

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 84 of 2007

KIMANI MACHARIA APPELLANT

versus

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence of E. J. OSORO, Senior Resident Magistrate

in the Chief Magistrate's Criminal Case No. 5240 of 2005 at NYERI)

JUDGMENT

The appellant was charged with two counts in the lower court. In the first count he was charged with the offence of **robbery with violence contrary to Section 296(2) of the Penal Code**. In the second count he was charged with **attempted robbery with violence contrary to section 297(2) of the Penal Code**. The lower court convicted the appellant on count 2 and acquitted him on the first count. The lower court sentenced him to suffer death as provided under the law. The appellant has filed his appeal against both conviction and sentence. As the first appellate court we are obligated to re-evaluate the lower courts evidence and draw our own conclusion. That duty is succinctly set out in the case of **OKENO vs REP (1972) EA 32**. In that case the court of appeal had the following to say:-

“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 findings 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.”

PW 1 on 22nd November 2005 at 10 p.m. heard someone outside his home screaming. On checking he found a man lying down who told him that he had been carjacked by robbers. PW 1 together with other people assisted him to move to a safer place because where he was lying he looked like he could slide down. The person they found stated that he had been carjacked and dumped there by the carjackers. PW 1 however noted that he had money on him and his mobile phone. This person had injury to his leg which PW 1 said was a fracture. PW 1 in his evidence said that this person was at a place which was far away from the road and that to have reached that point he ought to have jumped many fences. Where he was, was in the middle of a coffee plantation. PW 1 noted that there were no tyre marks nor any sign of struggle. From that place where this person was it was not accessible to the road. Although he said he had been carjacked he was unable to answer questions relating to the registration of the car and its make. The person however told them that he had been robbed kshs.1200. He said that the carjackers had injured his legs as they tried to put him in the boot of the car. The assistant chief was informed and he came on the scene. He called the police also to the scene. At the conclusion of PW 1's evidence in-chief the appellant declined to cross examine him. He simply thanked him for having helped him on that night. PW 2 on 27th November 2005 at 8.30 p.m. was at her mother-in-law's house. At that time somebody entered into the house holding a Somali sword. He rudely began to demand money. There was light in the room and she was able to note that he was tall brown and slender. He was wearing navy blue jeans and a white shirt. This person again rudely demanded money from PW 2. PW 2 managed to push him out of the house and as she was closing the door against him he cut her on her small finger. Her mother-in-law and other children who were in the house assisted her and closed the door. On closing the door they began to scream. This man was in the company of other men. When people began to respond to the screams they ran away. PW 2 confirmed that the man who entered the house was the appellant. He was arrested on that same night although she did not know the details of that arrest. She participated in the identification parade mounted by the police. In that parade she was able to identify the appellant amongst the persons in the parade. PW 2 said that in her mother-in-law's home where the robbers came was kept kshs. 108,000 belonging to the ACK church which were the proceeds of a fund raising. This however was not stolen. She confirmed that she was able to recognize the appellant because the lamp that was in the room illuminated the whole

room. At the identification parade she did not note that the appellant had plaster on his leg. She only saw him from the waist upwards. PW 3 responded to the screams of PW 2 and others but was attacked by a group of people and robbed of money and amongst the people who robbed him he was able to identify the appellant. His evidence related to count 1. The learned magistrate discounted and rejected his evidence, in our view quite rightly so because his identification of the appellant was a mere dock identification. Although other witnesses participated in the identification parade PW 3 did not. Because of the poor evidence of identification on count 1 the learned magistrate acquitted the appellant on that count. PW 3 was attacked at night and only had the aid of the torch he was carrying. His identification of the appellant therefore was under very poor circumstances. PW 4 was the Assistant Chief of Githeri Sub-location. He said that he resides in Ngami. Earlier in the evening of 27th November 2005 he and other people heard screams. Although they tried they were unable to trace the robbers. At 1 am whilst in his house he was called by PW 1 who told him that a man was at his home and that he had fractured his leg. He went and found the man was lying down about 400 metres away from the road. That where he was there was no road nearby. He too noted that there were no tyre marks or sign of struggle at the place where this man was. He identified that person as the appellant. The appellant had dislocated his left knee. In his view PW 4 said that such an injury could have been caused by the appellant running at a steep place. He said that that was the terrain of the place where the screaming seemed to have come from earlier on in the evening. PW 5 was a fifteen year old girl. On the material night she was at her grandmother's home. She is the daughter of PW 2. They were having dinner when somebody entered in to the room and began to demand for money. Her mother PW 2 began to struggle with this person whom she identified as the appellant in court. Her mother's index finger was cut in that struggle. She said that in the room there was light before it was hit and put off by the appellant. She was able to note that the appellant was wearing a white shirt, navy blue jacket which had many pockets and navy blue jeans. She said that they screamed until the neighbours came. She also participated in an identification parade and was able to pin point the appellant. PW6 was a police officer who was called by the assistant chief and who arrested the appellant. PW 7 treated PW 2's injury which he said was caused by a sharp object. PW 8 a police officer mounted up the identification parade. He said that the appellant accepted to participate in the parade and was assisted by a witness who could read and write. He mounted the parade by putting together people of similar complexion, class and station in life. The appellant was pointed out by PW 2 and 5. Because of his injury he placed him together with four other persons behind a wooden box. In his defence the appellant said that he was a lumber jack. On 27th November 2005 at 7.30 p.m he had gone to purchase petrol for his power saw. People who were in a vehicle hit him with an object on his leg when he attempted to escape from them. They further beat him and robbed him of kshs.1200. They then put him in the car and abandoned him later on. On being abandoned he saw a house nearby and he dragged himself to ask for help. That was the evidence presented before the lower court. The appellant was identified by 3 persons although only 2 of them participated in an identification parade. PW 2 and 5 identified the appellant through the aid of the lamp that was in the room. Their identification of the appellant was such that they were able to describe the clothing he was wearing. Whereas most honest of witnesses can be mistaken when it comes to identification the witnesses identification of the appellant was further enhanced by identification parade. The appellant was arrested having dislocated his knee at a sloppy place. His explanation of how he came to be there was not tenable. PW 1 and the Assistant Chief noted that although the appellant claimed to have been carjacked there were no tyre marks, nor signs of struggle. The appellant was not even able to give the registration number of his vehicle. The appellant did not cross examine PW 1. That evidence therefore stands unchallenged. That unchallenged evidence puts great doubt to the defence offered by the appellant. The prosecution's evidence and in particular that of identification of the appellant was clear and unassailable. In our view it met the required standard of proof in the criminal trial. More importantly the appellant's defence was only raised when he gave evidence in his defence. He did not raise it when he cross examined the prosecution witnesses. We are satisfied that there is sufficient evidence to support the appellant's conviction on count 2. We find no reason to disturb the conviction or the sentence meted out to him. The sentence of death is provided under section 297(2) of the Penal Code. The appellant's appeal is therefore dismissed.

Dated and delivered this 11th day of May 2009

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE