**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT MOMBASA**
**Criminal Appeal 190 of 2004**

**CHARLES KIPSANG ELONGOI ..…….. APPELLANT**

**- Versus -**

**REPUBLIC …… RESPONDENT**

**J U D G M E N T**

Charles Kipsang Elongoi has appealed to this court against conviction and sentence for the offence of robbery with violence contrary to Section 296(2) of the Penal Code, the particulars of which read as follows-

"On the 16th November, 2003 at about 1.00pm at Maweni Village Diani Beach in Kwale District of the Coast Province while armed with a dangerous weapon a knife (sic) robbed Emily Manyara of her mobile telephone make Siemen C45, Insurance Card, keys and cash Kshs. 800/- all valued at Kshs. 7,000/- and at or immediately before the time of immediately after (sic) the time of such robbery wounded the said Emily Manyara."

The prosecution case was simple and clear. The facts were that the complainant herein was walking home from church at about 1.00pm when someone greeted her from behind and suddenly grabbed her handbag. One strap got stuck on the left arm. The man cut her with a knife on her left arm and she screamed. The man then took her bag and ran off.

The complainant herself ran to her home which was nearby and called her father who sent a friend of his to take the complainant to hospital. Thereafter she went to the Police Station and made a report. The following day the complainant was informed that the man who robbed her had been apprehended. She thereupon went to the Police Station where an identification parade was conducted and she identified the appellant. The appellant was subsequently charged and denied having committed the offence. After the trial, he was found guilty as charged, convicted and sentenced to death, thereby prompting this appeal.

Mr. Kaburu for the appellant submitted that since the complainant was attacked from behind and the attack lasted under 2 minutes, the circumstances were not conducive to accurate identification. He further submitted that the identification parade was flawed inasmuch as there were both short and tall participants, and the appellant was the only participant wearing dreadlocks. As a consequence, the complainant failed to identify him when all the participants wore headgears, but only upon removal of the headgears. Finally, he argued and submitted that there was no connection between the appellant and the offence, and that the matter was not investigated as there was no evidence of any investigating officer. He also argued that the trial court failed to give any consideration to the evidence of the appellant, and this was a case of mistaken identity.

On his part, Mr. Onserio for the Republic supported the conviction. He contended that both PW1 and PW2 identified the appellant and that the identification parade was done in accordance with the rules. He also argued that although it was alleged that there were tall and short participants, that was only the view of the witness. It was not possible, he submitted, to get people of exactly the same height, but only about the same height, provided some are not too tall, or too short. He therefore submitted that the parade was properly conducted. He further submitted that the appellant was not the only participant in dreadlocks, and that the trial magistrate considered the evidence of the appellant but found it to be lies.

We have considered the submissions of both counsel. This being a first appeal, we are bound to re-evaluate the evidence

and draw our own inferences on the basis of the evidence without overlooking the conclusions reached by the trial court. We should analyse the evidence because that is what the appellant legitimately expects of us.

The complainant, who testified as P.W.1, said that she was robbed at about 1.00 p.m. on her way home from the church. In the course of the robbery, she was cut with a knife. The evidence of the injury was corroborated by P.W.2, Bahati Juma, who testified that on the material day at about 1.00 p.m., he was seated outside his house when he heard a child crying out in pain. He rushed there and saw a girl holding her bleeding hand as she went towards their home. He also saw a man leaving from where the girl was towards the witness. He was carrying a ladies handbag. He was also holding a knife in his right hand.

The evidence as to the injury was further corroborated by one Mutinda Muthui Musinga, a Clinical Officer who testified as P.W.4. He produced the P3 Form which showed that the assessed degree of the injury sustained was classified as "grevious harm." All this is not contested. What is contested is the identity of the robber and assailant. With the offence having taken place in broad daylight, one would have thought that there ought not to be any difficulty in identification. Towards that goal, P.W.1 herself said that when she recorded her statement with the police, she told them that she did not know the robber's name, but she used to see him. He had dreadlocks and a beard. She also described his colour and an estimate of his height. The following day some people from the stage called her home and said they had apprehended the man and taken him to the police station.

On the other hand, P.W.2 Bahati Juma, who was the only person to say that he saw a man leaving from where the girl was towards him, told the police that he could identify the man if he saw him. On the day of the attack, he went round with the police looking for the attacker, but they never got him. The next day, he was called to the Police Station and went for an identification parade.

From the above accounts of the two key prosecution witnesses, we note that none of these two witnessed the arrest of the appellant. The only account of that arrest is given by P.W.5, No. 66392, Cpl. Ambrose Lemuda. He testified that while on duty with his colleagues on 17th November, 2003, at about 9.00 a.m., in their motor vehicle GK A247B, they were stopped by members of the public who told them that those members had seen "a suspect" boarding a Nissan Matatu Reg. No. KAN 090W. The police followed the matatu in their own motor vehicle together with "the member of public". They followed the motor vehicle and "were shown" the accused. They arrested and took him to Diani Police Station where he was charged with robbery with violence.

This evidence exposes a big gap in the prosecution case. The circumstances surrounding the arrest of the appellant leave a few questions unanswered. P.W.5 said that members of the public told the Police that those members had seen "a suspect". What did the Police understand by that phrase? The phrase "a suspect" is different from the phrase "the suspect". The former is too general and means that there could be other suspects, whereas the latter is specific and relates to a specific person in relation to a given offence. The question then arises – the suspect was "a suspect" in respect of what?

More important, the witness says that they stopped the motor vehicle and were shown the accused, before the court. Who showed them the accused, now the appellant before the court? Even if an inference were to be drawn that perhaps it was the member of public who showed them the appellant, he should have said so. But he did not. Why?

The worst aspect of this arrest is that in cross-examination by the appellant, this witness said that the member of public was present during the robbery, and that he saw the appellant following the girl and taking her purse. Such a member of the public would have been a key witness for the prosecution, but no witness came forward to say that he was present during the robbery and that he saw the appellant following the complainant and taking her purse. Such a person, if there was one, should have been summoned to testify, otherwise in his absence, the police officers' evidence was mere heresay. In the absence of such a witness, we find that there is a missing link in the prosecution case. This eyewitness would have provided that link, but in the present circumstances we can't be certain that the appellant, who was the person arrested, was the same person who robbed the complainant. It could be a case of mistaken identity.

Having so found, even though P.W.1 and P.W.2 purported to identify the appellant at the identification parade, we are of the view that they could have been mistaken, especially considering that P.W.1 was of the impression that the robber was a person she used to see, and P.W.2 was also of the view that he knew the man but not by name. At the parade, therefore, P.W.1 went straight for the person she used to see, and P.W.2 went for the person he thought he knew. In her evidence, the complainant said that the day following the robbery, "some people from the stage" called home and said they had apprehended "the man" and taken him to the police station. Who were these people from the stage? How did they know that the appellant was the alleged robber and yet they were not eye witnesses? The police themselves arrested a person who was only shown to them by some unknown person. They did not arrest him on the strength of information given to them by the complainant, but by a total stranger. This evidence furthermore suggests that two persons were arrested – the first one by some people from the stage, and the second one by the Police! Yet there was only one accused, now the appellant. The investigating officer did not come to testify and thereby clear the air on these "arrests"

of the appellant. Was the person arrested by the people from the stage the same one who was arrested by the Police? The evidence leaves many questions unanswered.

In these circumstances, we find that there is a reasonable doubt as to whether the person arrested was the same one who robbed the complainant since there is a missing link between the commission of the offence and the arrest of the appellant. We don't think that that link could be provided by the identification parade. We therefore give the appellant the benefit of that doubt and allow his appeal.

The conviction of the appellant is accordingly quashed and the sentence set aside. He is also set free forthwith unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 10th day of June, 2008.

**J.K. SERGON**

**JUDGE**

**L. NJAGI**

**JUDGE**