REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 167 of 2005

DAVID MURIUKI NGARE……..……..…… APPELLANT

-AND-

REPUBLIC……...RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate Ms. M.W. Mwai dated 23rd March, 2005 in Criminal Case No. 1603 of 2004 at the Limuru Law Courts)

JUDGEMENT OF THE COURT

The charge brought against the appellant was robbery contrary to s.296(2) of the Penal Code (Cap.63). The particulars were that the appellant, on *2nd July, 2004* at Kinale Forest in Kiambu District, within Central Province, while in the company of others not before the Court, the group being armed with a dangerous weapon, namely a pistol, robbed ***Mohammed Abdallah*** of cash in the sum of Kshs.640,000/= and a mobile telephone of make *Nokia* all valued at Kshs.650,000/= being the property of Laile Flowers Ltd.

The prosecution called five witnesses, and PW1, ***Mohammed Abdallah,*** testified as follows. He is the owner of a flower farm in Naivasha, and on *2nd July, 2004* PW1 had gone to Standard Bank, Westlands in Nairobi, to withdraw moneys to be paid to the flower-farm workers. He left Nairobi, having withdrawn Kshs.600,000/=, at 10.15 a.m., reaching Kijabe, in the company of his driver, at 10.45 a.m. PW1 had been taking a call on his mobile phone when, suddenly, he heard his driver moan, "Oh my God!" He saw a white car butting into the road in front, leading to a collision which threw the said white car into the ditch. Assuming this was a normal accident, PW1 steadied himself just after his spectacles were thrown off in the impact, but only to notice two men, one armed with a rifle and pointing it at him. When PW1's driver pleaded with the two intruders not to shoot, they demanded to know "where the bag was". PW1 raised his hands and said, the bag was at the back of his car. The two men then dragged both PW1 and his driver out of the car, causing PW1 to fear that they would be shot. One of the intruders asked PW1 where the money was, and PW1 answered that the money was in the bag. There were two bags in the car; and PW1 went with the intruder who asked about the money, and showed him the one which contained the money. PW1 was then taken out of the car, after which he heard a commotion and a gun shot, and then the gang got into a car and drove off.

The collision of the two vehicles on the road had caused an obstruction to traffic, and so on-coming motor vehicles could not pass. PW1 believed the gangsters had carjacked some other motor vehicle, and driven away. After motorist-friends of PW1 stopped by, and Police officers also came to the scene, it was found that the white car which had caused the accident was out in a ditch. On closer checking, PW1 noticed

that there was a person lying in the driver's seat of the said white motor vehicle – and PW1 feared that that person had been shot. PW1 went to the Police station and recorded a statement. He testified that he was so shaken, he would be unable to identify the robbers; but he said he would be able to identify the man found in the driver's seat of the damaged white motor vehicle which had been used by the robbers to cause obstruction. PW1 testified that the appellant herein, whom he had not known before, was the one who had been driving the damaged white motor vehicle which had obstructed PW1's car on the material date.

On cross-examination, PW1 testified that the appellant herein had made an unauthorized U-turn along the road, thus blocking the progress of PW1's motor vehicle. He said he had heard gun-shot and a commotion at the *locus in quo*, and later learned that other motorists were also robbed at the same place, following the collision of the two motor vehicles. He said he had been able to see the driver of the white motor vehicle after his own vehicle was brought to a halt, by the collision; he could recall that the driver of the said white motor vehicle had sustained a *cut* on the side of his head, and that the said driver was found i*nside* the mangled white motor vehicle. Of the said facial cut on the side of the driver's head, PW1 said during cross-examination: "If you [i.e., the appellant] do not have the mark on your head, then it could have healed." PW1 testified that at the time of the robbery, he had seen three robbers in action, brandishing rifles – and that the driver of these robbers was the appellant herein. In response to the appellant's cross-examination, PW1 testified: "I did not see you in that vehicle at the time the vehicles collided. We found you minutes after the robbery. We found you lying down [in] the driver's seat. You seemed drunk but in shock."

PW2, ***Patrick Adede***, testified that he was the driver of PW1, and on the material date, at 10.00 a.m. the two of them came from Standard Bank Westlands in Nairobi, and were proceeding to Naivasha. He saw PW1 go into the bank with a bag, and then return with it to the car and put it in the back seat; he didn't know there was money in the said bag.

As his motor vehicle reached Kijabe, he saw a motor vehicle stopped on the side of the road, but when he drove on up to that point, the said motor vehicle just turned into the road; it was too near, and a collision could not be avoided; PW2 screamed as the collision occurred. Immediately thereafter, several men came along, bearing guns, and demanding money. These armed men took both PW2 and PW1 outside the vehicle, and forced PW2 to lie down. One of the robbers shot at a public service vehicle (a *matatu*) which was driving along the road. The *matatu* swerved, but managed to get past the accident scene. PW2 crossed the road and lay down, remaining there until he got the impression that good people had come to the scene to give rescue. In the meantime, PW1 was on the opposite side of the road, and PW2 did not know what was happening to him. When PW2 stood up, he saw PW1 coming from a trench, and was not injured. PW2 heard PW1 say that the sum of Kshs.600,000/= had been grabbed by the thugs. Police officers soon arrived and a check was made on the vehicle that had caused the obstruction which led to the vehicle collision; and that vehicle was found to have been hit on the *driver's side*, and there was a man lying in the d*river's seat*, looking drunk. The said obstructing vehicle was found to have fake registration particulars. It was PW2's testimony that the *appellant* is the person who was found lying in the driver's seat of the obstructing motor vehicle which occasioned the accident. He had not known the appellant before.

On cross-examination, PW2 testified that he had worked for PW1's company for five years; he had driven the same motor vehicle he was driving on the material date for three years; he has never known when moneys for salary were being transported to the flower farm at Naivasha; he has never talked to anybody about the movements of money for salary payment at the said farm. He testified that the appellant had occasioned the collision on the material date, by entering the road suddenly, allowing him (PW2) no time to swerve.

Where did the robbers come from? PW2 testified:

"The man who blocked us had the aim of robbing us. It is true that if [our] vehicle had not stopped there would not have been robbery. The robbers did not come from inside the motor vehicle. I do not know where they came from."

PW2 affirmed that it is the driver who was found in the damaged white vehicle, namely the appellant herein, who had blocked him and PW1 as they drove towards Naivasha. PW2 had hit the appellant's motor vehicle on the section of the driver's seat of that other motor vehicle. PW2 did not know if the same robbers had robbed any other person at the *locus in quo*. At the very moment the white motor vehicle made an abrupt U-turn into the road, PW2 did see a driver execute that turn, save that at that stage he had not seen that driver clearly. The Police officers came along quickly, within some *five minutes* of the escape of the robbers, and at that moment the appellant was found in the driver's seat of the motor vehicle which had made the abrupt U-turn causing a collision.

PW3, ***Sgt. Ngure*** of the Kimende Police Post testified that, on the material date, he was controlling a Police check-point at Kinale, along the Nairobi-Nakuru Road, when a motorist reported to him that a robbery had taken place some 2 ½ km from the check-point. A passenger with the motorist who brought the report, had been hit on the head, and was being rushed to hospital. PW3 and another Police officer proceeded to the *locus in quo*, finding two motor vehicles which had been involved in a collision, and also finding PW1 who complained of a robbery executed shortly before that moment. PW3 quickly examined the motor vehicle which had been involved in the collision and was lying on the side of the road. He found in that vehicle, a man lying on his back, bleeding on the face, unconscious – and that man is the appellant herein. PW3 had the appellant herein kept under guard, as he conducted a search, and in that motor vehicle, reg. No. KAP 530 A, he found several motor vehicle number plates, some of foreign origin; he also found in that motor vehicle 11 numbered stickers bearing letters and figures; 11 plain stickers; and red cloth. The motor vehicle itself, reg. No. KAP 530A also had stickers affixed to it, and PW3 formed the impression that part of the original registration number of it was KAQ 930. PW3 had the motor vehicles towed to Lari Police Station, where the appellant was also taken, and investigations into the incident of the material day began.

On cross-examination, PW3 testified that he had been alerted of the robbery incident at about 11.00 a.m. PW3 saw the *matatu* passenger who had been shot at the *locus in quo,* at the time he received the report, and he also, at the time, received the report that the robbers were terrorizing other motorists along the road, at the *locus in quo.* The car that caused the obstruction leading to the collision preceding the robberies, was Toyota Corolla by make, and PW3 had found the appellant in the same, when he arrived at the *locus in quo.*

PW3 when he arrived at the *locus in quo,* had spoken to persons who had been drawn to the scene, and he conducted a check of the motor vehicles which had been involved in the collision. He first checked whether the appellant was a victim, or a suspect, and he determined that the appellant was a suspect. PW3 learned from the complainant (PW1) that *four* persons had been involved in the robbery; three escaped, while the fourth, namely the appellant, remained in the Toyota Corolla motor vehicle. PW3 had been given the impression that the three escaped robbers had come out of the said Toyota motor vehicle. PW3 said that on the impact of the collision between the two vehicles, the appellant had fallen horizontally towards the back of the car. Replying to the appellant's cross-examination, PW3 had said: "You were the robbers' driver. You could not run away…You had minor injuries on your face. You have already healed. The driver's seat was lying backwards. I do not know whether you adjusted it that way, or it was [due to] that impact…I spoke to you after you became conscious. You claimed that you were put there by the robbers…You were found at that motor vehicle seat…the driver's [seat]…"

PW4, Police Force No. 66426 ***Police Constable Mutisya*** of Lari Police Station had been at the Kinale Police check-point when a report of the incident which was the subject of the charge herein, was received. The witness and his colleague (PW3) rushed to the *locus in quo*. The Police officers found a man lying in one of the motor vehicles which had been involved in a collision, and this man said to them he was not seriously injured. PW4 and PW3 arrested the man, who is the appellant herein, and later commenced prosecution proceedings against him, in connection with the violent robbery which took place on the material day.

On cross-examination, PW4 testified that he had seen a *matatu* passenger who was reported to have been shot by the robbers at the *locus in quo* and at the material time; and thereafter he and PW3 had taken *less than 10 minutes* to get to the *locus in quo.* The Police officers had found the appellant herein in the

Toyota Corolla car which had been involved in the collision, and PW4 was one of those who removed him from the said motor vehicle. PW4 further responded to cross-examination as follows:

"I found you in the motor vehicle and we believed you were one of the robbers. The other robbers ran away. You were searched. Nothing was recovered. I cannot recall whether the ignition key was in your vehicle. The engine was not running when we reached you….According to this case, you were the robbers' driver. We did not recover any gun…I found you lying. I suspected you were unconscious. I spoke to you and you said you were not unconscious. We carried you out of the vehicle and placed you on the side. You were reluctant. You did not want to get out of the vehicle."

PW5, Police Force No. 42666 ***Corporal Lawrence Kiprono*** of Tigoni Police Station had been in Nairobi on the material date, when he received the signal that a highway robbery had just taken place at Kinale. He proceeded to Lari Police Station, where the two motor vehicles involved in a collision at the *locus in quo*, had been brought. PW5 was shown the Toyota Corolla motor vehicle, which was believed to have been used by the robbers; and he found out that this car bore different inscriptions on the number plate of the front and of the rear. PW5 was given a number of different number plates recovered from the inside of the said Toyota Corolla car. After he received the report that the appellant herein had been arrested inside the said Toyota Corolla car, at the *locus in quo*, PW5 took over the file, conducted investigations, and laid a charge for the offence of robbery against the appellant.

On cross-examination, PW5 said, as the investigating officer taking over the matter after records of the robbery-incident had been compiled, his role was essentially professional and investigative.

PW5, on further cross-examination, testified that he had in the past worked at *Kirinyaga* Police Station, at a time when the appellant held the office of Assistant Chief in that area. PW5 further said (referring to the appellant):

"I have known you. You were surprised to find me at Lari [Police Station]. I had last seen you in 1999… I did not lift any fingerprints. I was never shown the keys of that motor vehicle [presumably the said Toyota Corolla car]…"

On re-examination, PW5 thus said of the appellant herein, as he saw the appellant when he took over the investigations:

"The accused [appellant herein] looked drunk, but he *could drive*. He was not so drunk to the extent of being unable to drive. It is his behaviour and smell that made me believe …he was drunk."

PW5 completed his testimony at the Lari Police Station, to which the trial Court adjourned, for the purpose of viewing the said Toyota Corolla car in which the appellant had been found, at the *locus in quo*. The said motor vehicle had a front number-plate inscription: KAQ 130A; but the rear number plate carried the inscriptions: KAP 530A.

On the evidence as recorded, the learned trial Magistrate put the appellant to his defence, and he thereupon elected to give sworn defence without calling any witness.

The appellant gave his testimony on 9th February, 2005, averring that he had spent the night leading to the material date, 2nd July, 2004 at Zimmerman in Nairobi, and after doing his errands during the day, he took a public service vehicle (*matatu*) towards Kijabe, with the intention of obtaining dental treatment. The appellant said he left Nairobi for Kijabe on the material date at *9.15 a.m.* and when he got to the turn-off to Kijabe, he alighted, and walked over a distance of about 500 metres with a lady who was directing him on the way leading up to Kijabe. The two passed by a bus stage and saw, parked about 40 metres away, a white car on the side of the road. Suddenly, the said white car just moved into the road, and the appellant heard a bang; the white car skidded, and landed on the other side of the road, facing the direction of Nairobi. The lady in the appellant's company started *screaming*, and the *two of them ran towards the white car*. As they got near, the two saw a *man leave the white car from the front-left door*, brandishing a pistol; the appellant fell on the hand of the gunman, who hit him, and the appellant *fell*

down unconscious. When the appellant regained consciousness, somebody came by, and asked him who he was; and he *later found himself at the Police station.* On the following day the appellant asked the senior officer of the Police Station, the OCS, to take him to hospital; and only subsequently, did he get to know there had been a robbery at the *locus in quo*. The appellant testified that he is not a driver, and he was *never in the said Toyota Corolla car* that was towed from the *locus in quo.*

On cross-examination, the appellant maintained that on the material date, he had been travelling to Kijabe Hospital; that he was hit on the head and fell unconscious; that the man who hit him was carrying a pistol; that he was c*onfused* because he had *lost his wife* only two weeks earlier; that he *did not know* what happened to him after he fell; that he knows nothing about the ownership of the Toyota Corolla motor vehicle which was involved in a collision at the *locus in quo*. Was the appellant ever in the said Toyota Corolla car? This is what he said, in cross-examination:

"*I do not think I was [the] one [found] inside that motor vehicle. The motor vehicle is not mine. I have never bought a car. I have no claim over that car*."

What fundamental *truth* emerges from this evidence, once all immaterial verbal dressing is stripped off? The best approach to this question, we think, is to *begin from the stand taken by the learned Magistrate* during trial.

We have fully laid out the *evidence* as our foundation for arriving at the truth. The Court of Appeal laid down the governing principle here, on the obligations of a *first appellate Court* such as this one. In ***Gabriel Kamau Njoroge v. Republic*** [1982 – 88] K.A.R. 1134 the Court had restated that principle:

"…***it is the duty of the first appellate court to remember that the parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen nor heard the witnesses and make due allowances for it…"***

Our analysis must proceed from a clear view of the lines of determination taken by the *trial Court*, in keeping with the principle in the ***Gabriel Kamau Njoroge*** case, because the trial process did accord the learned Magistrate a perception-opportunity which is not available to the first appellate Court, a Court that can only go by the record.

The learned trial Magistrate noted, quite correctly, in our view, that an act of robbery did indeed take place, against the complainant and on the material date; there was evidence that this robbery took place at gun-point, and even the appellant testified that he saw a man with a pistol involved in violence at the *locus in quo*; there is incontrovertible evidence that the complainant did have, in a bag in his *Subaru* car, a substantial amount of money, and his car was blocked as it moved along the road towards his flower farm at Naivasha, and he was robbed of the money in an environment of violence, threats and terror; there is evidence that the robbers also shot at a passing passenger vehicle, and wounded a passenger therein; therefore it is proved, that the robbery incident which took place at the *locus in quo*, on the material day, was armed robbery entailing *violence*. Although the appellant in his testimony spoke of only one person wielding a firearm at the *locus in quo* on the material date, there is substantial, credible evidence, that several robbers were involved, and that they were armed.

After recording those lines of analysis, an analysis with which we entirely agree, the learned Magistrate remarked: "The only question now is whether the accused was one of these daring day-time robbers."

On the evidence on record, the learned Magistrate noted as follows: the testimony of all the prosecution witnesses is to the effect that the appellant herein was found seated in the robbers' motor vehicle following the collision (notably the testimonies of PW1, PW2, PW3 and PW4). The appellant maintained that when he was found, he was unconscious, after being knocked on the head by a gunman. In the search for the truth on this issue, the learned Magistrate thus proceeded:

"…***they found the [appellant] lying at the driver's seat of the said motor vehicle. How did he get***

there? Was he put in the car by the robbers who hit him? I find that not to be plausible. Indeed, the driver's door is the one that was hit and is dented. It could not open. It does not sound plausible either, that no one, even the woman [who had been walking along with the accused] saw him being placed in the said vehicle."

The learned Magistrate came to the conclusion that "the accused was being short of being truthful." The trial Court's finding was that the appellant "was found in the said motor vehicle which was used in the robbery"; and that the appellant, therefore, "must have been one of the robbers." In the pursuance of that robbery enterprise, the appellant [the trial Court held], "unfortunately for him he got hit as a result of the collision and lost consciousness for a while and could not run away with the rest." This is the logical conclusion, the trial Court found, given also the fact that all indications are that the Toyota Corolla car used by the robbers was itself a stolen item: its registration number had been tampered with, and in it were found numbers of different registration plates, as well as disguise-stickers for concealing or misrepresenting the true motor vehicle registration particulars. These lines of reasoning led the trial Court to the conclusion that the prosecution had discharged the *burden of proof* placed upon them by law.

From the conviction and sentence imposed by the trial Court, the appellant moved to this Court on the following grounds:

(1) that, the trial Court erred in law and fact as regards identification of the appellant as a culprit;

(2) that, the trial Court had convicted him, notwithstanding contradictions in the prosecution evidence;

(3) that, the mode of arrest had led the trial Court to wrong conclusions on evidence;

(4) that, the trial Court had disregarded his sworn evidence without justification.

Learned counsel ***Mr. Orieyo*** appeared for the appellant, and contested ? we think, with justification ? the remark by the learned Magistrate that a lady who had accompanied the appellant at the time he says a gunman knocked his head, at the *locus in quo,* could have solved the mystery of *how he came to be found in the car used by armed robbers.* In our view, however, the point objected to was not so central to the prosecution case, and cannot have been the basis of the trial Court's decision.

Mr. Orieyo relied on authorities on *alibi,* showing that the accused simply a*lleges*; and immediately the *burden shifts to the prosecution* to negative the *alibi.* It was held, in a persuasive authority from the Supreme Court of Uganda, ***Kibale, v. Uganda [1991] 1 E.A. 148, at p.156 –***

"***The prosecution is under a duty to negative the alibi by evidence. Such evidence may be adduced by calling witnesses either before the defence is put forward by the accused in his testimony or statement at his trial, or afterwards by a rebuttal***."

On that principle, it was urged that the appellant had *no burden to discharge,* by calling the lady whose name he had mentioned as having been in his company.

Mr. Orieyo also contended that the appellant had not been properly identified as a suspect. His contention was that since the robbery had taken place along a *public road,* it should have been shown that no others found along that road were the culprits. This contention was, however, not canvassed in detail; but we have noted that learned counsel placed before us cases dealing with the subject of identification, including one which could not very much help the appellant's case, on the facts before us, namely ***Gikonyo Kirumo v. Republic*** [1980] KLR 33, in which the Court of Appeal held:

"***Where the conviction depends upon the identification of the defendant by a single witness, the evidence must be always tested with the greatest care. The Court must satisfy itself that it is safe to act upon that evidence. Whether it is safe is a question of mixed law and fact."***

As already noted, several witnesses (PW1, PW2, PW3 and PW4) had testified in the instant case that they

indeed found the appellant sitting in the driver's seat, in the Toyota Corolla car that had been used by the robbers.

Learned State Counsel ***Ms. Gakobo*** contested the appeal, and urged that the Court should uphold the conviction and affirm sentence.

Ms. Gakobo urged that it was not right, from the overall tenor of the trial Court's judgement, to contend that the Court had s*hifted the burden of proof* to the accused, as the learned Magistrate had expressly guided herself on this point, on the record; she had remarked:

"***I have considered all evidence adduced herein by both sides with care. The accused has categorically denied committing this offence. The onus of proof is, however, on the prosecution."***

From that position as clearly recognized by the trial Magistrate, counsel urged, it would have been a *misdirection* which could *not* be a fatal one, for the learned Magistrate to state: "It does not sound plausible that no one, even the woman [with whom] the accused was walking…saw him being placed in the said [motor] vehicle. Indeed the said woman would have exonerated the accused there and then." This unfortunate remark by the learned Magistrate, counsel urged, only came in the course of analysis after it had already become clear to the Court that *sufficient evidence* had been placed before the Court.

On the ground of appeal based on identification, learned State Counsel urged that there was no shortcoming afflicting the prosecution case. The act of robbery had taken place in broad daylight, at 10.45 a.m.; PW1 and PW2 gave evidence that the appellant was found in the driver's seat in the motor vehicle which had just caused a collision and created the occasion for the robbery to be executed; the robbers had emerged from the same vehicle; the appellant was arrested at the scene of crime – and so his identity was not at all in issue.

Learned State Counsel distinguished the persuasive authority on the cautions to be taken in the identification of an accused person, in ***Peter Ndung'u Njoroge & Another v. Republic*** H.C. Crim. Appeal No. 201 of 2005 ***(Lesiit, J).*** It was submitted that the instant case was not in the same class as the ***Peter Ndungu Njoroge*** case, where conviction in the Magistrate's Court had been on the basis of the evidence of a single identifying witness; in the instant case " there was sufficient evidence coming from the *locus in quo*"; the appellant was with three others when the robbery took place; the robbers were armed with a gun, a dangerous weapon which was used to threaten both PW1 and PW2. ***Ms. Gakobo*** urged that it was clear from the record, that *all the ingredients of the offence* had been proved by the prosecution.

We believe the prosecution to have established beyond reasonable doubt that a *gang* of some four persons had attacked and robbed the complainant along the Nairobi-Naivasha Road, at about 10.30 am. on the material date; that the occasion for the said robbery was a collision between the complainant's car, and a Toyota Corolla car which improperly turned into the road and blocked the way of the complainant's on-coming car; that the said Toyota Corolla car was *not lawfully on the road*; was a motor vehicle with fake number plates, and quantities of dishonest camouflages; a vehicle which could only have been under the charge of *persons with criminal intent*; that out of the suspect Toyota Corolla car, armed robbers emerged, accosted the complainant and his driver, and grabbed some Kshs.600,000/= or so, that was kept in a bag in the complainant's car, as well as other items belonging to the complainant; that during the collision between the said Toyota Corolla car and the complainant's car the driver's side of the panelling in the Toyota Corolla car was badly dented; that three of the armed robbers, brandishing a firearm, seized the complainant's property, shot at an oncoming public service vehicle injuring a passenger, and escaped in some other vehicle which was not identified; that one person, namely the appellant, was unable to escape from the said Toyota Corolla car, was injured, and was found having reduced consciousness in the driver's seat; that the appellant when found in the said Toyota Corolla car, was reluctant to leave the damaged motor vehicle and had to be removed by PW3 and PW4. These scenarios point, in our view, unambiguously to the appellant's having been *part of the robbers* who were using the said Toyota Corolla car, and who would have driven the said car in a U-turn into the main road, for the purpose of colliding with the on-coming motor vehicle of the complainant, as a *preparatory step* in aid of a planned robbery.

The circumstances also show that it was the *appellan*t who was driving the said Toyota Corolla car, and in this way facilitating the execution of the robbery by the other robbers who fled with the complainant's cash and effects. The circumstances, which have been fully proved by the testimonies of PW1, PW2, PW3 and PW4 also demonstrate quite clearly that the failure of the appellant to escape along with the other robbers, was accounted for by the major collision between the two vehicles, which hit in particular the driver's section of the front seat of the said Toyota Corolla car.

In contrast to the well-focused testimony of the prosecution witnesses, which shows beyond any doubt that the appellant was the driver of the gang of robbers, the appellant has raised a strange *alibi*, which we hold to have been fully displaced by the cogent evidence tendered by the prosecution. The appellant alleges that although he was, at the material time and on the material date in the neighbourhood of the *locus in quo*, he was there as a pedestrian, trying to find his way to Kijabe Hospital in the company of a lady he had met by chance. The appellant's account of how he and the said lady ended up close-by the *locus in quo*, and how one man wielding a gun at the *locus in quo* hit his head with an object, rendering him unconscious, with respect, sounds *unreal*. Since there is cogent evidence that the *locus in quo*, for some minutes, was a scene of mayhem, with gun-brandishing robbers attacking motorists, we have to take *judicial notice* that no simple pedestrian such as the appellant claims to have been, strolling along the paths with a lady-guide, would have deliberately approached such a scene – taking into account the natural behaviour of human beings. We therefore rule it out as a falsehood, that in the prevailing circumstances then, the appellant, in blissful ignorance, came to the scene of the robbery, and was then pounded on the head by one gunman.

Not only must we dismiss the appellant's account as a falsehood and a cock-and-bull tale, we must also observe that no explanation has been given on how he, the appellant, came to be in the driver's seat of the Toyota Corolla car used by the robbers, something which must be within his special knowledge. His being in the driver's seat of that car, we find, was by *design*, as part of a planned robbery strategy; and it is noteworthy in this regard, that there is evidence he was *reluctant* to be taken out of his perch, in the motor vehicle of the robbers.

We *dismiss t*he appellant's appeal, uphold conviction, and affirm sentence as pronounced by the learned trial Magistrate.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 24th day of July, 2007.

J.B. OJWANG

JUDGE

G. A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerks: Tabitha Wanjiku & Erick

For the Appellant: Mr. Orieyo

For the Respondent: Ms. Gakobo