REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 553 OF 2007

SAMUEL OCHIENG ONYANGO ……..……..APPELLANT

VERSUS

REPUBLIC ……..…….RESPONDENT

(From the original conviction and sentence in Criminal Case No. 4668 of 2006 of the Chief Magistrate's Court at Makadara by Miss Karani - Senior Resident Magistrate

JUDGEMENT

The appellant was charged with offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars are that on the 23rd day of august 2006 at Kasarani estate Nairobi jointly with another not before court and while armed with a dangerous weapon namely knife robbed Ibrahim Migwi Kimangi Safaricom line and a wallet all valued at Kshs.200/= and at or immediately before or immediately after such robbery used actual violence to the said **Ibrahim Migwi Kimangi**.

The complainant testified as PW1 and stated that on the material day at about 5.50 a.m. he was accosted and robbed of the items listed in the charge sheet. The robbers were two in number and after robbing him disappeared in the direction where he had come from. The complainant decided to follow the robbers from a distance until they reached a place near his work place. He screamed for help and his colleagues who were guarding a nearby premises came to his assistance. One of the robbers escaped, however, the appellant ran in between two houses where he was caught hiding behind a bush.

The evidence of PW2 George Gachanja, a watchman, is that on the material day he heard the complainant shouting thief, thief. He immediately responded and found the appellant running away from the scene. PW2 and his colleagues got suspicious as the appellant was not in a watchman's uniform, so they surrounded the area and arrested him.

PW3, Geoffrey Irungu a watchman, stated that on the material day he was attracted to the screams of the complainant who was asking for assistance. He stated that he saw the appellant running into a place and that he was later found squatting in a bush.

PW4, PC Wilson Ruto rearrested the appellant and testified that he went with the appellant to the scene where the complainant's wallet was recovered.

The appellant denied the charges that were leveled against him and stated that he was arrested after some people asked him where he was from and where he was going. He stated that the people accused him to be a thief and started beating him.

The trial court convicted the appellant on the grounds that the evidence of PW1, PW2 and PW3 was watertight and connected him to the charge. The trial court was of the view that there was no room for mistaken identity since the appellant was found at the scene a few minutes after the complainant was robbed. The trial court also convicted the appellant on the grounds that personal documents of the complainant which were earlier robbed were recovered at the very place where the appellant was found hiding.

We have considered the issues raised by the appellant and whether the appellant was convicted on cogent, sound and overwhelming evidence. No doubt the complainant was robbed as he was coming from his place of work by two intruders. There is no indication from the evidence of the complainant that he had an eye contact of the robbers before and at the time of the robbery. There is also no indication in the evidence of the complainant that he did not lose sight of the robbers from the time of the robbery to the time the appellant was arrested allegedly squatting in the bush. We have no evidence to show how PW1, PW2 and PW3 identified the appellant as the one who had committed the alleged robbery. Nothing is said about the appellant's features, attire or other descriptions that would have enabled the complainant to identify him as the one who robbed him.

No doubt the robbery took place at around 5.50 a.m. which is fairly dark and in such circumstances the issue of identification of the assailant is crucial and significant in a proper conviction. It is not the evidence of the complainant that he did not lose sight of the robbers from the time of the robbery until the appellant was apprehended. It is alleged that the appellant was found squatting in a bush in suspicious circumstances.

As a general rule, the burden on the prosecution of proving the guilt of an accused person beyond reasonable doubt never shifts. The appellant denied that he was involved in the alleged robbery and confirmed that he was arrested while in his normal business. The trial court convicted the appellant mainly on circumstantial evidence that he was found squatting in a bush and that he later led police to the recovery of items earlier stolen from PW1. There is no evidence to show that it is appellant who showed police the place where the alleged items were recovered from.

The evidence of PW4 is that he went to the scene where the appellant had been arrested from. On reaching the scene, a wallet and a knife were recovered. He also stated that the complainant could not identify the knife as the one that was allegedly used by the robbers at the time of robbery. We think that the possibility of mistaken identity was not eliminated by the prosecution. The fact that the appellant was found squatting in a bush cannot be a basis to infer guilt against him. In all the circumstances we think the finding of facts made on identification and arrest were based on the wrong evaluation of evidence. We are entitled to interfere with those findings.

The circumstances leading to the arrest of the appellant did not clearly point to the guilt of the appellant. In essence a reasonable tribunal cannot conclude that the robbery and the arrest of the appellant were proved beyond reasonable doubt. There is no evidence to link the appellant to the robbery that was committed against the complainant. In our view the evidence tendered by PW1, PW2 and PW3 as regards the arrest of the appellant did not measure to the requirement of the law. It is also our view that the evidence of the recovered items, next to the place where the appellant was arrested, did not point to his guilt In totality, the trial court did not address its mind to the issues enumerated hereinabove. We think it is unsafe to uphold the decision of the trial court. We allow this appeal, quash the appellant's conviction and set aside the sentence of death imposed on him. We order for the immediate release of the appellant unless lawfully held.

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

KHAMINWA **M. WARSAME**
JUDGE **JUDGE**