REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL 338 OF 2007

DOUGLAS KOMU MWANGI …….…..…… APPELLANT

VERSUS

REPUBLIC……..…….…….. RESPONDENT

(Being an appeal from the judgment of S.N. MBUNGI, Senior Resident Magistrate in Senior Resident Magistrate's Criminal Case No. 2509 of 2006 at Kangema)

JUDGMENT

The appellant was charged in the lower court with **Robbery with violence contrary to section 296(2) of the Penal Code.** On being tried before the Kangema SRM's court he was convicted and was sentenced to death. He being dissatisfied of that conviction and sentence has appealed to this court. This is the first appellant court. As such we are expected to submit the lower court's evidence to fresh and exhaustive examination. We need to weigh conflicting evidence and to draw our own conclusion. In doing so we need to make allowances for the fact that the trial court had advantage of hearing and seeing the witnesses. See ***Okeno Vs Republic [1972] E.A. 32.***

The evidence of PW 1 was that on 24th September 2006 having closed his hotel he began to go home. On his way he noticed torches at a distance. On enquiring who was there someone responded and said that it was Irungu. He said that his torch was more powerful and he directed it to the group of people ahead of him. He recognized the appellant who was his nephew. On recognizing the appellant he continued to approach the people with the confidence that his nephew was among them. On reaching where they were the appellant held him from the back.

The persons in his company went through PW 1's pocket and stole from him Kshs.5000/-. PW 1 screamed and this caused Irungu to run away. The appellant took from PW 1 Kshs.3000 which was in the trouser pocket together with four credit cards of Safaricom valued at Kshs.100 each. The appellant after this robbery returned to the Kambara shopping centre where he found the assistant chief with two police officers. PW 1 reported the incident to them. They returned to the scene and recovered a cap and walking stick. The assistant chief and police went to the appellant's home but he was not found. He was arrested the following day. On cross examination PW 1 denied that there was a land dispute between him and the appellant's family and denied having a grudge against the appellant. The assistant chief PW 2 confirmed that the robbery was reported by PW 1. They accompanied him to the scene and recovered a cap and walking stick. He confirmed that PW 1 had identified the appellant who was his nephew. PW 3 was the police officer who was in the company of the assistant chief. He too accompanied PW 1 to the scene. He was the one who arrested the appellant. A search was carried out at the appellant's home but nothing was recovered.

The clinical officer confirmed that PW 1 was injured by a blunt instrument and he assessed the injuries to be harm. The appellant was put on his defence. He gave unsworn statement. He narrated his movements of 25th June 2006 when he was arrested. He denied having committed the offence on 24th September 2006. It however should be noted that the appellant was arrested on 25th September 2006 and not 25th June 2006. It is however clear that the appellant did not state his whereabouts of the day the robbery was committed. In making that statement we are very clear in our minds that it is not the responsibility of the appellant to prove his innocence but rather it is the responsibility of the prosecution to prove his guilty beyond reasonable doubt.

The appellant in his submission in support of this appeal has argued that his constitutional rights under section 72(3) (b) of the constitution were violated. In arguing that he submitted that he was detained for more than 24 hours at the police station when he was first arrested. The appellant initially at the lower court was charged with robbery contrary to section 296(1) of the penal code.

On that initial charge sheet it is indicated that he was arrested on 30th September 2006 and taken to court on 3rd October 2006. Those dates do not tally with the dates given by the arresting officer. The appellant according to the arresting officer and the assistant chief was arrested on 25th September 2006. since no specific questions were put to the arresting officer in respect of the dates of arrest and whether the appellant remained in custody until the date he appeared before court we find that we are unable to entertain the appellants argument that his detention contravene section 72(3) (b). The charge against the appellant was subsequently amended to one contrary to section 296(2) of the Penal Code. The appellant pleaded not guilty to the amended charge. Having so pleaded we are of the view that the lower court's failure to explain the consequences of pleading guilty did not prejudice the appellant.

We have reexamined the evidence against the appellant and we find that the same was sufficient for the conviction of the charge against him. PW 1 identified the appellant through the torch light. He even was able to identify the kind of clothing the appellant was wearing. We are aware that the recognition of the appellant was under difficulty circumstances and the same should be tested with the greatest care. For us to be able to rely on PW 1's evidence it is important that the recognition be water tight. See the cases of ***Kamau Vs Republic (1975) E.A. 139, R Vs Eria Sebwato (1960) E.A. 174.***

> "***It is also the law that whether or not a conviction on identification of a single witness can be maintained is a question of both law and fact. See Kamau Vs Republic (Supra).***"

We are of the view that the recognition of appellant by PW 1 was without error. Having considered the proceedings of the lower court we are satisfied that the prosecution proved the case against the appellant beyond reasonable doubt. We find that the appellant's appeal has no merit and the same is dismissed.

Dated and delivered at Nyeri this 30th day of January 2009.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE