REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA
AT KITALE.

CRIMINAL APPEAL NO. 41 OF 2007.

EVANS WABOMBA SCOTCH :::::::::::::::::::::::::: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(*Being an appeal against the conviction and sentence of W.K. Chepseba – SRM, delivered on 24th July, 2007 in Kapenguria SRM CR.C No. 178/2006*)

J U D G M E N T.

1. The appellant Evans Wabomba Scotch was charged with an offence of simple robbery contrary to section 296 (1) of the Penal Code. The particulars of the charge stated that on the 19th day of February, 2006 at Makutano township in West Pokot District within Rift Valley province jointly with others not before court robbed **NICHOLAS OCHIENG OPONDO** of Ksh. 1,450/= and at or immediately before or immediately after the time of such robbery used actual violence to the said NICHOLAS OCHIENG' OPONDO. The appellant denied the charge and after a full trial he was convicted and sentenced to five years imprisonment. Being aggrieved by the conviction and sentence he has appealed.

2. His petition of appeal is also supported by lengthy written submissions which the appellant relied on. Briefly stated the appellant challenged the quality and quantity of the evidence that was adduced by the prosecution witnesses. In particular, the evidence of identification which was merely adduced by the complainant, there was no corroboration and the trial magistrate failed to take into account that the circumstances of a positive identification were difficult. There was no evidence to prove that the money that the appellant was found with belonged to the complainant. Lastly, the learned trial magistrate shifted the burden of prove upon the appellant to give an explanation why he was found at the scene of the robbery.

3. This appeal was opposed by the State Mr. Onderi, learned Senior Principal State Counsel, submitted that there was sufficient evidence as adduced by PW1 who was robbed while on his way home. He was able to recognize the appellant and immediately after the robbery he summoned Daniel Opiyo, PW2, they went back to the scene and found the appellant sharing the money with three other people who disappeared and the appellant was arrested and Ksh. 450/- was recovered. Thus, according to the state, the appellant was properly identified and the evidence is safe to sustain a conviction.

4. This being a first appeal this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction. In so doing, the court must bear in mind that it never saw or heard the witnesses testify and give due regard to that consideration. I now wish to set in summary the evidence that was before the trial court which the trial magistrate relied on to convict the appellant. **Nicholas Ochieng' Opondo**, PW1, who was also the complainant testified that on 18th February, 2006 at about 4.00 a.m., he was walking at Makutano trading centre to the house of Daniel Opiyo (PW2) and on the way, he was accosted by two people who held him by the neck, the other person searched his pockets and they robbed him Ksh. 1, 450/=. He said he was able to identify the appellant through an electric light.

5. He testified that he summoned the held of PW2 and went to look for the assailants and found the appellant at the scene with two other people trying to share the money. They arrested the appellant and took him to Makutano police patrol base with the help of members of the public. The appellant was rearrested by **PC Kimunge Chasaina**, PW3 who told the court that the appellant was brought to the Makutano police patrol base by the members of the public and when he searched him, he found Ksh. 450/= which he kept as an exhibit and produced it in court.

6. Put on his defence, the appellant denied the offence and in his unsworn statement of his defence he testified that on the material day he woke at 5.00 a.m. and headed to his place of work. On the way he met a group of people who alleged that he had assaulted the complainant and stole from him Ksh. 1,450/=. They searched him and took Ksh. 450/= which he claimed was his own money. The trial magistrate found in her judgment that the appellant was positively identified by electric light because he had come into close contact with the complainant when he held his neck. Moreover the trial court found that the appellant was found at the scene of crime a few minutes after the robbery while trying to share the money.

7. The conviction of the appellant was based on the evidence of identification by the complainant who said he recognized the appellant through the electric light. However, no evidence was adduced as to how he saw and identified the appellant or even the intensity of the electric light and where it was illuminating from, was it a street light, or a security light from a building? All that was not considered by the learned trial court. It is a well settled principle of law that before convicting on the evidence of a sole identifying witness the court ought to caution itself and the principles to bear in mind have been established by the Court of Appeal in a long line of authorities, key among them is the case of **RORIA VS. REPUBLIC [1967] EA 584** where it was held:-

"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the condition favouring a correct identification were difficult.

In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error."

8. The other anomaly in this conviction is the defence of the appellant that the Ksh. 450/= that was recovered from him was his own money. The prosecution's evidence did not show that the complainant's money had any distinguishing features and this lends credence to the contention by the appellant that since the money was not treated money, there was no way the court could prove beyond reasonable doubt that it belonged to the complainant. Finally had the learned trial magistrate evaluated the evidence regarding the intensity of the lights that illuminated the scene and the fact that the money that was recovered from the appellant could not be said beyond reasonable doubt that it belonged to the complainant, she would have arrived at a difference conclusion.

9. Consequently, I find the appeal has merit. I hereby allow the appeal, quash the conviction and set aside the sentence that was pronounced by the trial court. Unless the appellant is otherwise lawfully held,

he is to be set at liberty forthwith.

Judgment read and signed this 11th day of February, 2011.

M.K. KOOME.
JUDGE.