REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO.581 OF 2007

BENJAMIN GITAU KURIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No.5958 of 2006 of the Chief Magistrate's Court

at Kibera by Mr. 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 17th day of October 2006 at Dagorreti Corner in Riruta within Nairobi jointly with another not before court being armed with a knife robbed **Lucas Oduol Silvester** of his national Id card, voting card, calling card and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Lucas Oduol Silvester**. The appellant was also charged with an alternative count of handling stolen property contrary to section 322(2) of the Penal code in that he dishonestly received or retained a national ID card, voting card and a calling card knowing or having reason to believe them to be stolen property. After full trial he was convicted in the main count and sentenced to death.

The evidence that led to the conviction of the appellant is that PW1 who is a teacher was robbed of the items stated in the charge sheet. It is alleged one of the attackers was armed with a knife at the time of the robbery. It is contended that PW1 was able to positively identify one of the attackers. After the robbery, PW1 went and alerted students of school he was teaching. He then mobilized students in order to apprehend the robbers. It is alleged the students were able to arrest the appellant and in the process recovered a wallet belonging to PW1.

PW2 was one of the students who participated in the chase and arrest of the appellant. He stated that he recovered a wallet belonging to PW1 and that the appellant was arrested a few metres from the scene of crime.

It is the case of the appellant that the evidence of identification by PW1 and PW2 was not safe, the same was full of errors and could not be a basis for a proper conviction. According to PW1 he was walking from his home to school when he was suddenly grabbed on his neck and a knife placed on his tummy by two assailants who attacked him from behind. He stated that the robbers grabbed him along the railway line but he later managed to free himself from the hands of the robbers. He then ran to the school and informed his students about ordeal. The students then joined in pursuit of the attackers and a few distance they noticed a person who appeared to be one of the robbers. They managed to arrest appellant and allegedly recovered the items stated in the alternative count.

It is important to note that the incident took place during broad daylight when visibility was very clear. However, the complainant did not described or indicate how he was able to recognize the appellant as one of his attackers. PW1 did not say how he was able to recognize the appellant and how he was able to identify him after he went to school and mobilized his students. The question is whether the identification of the appellant and subsequent arrest was watertight and safe from any possibility of mistakes. In essence the evidence against the appellant was based on a single witness and it was appropriate for the trial court to be sure such evidence was free from the possibility of errors in order to minimize miscarriage of justice.

No doubt the attack was sudden and there was lapse of time between the time of the robbery and the arrest of the appellant. It is important to ensure that the circumstances are clear in order to avoid a possibility of mistaken identity. It is alleged that the appellant was found in possession of items earlier stolen from the complainant. There is no evidence of recovery since the person who actually searched and recovered the items, did not give evidence against the appellant. We think the trial court committed a gross misdirection, by relying on the evidence of PW1, PW2 and PW3 when the circumstances and events did not connect the appellant to the alleged robbery.

We think the evidence of the alleged identification, arrest and recovery of items stolen from the complainant was insufficient and incoherent to sustain a proper conviction. We think possession was not positive and that the property was not positively and correctly identified by the complainant.

Consequently, we are of the view that the appellant was convicted on insufficient evidence and that the prosecution did not prove its case beyond reasonable doubt. There are material doubts that exists in the prosecution case which tilts the scale of justice in favour of the appellant. We are not sure how the appellant would be found in possession of items stolen from the complainant when there was a large crowd coming to arrest him. We are also not sure how the complainant was able to recognize the appellant as one of the attackers when he was suddenly attacked from behind in distressing circumstances.

All in all, we are of the view that the appellant was not given the benefit of doubt and the manner of his arrest was not clearly explained. In our view, the manner in which the appellant was arrested raises some doubts as to his participation especially when his defence is taken into consideration. We therefore think the appellant's appeal is well merited and is hereby allowed. We quash the conviction, set aside the death sentence and order for the immediate release of the appellant unless lawfully held.

Dated, signed and delivered at Nairobi this 16th day of May 2011.

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