REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 3 OF 2007

JOSEPH GICHUKI GITONGA Alias SMOKY JOE …… APPELLANT

VERSUS

REPUBLIC…….....……. RESPONDENT

(Being an appeal from the conviction and sentence of E. MBAYA, Senior Resident Magistrate in the Senior Resident Magistrate's Criminal Case No. 1045 of 2006 at NANYUKI)

JUDGMENT

The appellant was charged in the lower court with ***Robbery with violence contrary to section 296(2) of the Penal Code.*** He was convicted by the lower court as charged and was sentenced to suffer death as provided under the law. He was dissatisfied with the conviction and sentence and preferred this appeal. This court is duty bound to re-evaluate the evidence of the lower court and in this regard the case of ***OKENO vs REPUBLIC 1972 EA 32*** is relevant. It was stated in that case as follows:-

> *"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 R., (1957) E.A. 336 and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R.(1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; 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."*

P W 1 Scott Davis works for the British Army. On 20th May 2006 at 11 pm whilst in the company of other soldiers and a lady friend were leaving Sportsman's Arms Hotel. He and his lady friend were walking slightly behind the other soldiers. The appellant came to him and asked for money. As he did so he began to touch his pockets. He was in the company of two other people. These other people held him and the appellant took his watch and ran away. The appellant was well known to him because he used to see him at the show ground at the Curio Shop. He used to speak to the appellant on almost daily basis. He recognized him because the security light at the hotel were on. The incident occurred close to the hotel near the security bulb. He was also able to recognize him because of their close proximity. The matter was reported to the police. The watch was recovered. On cross examination PW 1 said that he often spoke to the appellant in English language at the curio shop at the show ground in Nanyuki. PW 2 was the arresting officer. He got information that the appellant was in Nanyuki Town and was drunk. He went there and informed him that there had been a report that he was involved in a robbery. He told him

that the complainant would not press the case if the watch was recovered. It was then that the appellant took him to PW 3 to whom they had sold the watch for Kshs. 600. When he went to PW 3, PW 3 confirmed that the watch had been sold to him on 20th May 2005 at midnight. He was at his kiosk at that time when three young men came and told him that they had been given the watch by a white man and that they were interested in selling it. He bought it for Kshs. 600. It was later thereafter that the police informed him that it was stolen. In cross examination he said that the appellant was in the company of the man who sold the watch to him. However all the young men were involved in the bargain of the price. On being found with a case to answer the appellant declined to give evidence in his defence and stated;

"***I will await the judgment from the evidence on record".***

The appellant in his grounds of appeal raised various issues. The appellant argues in his grounds that the language of the court was not indicated. We have looked at the lower court's proceedings and we find that that ground is not supported by the record. PW 1 testified in English. On being cross examined by the appellant he repeatedly stated that the appellant who was known to him spoke English. That previously with the many contacts they had with each other they had conversed in English. The only other witness for the prosecution being the arresting officer gave evidence in Swahili. The appellant did not give evidence in his defence. In the case of FRANCIS MACHARIA GICHANGI & OTHERS vs REPUBLIC Criminal Appeal No. 11 of 2004 (unreported) the Court of Appeal stated:-

"***While, as stated above, the court has a duty to enforce constitutional provisions, there is a reciprocal duty on the part of an accused person to indicate to the court, for instance, that he is not able to understand the language of proceedings. This does not lessen the duty of the court of being satisfied that the accused is able to follow the proceedings. Section 77(1)(b) and of the constitution use the words "understands" and the phrase 'he cannot understand.'***

These place an implied duty on the accused to inform the court whether or not he is able to follow the proceedings. In an appropriate case where there is no complaint at the trial this court may well infer that there was interpretation where the proceedings show the accused understood the nature of the charges against him and the evidence presented in support thereof notwithstanding absence of a note regarding interpretation."

The appellant engaged each prosecution witness in cross-examination. We are therefore satisfied that the appellant understood the charge against him and defended himself in cross examining those witnesses. That ground therefore is rejected. The appellant also argued that the evidence of PW 3 was not credible. We have re-examined that evidence and we also find that that ground of appeal is for rejection. The evidence of PW 3 was clear and without contradiction. The appellant faulted the prosecution's case for failing to call the OCS to whom the report was first made. The fact that prosecution did not call that witness does not weaken the case of the prosecution. The evidence of PW 1 the complainant was very clear and credible. It was not shaken during cross examination. He was sure that it was the appellant who robbed him off his watch whilst he was in the company of others. We are satisfied that the ingredients of robbery with violence as set out in the case of JOHANA NDUNGU VS REPUBLIC Criminal Appeal No. 116 OF 2005 (unreported) were met. The recognition of the appellant was during the night. The general principles on the standard of evidence required in the case of identification were well set out by the Court of Appeal in the case of **CLEOPHAS OTIENO WAMUNGA vs REPUBLIC** *(1989) KLR 424*, the court stated:-

"***Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well known case of R vs Turnbull (1976) 3 ALL ER 549 at page 552 where he said:***

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

In the case of *Kamau v Republic (1975) EA 139 the East African Court of Appeal* had the following to say;-

"***The most honest of witnesses can be mistaken when it comes of identification."***

In this case PW 1 stated that there was sufficient light from the Sportsman's Arms Hotel. He was therefore able to recognize the appellant who was well known to him. It is noted that PW 2 managed to get the cooperation of the appellant to direct him where they had disposed the watch and this was only after he promised the appellant that the complainant did not intend to press charges. The complainant took him to PW 3 to whom the watch was sold on the same night it was stolen. The prosecution's case in our view was water tight and it met the required proof of beyond reasonable doubt. The appellant's appeal is dismissed for having no merit.

Dated and delivered this 30th day of January 2009

MARY KASANGO

JUDGE

M. S. A. MAKHADIA

JUDGE