REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 131 OF 2007

SAMWEL KIUNGA GATUNGA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of Hon. Mr. J.R. Karanja in Meru Criminal Case No. 682 of 2006 delivered on 3rd July 2009)

JUDGMENT

The appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code before chief magistrate Court Meru. He was convicted after trial and sentenced to death. He has appealed against conviction and sentence. As the first appellant court, we are under duty to reconsider the evidence of the lower court, re-evaluate it and draw our own conclusion. This duty was well set out in the case **Okeno V. R** [1972] EA 32:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and drawn its own conclusions. (Shantilal M. Ruwala Vs. Republic [1957] E.A. 570). It is not the function of a first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vs. Sunday Post, [1958] E.A. 424."

PW1the complainant was on 21st March 2006 at about 8pm in his house in Meru town. Whilst he was in his house with his family, he heard somebody outside shouting and asking for him by name. Before he could get out of his house, a person entered into the house followed by another one. There was electric light in the house. The first person introduced himself as a police officer. The 2nd person who accompanied him had a firearm. PW1 identified the appellant whilst in the dock as the first person who entered his house. PW1 realized that these persons were up to no good and he begun to shout for help. The appellant took his mobile phone Nokia 3410 and handed it over to the person with the firearm. The person with the firearm ran out of the house. The door was closed which impeded the escape of the appellant. PW1 began to struggle with the appellant. He said that he drew out a knife and stabbed the appellant at the neck and the head. PW1 was also injured in that struggle. The appellant however managed to free himself and run out of the house. He was arrested two days later and PW1 recognized him at the police station although no identification parade was mounted. On being cross examined, PW1 was emphatic that he had identified the appellant because his house was adequately lit. He said that the appellant was in his house for 15 minutes. Although the appellant was arrested, his mobile was not recovered. PW2 was a daughter of PW1. She was in the house when the appellant and his companion entered the house. She heard the appellant announce that he was a police officer. He said that he wanted money. He was joined by his companion who had a firearm. The person with the firearm ordered PW2 to lie down but she declined. The first person who had entered who she identified as the appellant took PW1's mobile phone and gave it to his

companion. They all started shouting. The person with the firearm ran out of the house. PW2 and her father held on to the appellant. She saw her father draw a knife and stab the appellant near the head and near the neck. PW2 said that there was enough light which enable her to identify the appellant. She was also able to identify the appellant at the dock. On being cross examined, PW2 said that the house was well lit and there was also security lights that were on outside the house. She therefore said that it was easy to see and identify the appellant. PW3 said that he was a friend of PW1. On the night in question, he was sent by the PW1 to go and buy for him kerosene. As he went out of the house, and near the gate, he saw a young man. That young man was wearing a hat and it was a person he knew. He identified that person as the appellant in the dock. PW3 proceeded to buy the kerosene as he had been sent and left behind that young man. It was on his return that he was told that PW1 had been robbed. When he was cross examined by the appellant he responded by saying that the appellant had talked to him at the gate and had asked whether PW1 was in the house. PW3 said that the appellant was not a stranger to him even though he did not know his name. PW4 was the clinical officer who examined PW1 and issued him with a P3 form. PW5 the police officer who responded to the report of the robbery said that he used a police dog to follow the scent of the robbers but the scent was lost when they reached a river. He confirmed that although the appellant was arrested no stolen item was recovered. He noted that when the appellant was arrested, he had injuries. The injuries were treated whilst he was under arrest. However, the treatment notes were released to the appellant. The learned trial magistrate did not make a specific finding that the appellant had a case to answer. He however noted in the proceedings that the provisions of section 211 Criminal Procedure Code had been complied with. The trial court having complied with section 211 we find that there was no prejudice that was suffered by the appellant by failure to make a specific finding of case to answer. In his short defence, the appellant stated that he was a vegetable vender at a market in Meru. On 17th April 2006 at about 8pm, he was on his way home from a bar. He was stopped by police officer who questioned him. He was drank. He was arrested and taken to the police station and then was charged with the present offence.

The main ground that we note the appellant has raised in this appeal and in his submissions is one of identification. The offence occurred at night but both PW1 and 2 were emphatic that there was sufficient light in their home. PW1 stated that the appellant was in their home for 15 minutes. It is clear that whilst they struggled PW1 was in very close contact with the appellant. He of all people had a good opportunity to identify the appellant. PW3 evidence in our view is very vital contrary to what was stated by the learned trial magistrate in the judgment. Although PW3 was not present when the robbery took place, he saw the appellant at the gate of the complainant before the robbery. The appellant was known to him prior to that date. There was sufficient light in the house and security lights outside the house. It should be noted that the appellant talked to PW3 asking him if the complainant was inside the house. On the issue of identification the Court of Appeal in the case **Anjononi & Others Vs. Republic** [1980] KLR 59 had this to say:-

".....The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in cases like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other....."

That decision is pertinent because PW3 knew the appellant before the incident. His evidence on the knowledge of the appellant was not shaken at cross examination. We have considered the evidence of identification and we find that it cannot be faulted at all. The evidence is reliable, credible and in our view is free from doubt. That evidence contrary to the submissions made by the appellant is not contradictory. The appellant faulted the prosecution's case on the basis that the investigating officer was not called to give evidence. In our view, the fact that the investigating officer was not called does not in any way weaken the prosecution's case. As we understand it, it is the prosecution's case that the appellant together with another person violently robbed the complainant. The prosecution adduced evidence to prove just that in our view, the prosecution proved its case beyond reasonable doubt. Not even the defence offered by the appellant could weaken its case. The appellant did not give evidence of his whereabouts on the material date, that is, 21st March 2006. He only stated in his defence that he was arrested whilst drank on 17th April 2006. It also should be noted that the appellant was presented before court on 4th April 2006. That was a date before the date he alleges he was arrested. By 17th April 2006 the appellant was remanded in custody. We find that the appellant's appeal has no merit and the same is hereby dismissed.

Dated and delivered at Meru this 29th day of October 2010.

LESIIT, J.
JUDGE

KASANGO, M.
JUDGE

Read, signed and delivered at Meru this 29th day of October, 2010.
In The Presence Of:
Kirimi/Mwonjaru .....……. Court Clerks
Appellant …….... Present
Mr. Kimathi …….....…… For the State

LESIIT, J.
JUDGE

KASANGO, M.
JUDGE