REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 170 OF 2007

MICHAEL NG'ANG'A KINYANJUI……..……..……..APPELLANT

VERSUS

REPUBLIC ……..…….RESPONDENT

(From the original conviction and sentence in Criminal Case No. 8191 of 2005 of the Chief Magistrate's Court at Kibera by Maundu - Senior Resident Magistrate

JUDGEMENT

The appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars are that on the 21st day of November 2005 at City Park within Nairobi area jointly with others not before court while armed with a toy pistol robbed Francis Kiteta King'oo of one mobile phone make Siemens C25 valued at Kshs.3,650/= and at or immediately before or immediately after the time of such robbery wounded Francis Kiteta King'oo. The prosecution called four witnesses in support of the charges against the appellant.

According to the complainant, on the material day at about 4 p.m. he was going to his place of work Aga Khan Hospital through City Park. As he was walking he was confronted by three attackers who ordered him to stop and hand over his mobile. Suddenly he was hit on the head by one of the intruders who was holding a pistol. The said person then took the phone from the complainant right trouser pocket. It was then that members of the public noticed the commotion and started shouting thiefs, thiefs! The assailants took off and members of the public started chasing them. According to the complainant at the time the attackers were being chased, he was bleeding from his head as a result of the injuries inflicted upon him by the attackers. The complainant reported the matter to Parklands Police station where he recorded a statement and was issued with a P3 form. The P3 form was filled by PW4 who assessed the degree of the injury as harm.

One of the members of the public who came to the rescue of the complainant and who assisted in arresting the appellant, was PW3 **Kennedy Wekesa Wanyonyi**. The said witness narrated to court how he was attracted to the attack perpetrated by the appellant and his colleagues against the complainant. He said he is the one who raised alarm after he found the complainant being attacked by a group of three boys. He raised alarm and also chased the appellant till he arrested him a few metres away from the scene. When the appellant was arrested, he was found in possession of a toy pistol that he used to attack the complainant.

It is the evidence of PW2 Cpl Peter Kiio that on the material day he was informed that there was a robbery which took place at City Park and that a toy pistol had been recovered from one of the

suspects. Together with three other officers, he proceeded to City Park where he met the complainant bleeding from the head. He also found a big crowd who were in the process of lynching the appellant. He stopped the members of the public from lynching the appellant and that he was given a toy pistol recovered from the appellant by PW3.

The appellant gave sworn testimony and stated that on the material day he was going to play football at City Park when he was stopped by a group of people asking him why he was running. One of those people allegedly told him that he was one of the robbers who had robbed people at City Park. He was suddenly hit on the head and lost consciousness. He later found himself at Aga Khan Hospital where he was told that he was taken by police officers and that he had been unconscious for five days.

After analyzing the evidence of the prosecution and the defence by the appellant, the trial court expressed himself as follows;

"I have no doubt in my mind that the said pistol was recovered from him. It was during the day and there is no possibility of a mistaken identity. I find the evidence against him to be watertight. His defence is therefore false."

The question for our determination is whether the appellant was properly convicted by the trial court. This is a first appeal and it is our duty to re-evaluate the evidence in order to determine whether the prosecution proved its case beyond reasonable doubt. The law is that the identification of a person who took part in an alleged offence and was chased from the scene of crime to the place where he was arrested, is of course strong evidence of identification if all the links and the chain are not broken. In this case, the complainant was attacked in City Park during broad daylight by a group of three intruders. As the complainant was being attacked, the incident was noticed by PW3 who raised alarm and followed the assailants till one of them was arrested.

The evidence of PW3 is that he had seen and properly identified the appellant as one of the persons who attacked and took away a mobile phone during the time of the incident. It is the evidence of PW3 that he did not lose sight of the appellant until he arrested him a few metres from the scene of crime. It is also the evidence of PW3 that the appellant was the one who was pointing a toy pistol to the complainant and that he was found in possession of a toy pistol at the time he was arrested.

In our view the evidence of PW3 was cogent and credible since he did not lose sight of the appellant from the time of attack to the time he arrested him. A toy pistol was recovered which was identified by the complainant as the one that was used by one of the attackers during the time of robbery. It is also our view that the manner in which the appellant was arrested, is a clear indication that he was one of the assailants who attacked and robbed the complainant. The appellant was arrested a few metres from the scene and PW3 was firm and forthright in stating that he did not lose sight of the appellant. The fact that the appellant was clearly identified by PW3, is a clear indication that he is the one of the persons who attacked the complainant.

We have also analyzed the conduct of the appellant in refusing to participate in the proceedings when PW3 was about to give evidence. On 14th March 2006, PW3 travelled from Kitale and was in court to give evidence. The appellant asked for more time which was given by the trial court. On 15th March 2006, the appellant informed court that he did not want PW3 to give evidence. He intentionally went back to the cells and the trial court proceeded with the evidence of PW3 who gave evidence as PW1.

On 7th July 2006, the appellant made an application asking the case to start afresh. The trial court then allowed the application and ordered the case to start de novo. On 5th October 2006, the trial court was informed that PW3 had travelled from Kitale and was ready to give evidence. The appellant informed court that he did not want to proceed with the case and made an application to recall the complainant. The trial court noted that the appellant was not eager to proceed with the case and allowed PW3 to testify. From the conduct of the appellant and his reluctance to hear the evidence of the person who chased and arrested him is a clear illustration that PW3 is a witness of truth. In our view the trial court was right in believing the evidence of PW3. We also think that the trial court was right in believing that

the appellant was the one allegedly chased by PW3 till he was arrested. The failure to call some of the members of the public who assisted PW3 in arresting the appellant cannot vitiate the proper conviction entered by the trial court. We therefore think that the appellant was convicted on sound and clear evidence. In short the prosecution proved its case against the appellant beyond reasonable doubt. Consequently we uphold the conviction and affirm the sentence entered by the trial court.

Dated, signed and delivered at Nairobi this 15th day of February, 2011.

J. KHAMINWA
JUDGE

M. WARSAME
JUDGE