe to rely on such evidence to form a basis of a conviction.

We turn to consider the evidence of the police identification parade. According to the complainant he identified the appellant out of a group of seven (the appellant included). Harriet picked out the appellant in a parade of four members who were totally different. When Harriet was recalled on 21<sup>st</sup> July 2003 she changed her story and this time around there were six members of the parade, comprising people older than the appellant.

According to Jacob Kiremi and Andrew Mwirigi the physique and complexion of the parade members were distinct. Cpl. Ndereva, on his part, maintained that there were eight (8) members of the parade. He added that he advised the witnesses that one of the attackers was in the parade.

It is our considered opinion that this evidence was in gross violation of Chapter 46, Forces Standing Order, which provides *inter alia* that the officer conducting the parade must not suggest to the witness that the suspect is in the group. It is also a requirement that the accused or suspect must be placed among

atleast eight persons, as far as possible of similar age, height, general appearance and class of life as the accused/suspect. Nyarangi, JA in **Oluoch V. R.** (1985) KLR 549 remarked:-

*“In an identification parade, it is dangerous to suggest to an identifying witness that the person to be identified is believed to be present in the parade. The value of the parade as evidence in this case was considerably depreciated.”*

It should be clear that in this case we find no evidence of identification of the appellant as one of the perpetrators of the robbery. We can merely guess that the only reason why he was suspected is clearly stated by the complainant in his testimony as follows:-

*“What I told them is that I know you as my wives (sic) worker. I did so to the C.I.D. and told them it is you who knew about what my wife did.”*

Earlier in his testimony the complainant had stated he recognized the appellant because he demanded money from his (the complainant’s) wife, being the proceeds of sale of cereals. This, in our considered opinion is simply suspicion, which cannot, no matter how strong, be a ground to found a conviction.

The appellant has raised other grounds such as non-compliance with section 200 of the Criminal Procedure Code and his constitutional rights under sections 72(3) (b) and 77(2) of the Constitution. But considering our finding so far we find no point of addressing those grounds.

In a nutshell, this appeal is allowed and the conviction quashed. The sentence of death is set aside and the appellant shall be set free forthwith unless he is detained for any other lawful reason.

Dated and delivered at Meru this 29<sup>th</sup> day of July 2008.

**M. A. EMUKULE**

**JUDGE**

**W. OUKO**

**JUDGE**

**29.7.08**

Coram: M. A. Emukule J

W. Ouko, J

Mr. Kimathi for state

Gacheri C/clerk

Appellant present in person

Judgment delivered