

**IN THE COURT OF  
APPEAL AT  
KISUMU**

**(CORAM: MUSINGA (P), KIAGE & ODUNGA, JJ.A)**

**CRIMINAL APPEAL NO. 14 OF 2018**

**BETWEEN**

**FRANCIS MUTUKU MUSYOKA ..... 1<sup>ST</sup>**

**APPELLANT PETER NJIRU NDWIGA.....2<sup>ND</sup>**

**APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (D. S. Majanja, J.) dated and delivered on 15<sup>th</sup> November 2017*

*in*

***Criminal Appeal No. 82 of 2014)***

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. This is a second appeal from the original conviction and sentence of the appellants by the Senior Principal Magistrates' Court at Vihiga in Criminal Case No. 72 of 2014 where the appellants ***Francis Mutuku Musyoka (1<sup>st</sup> appellant)*** and ***Peter Njiru Ndwiga (2<sup>nd</sup> appellant)*** were charged, convicted and sentenced to death for the offence of robbery with violence contrary to ***section 295***

as read with **section 296 (2)** of the Penal Code. The particulars of the offence were that on 31<sup>st</sup>

December 2013 at Luanda Township within Vihiga County jointly with others not before the court and while armed with dangerous weapons namely, metal bars robbed Kennedy Okango Obunga of Kshs.111,000/=, a Kenya Commercial Bank ATM card, a Co-operative Bank ATM card and a Huawei U2800 mobile phone valued at Kshs.3,200/=, all valued at Kshs.114,200/= and immediately at the time of said robbery injured the said Kennedy Okango Obunga.

2. The appellants' first appeal to the High Court at Kakamega (**Majanja, J**) was unsuccessful. Consequently, the appellants preferred a second appeal to this Court. This being a second appeal, by dint of the provisions of **section 361** of the **Criminal Procedure Code** the Court is strictly limited to consider matters of law only. See **Sichie vs Republic (Criminal Appeal No. 8 of 2020) [2025] KECA 152 (KLR) (7<sup>th</sup> February 2025 (Judgment))**.
3. The brief facts that gave rise to the case were that on the morning of 31<sup>st</sup> December 2013, **Kennedy Okango Obunga (PW 1)**, together with his wife went to Luanda branch of the Kenya Commercial Bank where he withdrew Kshs.106,000/=. As PW 1 approached his home at about 10.00 am, a white

saloon car Registration No. KBS 332L that had five occupants appeared. One of the occupants in the car greeted PW 1 and he responded. Suddenly four people came out of the car and the person who had greeted him said that they were police officers who were looking for a suspect. One of the men who was wearing a jungle green jacket told PW 1 that he was the suspect and proceeded to handcuff him and place him under arrest. He was thereafter shoved into the rear of the car and told to lie on the floor.

4. Those happenings were witnessed by **Nelson Hezekiah Alumere PW 7**, who corroborated the evidence of PW1. Meanwhile the alleged police officers started beating PW 1 and stole from him Kshs.106,000/= and also took the KCB and Co- operative bank ATM cards and demanded his PIN number. The robbers withdrew a sum of Kshs.5,000/= from PW 1's KCB bank account at KCB Mbale branch.
5. The robbery was reported to the police and investigations commenced. On 15<sup>th</sup> January 2014 PW 1 attended an identification parade that was conducted by Inspector **Pius Nzioki, PW 4**. PW 1 identified the two appellants. He said that the 1<sup>st</sup> appellant was the one who had a jungle green

jacket, while the second one was the one who waved at him and greeted him on his way to his house from the bank.

6. The investigation officer, **PC Jillo Kombo, PW 9** testified that two weeks after PW 1 was robbed, a similar robbery was committed at a neighbouring area, involving five men who were in a motor vehicle. The police intercepted the motor vehicle and arrested two suspects who were taken to Vihiga Police Station where an identification parade was conducted and the two appellants were duly identified by PW 1.
7. The appellants denied having committed the robbery. The 1<sup>st</sup> appellant said that he was a police officer and on 31<sup>st</sup> December 2013 he was on duty at Rumuruti in Laikipia West; that on 15<sup>th</sup> January 2015 he was at Siaya Law Courts when he was requested to go to Vihiga Police Station, but upon getting there he was arrested and remanded in custody and thereafter requested to participate in an identification parade where he was identified by PW 1 as one of the people that had robbed him.
8. The 2<sup>nd</sup> appellant testified that he was a businessman in Nairobi; that on 31<sup>st</sup> December 2013 he was at his home in Embu County celebrating the end of the year; that on

15<sup>th</sup>

January 2015 he was at Siaya Law Courts when he was informed that he was wanted by CID officers from Vihiga; that he was taken to Vihiga Police Station and requested to participate in an identification parade where he was identified by PW 1 as one of the robbers.

9. Upon consideration of the prosecution and defence case, the trial court convicted the appellants of robbery as aforesaid and sentenced them to death as earlier stated.
10. In their first appeal before the High Court, the appellants faulted the trial court for convicting them on insufficient identification evidence. However, the learned judge held that the appellants were properly identified. The learned judge delivered himself as follows:

***“21. In this case the incident occurred in the midmorning hours in broad day light. PW 1 told the court that he was able to see the 2<sup>nd</sup> appellant (now 1<sup>st</sup> appellant) who greeted him. He also stated that the 1<sup>st</sup> appellant (now the 2<sup>nd</sup> appellant) who was wearing a jungle green jacket is the one who handcuffed him. After the assailants confronted him, they talked to him to inquire whether he was a suspect and then bundled him at the back of the vehicle where they continued to assault him while riding with him in the car. The assailants were not masked and given the time, which was over an hour, they were together with PW 1, I find and hold these circumstances were favorable for positive identification.”***

11. In their memorandum of appeal before this Court the appellants raised three grounds of appeal being:

1. ***The learned judge erred in law by upholding the appellants conviction and sentence by the trial court which was against the prosecution's evidence to prove its case beyond reasonable doubt. (sic)***
2. ***The learned judge of the superior court erred in law when he held that the appellant was properly identified by the prosecution witness whereas there was no mention or description of the appellant in the 1<sup>st</sup> report, and the prevailing circumstances were not favourable for positive identification.***
3. ***The Judgment was against the weight of the evidence.***

12. At the hearing of the appeal, the Court was informed that the 1<sup>st</sup> appellant was at large. As for the 2<sup>nd</sup> appellant he was represented by ***Ms. Pamela Omondi***, who briefly highlighted written submissions that she had prepared for and on behalf of the two appellants.

13. On the first ground of appeal, the appellants submitted that the learned judge erred in finding that the elements of robbery with violence as stated under ***section 296 (2)*** of the ***Penal Code*** had been proved beyond reasonable doubt. It was submitted that PW 1 only testified that there were five occupants in the motor vehicle that approached him near his home, but did not say that any of them were

armed with any

weapon; that no metal bars were retrieved by the prosecution from the motor vehicle, yet the charge sheet indicated that the appellants were armed with metal bars; and that also PW 7 who was said to have witnessed the incident did not testify that he had seen any of the assailants armed with any weapon.

14. Turning to the second ground of appeal regarding identification, it was submitted that the complainant did not give a description of his attackers for purposes of identifying potential suspects at an identification parade; that the learned judge failed to take into account the prevailing circumstances surrounding identification of the appellants, given that there were five people when the complainant was robbed and he had never encountered any of them before; that the complainant was told to lie down in the motor vehicle and it was therefore impossible for him to have recognized them.

15. The 2<sup>nd</sup> appellant relied on the case of **Ogeto vs Republic** [2004] KLR 19 where it was held that:

***“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favoring identification were***

***difficult. Further the court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”***

16. On the third ground there was no substantive submissions made by counsel.

17. **Mr. Kilambyo, Assistant Director of Public Prosecutions**, filed submissions on behalf of the respondent. As to whether the ingredients of the offence of robbery with violence were duly satisfied, the respondent cited the decision of this Court in **Oluoch vs Republic [1985]** where it was held that:

***“Robbery with violence is committed in any of the following circumstances:***

***(a) The offender is armed with any dangerous and offensive weapon or instrument; or***

***(b) The offender is in company with one or more person or persons; or***

***(c) At or immediately before or immediately after time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person....”***

18. The respondent also cited various other decisions of this Court including **Dima Denge Dima & Others vs Republic, Criminal Appeal No. 300 of 2007 [2013] eKLR** and **Johana Ndungu vs Republic [1996] eKLR**. It was submitted that the use of the word **“or”** in the definition of the offence of robbery with violence under section 296 (2) of the Penal

Code means that the proof of any of the above ingredients is sufficient to establish the offence. It was further submitted that there was

sufficient evidence that the offenders were many; were armed with offensive weapons and at the time of the robbery assaulted the complainant. Consequently, the offence of robbery with violence was sufficiently demonstrated.

19. Regarding identification of the appellants, it was submitted that the first appellate court extensively analyzed the evidence of identification of the appellants, and equally the first appellate court carefully scrutinized that evidence, citing, *inter alia*, the case of **John Njeru Kithaka & Another vs Republic Criminal Appeal No. 436 of 2007** where it was held;

***“On identification the law is now well settled and that is that a trial court has a duty to consider with utmost care, evidence of identification and recognition before it bases conviction on it. In particular if the conditions under which such identification is purported to have been made were not favourable.”***

20. We have considered the memorandum of appeal in light of the submissions filed by the appellants and the respondent and briefly highlighted by both Ms. Omondi and Mr. Kilambyo. In our view, this appeal raises only two substantive grounds, that is, whether the ingredients of the offence of robbery with violence were proved beyond

reasonable doubt, and whether there was sufficient evidence of identification of the appellants to warrant their conviction.

21. Turning to the first ground of appeal, that is whether the offence of robbery with violence as defined under section 296

(2) of the Penal Code was proved, as stated by both the appellants and the respondent, robbery with violence is committed in any of the following circumstances:

- (i) **Where the offender is armed with any dangerous and offensive weapons or instrument; or**
- (ii) **The offender is in company with one or more person or persons; or**
- (iii) **At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.**

It is trite law that the above three elements of the offence are to be read disjunctively and not conjunctively, meaning that even one of the above elements is enough to found a conviction. See **Dima Denge Dima & Others vs the Republic (supra)**.

22. Both PW 1 and PW 7 testified that the robbery was committed by more than one person, and that the persons severely assaulted the complainant. **PW 3**, the medical officer who examined and treated the complainant, also testified about the grave injuries sustained by the

complainant at the time of the robbery. It matters not that none of the witnesses testified that

the robbers were armed with dangerous weapons. We therefore find that the offence of robbery with violence was duly proved by the prosecution and the two courts below did not err in their finding on that issue.

23. Turning to the ground of identification of the appellants, the first appellate court held, *inter alia*, that:

***“The sum total of the evidence is that PW 1 positively identified the appellants on the date he was robbed. Although he did not describe them to the police in his first report, he was sure that he could clearly identify them if he saw them. When the police arrested persons in a robbery similar to the one which PW 1 was involved in, the subjects were subjected to an identification parade a fortnight after the incident and PW 1 was able to pick them out without any difficulty.”***

24. Looking at the evidence of PW 1, the complainant, he testified that the person who greeted him and said that they were police officers and the other one who had a jungle green jacket, black trouser and a beret were among the five robbers who attacked and robbed him on the material day. PW 1 said that he saw them clearly. Although he never gave their description to the police in his statement that he recorded on 31<sup>st</sup> December 2013, he however stated in his cross examination as follows:

***“I was robbed on 31/12/13 and it is the same day I recorded my statement. I gave out description of***

***the***

***clothing 1<sup>st</sup> accused had. I said among them one of them was wearing a jungle uniform”.***

25. About two weeks after the robbery, PW 1 was able to identify the appellants at an identification parade that was conducted by PW 4, who testified in great details how the identification parade was conducted.
26. We do not agree with the 2<sup>nd</sup> appellant’s submissions that failure to give a description of the assailants before an identification parade is conducted *per se* renders the identification parade useless. The court must also consider all the relevant aspects relating to the complainant’s ability to positively identify his assailants. In this appeal, the robbery took place in broad day light and PW 1 was able to see how the two appellants were dressed and he was able to clearly explain the role played by each one of them during the robbery. The identification parade took place about 15 days after the robbery when the incident was still fresh in the mind of PW 1.
27. We agree with the first appellate court’s reliance on the decision of this Court in ***Nathan Kamau Mugwe v Republic Criminal Appeal No. 63 of 2008 [2009] eKLR*** that failure to give the description of a suspect before an

identification parade

does not render the identification useless. In that case the court observed as follows:

***“James swore he saw the appellant from the time they met and negotiated the fare and was with him from the place of hiring up to the place where he was attacked and tied up. The appellant was sitting next to him on the front passenger seat. The trial Magistrate and the first appellate court were satisfied that James had ample time to see the appellant during the period the two were alone in the vehicle and also at the beginning of the journey. James had no difficulty in identifying him at a properly conducted identification parade.... We think the identification of the appellant was, in all the circumstances of the case, sound and even if the two courts below had excluded the evidence of Mwendo with regard to the parade, they would have inevitably come to the conclusion that the appellant had been properly and correctly identified as the person who had hired James at Cheers Makuti Bar and subsequently robbed him in the company of another person..... As to the complaint in ground six that the witnesses had not given to the police a description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in Gabriel Kamau Njoroge v Republic (1982 - 1988) 1 KAR 1134, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the court said was that the witness “SHOULD” be asked.... It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the*”**

***person. Again, the police themselves may, through their own investigations, come to know that a particular person***

**may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him. In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.”**

28. All in all, we find this appeal devoid of merit. We uphold the judgment of the first appellate court and dismiss the appeal in its entirety.

**Dated and delivered at Kisumu this 19<sup>th</sup> day of December, 2025.**

**D. K. MUSINGA, (PRESIDENT)**

.....  
**JUDGE OF APPEAL**

**P. O. KIAGE**

.....  
**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**