REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 120 OF 2008

JAMES LESHOO SOKOME …… APPELLANT
-VERSUS-
REPUBLIC ……..…….. RESPONDENT

JUDGMENT

(Being an appeal from the Original sentence and conviction of Hon. J. D Kwena Senior Resident Magistrate's Court at Ogembo Criminal Case No. 916 of 2006, delivered on 21st December, 2006.)

This appellant, **James Leshoo Sokome** was charged before the Principal Magistrate's court at Ogembo with robbery with violence contrary to section 296 (2) of the **Penal Code**. The particulars of the charge were that on 27th April, 2006 at Ololchani village in Transmara District jointly with another not before court while armed with dangerous weapons namely, panga and a bolted rungu, robbed **Edison Meruki** of his belt valued at Kshs. 600/= and at or immediately before or immediately after the time of such robbery they wounded the said **Edison Meruki**. The appellant also faced two charges of assault contrary to section 253 of the **Penal code** particulars being that on 28th April, 2006 at the same village he unlawfully assaulted Administration police officers **APC Philemon Melly** and **APC Paul Lemuya** who were executing their official duties and occasioned them actual bodily harm. The appellant denied all the charges and he was subsequently tried.

The evidence led by the prosecution in short was that on 27th April, 2006, **Edison Meroki** (PW1) the complainant in count 1 had gone to the home of his neighbour one, **Sokome**. As he left for home at about 8.00p.m. he was suddenly stopped by two people on a footpath leading to his home. They held him and he fought back, but they overpowered him by boxing and hitting him with their fists and bolted rungus. They tore his shirt pockets and snatched his beaded belt. He screamed for help and one, **Moses Laterio** (PW2), a neighbour came to his rescue. The scene was 100metres from his home. He stood for a while and observed the fighting. In the process he recognized all the three people involved in the encounter as they were from the same family. Their fathers were infact brothers. He knew their names and knew that they were all cousins. He witnessed the appellant and the other beat up the complainant whom they had pinned on the ground. He shouted at them and one moved aside but the appellant continued to assault the complainant. PW2 pulled the appellant aside and raised the complainant from the ground. He noticed that the complainant couldn't walk well, had bruises on his elbows and had a swollen eye. He escorted him to his home and left him with his wife and children. The following morning he went back to the complainant and told him about the people who had attacked him. The complainant went to the police to report as a result. On the same day the appellant came to the home of PW2 and sent him to call the complainant and elders so that he could ask for forgiveness from the complainant, but it was too late as the complainant had already gone to report the incident to the police. Infact he came back with the police who apprehended the appellant. In the process of being arrested, the appellant put up a strong and spirited resistance injuring the two police officers, (PW3 and PW4). He was however eventually subdued and arrested. Even after being handcuffed, the appellant still wouldn't move. The police were forced to bring a land rover to deliver him to the station. He was subsequently charged with the offences.

Put on his defence, the appellant elected to give unsworn statement.He denied the charges and insisted that he was arrested while working in his sister's compound.Otherwise the previous day he had been at home throughout. On 28th April, 2006 when he was arrested as aforesaid, the police told him that he had robbed somebody and was beaten.He denied having fought the police during the arrest.

The trial magistrate duly considered the evidence on record and was satisfied that the case for the prosecution against the appellant had been met. Accordingly, she convicted the appellant on count 1 and sentenced him to death as required by law. With regard to counts II and III, she found them not proved since no medical evidence was adduced to support the injuries allegedly inflicted on the complainants in those counts. She therefore acquitted him of those counts.

Aggrieved by the conviction and sentence aforesaid, the appellant lodged the instant appeal. He faulted his conviction and sentence on the grounds that his identification and or recognition at the scene of crime was not free from possibility of error, essential witnesses were not called and that the trial magistrate preferred the prosecution evidence against his for no apparent reason.

When the appeal came up for hearing before us on 20th January, 2011, the appellant orally submitted that the offence was allegedly committed at 8.00p.m. and though PW1 claimed that there was moonlight, he neither saw nor recognized the appellant between the two people who attacked him. PW2 testified that when he heard screams, he rushed to the scene and saw three people in a fracas and when he shouted they ran away. How could he then have recognized those people who ran away. He claimed to have seen the appellant with a panga and rungu. However, there was no evidence that the panga and rungu were used to injure anyone. On the following day PW2 said he went to pW1 and informed him who his attackers were. The complainant only reported the incident to the police based on that information. On contradictions the appellant submitted that PW3 was the arresting officer. He stated that during the arrest, the appellant removed a panga and rungu from a jacket while the complainant stated that he removed these items from the pocket of his shorts. On the other hand Pw5 said that he took out the panga and rungu from around his waist. Both PW1 and PW2 alleged that the three were all related. However the investigating officer stated that the appellant was not related to the complainant.

The appeal was opposed. **Mr. Mutuku**, learned senior principal state counsel submitted that PW1 and PW2 recognized the appellant among the assailants whom they knew very well. Thus the recognition of the appellant was beyond reproach. When the two witnesses made a report to the police, they gave the names of the appellant. It was on the basis of this report that PW3 and PW4 proceeded to arrest the appellant. Though the complainant was injured and treated, his P3 form was not tendered in evidence. With regard to particulars of 1st count, the element of injury was therefore not proved. The trial court found as much in its judgment. In the absence of such medical evidence, the trial court ought to have convicted the appellant of simple robbery under section 296 (1) of the **Penal code.** Counsel further submitted that should we agree with him on the above proposition, then we should proceed to substitute his conviction under section 296 (2) with one under section 296 (1) of the **Penal Code** and mete out an appropriate sentence.

On a first appeal we are called upon to look at the evidence adduced before the trial court afresh, re-evaluate and assess it so that we may reach our own independent conclusions. However, we must be wary of the fact that we did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore we are not in a position to tell or comment on their demeanour.

From the totality of the evidence on record it is common ground that the appellant and the complainant were close relatives. Infact they were cousins since their fathers were brothers. The evidence on record does not suggest at all that the appellant set out to rob the complainant of anything or at all. We think that the allegation that in the course of the encounter, the complainant lost to the appellant and another cousin of his a beaded belt was an afterthought purposely calculated to fix the appellant. To our mind, this is a clear case where our criminal justice system was invoked in a rather unorthodox manner in order to settle family scores. It is rather unfortunate that the trial court did not at all see through the scheme. At the end of the day, the appellant was convicted on tramped up charges and has had to endure almost five years imprisonment for an offence we are satisfied that he never committed. We do not see how the appellant and his cousin who to date has never been arrested over the incident could accost the complainant without just cause or provocation and launch a violent attack on him. From the complainant's own evidence he stated that as he was walking home at about 8.00p.m, on a path, he heard someone say ***"wewe simama".*** He was then held and he launched a counter attack. He was then hit on his left eye and he fell down. The two attackers continued to rain blows on his head. He screamed and somebody (PW2) came to his rescue. PW2 intervened and brought the fight to an end. At this juncture all that concerned the complainant was his torn clothes. Incidentally, much as the complainant was in close proximity with the appellant as they allegedly fought he could ***"…from the moonlight I couldn't get their identities well…"***. Yet PW2 under similar circumstances claimed to have identified the appellant among those fighting with the appellant and yet they were relatives. At no time did the complainant tell PW2 what the fight was all about nor did PW2 himself ask the appellant the genesis of the fight if at all he was at the scene.

It seems to us really inexplicable that the appellant with his accomplice, knowing that he would easily be recognized by the complainant would brazenly attack him in a bid to rob him. See **Republic –vs- Eria Sebwan (1960) E. A 174**. He knew he was bound to be recognized. To us this case has more than meets the eye. It has all the making of a family fued or discord and whose members are trying to outdo each other and in the process sucking in our criminal justice system unnecessarily. We are fortified in this conclusion by the evidence of PW2. According to him all he saw was the appellant and his accomplice boxing the complainant on the head and stomach. He intervened and stopped the fight. He then took the complainant home. At home he saw the elbows of the complainant bruised, hands had been twisted and eyes swollen. He then left the complainant and went to his house. It is instructive that the complainant did not mention to him at all that his beaded belt had been stolen by the appellant in the process.

To our mind even if the complainant lost the belt, it was not because it was stolen but was a consequence of the fracas. In any event we do not think that there is sufficient evidence to show that the complainant indeed had such belt on him. We are further fortified in our conclusion that his case was a mere frame up of the appellant by the fact that much as the complainant stated that he was seriously injured during the alleged robbery, which allegation was backed by, PW2, there was no evidence of him being treated anywhere as a consequence. If he was issued with the P3 form, there is no evidence whether it was filled and if so by whom. In other words there was absolutely no medical evidence tendered with regard to the alleged injuries sustained by the complainant when he was allegedly robbed. The state counsel has conceded that much.

On the whole we find that the appellant was wrongly convicted. We therefore allow the appeal, quash the conviction and set aside the sentence of death. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Judgment dated, signed and **delivered** at Kisii this 15th day of March, 2011.

ASIKE-MAKHANDIA **RUTH NEKOYE SITATI**
JUDGE **JUDGE**