**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL APPEAL 772 OF 2007**

**WILSON KIMANI MUNGAI ……..……APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 1235 of 2007 in the Chief Magistrate's Court at Kiambu – Mrs. G. W. Macharia (SRM) on 5/12/2007)*

**JUDGMENT**

**1. Wilson Kimani Mungai,** the appellant herein was tried and convicted for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** by the learned Senior Resident Magistrate at Kiambu law courts.

**2.** The chief facts are that on the 6th day of March 2007, at Kihara in Kiambu District, jointly with others not before Court while armed with offensive weapons namely pangas, they robbed Wilson Kamau Mungai of cash Kshs.6,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Wilson Kamau Mungai.

**3.** Upon conviction he was sentenced to suffer death as by law prescribed. Being aggrieved by the conviction and sentence the appellant filed appeal number 772 of 2007.

We have anxiously re-evaluated the evidence on record bearing in mind that the duty of the first appellate court is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion. In **Kiilu and Anor v Republic [2005] 1 KLR pg 174,** the learned Judges of Appeal, Tunoi, Waki and Onyango Otieno JJA, held *inter alia* that:

***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts' own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions."***

**4.** In this case the 1st ground of appeal was that the circumstances of identification were not conducive. To advance this ground, learned counsel Mr. Gatumuta for the appellant submitted that **PW1** was being chased by two panga wielding persons, whom he did not identify. That he could not purport to

have identified a third person who emerged from a side walk. In his opinion these conditions were not conclusive for identification.

**5.** The learned state counsel Miss Mwanza, opposing the appeal on behalf of the state, submitted that whereas **PWI** did not identify the first two assailants, he identified the third man because he was his brother, and that the scene was well lit.

**6.** We have scrutinized the record and it shows that **PWI** was first chased by two men who emerged from the side of the road wielding pangas. As he ran, a third man emerged from a foot path leading into the shamba, and cut him on the upper part of the face and he started bleeding. He turned back towards the direction he had come from but the other two men had also reached him. They cut him on the head and he lost consciousness.

**7.** The time of the assault was 7.30 p.m. but **PWI** said that he had a light on his house that illuminated a radius of 500 metres around the house. He testified that when he regained consciousness he found that the pair of long trousers he was wearing and the Kshs.6000/- therein were missing.

**8.** The circumstances of identification thereof are that **PWI** was fleeing because his life was in danger. Two panga wielding men were pursuing him when a third man emerged from a foot path and immediately cut him on the face. He turned back and was confronted by his pursuers who also cut him on the head before he fell down unconscious.

**9.** It is our humble opinion that the pace of events was fast, and the circumstances were such that there was not sufficient time for **PWI** to take a good look at the third man, and be able to identify him. The appellant denied the offence and told the court that at the material time he was at home in bed. We also noted that the appellant's arrest came almost three months later, even though **PWI** told the court that they were brothers, and that the appellant lived on PWI's farm. In reaching this conclusion we took into account the Court of Appeal decision in **Ogeto v Republic [2004] 2KLR**, in which the Hon. Judges of Appeal Omolo, Githinji and Onyango Otieno, JJA held, *inter alia*, that:

***"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken".***

**10.** The 2nd and third grounds of appeal were that the first report to the police was that of assault and further that there existed a grudge between the appellant and **PWI** over land ownership. On these grounds learned counsel for the appellant, Mr. Gatumuta, submitted that, chances of bad blood between the appellant and **PWI** forming the basis of the prosecution, could not be ruled out. This is in view of the fact that the two are brothers but have very many cases between them. **PWI** was also in the process of evicting the appellant.

**11.** The learned state counsel Miss Mwanza on her part, submitted that it was a true fact that there was a pre-existing grudge between **PWI** and the appellant concerning land. She however submitted that the said grudge was not material to the case before court. In her opinion **PWI** did not use that case to fix the appellant.

**12.** From the evidence on record there appears to exist deep rooted animosity between the two brothers. In cross-examination **PWI** had this to state.

***"I have had many cases with you. Firstly you live on my land to date. Secondly there is a time you threatened that you would kill me. The case involves land. I was appointed administrator and all of us were given our share but you have refused to be contented. Our mother had run away that is why I was made administrator. I am now in process of getting an eviction order against you."***

It is likely that in those circumstances, upon being attacked in such a vicious manner, the first culprit to

come to the mind of **PWI** would naturally be his brother who had earlier threatened to kill him, and whom he was in the process of evicting.

**13.** Ground 4 and 5 are that the conviction was based on contradictory evidence, and that crucial witnesses did not testify. Learned counsel Mr. Gatumuta submitted that there were material contradictions as to the time of the attack. Whereas **PWI** testified that the attack occurred at 7.30 p.m., **PW2** his wife testified that it occurred between 8.00 p.m. and 8.30 p.m. while **PW6** the Investigating Officer testified that the attack occurred at 11.00 p.m. The learned counsel also submitted that whereas **PW6** testified that **PW2** was alerted of the attack that was going on outside by her daughter who heard screams, **PW2** herself did not mention her daughter.

**14.** Indeed the record shows that **PW2** was none the wiser about the attack until **PWI** knocked at the door. She opened the door for him only to find his face and body covered in blood, and he did not have his long trousers on.

**15.** If **PWI** was attacked some 3-4 metres outside his gate and there were screams from himself and some unknown woman, it is incomprehensible that **PW2** who was in a kitchen where, according to her testimony, she could see who was at the door by looking out of the window, did not hear the screams.

**16.** In sum we find that the issues we have adverted to in this judgment raise serious doubt to which the trial court did not address itself. We find therefore that the prosecution's case was not proved beyond reasonable doubt and the conviction entered against the appellant cannot stand.

We therefore allow the appeal, quash the conviction, and set aside the sentence imposed upon the appellant.

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

**SIGNED DATED** and **DELIVERED** in open court this ***19th*** day of ***June*** **2012.**

**F. A. OCHIENG**
**JUDGE**

**L. A. ACHODE**
**JUDGE**