



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 417 OF 2002

JACOB MATHENGE NJOGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL NO. 451 OF 2002

BERNARD MBOGO GICHOVI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL NO. 454 OF 2002

FRANCIS MAINA KINYEKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL NO. 462

PATRICK MWANIKI THIAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(Being Appeals from a judgment of the
Principal Magistrate's Court at Kerugoya, N. M. Kiriba,
Senior Resident Magistrate, in Criminal Case No. 2019 of 2001)**

JUDGMENT

There are four appeals all consolidated for hearing. Criminal Appeal No. 417 of 2002 was filed by JACOB MATHENGE NJOGU. Criminal Appeal No. 451 of 2002 filed by BERNARD MBOGO GICHOVI. Criminal Appeal No. 454 of 2002 filed by FRANCIS MAINA KINYEKI and Criminal

Appeal No. 462 of 2002 filed by PATRICK MWANIKI THIAKA. These Appellants were before the trial magistrate as Accused Four, Accused Two, Accused One and Accused Three respectively.

They jointly faced a charge of robbery with violence contrary to Section 296(2) of the Penal Code where it was alleged that on 10th June, 2001 at Ngucui village in Kirinyaga District while armed with pangas, rungas, axes and torches they robbed Muthie Gati of his cash Kshs.11,000/=, radio cassette make Sanyo, four radio cassette compacts and assorted shop goods total value Kshs.22,590/= and that during the robbery they wounded the said Muthie Gati. The Complainant, Muthie Gati, who gave evidence as P.W.1, claimed to have identified the First, Second and Third Accused persons at the robbery at 2.00 a.m. He said they were people he had known before. It was therefore a matter of recognition. However, he did not seem to know the name of Accused Two and added he had never met Accused Two before. The Complainant admitted during the hearing that he did not see Accused Four at the robbery.

He said he immediately opened the door for them, they cut him on the head and he was forced to give them Ksh.6000/=. They searched the house and took Kshs.5000/= more before they took more items from the house. After he had been cut on the head on the first encounter it is not clear how he went ahead to identify the people he claims to have identified as that injury could have impaired his capacity to identify his attackers. He said he had been forced to put off his torch while at the same time he said he used the torch to see the face of Accused One. When did he see that face? In his evidence in chief he did not say he led the Police to the arrest of any of the Appellants but during cross-examination he said he had identified Accused One to the Police. He does not say where and how. There is no evidence of his having gone to a police identification parade. Nothing was recovered from the Appellants. From the record, it is not clear what P.W.2 Andrew Maina Githinji and P.W.3 P.C. Gaceru Mwangi were saying. Their evidence was recorded so badly that we were not able to figure out any useful piece of evidence either of the two gave the court during that hearing. It could have been due to poor prosecution but the learned trial magistrate should not have allowed that to happen.

A.P.C. Alex Gichege was recorded as P.W.3 when he should have been P.W.4. He was the arresting officer after the Complainant had complained to him. But his evidence does not show how he came to identify the people he arrested. Did he simply sit down with the Complainant, figured out some names and as a result he went to arrest the Appellants? P.W.4 did not say the Complainant gave him any names. He did not say he was accompanied by the Complainant. The identification he mentions seems to be identification of those he arrested after they had been arrested but not at an identification parade. It suggests something irregular and unacceptable.

Police Inspector Jacob Libo who was P.W.5 told the court he recorded Patrick Mwaniki Thiaka's statement under inquiry. This witness was to write the statement first. But reading his evidence, it would appear that he read the statement before he wrote it. He then asked Accused Three whether Accused Three wanted to write a statement. That evidence suggests further that before Accused Three wrote his statement, P.W.5 gave Accused three one statement to sign and Accused Three signed it and P.W.5 countersigned and went on to interpret the statement into English, signed it and prepared a certificate and signed it. That evidence cannot be narrating the correct procedure.

Moreover, that statement talks of Ksh.11,000/= only. Other items not mentioned. It is apparent from the record that the statement was not produced, at the trial, properly. The alleged maker was not given the opportunity to say whether or not he objected to the production of the statement in evidence. The record does not identify the one accused person who was given the opportunity to cross-examine P.W. 5. The other accused persons were wrongly denied the opportunity to crossexamine P.W.5.

On the whole therefore, we find that the learned State Counsel, Mr. Obuo, properly conceded all the appeals. Firstly, the prosecution was poor and the evidence badly recorded. Secondly, the statement under inquiry was inadmissible and if admissible, it was improperly admitted in the evidence. Thirdly, Accused Four, now Appellant Jacob Mathenge Njogu, was convicted simply because he was mentioned in the statement under inquiry attributed to Accused Three which statement we have said was either inadmissible or improperly admitted. Fourthly, there was no sufficient evidence to sustain a conviction of any of the Appellants.

From the foregoing, we do hereby allow the four appeals before us, quash the conviction of each Appellant and set aside the sentence imposed upon him.

Each Appellant be set at liberty forthwith unless lawfully detained in some other cause.

Dated this 27th day of November, 2003.

J. M.KHAMONI

JUDGE

H. M. OKWENGU

JUDGE