REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 484 OF 2006

SAMUEL MBURU NJOROGE .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 1926 of 2006 of the Chief Magistrate's Court

at Kibera by Mr. Maundu – Senior Resident Magistrate)

JUDGEMENT

The appellant was charged with three counts of robbery with violence contrary to section 296(2) of the Penal Code. After full trial he was convicted in counts 2 and 3 and sentenced to death in each count, hence this appeal. We have noted the trial court sentenced the appellant to death in counts 2 and 3. We wish to state that a person cannot suffer death twice, therefore in circumstances where a person is charged and convicted for two or three counts of robbery with violence contrary to section 296(2), the sensible thing to do is to sentence him to death in one count, while the sentences in the other counts shall be ordered to remain in abeyance.

In count 2 it is alleged that the appellant robbed and wounded Martin Dames. In count 3 it is alleged he robbed and wounded Mary Wanga on the 28th day December 2005 at Ongata Rongai Township in Kajiado District.

The basis of the appellant's conviction is that he was properly identified by the two complainants in count 2 and count 3 at the time of the robbery. The trial court was of the view that there was no possibility of error in the identification of the appellant as one of the robbers who attacked and robbed the complainants on the material night. The trial court dismissed the appellant's defence as false and convicted him accordingly. The question for our determination is whether the appellant was correctly and properly identified by PW1 and PW2 on the material night.

There is no dispute that the two complainants were robbed and wounded on the material night but the question is whether the appellant was part of the gang that robbed them. It is the evidence of PW1 and PW2 that they met the appellant in a bar after he was introduced to them by one Ismael Hussein who did not give evidence before the lower court. It is alleged PW1 bought the appellant beer in the bar where they were drinking until about 10.30 p.m. when the bar was closed.

After PW1 and PW2 left the bar they were ordered to stop by a group of people who were pretending to

be police officers. PW1 was hit with a stick on the head and he immediately lost his consciousness. It is the evidence of PW1 and PW2 that they identified the appellant because there was a light from a nearby building and that the building was about 15 metres away from the scene.

It is the case of the appellant that he was arrested after his mother made a complaint against him. He stated that the charges against him were fabricated. It is also the case of the appellant that the alleged identification by PW1 and PW2 was not proper.
This is a first appeal and it is our duty to re-evaluate the evidence in order to determine whether the appellant was properly convicted by the trial court. The basis of the appellant's conviction is that he was identified by PW1 and PW2 as one of the persons who attacked them on the material night when the robbery took place. According to PW4 investigating officer, the appellant was arrested by Administration police officers after his mother had made a complaint for damaging her property. It is also the evidence of PW4 that he did not record statements from PW1 and PW2. He contended that he did not receive any report that the appellant was among the persons who robbed the complainants. As the appellant was in police custody, PW1 and PW2 allegedly identified him as one of the persons who robbed them of the items stated in the charge sheet. The basis of such identification is not clear from the evidence on record.

It is clear that the person who arrested the appellant did not give evidence. It is also clear that the person who recorded the statement from the complainants did not give evidence. Further it is pertinent to note that the person who received the first report from the complainant did not also give evidence. It is not clear whether the complainants mentioned the names of the appellant at the time they made the first report to the police. There is also no indication that the complainants gave the description of the appellant as the one who attacked them on the material night. It is therefore true that the procedure of identifying the appellant is not clear, whether it is through an identification parade or otherwise since the person who arrested and why the appellant was arrested did not give evidence.

In our mind the identification of the appellant is not watertight since there was no identification parade conducted and since there is no indication that the complainants gave the names of the appellant at the time they made their first report. In the circumstances we think the trial court grossly misdirected itself in convicting the appellant on the disjointed evidence tendered by PW1 and PW2. It cannot be the basis of a proper conviction when there is no basis as to why and how the complainants identified or recognized the appellant.

Taking into consideration the evidence of PW1, PW2 and PW4, we think the appellant was wrongly convicted by the trial court on insufficient evidence. We also think that the prosecution did not prove its case beyond reasonable doubt. In the circumstances we think the appeal by the appellant has merit. Consequently conviction quashed and sentences set aside. We order for the immediate release of the appellant unless lawfully held.

Dated, signed and delivered at Nairobi this 18th day of November 2010.

J. KHAMINWA
JUDGE

M. WARSAME
JUDGE