REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Criminal Appeal 204 of 2008

MOSES LUKUPANU..... APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

(From the original conviction and sentence in Criminal Case No.5103 of 2006 of the Chief Magistrate's Court at Kibera by Maundu (Mr.) –Senior Resident Magistrate)

JUDGMENT

The appellant, **MOSES LUKUPANU**, was convicted for the offence of Robbery with violence **contrary to section 296 (2) of the Penal Code**. He was then sentenced to death.

Being dissatisfied with both the conviction and sentence, he lodged an appeal to the High Court. In his said appeal, he raised eight (8) issues, which can be summarized as follows;

(1) ***The charge sheet did not conform with*** *section 137 (c) of the Criminal Procedure Code,* ***as the items allegedly stolen from the complainant were not specified.***

(2) ***The charge sheet was fatally defective because it failed to cite cash as one of the items allegedly stolen from the complainant, yet the complainant later said that he had lost cash to the appellant.***

(3) The identification was inconclusive.

(4) The alleged identification of the appellant at the Police Station was worthless because the appellant was exposed to complainant.

(5)None of the stolen items were recovered from the possession of the appellant. The items were found at the house where the appellant was a visitor.

(6) The appellant was a victim of circumstances, not a villain.

(7)Crucial witnesses failed to testify.

(8) The defence was cogent and plausible. It displaced the prosecution's case.

As the first appellate court we have re-evaluated all the evidence on record, and drawn therefrom our own conclusions. In doing so, we have borne in mind the fact that, unlike the learned trial magistrate, we did not observe the witnesses when they were giving evidence.

(1) <u>Charge Sheet</u>

The particulars of the charge sheet were that on 4th September 2006, along Lang'ata Road, Hardy Estate, whilst the appellant was;

"***armed with a dangerous weapon namely a Somali sworn robbed DUNCAN KIOKO KALIKU of a briefcase containing clothes valued at KShs.10,000/- and at or immediately at the time of such robbery threatened to use actual violence to the said DUNCAN KIOKO KALIKU."***

The first issue taken by the appellant was that the word "clothes" was not specific, as required by law. He submitted that the charge sheet should have specified if the items included shirts, trousers etc.

Secondly, although the charge sheet cited the value of the clothes as KShs.10,000/-, the complainant said that the items which were stolen from him were valued at KShs.8,500/-. The value cited by the complainant included KShs.2,000/- in cash, photo albums and an exercise book.

<u>Identification</u>

The incident took place at night and the only light that illuminated the scene was on a fence. Meanwhile, the attacker's head and neck were covered.

Those circumstances were described by the appellant as being unfavourable for a positive identification.

Thereafter, at the police station, the ability of the complainant to identify the attacker was not put to an objective test, as the appellant was taken out from the cells and shown to the complainant.

<u>Possession of stolen items</u>

Although the trial court held that the appellant was found in possession of the items that had just been stolen from the complainant, the appellant says that that finding was factually inaccurate. He said that the items were found in the house of a man called Robert, whom the appellant had gone to visit.

In any event, one witness said that the bag was inside Robert's house, whilst another witness said that the luggage was outside the house. Therefore, the appellant said that the evidence was not reliable.

And because Robert did not testify, the appellant argued that there was a gap in the prosecution case.

The appellant said that he was arrested when visiting Robert.

Therefore, if the bag was at Robert's house, he says that he was only a victim, not a villain.

In answer to the appeal, Ms Mwanza, learned state counsel, submitted that the circumstances prevailing at the time the offence was committed were favourable for positive identification.

The respondent also submitted that the identification of the appellant was based on the recovery of the stolen items from his possession.

As the face of the attacker was not covered, the respondent said that his identification was very positive.

At the time of the attack, the respondent says that there was light from the security lighting nearby, as

well as lights from a passing vehicle.

On the following morning, the complainant was able to identify the appellant at the police station.

After re-evaluating the evidence on record, we find that **PW 1** was walking with his wife **(PW 2)** from "Stage 12" in Karen, towards their house at Kuwinda Village. The time was 8.00p.m.

He was carrying a suitcase, inside which were his and his wife's clothes, together with KShs.2,000/- cash.

When **PW 1** was about 15 metres from his house, a young man emerged from some bushes beside the road. He was armed with a panga and a rungu.

When the young man raised up the panga, after threatening to cut **PW 1** and **PW 2**, the complainant held that hand. He then struggled with the assailant. At that time, the assailant hit **PW 1** on his ribs, using the rungu. That caused **PW 1** to let go of the assailant.

PW 1 said that the assailant was wearing a woolen hat on his head. The hat covered his head and neck, but not the face.

On the next morning **PW 1** found one of his shirts and a photo album at the place where the assailant had opened the suitcase, after the complainant had abandoned it.

PW 1 found a watchman at the residence of John and Margaret Keen, who told him that they had arrested a man on the previous night. They took the man to Hardy police Station. The watchman was named Robert.

PW 1 went to Hardy Police Station where **PW 6** was interrogating the appellant. **PW 1** and **PW 2** identified as theirs, the suitcase which had been brought to the police station alongside the appellant. They also identified the contents of the said suitcase.

One of the things that were inside the suitcase was a photo album, which had the photographs of **PW 1** and **PW 2**.

Both **PW 1** and **PW 2** said that the police showed them the suspect. It is then that they identified him, as the person who had robbed them the previous night.

In our considered opinion, the police officers at the police station erred by bringing out the suspect from the cells, and showing him to the 2 potential identifying witnesses.

As the suspect was arrested in the absence of the potential identifying witnesses, the police ought to have organized two (2) parades, at which **PW 1** and **PW 2**, respectively, would be asked to try and identify their assailant. Instead, the police exposed the suspect to the complainant and to the complainant's wife. In the circumstances, the court cannot be sure that the appellant was actually identified when the offence was being committed.

The attack is said to have occurred about 15 metres away from where the complainant lived however, even though **PW 2** screamed, nobody came to their rescue. Even the guard at the nearby residence did not come out.

We are therefore of the view, that the estimation by **PW 1**, about the distance from the scene of attack, and his house was deliberately understated. We say so because after the complainant was robbed, the person who robbed him walked some distance, and then stopped to open the suitcase.

Surely, if the attack was so close to the complainant's house, it would imply that the robber would literally have been at or beyond **PW 1's** house, by the time he started inspecting the contents of the suitcase.

The plot where **PW 1** used to live was guarded by a watchman named Maina.

The robber passed near that plot, and then sat down to inspect the contents of the suitcase. **PW 1** saw him inspecting the suitcase after **PW 1** had talked to Mr. Maina, the watchman. But the watchman declined to pursue the attacker because he did not know the weapons which that man might have had with him.

What was the source of lighting at the scene of crime? **PW 1** said that there was moonlight: But **PW 2** said that there were lights from a car which approached the scene from the same direction as the complainant had emerged from.

To our minds, it would defy logic for a lone man to be so courageous as to attack two people in an area which was well lit; and to thereafter, be so defiant as to open the suitcase which he had just stolen, so that he can inspect its contents.

In any event, the robber's head was covered. And, as **PW 2** said, the person who robbed them did not have any distinctive mark on him. He simply had the

"facial appearance (like) that of a Maasai".

Meanwhile, **PW 1** identified the robber because of his physical stature. He did not specify the said physical stature.

In conclusion, therefore, we are unable to say that the circumstances prevailing were conducive for positive identification. We have reasonable doubts about the alleged identification.

But was not the appellant found in possession of the items which had just been stolen from **PW 1**?

According to **PW 1**, the robber was arrested by Robert, who was one of the watchmen at the residence of John and Margaret Keen.

PW 3, John Kyalo Musai, was a watchman at the residence of John Keen. On the material night, he was on duty, when he heard a woman screaming about 100 metres away. The noise was coming from:

"where it was bushy and at a corner."

10 minutes later, Robert came to **PW 3**, and informed him that he (Robert) had recovered something. Robert then took **PW 3** to his house, where he found the appellant, together with the wife and children of Robert.

Robert told **PW 3** that the appellant had brought the travelling bag to his (Robert's) house.

PW 3 called other watchmen, who joined Antony Keen to take the appellant to Hardy Police Station.

As **PW 3** said, he found the bag inside Robert's house. **PW 3** also said that he was aware that Robert and the appellant knew each other.

PW 4, Arikoro Alichare, is also a watchman at the Keen's residence.

He said that Robert Rupelo had travelled to his home in Maralal, after his services were terminated.

PW 4 testified that Robert and the appellant had known each other, and that the appellant used to visit a female worker who used to work at the homestead of John Keen.

As the appellant's defence was that he had been found at Robert's house, where he had gone visiting; and because when the bag, suitcase or briefcase was found inside (or outside) Robert's house, there were other persons present, it cannot be said that the said suitcase, bag or briefcase was "in the possession" of

the appellant.

The prosecution was well aware of the need to have Robert Rupelo testify, so as to adduce evidence of how the suitcase reached his house. For that reason, the prosecution applied for witness summons, and the court issued the same. However, the prosecution later closed its case before Robert Rupelo had testified. The prosecution also failed to offer any explanation for the failure of Robert to testify.

In the circumstances, we find that the appellant's defence gives rise to a reasonable doubt as to his culpability in the crime. He may have been an innocent visitor at Robert's residence. Of course, he might have been a visitor, but one who came with stolen baggage. But because Robert, his wife and his children did not testify, the court could not say with any degree of certainty that it is the appellant who robbed **PW 1**. There is the possibility that Robert may have been responsible.

In the event, we find that it may be unsafe to sustain conviction. We therefore allow the appeal, quash the conviction, and set aside the sentence.

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

Dated, Signed and Delivered at Nairobi this 17th day of May, 2012.

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