



**REPUBLIC OF KENYA**

**High Court, at Nairobi**

**Criminal Appeal Nos 1715, 21, 24 & 25 of 1984**

**Mutu**

**v**

**republic**

**(Appeal from the Resident Magistrate's Court at Kitui, K D Kibanga, Esq)**

**Advocates**

**Appellants absent, not wishing to be present and unrepresented**

**Miss L G Mbarire for Respondent**

**October 23, 1985, Mbaya J delivered the following**

**Judgment.**

These four appeals have been consolidated. All the four appellants were charged with robbery contrary to section 296(1) of the Penal Code. The particulars of the offence stated that they jointly with others not before the court robbed the complainant, Mutia Nzomo PW 1, cash Kshs 302,000.00 and two wrist watches, all valued at Kshs 312,000.00 the property of the said Mutia Nzomo. After trial, all the appellants were convicted and were each sentenced to five years' imprisonment, five strokes of the cane, along with an order for five years' police supervision after completion of sentence. The appellants now appeal against both their conviction and the sentences.

For the convenience in this judgment, the appellants Mutu, Munyoki, Kathuli and Mutinda will be referred to as the 1st, 2nd, 3rd and 4th appellant respectively. This is in the order in which they filed their appeals.

The complainant is a businessman in Kitui Township. On the evening of December 13, 1983, he retired to bed with his wife Josephine PW 5. At about 2.00 am in the night, he was awakened by Josephine who had heard noises from the children's bedroom. PW 1 proceeded to the door of the children's room which he found open. There he met a gang of people who were armed with sticks, an axe, hammer a pistol and a torch. He was beaten up with sticks, and was fired at with a pistol. The shots missed him. It seems to have been meant to scare him. The complainant was being asked for money by the robbers. The robbers held his son Kyalo Mutia PW 3 and forced him to go to a cabinet in the sitting room where they took the money and the items which are the subject matter of the present charge. The robbers escaped, and the complainant reported the robbery to police.

In their defences, all the appellants made unsworn statements in which they provided evidence of alibi.

The issue now is whether the appellants were part of the gang that attacked the complainant: is there sufficient evidence of identification?

The evidence generally is that at the house of the complainant on the night in question, there was a lit hurricane lamp which was kept on all night along the corridor of the house. Through the help of the light from the lamp, the complainant, his wife and the children, son PW 3 and daughter Kasiki PW 4 could clearly see the assailants. The assailants also had a torch with them which they flashed occasionally, and

which provided extra light enabling further opportunity for identification. All these witnesses were further able to pick the respective appellants at identification parades held later by police at Kitui Police Station. The identification parades were all held according to the established procedure. There are no allegations of irregularities. In addition all evidence of alibi was displaced by the prosecution evidence. It was however, contended for the 1st appellant by Mr Mutito who appeared for him on this appeal that the witnesses who identified him at the identification parade did not describe the appellant nor did they give the basis upon which they based their identification of this appellant. Mr Mutito cited R v Mohamed bin Allur 1942, 2 E A C A 72, 73 to support his contention that his client was not properly described to be one of the attackers of the complainant. Mr Mutito contends that in the absence of the description of the appellant by the witnesses, the conviction cannot stand. I agree with the proposition of the law in this authority but I am of the view that a witness can only give description where he is required to in cross-examination by an accused person or his counsel. If he is not asked to describe the appellant, then his identification is not, so to say, challenged, and remains sufficient as it is unchallenged. In the circumstances I am satisfied that the evidence of the identifying witnesses was sufficient in this case, at which event all this 4 appeals must and are hereby dismissed.

**October 23, 1985**

**Mbaya J**