REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO.12 OF 2008

NELSON WAINAINA MUTUOHORO...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From the original conviction and sentence in Criminal Case No. 3706 of 2006 of the Chief Magistrate's Court

at Thika by F. Nyakundi – 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 of the offence are that on 11th day of August 2006 at about 9.30 .m. at High Point in Thika District within the Central Province, jointly with another not before the court robbed Freshia Mumbi Koma of her hand bag, mobile phone and cash Kshs.13,000/= all valued at Kshs.25,000/= and before the time of such robbery used actual violence to the said Freshia Mumbi Koma. After full trial, he was convicted and sentenced to death. The appellant is aggrieved by the decision of the trial court and has put forward the following grounds;

1. The trial court erred in law and facts in accepting and relying upon the evidence attributed to PW1 and PW2 without adequately observing that the chase and arrest was done at night and posed a big margin of error.

2. That the trial court erred in law in accepting and relying upon the complainant's evidence and identification, at the scene without considering that the conditions and circumstances of the attack were unfavourable.

3. That the charge was not proved beyond reasonable doubt and that some crucial witnesses were not called to give evidence on behalf of the prosecution.

4. That the trial court failed to consider and evaluate the appellant's defence as required under the law.

The prosecution case is that on the material day the complainant had just alighted from a vehicle at High Point in Thika District when she was confronted by two assailants. The complainant was attacked and robbed of the items indicated in the charge sheet. In the cause of the struggle the complainant was stabbed with a sharp object in the left arm and hand. She raised alarm attracting the attention of PW2 who was in his car across the road. After accomplishing their mission the robbers crossed the road and run towards a nearby bush. The complainant then went away and reported the matter to a nearby Chief's office.

The evidence of PW2 is that as he was seated in his car he saw two men struggling with a woman on the side of the road. He then told his friend that they should assist the woman who was being attacked by the two men. As he was trying to come to the rescue of the complainant, the two attackers run and crossed the road. PW2 then gave chase but the attackers entered a nearby thicket. One of the bouncers from a nearby bar came to the assistance of PW2 and they allegedly arrested the appellant. According to PW2 the distance between him and the robbers during the time of the attack and chase was very short. It is also the evidence of PW2 that when he caught up with the appellant he became afraid as he told him he will shoot him. It was at that time that the bouncer came from behind and arrested the appellant. He was then taken to the AP's camp at High Point where he was later arrested by PW3. It is also the evidence of PW2 that there is no time he lost sight of the attackers from the time they apprehended the appellant.

This is a first appeal and it is our duty to re-evaluate the evidence in order to satisfy ourselves whether the appellant was rightly and properly convicted. As rightly pointed out by the trial court, the question is whether the prosecution proved its case beyond reasonable doubt. From our understanding, the basis of the appellant's conviction is the evidence given by PW2. There is no dispute that PW1 was attacked and robbed on the material night. The central issue in this matter is whether the appellant was involved in the said robbery. There is also no dispute that the complainant was attacked in an area which was not well lit. According to PW1 there was some darkness at the area where she was attacked. She also contended that there was light coming from Cheers hotel. On the other hand PW2 stated that he saw the two attackers with the help of the light of his vehicle. The question therefore is whether PW2 was able to see the attackers from the time they attacked PW1 to the time he arrested the appellant. PW2 said that he never lost sight of the attackers while on the other hand he said that they entered a thicket where the appellant was arrested from. It is worthy to note that PW2 had not identified PW1's attackers at the scene and therefore could most likely arrest whoever was running and was ahead of him in the mistaken believe that the same were the robbers. It is also clear that the possibility that PW2 may have lost sight or track of the attackers was not eliminated by the prosecution. No doubt PW2 mentioned two other persons who were present at the time he gave chase and arrested the appellant. Regrettably the prosecution ailed and/or declined to cover the extra mile and procure the evidence of the bouncer and the other person who was in the company of PW2. The evidence of the said witnesses would have corroborated or shed light on the person and the mode of arrest of the assailants.
The law is that a witness can be honest yet mistaken. PW2 told court that he was not the person who arrested the appellant but someone else. The said witness said in part;

"I became afraid and the bouncer came from behind and kicked this person."

In our view it was essential to call the bouncer in order to determine whether the right person who attacked PW1 was arrested. There is no evidence to show that the attendance of the bouncer and the person who was together with PW2 could not be procured. In essence the only evidence linking the appellant to the subject robbery is the evidence of PW2. There are material and substantial doubt as to whether PW2 chased and arrested the proper assailant. The fact is that after the chase the assailant entered

a nearby thicket and the possibility that the appellant was the one who attacked the complainant and thereafter was arrested from the thicket was snot established beyond any reasonable doubt.

The appellant in his unsworn defence stated that he was arrested on his way home for an offence he did not commit. He also stated that on his way home he was accosted by people who beat him up and took him to a nearby police station. Later his finger prints were taken and he was charged with an offence he did not commit. In essence the appellant on his way home from work, he fell a victim of circumstances. The trial court did not assign or give reasons for rejecting the defence of the appellant. On our part we think it was incumbent upon the trial court to state or give reasons why she rejected the defence given by the appellant. It was a mistake or a misdirection to simply brush aside the defence of an accused person without giving any reasons for its rejection. We think the appellant gave a reasonable explanation as to the circumstances leading to his arrest and was entitled to the benefit of doubt.

Having given careful consideration to the evidence on record, we find that the prosecution did not prove its case beyond reasonable doubt. We think the appellant was convicted on insufficient evidence. Accordingly the appellant's appeal against the conviction and sentence is well merited. 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**