REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCR NO. 59 OF 2009

BOSCO MUGENDI NJERU……..……ACCUSED

VERSUS

REPUBLIC…….PROSECUTOR

LESIIT J.

JUDGEMENT

The appellant was charged with count of robbery with violence contrary to section 296(2) he also faced an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. After hearing the case the learned trial magistrate reduced the charge from capital to simple robbery contrary to section 296(1) of the Penal Code on the grounds that the robbery was not aggravated. The accused person was sentenced to serve 5 years imprisonment and thereafter to be on police supervision for five years.

The appellant was aggrieved by the conviction and therefore filed this appeal. He was represented by counsel Mr. Basilio Gitonga. Mr. Gitonga argued only one of the eight grounds of appeal raised in the petition. The ground argued was:-

"**The learned trial magistrate erred in law and in fact in failing to hold that the prosecution had not proved their case on the required standard thereby convicting the appellant on insufficient evidence".**

Mr. Gitonga urged that the appellant was convicted for the offence of robbery on the basis that a Seiko 5 watch was stolen from the complainant was found in his possession. Mr. Gitonga submitted that PW1 the complainant in this case did not adduce evidence to establish how he was able to identify the watch as the one that was stolen from him. Mr. Basilio urged that the learned trial magistrate did not consider the appellant's defence that he had differences with AP Corporal Hussein who told the court that he was the one who recovered the watch from the appellant.

Mr. Kimathi learned counsel for the state conceded the appeal on three grounds; the first one was on the ground that even the complainant said that he identified one of the boys who attacked him as Mugendi i.e. the appellant he did not mention this to PW2 and 3 who are his neighbours. PW2 and 3 in their evidence stated that the complainant did not tell them that he had recognized any of his attackers. The second reason the state conceded to this appeal was the fact that the appellant also claimed the Seiko 5 watch that was recovered from him was his. Mr. Kimathi urged that since the complainant did not give any cogent evidence of how he identified the watch as his that evidence was not sufficient. The third reason why the state conceded on the ground AP Corporal Hussein was a very important witness and that he was not called to testify in this case.

I have carefully analyzed and evaluated the evidence that was adduced before the trial court. In the case of **OKENO V. REPUBLIC [1972] EA 32**. the role of a first appellate Court is given as follows:

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

The evidence against the appellant was that of the complainant PW1. The complainant claims that he recognized the appellant as one of the young men who attacked and robbed him on the material night. The complainant also purported to identify a watch recovered from the appellant one day later after the incident. PW2 and 3 who are neibhbours of the complainant went to his rescue when they heard him screaming on the road after the attack. It is not worthy that the complainant did not inform PW2 and 3 the far that he had recognized any of his attackers from the evidence of the trial court it is clear that complainant only named the appellant one day later. The person the complainant alleges that he informed that the appellant was one of the attackers was not called as a witness. In addition apart from casually identifying the watch on the basis of the colour on the face of it the complainant did not give any cogent basis upon which he identified the watch. The watch was recovered from the appellant by an Ap Hussein who handed it over to PC Simiyu PW4. Pc Simiuyu was however not called as a witness. **BUKENYA & OTHERS** (supra), LUTTA Ag. VICE PRESIDENT held:

"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

I have considered the appellants defence. In that defence the appellant testified that he was arrested by an Administrative Police Officer on allegations that he was seen talking to his wife and also for the reason the appellant owned a Seiko watch which the appellant alleged was stolen from him. I find that in view of the allegations made by the appellant in his defence and in view of the fact that there was no evidence of how the watch was recovered that the Administration Police Officer who arrested the appellant and recovered the watch was a material witness in the case. The learned trial magistrate ought to have made an advance inference that the reason why the Arresting Officer was not called as a witness was that if he was called his evidence would have tended to be advance to the prosecution case. I agree with the learned State Counsel and the appellants counsel that the evidence of recognition of the appellant by the complainant was unreliable in the circumstances and further there was no evidence to sufficiently identify the watch found in the possession of the appellant as the same one that was stolen from the complainant. Having come to this conclusion I am satisfied that the appellant appeal has merit. I find that the conviction entered in this case was unsafe and should not be allowed to stand. I consequently quash the conviction set aside the sentence and the police supervision order. I order that the appellant should be set

at liberty forthwith unless he is otherwise lawfully held.

Dated Signed and delivered at Meru this 17th day of February 2011

LESIIT, J
JUDGE