JOHN KIMANI GITAU ....APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

JUDGMENT

1. The Appellant, John Kimani Gitau was tried and convicted at Kibera Chief Magistrate's court with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code.**

2. The brief particulars are that on the 12th day of December, 2006 at Dagoretti market within Nairobi Area Province, jointly with another not before the court while armed with offensive weapons namely a rungu and a screw driver, they robbed Philip Gitau Kimuhu of a mobile phone make Motorola C 113 valued at Kshs.1900/- and cash 100/= and at or immediately before or immediately after the time of such robbery used actual violence against the said Philip Gitau Kimuhu.

3. The Appellant being aggrieved by the decision of the court filed an appeal against conviction and sentence. He advanced six grounds in which he stated that the learned trial magistrate erred in law and fact by failing:

1. ***to find that circumstances during the robbery were not conducive to proper identification:***

2. ***to resolve material contradictions in favour of the Appellant;***

3. ***to find that nothing incriminating was recovered from the Appellant:***

4. ***to note that the nickname allegedly given to the Appellant by PW1 and PW2 did not belong to him:***

5. ***to find that the prosecution did not prove their case beyond reasonable doubt;***

6. ***to consider the Appellant's defence adequately, and to comply with Section 169(1) of the Criminal Procedur Code.***

4. The prosecution called four witnesses on identification. **PWI** the Complainant stated that the offence occurred at 8.15 p.m. and that the scene was dark. His assailant accosted him and led the Appellant to a dark spot where he beat him up. The assailant had a torch which he shone in the face of PWI. A second person came from behind and hit **PWI** with a piece of timber. He fell down but got up and screamed for help. Some young men ran from the bar in which he worked and chased the assailants. They arrested the Appellant a short distance away within that area.

5. PW2 was one of the young men who responded to the Complainant's cry for help. He said that when he got to the scene the Complainant reported that someone, whom he knew by appearance and not name, had robbed him of his phone. The Complainant pointed at the Appellant as the one who had taken his phone. At that moment the Appellant began to flee but PWII and others chased and arrested him some 30 metres away. They did not recover anything on the Appellant, and PWII did not know the Appellant before. They handed him over to police from Dagoretti police post.

6. The Appellant in his unsworn defence admitted being at the bar referred to by PWI, but stated that he was arrested because he inadvertently tipped a table over, which caused drinks to spill, and he had no money to pay for the spilled drinks. He denied the offence.

7. The Court has examined the evidence on identification, and noted that the Appellant was arrested within close proximity to the scene of the robbery after a brief chase. The court also notes that **PW2** found him still at the scene and he was pointed out to **PW2** as the robber by PW1 before the chase began.

8. From the evidence of PWI, he was attacked by two people whereas only one of them was arrested. The fact therefore that the mobile phone and cash stolen from PWI were not recovered from the Appellant, does not preclude him from being one of the assailants.

9. The Appellant was not identified by some nickname, but was arrested in close proximity to the scene of robbery in the process of fleeing the scene. The nickname would be material if he disappeared and **PWI** and **PW2** were left to locate a person not known to them but whose nickname they came to know.

10. Since this is the first Appellate court, we have carefully considered this appeal and have evaluated and analyzed the evidence afresh as expressed in **OKENO VS REPUBLIC 1972 E.A. 32.** We are satisfied that there were no contradictions, in the evidence of **PWI** and **PW2**, the two witnesses who were at the scene of the robbery. We are also satisfied that the learned trial magistrate gave due consideration to the evidence of the Appellant, and concluded, rightly so, that it did not shake the prosecution's evidence on record.

11. If indeed, as the Appellant would have both this and the trial court believe, this case was planted on him for failure to pay the bill for drinks that he spilled inadvertently while in the bar, then the injuries that PW3, the arresting office, saw on PWI when he arrived at the scene would be unexplained. **PW4,** Dr. Mwaura who examined **PWI** five days later and filled a P3 Form in this respect, confirmed that PWI had injuries on the left side of the head which was swollen and bruised. PWI also had tenderness in the left side of the neck, and the left elbow was also swollen and bruised.

12. In our opinion the evidence of the injuries as observed by **PW3** and PW4 was consistent with the evidence of PWI, that he was hit on the side of the head by a second person from behind and that he fell to the ground.

13. We have carefully considered the evidence on record and find that the evidence of PWI is well corroborated by **PW2, PW3** and **PW4**. The evidence of the four witnesses interlocks to establish that the Appellant, together with another, were at the *locus-in-quo* on the ill-fated night. The Appellant was armed with what PWI only identified as an "implement," which he used to threaten PWI. His cohort was armed with a piece of timber. In this case the implement and the piece of timber in the hands of appellant and his cohort qualified to be called offensive weapons. We say so because the test of whether an article can be described as a dangerous or offensive weapon is really the use or the purpose for which the person possessing it intends to put it to (see **DAVID ODHIAMBO AND ANOTHER VS. REPUBLIC** Criminal appeal No. 5 of 2005. Their Lordships cited Section 89(4) of the Penal Code which defines an offensive weapon as meaning
"any article adapted for use for causing injury to the person, or intended by the person having it or under his control for such use."

The implement and piece of timber were indeed in the circumstances intended by the appellant and his companion for use of harming the complainant. Thus the two articles fall under the category of offensive weapons. The court notes that the piece of timber was used to strike and wound **PWI** during the robbery, while the unidentified implement in the Appellant's hand was used to threaten PWI. In the course of the attack, PWI did lose his mobile phone make Motorolla and Kshs.100/- in cash.

14. We are therefore satisfied, that the ingredients of the offence of robbery under Section 296(2) of the Penal Code, were met and that the learned trial magistrate, directing herself to the evidence before the

court, and the law applicable, came to the right conclusion. We are unable to believe the Appellant's evidence in light of all other evidence on record.

15. We dismiss the Appellant's appeal and uphold both conviction and sentence, as determined by the trial court.

SIGNED DATED and **DELIVERED** in open court this **9th day** of **February 2012.**

F. A. OCHIENG **L. A. ACHODE**

JUDGE **JUDGE**