



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 117 of 2006, 118 of 2006 & 119 of 2006 (Consolidated)**

**JOHN ODUOR WINGA.....1<sup>ST</sup> APPELLANT**

**JOSEPH MBWIKA KANONGI.....2<sup>ND</sup> APPELLANT**

**ANTHONY MAINA NJERI.....3<sup>RD</sup> APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

***(An appeal from the Judgment of Principal Magistrate Mrs. Muketi delivered on 10<sup>th</sup> March, 2006 in Criminal Case No. 9569 of 2004 at Kibera Law Courts)***

**JUDGEMENT OF THE COURT**

The appellants herein were jointly charged with others, for the offence of robbery with violence contrary to Section 296(2) of the Penal code (Cap.63, Laws of Kenya). It was charged, in specific terms, that the persons aforesaid, on 22<sup>nd</sup> November, 2004 at Githembe Village in Riruta, in the Nairobi Area, while armed with dangerous weapons, namely pistols and crude weapons, robbed **David Ondiek Oyugi** of Kshs. 4800/=, an identity card, and a jacket valued at 300/=, and at or immediately after the time of such robbery, used actual violence upon the said **David Ondiek Oyugi**.

It was the prosecution case that the complainant was accosted by five people while he was at a bus-stop, waiting for transport. The complainant testified that he had positively identified three of his assailants, and he had reported this fact to the Police. The complainant testified that, in a place illuminated by security lights, his assailants carried him to a place behind a kiosk, and as he struggled with them, one of them drew a pistol and pointed it at him, ordering him to keep quiet, or be killed. One of the attackers kicked the complainant on the chest, felling him; an attacker bearing a metal bar then fell upon the complainant; the assailants rummaged in his clothes and pockets, taking his grey jacket, his money (Kshs. 4800/=), and his identity card. As the attackers fled, the complainant saw passers-by, including a lady, come to his rescue. His wife, **Loise Akeyo** and her friend **Judy** also came, and they carried the complainant to the house.

The complainant reported the incident two hours later, at Riruta Police Station; and he informed the Police officers that he would be able to identify three of his attackers; he indicated to the Police that these attackers were not unfamiliar people, as he used to see them within the locality. The complainant visited the *locus in quo* with Police Officers, and found two of his assailants at a charcoal-vending kiosk; when

they saw the Police officers, they fled, but they were then arrested: these were 2<sup>nd</sup> and 3<sup>rd</sup> appellants herein. On the following day the complainant went to the Police station, and found that the attacker who had wielded a pistol – 1<sup>st</sup> appellant herein – had been arrested. The arrest had been possible because the complainant had given the description of 1<sup>st</sup> appellant to the Police officers. It was the complainant's testimony that the 3<sup>rd</sup> appellant herein is the one who had kicked him in the chest, and had hit him with a metal bar; and he had seen 2<sup>nd</sup> appellant herein ransacking his pockets. For some 6-7 months, the complainant testified, he had seen the three appellants herein in the neighbourhood; and he knew that 3<sup>rd</sup> appellant lived with his parents; but he did not know 1<sup>st</sup> appellant's name though he was familiar with this appellant's facial appearance; as for 2<sup>nd</sup> appellant herein, the complainant had only seen him at the *locus in quo*.

On cross-examination, the complainant said the attack had taken place at dawn; the scene was illuminated by security lights from the butchery; the complainant had seen 3<sup>rd</sup> appellant as one of the attackers; the complainant had furnished this appellant's description to the Police; it was 3<sup>rd</sup> appellant who kicked the complainant in the chest, and hit him with a metal rod.

The 1<sup>st</sup> appellant had no questions to ask in cross-examination. To 2<sup>nd</sup> appellant, the complainant responded;

*“You strangled me and I fainted. I identified you before I fainted. I told the Police I would identify you, and I did when the Police caught you”*

In his defence, 3<sup>rd</sup> appellant said he was going to work when he was arrested by Police officers; 1<sup>st</sup> appellant said he was arrested in his house as he was having supper; and 2<sup>nd</sup> appellant said he had been apprehended in connection with a drug offence.

Of the complainant's evidence, the trial Court thus found:

**“The complainant's evidence was credible and detailed. Though this Court invoked the provision of Section 200 CPC to proceed with this case, [no difficulties arose with the complainant's testimony]. He described each of the accused's role, particularly the three [appellants herein] that he was able to identify. His version did not change even when he testified for the [second] time....”**

The learned Magistrate was convinced of the veracity of the complainant's testimony; she remarked.

**“On identification he clearly outlined the role of the three suspects that he was able to identify. These were people [who] were known to him and the possibility of him mistaking them does not arise. His, therefore, was evidence of recognition which is stronger than...evidence of identification”.**

The learned Magistrate, after making the foregoing assessment of the truthfulness of testimony, went on to sound a caution on *“the dangers of convicting on [the basis of the evidence of] one identifying witness”*. She then went on to observe that *“the evidence adduced was detailed, consistent and credible.”*

The trial Court noted the following points which counted in assessing the quality of the identification evidence: the complainant had seen the 3<sup>rd</sup> appellant herein *before* the material incident; this appellant *kicked* the complainant, and *hit* him with a metal bar; the scene was *illuminated*, with lighting from a nearby butchery; the complainant was able to *see* his attackers; hence the 3<sup>rd</sup> appellant's defence that he was arrested without cause, has no basis; the complainant had quite easily identified the 1<sup>st</sup> appellant after 1<sup>st</sup> appellant had been arrested; the complainant had clearly *seen* 2<sup>nd</sup> appellant at the scene, and it is this appellant who attempted to *strangle* him, and also ransacked the complainant's pockets; of the three appellants, the complainant had clear identification testimony, whereas he made it clear he had not been able identify either the 4<sup>th</sup> or the 5<sup>th</sup> accused before the trial Court.

On the basis of that evidence, the trial Court found the appellants herein guilty as charged, and convicted and sentenced them under Section 296 (2) of the Penal Code.

Although the appellants had filed grounds of appeal with their petitions, when they came for the hearing they were each armed with “amended grounds of appeal,” annexed to written submissions which they clearly intended as their main presentation before us. In these “amended grounds” they contended as follows:

- (i) they could not have been properly identified; for there was only one identifying witness; and the conditions prevailing were not conducive to accurate identification;
- (ii) the charges had not been proved beyond any reasonable doubt;
- (iii) the learned Magistrate wrongly rejected the defence cases;
- (iv) the proceedings had been irregular, for not complying with Section 85 (2) and 151 of the Criminal Procedure Code;
- (v) there were material contradictions in the prosecution evidence;
- (vi) the trial Court convicted on uncorroborated evidence;
- (vii) the trial Court shifted the burden of proof on-to the accused persons.

The 1<sup>st</sup> appellant, in his oral submissions, disputed the veracity of the complainant’s testimony, doubting whether indeed, the complainant was able to identify him. The third appellant too questioned the complaint’s truthfulness, contending that this one complainant was passing by different names. The 2<sup>nd</sup> appellant too, contended that it was not true the complainant had known him prior to the material incident.

Learned respondent’s counsel **Mr. Makura** contested all the three appeals. He urged that there was overwhelming evidence to support the convictions for robbery with violence.

Counsel urges that there was enough evidence that the appellants had been identified as suspects: the offence took place at 5.45am., but the scene was illuminated with security lights from the butchery and the kiosk; the complainant had on several occasions, seen the appellants in the neighbourhood; the complainant recognized the appellants on the material occasion; the complainant had described the role in the incident of each of the appellants, in his first report; the complainant’s testimony in Court was clear in every respect; the Court found the complainant’s evidence consistent and truthful; PW3, a Police officer, re-arrested the appellants from the hands of members of the public who had arrested them soon after the robbery incident.

Counsel urged that the trial Court had considered the appellants’ unsworn evidence, but rightly rejected the same.

Counsel urged as not material the fact, as stated by 2<sup>nd</sup> appellant in his written submission, that the record had not on a certain occasion shown the rank of the prosecutor as was required. It was noted that when plea taken on 27<sup>th</sup> June, 2005, the prosecutor was **Inspector of Police Mutisya**; and during the mention of 14<sup>th</sup> February, 2005 the prosecution officer attending was **Chief Inspector Ndemo**.

Counsel urged that the three appeals lack merit, and should be dismissed.

From the foregoing review of the evidence, we have found no evidence of fault, in the identification of the three appellants as having been part of the group of robbers who caused damage to the complainant. There is no technicality raised by the appellants, weighty enough to justify interference with the

methodical assessment of evidence such as was undertaken by the learned Principal Magistrate; and the essence of that evidence is that all the three appellants were part of the gang of robbers of the material morning.

We hold that the appellants were rightly found guilty; we dismiss the appeals; we uphold the conviction of each appellant; we affirm the sentence imposed against each of the appellants.

***Orders accordingly.***

**ATED and DELIVERED** this 24<sup>th</sup> day of October, 2008.

**J. B. OJWANG            H.A. OMONDI**

**JUDGE                JUDGE**

**Coram: Ojwang & Omondi, JJ.**

**Court Clerks: Huka & Erick**

**For the Respondent: Mr. Makura**

**Appellants in person**