REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 16 OF 2008

EVANS NJUGUNA NDEGWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 15570 of 2004 of the Chief Magistrate's Court

at Makadara by K. Muneeni – Senior Resident Magistrate)

JUDGMENT

The appellant, **EVANS NJUGUNA NDEGWA**, was convicted on 2 counts of Robbery with violence **contrary to Section 296 (2) of the Penal Code**.

Thereafter, the appellant was ordered to be held in prison at the pleasure of the President of the Republic of Kenya. The said sentence was handed down because the appellant was a minor at the time the offences were committed.

Having re-evaluated the evidence on record, we do agree with both the appellant and the respondent, that the conviction on count 1 was not sound.

The reason for that is that there was no evidence about the manner or reason for the arrest of the appellant, in relation to that count.

The complainant, **LINUS MUNANU MWANGI (PW 2)** said that he was accosted by 6 robbers. At the time he was accosted, **PW 2** was at Gate 6, at the Air Force Base. He was robbed of a bicycle, make "HERM", and shoes.

However, he managed to escape from the robbers, and ran to the Chief's office.

6 days later, **PW 2** identified the appellant at an Identification parade which was conducted at Muthaiga Police Station.

During cross-examination, **PW 2** admitted that he had not described his assailants to either the police or to the Chief.

Therefore, as the arresting officer did not testify in relation to that count; and as no recoveries were made from the appellant; and also because there was no evidence to show why the police linked the appellant to the offence, so that they had reason to have him in the Identification parade, we find that the conviction was unsafe.

The respondent did, however, support the conviction on count 2. As far as Ms Mwanza, the learned state counsel was concerned, that conviction was safe because the appellant was "arrested" by the complainant.

The basic facts were that the complainant **(PW 1)** was attacked by about 6 to 7 persons, who assaulted him with an iron bar. However, **PW 1** fought back, before being overcome.

When the other robbers ran off, **PW 1** managed to hold onto the appellant, until the police arrived and re-arrested the appellant.

PW 4, PC BERNARD KINYANJUI, re-arrested the appellant when they found a group of young men robbing the complainant.

Although **PW 4** did not specify which of the complainants was being robbed when the police arrived, he said that the complainant was left holding onto the appellant. That evidence therefore suggests that when the police arrived at the scene, it is **PW 1** who was being robbed. We say so because it is **PW 1** who testified that he did hold onto one of the robbers until the police rescued him.

But then, the complainant whom **PW 4** found holding the appellant, said that he had lost a mobile phone and money to the robbers; whilst **PW 1** said that he only lost a mobile phone. He was categorical that he did not lose any money.

In the circumstances, it is not clear who was being robbed when **PW 4** and other police officers arrived at the scene.

Secondly, **PW 1** testified that at the time of the robbery he was in the company of **PW 2.** In contrast, **PW 2** said that he was all alone at the time of robbery.

If **PW 1** was with **PW 2**, they would have described the same scene, yet **PW 1** said that he was accosted before reaching the Air Force gate, whilst PW 2 was robbed at the Air- Force gate.

Furthermore, whilst **PW 1** said that it was dark at the place where he was robbed, **PW 2** said that there

were electric security lights at the scene. **PW 2** even talked of lighting from passing motorists.

Those inconsistencies were never explained by any prosecution witness or by the prosecution.

And it is also noteworthy that PW 1 had already drunk one Smirnoff Ice and 4 beers before he was robbed. That fact alone puts to question his level of sobriety at the time he was attacked.

The robbers hit him with an iron bar causing his eyes to get swollen. Therefore, **PW 1** readily conceded that he was unable to identify any of his assailants. He only managed to hold onto one of the said assailants.

According to **PW 1**, the incident took place at 8.30p.m.

If the police re-arrested the appellant from the hands of **PW 1**, it is inexplicable how the appellant was later able to attack **PW 2** between 9.00p.m. and 9.30p.m, as asserted by **PW 2**.

The learned trial magistrate was alive to that position, but proceeded to find as follows;

"From the evidence it would imply Linus Mwangi was the first to be attacked...."

That finding is not supported by the evidence on record.

In the result, we find and hold that the convictions on both counts were unsafe. Accordingly, the convictions are quashed and the sentence is set aside.

We order that the appellant be set at liberty forthwith unless he was otherwise lawfully held.

Dated, Signed and Delivered at Nairobi this 20th day of February, 2012.

.....	**.....**
FRED A. OCHIENG	**L.A. ACHODE**
JUDGE	**JUDGE**