**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.*

**JUDGMENT**

**Omolo, O’Kubasu and Deverell JJA:** This a second appeal from the decision of the Superior Court (LP Ouna J and J Khaminwa, Commissioner of Assize) (as she then was) on appeal from the original conviction and sentence in criminal case number 1903 of 1999 by (L Achode, SRM) in which she found the appellant before us, Nassoro Mohamed Mwabunja, guilty of the offence of robbery with violence contrary to section 296(2) of the Penal Code and sentenced him to death that being the mandatory sentence for this offence. The Superior Court summarised well the evidence of the complainant (PW1), a woman called Sophia Asha in these terms: “Sophia Asha had travelled overnight from Nairobi to Ukunda by a Tawfiq bus. She alighted at a place called Pahani clinic which is close to her home at Harmony village Diani Location in Kwale District within Coast Province. She had luggage which included a travelling bag and a paper bag containing her personal effects. She was alone. The time was about 5:15am in the morning of 11 June 1999. Immediately she stepped out of the bus and the bus having zoomed off and hardly a few steps towards her house, she saw four men walk towards her from the direction of a kiosk which she was to pass by on her way home. They encircled her. She stated in her testimony that all of them displayed knives and one of them carried a machete and a club. One of the men was tall. He confronted her face to face and held her neck. He demanded money. She told them she had none. The tall man was furious and attempted to stab her but because she was tightly clutching a bag on her side, the knife went through the bag making a hole in the bag. They then robbed her of her luggage, shared the items and took off. She raised the alarm and her neighbours came to her rescue, but the robbers had ran off and disappeared. They took her personal effects worth KShs 15 000. She proceeded to Diani Police Station and made a report. The police immediately swung into action and proceeded to an area which they knew was a notorious and well known escape route for criminals.” (PW2) PC Noa Adego described the ambush in his evidence thus: “IP Maina and I, left the vehicle immediately to intercept the thugs on a route in Harmony which we knew thugs use after attacking people at the bus stage. We got out of the vehicle and laid an ambush and presently two young men came along. The one in front had nothing in his hands but the second one carried a bag. When we told them to stop, they split and the one with the bag ran into some bushy thorn thicket and fell down. When we got to him and searched him, we found that he was lying on this bag (MFI 1 identified). At his waist was strapped this money bag. (MFI 6 identified). I also touched his side and felt a knife. It was in his trousers behind his right side. We opened the bag and found a jacket (MFI 2), trousers and two blouses. There were some glasses, purse, inner clothes and a novel. He could not explain what he was doing with these things.” After the arrest and recovery of the bag and its contents they drove back to the police station and on the way met the complainant who was going home although they did not know who she was. They stopped and requested her to get into the vehicle. In her testimony she said: “On the way I met the police vehicle coming back. It stopped beside me and the officer told me to come in. The minute I did, I saw the young man who had held me to the front and demanded money and even tried to stab me. I recognised him because he had long teeth and at that time he had a swelling on his forehead as if he had been hit by something. He is the one who had stood face to face with me and he is the one I had pleaded with not to kill me and yet he still wanted to stab me.” The appellant gave unsworn evidence that on that day he had gone to Tiwi to look for casual work when he was stopped by the police. He denied being one of the people who had robbed the complainant and stated that he knew nothing about the robbery. The appellant had cross examined the complainant and in answer she said: “The robbery was fast. It lasted just about 3 minutes. It was too early to have other people in the road. It was after 5:15am. You held me by my clothes in front at the neck and someone else was on one side and another stood on the other. I could not look at all these men. I identified you because you stood in front of me and we talked face to face. As I was climbing into the land rover I saw you and got startled and immediately shouted to the officers that you were the one who tried to stab me. Your face was still fresh in my mind. I was not too startled to identify my attacker especially when you were standing in front of me and talking into my face. You have a long mouth with long protruding teeth like a rodent’s.” (PW3) Inspector Isaac Ibrahim gave evidence as to how, following a report of different robbery along the beach at Diani, he and other police officers laid an ambush in the Tiwi bushes which robbers were known to use for their get away. He said that a few minutes before 5am he received a radio call that a woman had just been robbed some few metres from where he was. They then presently saw two figures coming along the path upon which they were. The police challenged the two men to stop. One disappeared into the bush but the other was caught. He was carrying a travelling bag in one hand and a money bag was strapped to his waist. He also had a knife. The man who unable to explain how he came to be in possession of the two bags and their contents other than to claim that he had just been given the bag by a family that lived in home nearby. He was unable to show the police where this alleged home was. The bags and their contents were later identified by the complainant to be hers and of which she had just been robbed. PW2 in his evidence explained that the reason why the police did not mount an identification parade was because immediately the complainant saw this man (the appellant) when she was at the door of the vehicle she just shouted that this was her assailant and the one who wanted to stab her. We consider that in these circumstances an identification parade would have been a pointless exercise. We are also satisfied that the recognition of the appellant by the complainant after the close face to face encounter so soon after the robbery proved beyond reasonable doubt that he was one of the robbers. Not much light is needed to see the features of a person face to face just before dawn when the sky is beginning to lighten. Furthermore there was the compelling evidence that the appellant was found so soon after the robbery to be in possession of the complainant’s property of which she had just been robbed as to which the appellant had no explanation. The learned Counsel for the appellant Mr GO *Odongo* relied heavily on the ground of appeal that the trial was a nullity due the lack of a legally competent court prosecutor during part of the proceedings. The learned Counsel for the state Mr VS Monda did not support the conviction and sentence for this reasonMr *Odongo*’s contention on this aspect was that there were two consecutive entries of the quorum on 21 June 1999 and 5 July 1999 for which IP Muthee and IP Muriuki respectively were shown as representing the State. The next two immediately following entries on 19 July 1999 and 2 August 1999 read “Coram as before”. All the subsequent entries expressly showed various Inspectors of Police as being present representing the State except for two mentions which were attended by Police constables. Mr *Odongo* rightly raised no issue relating to these two constables as the occasions attended by them were merely mentions which do not require attendance by a qualified prosecutor. However, Mr *Odongo* did submit that the two entries for 19 July 1999 and 2 August 1999 of the words “Coram as before” rendered the whole proceedings a nullity despite the fact that the two entries followed immediately after the 5 July 1999 entry showing the attendance of IP Muriuki. We consider that the use of the phrase “Coram as before” in the judge’s or magistrate’s note of proceedings must, unless there is an express contrary indication, mean that the appearance are the same as in the immediate preceding entry. Where there is a record of the prosecutor being a named Inspector of Police and it is followed by an unbroken chain of one or more occasions where the phrase is used, the natural meaning of the use of the phrase is that on each occasion the initially named prosecutor was present. It is only if there is a break in the chain of use of the phrase that it can validly be claimed that there is no evidence of the presence of the previously stated qualified officers. In the present case, the first two corams on 21 June 1999 and 5 July 1999 showed IP Muthee and IP Muriuki respectively as representing the State. This was followed by two entries for 19 July 1999 and 2 August 1999 using the phrase “Coram as before”. All the next three occasions show the presence of an Inspector of Police. There are the two occasions when the State is shown to be represented by a Police Constable but these occasions on 13 September 1999 and 22 September 1999 were mere mentions not requiring a qualified prosecutor as has been held by this Court. We consider that, applying the above analysis to the record of the proceedings, there is no doubt that IP Muriuki was present on both 19 July 1999 and 2 August 1999 being the dates as to which Mr *Odongo* has raised this issue. The case cited by Mr *Odongo* of *Bernard Lolimo Ekimat v R* criminal appeal number 151 of 2004 is distinguishable because in that case the record for the day on which the hearing commenced simply stated “Order: hearing to proceed”. There was no entry relating to the coram for that day at all. There is no basis for declaring the proceedings a nullity and we decline to do so. Having considered the evidence recorded we have no hesitation in rejecting the appeal which is hereby dismissed.

For the appellant:

Mr GO *Odongoe*

For the state:

Mr VS *Monda*