



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL OF KENYA AT NAIROBI**  
**Criminal Appeal 74 of 2005**

**FRANCIS NDUNGU WARARI**

**ALEX CHEGE MAINA**

**ROBERT NGANGA MUTURI .....APPELLANTS**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from the judgment of the High Court of Kenya at Nairobi (Mbaluto & Onyancha, JJ)  
dated 10<sup>th</sup> July, 2003**

**in**

**H.C.CR.NOS. 404, 405, 406 OF 1998)**

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**JUDGMENT OF THE COURT**

**FRANCIS NDUNGU WARARI** (first appellant), **ROBERT NGANGA MUTURI** (second appellant) and **ALEX CHEGE MAINA** (third appellant) were jointly charged before the Senior Resident Magistrate, Thika with the offence of robbery with violence contrary to **Section 296 (2)** of the *Penal Code* (count I) and the offence of attempted robbery with violence contrary to **Section 297 (2)** of the *Penal Code* (count III). The first appellant was separately charged with the offence of rape contrary to **Section 140** of the *Penal Code* (count II).

The third appellant was the first accused at the trial while the first appellant and the second appellant were the second and third accused respectively.

The three appellants were convicted of the offences of robbery with violence in count I and the offence of attempted robbery with violence in count III and sentenced to death on each of the two counts. The first appellant was acquitted of the offence of rape in count II. They appealed to the superior court against the conviction and sentence. The superior court dismissed the appeal against conviction for the offence of robbery with violence in count I, but allowed the second and third appellants' appeal in respect of the offence of attempted robbery with violence in its entirety. The superior court also partially allowed the first appellant's appeal in respect of the offence of attempted robbery in count III to the extent that the charge was reduced to one of causing actual bodily harm contrary to **Section 251** of the *Penal Code* and sentenced the first appellant to 3 years imprisonment which sentence was suspended.

On 26<sup>th</sup> October, 1997 at about 7.00 p.m. Margret Waithera Gitau, the complainant in count I (pw3) was walking towards a bus stage in Thika Town to take transport to Ruiru Town. She met three people at a corner, one person pointed a knife at her chest and she was robbed of a coat, a bag, a purse containing Shs.64 and an identity card. She was taken to a kiosk where she was raped by one person whom she identified as the first appellant. When the second person was about to rape her, a motor vehicle appeared and its headlights illuminated them and she escaped. She reported the robbery and rape at Thika Police Station. Meanwhile, Florence Adhiambo Olonde, the complainant in count I (PW1) was going to Thika District Hospital for duty. She met three people along Kenyatta Highway at 7.15 p.m. whom she identified as the appellants at the trial. She was hit by the first appellant and she fell down after which the first appellant stepped on her. She screamed and P.C. Benjamin Kitaka (PW2), a police officer on patrol duty and others came to her rescue.

PW2 chased the first appellant who was running away and arrested him. He also arrested the third appellant at the scene after PW1 identified him. The third person escaped. The first appellant was searched at the Police Station and some body lotion and a purse, were recovered from his pocket. The purse contained Shs.64/= and the Identity Card of PW3. Later PW1 went to the police station and reported the robbery and rape.

She was shown the items already recovered from the first appellant and identified them as hers. PW3 then took police to the place where she was robbed and raped. They found the second appellant sleeping under a table used by hawkers. He was sleeping on a lesso and using a handbag as a pillow. PW3 identified them as hers. One shoe which PW3 lost during the rape was also recovered.

The first appellant stated in his defence at the trial that he was going home at 8.00 p.m. when he saw two people running away. He then saw a police officer who stopped him and arrested him for nothing.

The second appellant stated by way of defence that he was going to his aunt's house at Majengo at 8.30 p.m. and on reaching the stadium it rained a lot. He then sheltered in a structure where he found a lesso and a bag. He slept until he was awakened by four police officers.

The third appellant on his part stated that he was going home when he heard screams and when he went to answer the screams he found the first appellant having been arrested for no apparent reason and that he was also arrested.

There is one main common ground of appeal – that the evidence of the identification of the appellants was not sufficient. Mr. Gaita for the first appellant submitted, among other things, that the evidence of identification by PW3 amounted to dock identification, that such evidence of dock identification was not reliable and that no identification parade was held. Mrs. Murungi, learned Principal State Counsel, supported the conviction of the first and third appellants but did not support the conviction of the second appellant. She submitted that the evidence of identification of second appellant required corroboration and that the second appellant was not arrested in possession of anything.

The trial magistrate considered the evidence and made findings of fact that PW3 was robbed between 7.00 p.m. and 7.30 p.m.; that PW3 identified the appellants through headlights of a car; that the first and second appellants were arrested while committing another offence a few minutes later; that the first and second appellants were arrested red handed; that PW1 identified them and that first appellant was found in possession of PW3 properties.

After re-evaluating and re-considering the evidence, the superior court agreed with the findings of the trial court. The superior court was satisfied that the three appellants were properly identified and that they were found in possession of properties stolen from PW3 on the same night and said in part:

***“Further more, in our view, any doubt about the identity of the appellants was finally eliminated by the fact that a few hours later during the same night, the three appellants were arrested while in possession of items stolen from the 2<sup>nd</sup> complainant”.***

Thus, there are concurrent findings of fact by the two counts below that the appellants were identified by PW3 and that they were in recent possession of the properties stolen from PW3.

Although no identification parade was held in respect of each appellant this is not a case of identification at night by one single witness. An identification parade would have been useless in this case because both PW1 and PW3 saw the appellants after arrest on the same night. Rather, this is a case where the three appellants were identified by both PW1 and PW3. In addition, in the case of the identification of the first and third appellants by PW1 the evidence of PW1 is supported by the evidence of PC Benjamin Kitaka. PW3 described the respective roles played by each appellant during the robbery and rape. Her evidence of the identification of the appellants is given credence by the further evidence that the first and third appellants were arrested together shortly after and that the first appellant was in possession of the goods stolen from her including her identification card.

Her evidence is further lent credence by the evidence that the second appellant was also shortly after the robbery and rape found sleeping in the self same shed where PW3 was raped and in possession of PW3's lesso and hand bag.

In our view, the evidence of the identification of the three appellants including the second appellant was free from error and was properly believed.

Secondly, as the superior court found there was ample evidence that the first appellant who was in the company of the third appellant was found in possession of properties stolen from PW3 a few hours after the robbery. There was also evidence that the second appellant was found sleeping in a shed in possession of a lesso and hand bag belonging to PW3 a few hours after the robbery.

The first and third appellants did not explain their respective possession of the stolen properties. The second appellant did not give a credible explanation of his possession of the lesso and hand bag. The recent possession by the appellants of the properties stolen from PW3 in the absence of any explanation raises a presumption that the appellants were in the circumstances of the case the persons who robbed PW3. (See *Andrea Obonyo V R* [1962] EA 542 at page 548). That evidence of recent possession of stolen goods was sufficient to support the conviction and when considered together with the evidence of identification leaves no doubt that the three appellants are the ones who robbed PW3.

For those reasons, we are satisfied that the appellants were properly convicted.

In the result, we dismiss the appeal of each appellant.

**Dated and delivered at Nairobi this 14<sup>th</sup> day of July, 2006.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**