**Mwabuja v Republic**

**Division:** Court Appeal of Kenya at Mombasa

**Date of judgment:** 20 January 2006

**Case Number:** 155/04

**Before:** Omolo, O’kubasu and Deverell JJA

**Sourced by:** LawAfrica

**Summarised by:** H Kibet

*[1] Criminal procedure – Prosecution of criminal cases – Presence of a qualified prosecutor – Record*

*of proceedings – Use of phrase “Coram as before” – Meaning of the phrase “Coram as before” –*

*Whether qualified prosecutor present during trial.*

*[2] Evidence – Identification – Identification by recognition – Failure to hold an identification parade –*

*Whether the failure to hold an identification parade was fatal to the conviction.*

**Editor’s Summary**

In the early morning hours of 11 June 1999, the complainant alighted from a bus at Pahani Clinic in

Diani village on her way home. As she started to walk home carrying some luggage with her, she noticed four men walking in her direction. The men, who were armed with knives, surrounded her and one of them confronted her and demanded money. When she told them that she had none, he attempted to stab her but a bag that she was clutching by her side absorbed the force of the knife. The men then robbed her of her luggage and ran off. The complainant raised an alarm and neighbours came to her rescue but by then the robbers had disappeared. The complainant then reported the incident to Diani Police Station. The police proceeded to a well-known escape route for criminals and laid an ambush. A short time later two young men came along and, when asked to stop, ran away. The police gave chase and caught up with one who they found to be in possession of a bag containing various items. The young man was then placed in a police vehicle. As the police drove to the police station, they met the complainant and asked her to get into the vehicle. She immediately recognised the appellant as the person who had demanded money from her. She later identified the bag and its contents as belonging to her. The appellant was later charged in the Senior Resident Magistrate’s court on a count of robbery with violence contrary to section 296(2) of the Penal Code. At his trial, a police officer testified that they had held no identification parade because immediately the complainant had seen the appellant from the door of the vehicle, she had shouted that this was her assailant. In his defence, the appellant stated that he had been arrested by the police as he was looking for casual work in Tiwi. The trial magistrate found that the prosecution had proved its case, convicted the appellant and sentenced him to death. His first appeal to the High Court was dismissed. He now appealed to the Court of Appeal on the grounds, *inter alia* that the trial had been a nullity due to the lack of a legally competent court prosecutor during part of the proceedings.

**Held** – In the circumstances of this case, an identification parade would have been pointless. The recognition of the appellant by the complainant so soon after the robbery proved beyond reasonable doubt that he was one of the robbers. The evidence to the effect that the appellant had been found with the complainant’s property just after she had been robbed was also compelling. The use of the phrase “Coram as before” in the magistrate’s own note of proceedings meant that the appearances were the same as in the immediate proceeding entry. Where there was a record of a prosecutor being a named Inspector of Police and it was followed by an unbroken chain of one or more occasions where the phrase was used, the natural meaning of the use of the phrase was that on each occasion, the initially named prosecutor was present; *Bernard Lolimo Ekimat v Republic* distinguished. In this instance, there was no doubt that the Inspector who had been present on 5 July 1999 had also been present on 19 July and 2 August. There was therefore no basis for declaring the proceedings a nullity. Appeal dismissed.

**Case referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Bernard Lolimo*