



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL APPEAL NO 337 OF 1987**

**BETWEEN**

**NGUGI KAMAU..... 1ST APPELLANT**  
**JOSEPH KAMANDE GICHIA.....2ND APPELLANT**  
**STEPHEN MUCHOKI GATHOGO.....3RD APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*(Appeals from convictions and sentences of the Senior Resident Magistrate's Court at Thika, H R Aggrawal Esq)*

On October 27, 1988, **Dugdale J & Mbito Ag J** delivered the following Judgment.

The appellants, Ngugi Kamau, Joseph Kamande Gichia and Stephen Muchoki Gathogo, whose appeals we have consolidated were convicted on two counts of robbery contrary to section 296(1) of the Penal Code and sentenced to (5) five years' imprisonment, four strokes of the cane on each count and to be placed under police supervision for five years on release from prison. The sentences were to run concurrently. The three have now appealed to this court, against both conviction and sentence.

The facts of this case are briefly that on November 23, 1986, between 4.10 and 4.15 pm the complainants were at the fourteen falls, Thika and were accompanied by their 3 children. They went further down the river on foot as they wanted to take photographs of the falls. After taking the photographs they decided to come further up the river to a more open place. As they were coming up the river, they met three young persons two of which had *simis*. When the three reached where the complainants were one of them grabbed the first complainant's camera from his shoulders.

The complainants had observed the young men for a distance of about 12 paces before they grabbed the camera. According to the 1st complainant, the ones who had *simis* were first and second appellants and it was the 1st appellant who grabbed the camera while the third was guarding the children. After the above, the 1st and 2nd appellants, then searched through the 1st complainants pockets and removed some money, diary, driving licence, office keys and car keys, but later returned office keys, car keys and driving licence. They also removed first complainant's shoes and some items from the second complainant who is the wife of the first complainant. The three then left and the complainant made a report to the police who

were guarding vehicles at the car park. The complainants then went to fourteen falls police station when they gave descriptions of their three assailants and particularly their faces. The details of descriptions of the three assailants given to the police were given to the court except that one of them had squinting eyes. The complainants had not known the assailants before that occasion. It is therefore not possible to tell the descriptions which were given to the police regarding the other two assailants. However according to PW 3 one of the assailants had squint eyes. Further in cross-examination, the 1st complainant stated that they had been struck by the squint eyes of one of their assailants and PW 2 also said that it was the man with squint eyes who gave the names of the other two. Nine days later, an identification parade was held at Thika police station at which the complainants were asked to identify their assailants as some suspects had been arrested. The complainants identified the 1st appellant as the man with squint eyes, the second appellant as the person who had a *simi* and the 3rd appellant as the one who was guarding the children.

As can be seen from the above summary the identification of the 1st appellant was based on the description of squint eyes to the police, complainants' identification at the parade and in court. In the case of the other two, there were no particulars of their descriptions on record and their names were said to have been given to the police by the 1st appellant. Their identification is therefore only through the identification parade and in court.

A number of points were raised by the appellants in their appeals, most of which we did not consider to be of any substance. However in all the three appeals, the appellants raised the issue of the identification parade and our attention was drawn to the Identification Parade Report which had been admitted as Exhibits 1, 2 and 3. Exhibit 1 shows that the suspect on the first parade held from 5.00 pm to 6.25 pm on 2/12/86 was the 1st appellant and was identified by both PW 1 and PW 2. The second parade was held at 5.30 pm to 5.40 pm the same day. The parade took a shorter time and consisted of the same 8 members in the same order as on the first parade. The second appellant was then called to take his place and both witnesses ie PW 1 and PW 2 identified him. The third parade was held from 5.45 pm to 5.55 pm. It also took a shorter time than the first and consisted of the same 8 members in the same order as in the previous parades. The third appellant was then called to take his place and both witnesses, once more, identified him. From the above, it is obvious that when the two identifying witnesses went to the second and third parade relating to 2nd and 3rd appellants, they only had to look along the line of the man to observe that the parade was identical with the first parade except for the absence of the previously identified person and in his place was another person who must be the suspect. Once a witness knows who the suspect is, an identification parade is in our opinion valueless. The police might as well bring the suspect alone and confront him with the identifying witnesses. In the case of *Githinji v Republic* [1970] EA 231, it was held that a parade such as the above one, is valueless. So is the identification of the accused in court and if there is no other evidence to connect the accused with the offence, then, such accuseds would be entitled to an acquittal.

In this case, apart from the identification parade and identification in court of the 2nd and 3rd appellants namely, Joseph Kamande Gichia and Stephen Muchoki Njuguna, which in the circumstances explained were in our view valueless, there is no evidence to connect them with offence. None of the stolen property was found in their possession. They were arrested by PC Peter Nzioka and PC Joseph Irongo (PW3 and PW4) on information from the 1st appellant who gave their names. There is no evidence that at the time the complainants made their reports, they gave description of the 2nd and 3rd appellants nor were details of their descriptions given, to our knowledge, to the police to enable them to trace the robbers. Consequently we find that there is no evidence to connect the 2nd and 3rd appellants to the offence and their appeals are allowed.

As regards the 1st appellant, there is evidence that the complainants informed the police that one of the robbers had squint eyes. The complainants also identified the 1st appellant during the parade as the squint eyes. According to PW 3 "one of the robbers was said to have squint eyes" on account of description he was arrested. In view of the above identification and as the identifying witnesses had ample opportunity to see the 1st appellant during broad daylight. We are satisfied that the 1st appellant was positively identified by the complainants. There were no inconsistencies of any substance in the evidence relating to the 1st appellant nor can we find any fault with the conduct of the 1st identification parade.

In fact the 1st appellant was satisfied with the conduct of the parade and said so. We therefore find no merit in the 1st appellant's grounds of appeal. On considering the evidence afresh, we find that the offence complained of was committed in broad daylight. The complainant had ample opportunity to observe the appearances of the robbers and gave details to the police who on account of those details arrested the 1st appellant. To confirm their observations, the complainants identified the 1st appellant in a parade which was properly conducted in so far as he is concerned and he in fact said so and signed the forms. The 1st appellant defence is mere denial and in face of the prosecution's overwhelming evidence of identification and manner in which the offence was committed, we find the case against him proved beyond any reasonable doubt.

On sentence, the 1st appellant had six previous convictions, four of which were relevant to the present conviction. It is also observed that no recovery was made and that the offence is punishable by up to 14 years imprisonment and corporal punishment. Consequently, we are unable to say that a period of 5 years and four strokes is manifestly excessive.

On account of our above findings, the appeal of the 1st appellant against conviction and sentence is dismissed. The appeals of 2nd appellant, namely, Joseph Kamande Gichia and 3rd appellant, namely, Stephen Muchoki Gathogo are hereby allowed. Their respective convictions are quashed and sentences are set aside and it is ordered that they should be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Nairobi this 27th day of October , 1988**

**N. DUGDALE**

**G.P. MBITO**

**JUDGE**

**AG. JUDGE**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**