



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

**APPELLATE SIDE**

*(Coram: Ojwang, Sitati, JJ.)*

**CRIMINAL APPEAL NO. 91 OF 2006**

**BETWEEN**

**NICODEMUS NZUKI MUTINDA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the Judgement of the Senior Resident Magistrate, E.K. Makori, Esq at the Kitui Law Courts, in Criminal Case No.825 of 2005 dated 31<sup>st</sup> July, 2006)*

**JUDGMENT OF THE COURT**

The appellant was tried on a charge in two counts, firstly, that of robbery contrary to s.296(2) of the Penal Code (Cap.63), and secondly, that of assault causing actual bodily harm contrary to s.251 of the Penal Code.

The particulars of the first count were that, the appellant, on 26<sup>th</sup> April, 2005 at about 12.00 midnight, at Ithiku Sub-Location, Mutito Location in Kitui District, jointly with others not before the Court and while being armed with offensive weapons, namely swords, bows and arrows, robbed one **Kakuu Muveva** of Kshs.200,000/=, and at, or immediately before, or immediately after the time of such robbery, used actual violence against the said **Kakuu Muveva**.

The particulars of the second count were that, the appellant, on 26<sup>th</sup> April, 2005 at about 12.00 midnight, at Ithiku Sub-Location, Mutito Location in Kitui District, jointly with others not before the Court, unlawfully assaulted one **Muthui Muveva**, occasioning him actual bodily harm.

The learned Senior Resident Magistrate entered upon his judgment by reviewing the evidence tendered by eight witnesses called by the prosecution. At the material time the two complainants, **Kakuu Muveva** (PW2) and **Muthui Muveva** (PW3) were asleep in their respective houses. PW2 heard the dog bark, and then there was a bang on the door to her son's (PW3) house. Thereafter PW3 screamed, calling out PW2's name and lamenting that he was being killed. PW2 looked out through the window, in "very bright moonlight", and saw PW3, accompanied by his brother **Mwendwa Muveva** (PW4), being thrown out of their house which was only some 10 metres from PW2's house. PW2 who was alone in her house, saw her son being beaten up by the attackers. She was able to see that the appellant herein was brandishing a sword, and he was accompanied by about six others who bore axes. Some members of the gang were

egging-on one another verbally in favour of “finishing the work and then leaving”; and they ordered PW3 to waken PW2 failing which they would kill him. PW2 saw the appellant cut PW3 with a sword on the shoulders, and she then opened the three reinforcing doors to her house; and she was immediately slapped over the eyes, and she fell down. Out of the members of the gang attacking PW3, PW2 could only identify the appellant. At first she had seen the appellant in the moonlight; but at her door, where it was dark, the attackers were using “a big torch” which they flashed about. The light from that source enabled PW2 to identify the appellant herein.

As a trader in textiles, PW2 had some Kshs.200,000/= kept in a wallet which she intended to use for making new orders. She gave out that money together with the wallet, to her attackers. The appellant herein had demanded the money, and PW2 told him and the others “to take away everything they wanted.” The attackers locked up PW2, PW3 and a relative in a store in PW2’s house, then they padlocked the main door to the house, and escaped. When later PW2 and PW3 were released, PW3 had to be admitted at Kitui General Hospital, and the incident was reported to the District Officer (PW1).

PW2 was in a passenger-service vehicle, returning from the hospital when she, by chance, saw the appellant herein alighting from the same vehicle. He had only disembarked, en route, briefly, for he returned to the vehicle; and PW2 informed the vehicle conductor that a robber was among the passengers. The conductor agreed to have the vehicle driven to the DO’s office: and there, the appellant herein was arrested. When arrested, the appellant was carrying a bag; PW2 identified the bag, as well as the jersey which the appellant had worn when he had participated in the night attack. PW2 testified that she had seen the appellant very clearly, and even identified the trousers he had been wearing when the night attack took place.

PW2 testified that the appellant was well known to her, and his common name is **Mutinda Nzuki**. He used to operate as a turn-boy on certain passenger service vehicles, and many times he had loaded and off-loaded PW2’s goods when she was travelling. Many times he had also visited PW2’s shop, for the purpose of purchasing items on sale. The appellant and PW2 had lived in the same neighbourhood, but in the course of time, he and his parents migrated to some other place. On cross-examination by the appellant, PW2 had thus responded:

“...I don’t know why you [came to rob me] while I knew you quite well. A robber attempts to hide himself, but you did not. I did look at you as you took my son from the room [wielding a sword] ...You held the sword with the right hand. It’s true I was slapped as robbers [entered] ... When you entered there was enough moonlight. You switched on the torch, which made me identify you. The other robber told you not to. The torch was directed at me. As I was [handing over] the handbag I saw you with a sword. I was bending to look for the money; as I gave out the money I did see you clearly. You never gave me time to [establish familiarity] with you. It is true I did panic, but the time taken made me see you. The moonlight was full moon, quite bright. I did identify you physically and by the clothes which you wore.”

In his sworn evidence the appellant testified that he, indeed, knew PW2 well. He alleged that he was a hotel worker in Nairobi and had no knowledge of the incident of robbery that was the basis of the charge against him.

The learned Senior Resident Magistrate, correctly, in our view, noted that the real issue in this case is identification. Was the appellant one of the assailants who subjected to grief, at midnight, the home of PW2, on 26<sup>th</sup> April, 2005? He considered that the circumstances for identification were difficult, on the occasion of the attack; and he resorted to a Court of Appeal decision, **Odhiambo v. Republic** [2002] 1 KLR 241, at p.247, for guiding principles on identification evidence, in such circumstances. The relevant passage reads:

**“The law on identification is not in doubt. It has been stated and restated in several judicial decisions by this Court and by the High Court. The Court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. Where evidence**

***of identification rests on a single witness, and the circumstances of identification are known to be difficult, what is needed is other evidence either direct or circumstantial, pointing to the guilt of the accused persons from which the Court may reasonably conclude that identification is accurate and free from the possibility of an error: see Abdala Bin Wendo and Another v. Republic [1953] 20 EACA 166; Roria v. Republic [1967] E.A. 583.”***

After duly recording the important caution regarding identification in difficult circumstances, the learned Senior Resident Magistrate summarized the essence of the defence case as *alibi*. He then recorded the following facts emerging from the evidence: the complainants (PW2 and PW3 being mother and son) say they were attacked by a gang of robbers armed with offensive weapons in the middle of the night; the mother, in bright moonlight, could see outside as her son was being assaulted; the son could see the assailants with swords and axes; as the son was being battered he had the time to look at the assailants; the mother too had ample time to look at the assailants; the assailants had a big torch, which also helped the mother to see clearly, in darkened areas; mother and son say they saw the appellant herein, among the attackers; the appellant is the one who wielded a sword, and he indeed used it on the son, badly injuring him; mother and son actually knew and recognized the accused, who for a long time was their neighbour. This conjuncture of “identification-moments”, the learned Magistrate held, had the effect of providing for a favourable condition for isolating the appellant herein as a participant in the robbery. The appellant was positively identified by PW2 and PW3; he was one of the attackers; he robbed and inflicted harm unlawfully upon PW2 and PW3. This was the trial Court’s conclusion, and we are in agreement. The Court, in those circumstances, found that the prosecution had proved their case beyond reasonable doubt, in respect of both counts of the charge.

We uphold the conviction recorded by the trial Court. The learned Senior Resident Magistrate had imposed the death penalty in respect of the 1<sup>st</sup> count, robbery contrary to s. 296(2) of the Penal Code (Cap.63). The prescription of the law in that regard is mandatory; and so we uphold the death sentence. The trial Court sentenced the appellant to two years’ imprisonment in respect of the 2<sup>nd</sup> count, assault causing actual bodily harm. We uphold that sentence, but order that it shall remain suspended, in the light of the capital punishment awarded in respect of the 1<sup>st</sup> count. We thus dismiss the appellant’s appeal.

***Orders accordingly.***

**DATED and DELIVERED** at Machakos this 11<sup>th</sup> day of May, 2007.

**J. B. OJWANG**

**JUDGE**

**R.N. SITATI**

**JUDGE**