REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 23 OF 2006

JOSEPH WAMUGARI NJERI……...…..……..APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

JUDGMENT

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 state that on the 1st day of May 2005 at Rongai Trading Centre in Nakuru District within the Rift Valley Province while armed with offensive weapon robbed Samwel Kipyegon Ngetich of his bicycle make Raja valued Ksh 2,700/= and immediately before, or immediately after, the time of such robbery used actual violence on the said Samwel Kipyegon Ngetich by wrestling him down.

Upon trial by the Senior Resident Magistrate at Molo, the appellant was convicted and sentenced to the mandatory death sentence. Being aggrieved by conviction and sentence, the appellant challenged the trial court's judgement on the grounds that the charge as framed was not supported by the evidence. The appellant also contended that the conviction which was based on the evidence of a single identifying witness was not sufficient to support the conviction and death sentence. The judgment was also faulted for failure to consider that the circumstances under which the complainant identified the appellant were difficult. There was also no evidence by the investigating officer and the defence by the appellant was not taken into account. According to the appellant, his defence was credible and should have entitled him to an acquittal.

This appeal was opposed by the State. The learned State Counsel **Mr. Njogu** submitted that there was overwhelming evidence that the appellant accosted the complainant, hit him with a plank of wood on the head and robbed him of his bicycle. The complainant ran after the appellant, caught up with him because it was muddy and the bicycle could not move fast. He wrestled the appellant and raised an alarm, he was joined by members of the public who arrested the appellant and took him to the Police Station.

This being a first appeal, this court is mandated to reconsider the evidence, re-evaluate it itself and subject the entire judgment to its own scrutiny and arrive at its own independent decision on whether or not to allow the appeal. This court should always bear in its mind that it never saw or heard the witnesses and give due allowance for that. (See the case of **Okeno vs. Republic [1972] KLR 32**).

We now briefly set out albeit in summary, the evidence before the trial court which led to the conviction and sentence being appealed against. **Samuel Kipyegon Ngetich, (PW1)** also the complainant in this matter testified that on 1st May 2005, at about 6.30 p. m. he was cycling on his bicycle. Along the way he decided to stop and fold his trousers. While he was bending down, the appellant hit him on the head and he fell down. The appellant demanded to be given money. When PW1 said he had no money the appellant took the bicycle and rode it away. PW1 shouted and ran after the appellant, it was muddy and therefore he was able to catch up with the appellant. He also raised an alarm and members of the public gathered and arrested the appellant who was taken to the Police Station.

Elijah Kiplangat Chepkwony (PW2) and **Peter Gitau Wainaina (PW4)** were at a nearby '*Simu ya*

Jamii' kiosk when PW1 shouted for help. They responded and PW1 informed them that the appellant had robbed him of his bicycle. The bicycle was with the appellant and when they interrogated the appellant, at first he claimed the bicycle was his, later on he started faking drunkenness. **PC John Limo (PW3)** was also at the Rongai shopping centre when he saw a crowd of people gathered around the appellant. Upon inquiry, he was told that the appellant had robbed the complainant his bicycle and was caught by the members of the public. PW3 escorted the appellant to the police station. He photographed the bicycle and obtained the ownership receipt from PW1 which he produced in court.

Put on his defence the appellant gave unsworn statement of defence and claimed that he was drunk and he was not aware that he had stolen PW1's bicycle. The learned trial magistrate considered this evidence and was satisfied that the prosecution had proved the case against the appellant to the required standard. The trial magistrate was satisfied that the appellant was armed with an offensive weapon namely a big piece of wood with which he hit the complainant on the head and snatched from the complainant the bicycle.

The issue for determination in this appeal is whether the charge as framed is supported by the evidence before the court. The charge does not indicate the offensive weapon that the appellant was armed with. From the evidence before the trial court it is also not clear whether the appellant used a weapon to strike the complainant. The fact that the complainant was also able to recollect himself immediately and ran after the appellant to recover the bicycle causes doubt as to whether he was hit with the plank of wood or with bear hands.

The appellant was charged with a capital offence. The particulars of the charge ought to have clearly stated the dangerous weapon which the appellant was armed with, so that the appellant could have had an opportunity to prepare his defence on the charges he was facing. Failure to name the offensive weapon rendered this charge defective. The appellant could not be expected to assume the weapon he was armed with. Although in the evidence of the complainant it is stated that the appellant was armed with a plunk of wood, it is instructive that the appellant was arrested a few metres from the scene of the crime, and this offensive weapon was not produced as an exhibit so that the court could have evaluated whether it was indeed an offensive weapon.

There were no investigations that were carried out in this matter, the arresting officer merely took photographs of the bicycle and did not bother to gather evidence regarding the offensive weapon or even to frame the charge against the appellant properly. For these reasons we are not satisfied that it is safe to uphold this conviction. The conviction by the trial court is hereby quashed and the death sentence is set aside. Unless the appellant is otherwise lawfully held he is to be set at liberty.

Judgment read and signed on 14th day of May 2009

M. KOOME

JUDGE

M. MUGO

JUDGE