REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG & OMONDI, JJ.)

CRIMINAL APPEAL NO. 486 OF 2006

-BETWEEN-

JOSEPH KAMAU.....APPELLANT

-AND-

REPUBLIC……RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate Mr. Maundu dated 31st October, 2006 in Criminal Case No. 124 of 2006 at Kibera Law Courts)

JUDGEMENT OF THE COURT

The appellant was charged with robbery with violence contrary to s.296(2) of the Penal Code (Cap. 63, Laws of Kenya). It was alleged that the appellant, on 1st January, 2006 at the railway line at Ngando, in the Karen area of Nairobi, jointly with others not before the Court, robbed ***Dorcas Kinya Kinoti*** of a mobile phone, Nokia 2100 valued at Kshs.5,600/=, and cash in the sum of Kshs.200/= – all valued at Kshs.5,800/= – and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence upon the said ***Dorcas Kinya Kinoti.***

The complainant testified that on the material day, at about 6.30 p.m., as she walked home from Kawangware Market, she met three men, among them the appellant. When she stepped aside to give way to the three, the accused suddenly grabbed the complainant by the neck. She and the accused fell down, and she held the accused tightly as she screamed out for help. She would not let go even when the accused battered her with his fists. In the meantime, the other two men ransacked her pockets and removed her mobile phone, Nokia 2100, as well as her money, in Kshs.200/=.

David Simiti Kelwa (PW2) heard the complainant's distress call, and rushed to the scene. The two men accompanying the appellant ran away, when they saw PW2; he chased them, but they disappeared. PW2 then returned to the *locus in quo*, where the complainant was still struggling with the accused who was trying to free himself. PW2 gave assistance to the complainant, and they arrested the appellant and marched him to the tarmac road (Ngong Road). Members of the public then alerted Police officers, who came along, and re-arrested the accused. The appellant was later charged with the offence of robbery with violence.

The appellant gave unsworn testimony, denying the offence. He said that about the material time, he was

coming from a neighbouring school, when a woman and a man emerged, the woman made gestures at him, and the accompanying man hit him (the appellant) with a metal bar till he lost consciousness, regaining it only at the time he was arrested along Ngong Road. He said he was not told why he was being arrested, but he was later charged in Court.

The learned Magistrate asked himself the question whether the prosecution case had been proved beyond reasonable doubt. He came to the conclusion that the accused person had been arrested at the time of the commission of the alleged offence. The learned Magistrate remarked: "*He [the appellant] was [caught] red-handed and there [can be] no mistake about his identity. His defence that he was walking home when he was suddenly confronted by the complainant and her witness does not hold water. This is a fabricated story.*"

On the basis of the evidence, the learned Magistrate thus concluded:

> **"....I have no doubt that the accused person was acting in cahoots with the two...people who disappeared with the complainant's mobile phone and money. The three of them had common intention, that is, to rob the complainant."**

The trial Court found that the prosecution had proved its case against the appellant beyond any reasonable doubt, and convicted him accordingly, sentencing him to death as required by law.

In his appeal, the appellant contended that he had not been properly identified as a suspect; that the charge was defective; that his evidence had been rejected without cause. He brought into Court written submissions, elaborating the said grounds; and orally, the appellant said he had been involved in his own business, at the time he had been arrested and subsequently charged.

Learned counsel, ***Mrs. Gakobo*** for the respondent, opposed the appeal, and supported conviction and sentence. She urged that there was sufficient natural lighting at the time of the offence, and that the appellant had been properly identified. The testimony of the complainant and of PW2, counsel urged, was mutually corroborative, and showed that the appellant had been properly identified. The arrest had taken place during the commission of the offence, and thus, there had been positive identification of the appellant as suspect.

After considering all the evidence, and adverting to the submissions made, we have come to the conclusion that, the time being early-evening time, and the appellant not having broken the chain of events and of perception from the time of attack to the time of arrest, there was no possibility of a mistaken identification. The reliable evidence of both PW1 and PW2 proves the case, and the appellant did not put up any credible defence.

Consequently, we dismiss the appeal, uphold the conviction, and affirm sentence as imposed by the trial Court.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 25th day of September, 2008.

J.B. OJWANG H.A. OMONDI

JUDGE JUDGE

Coram: Ojwang & Omondi, JJ.

Court Clerk: Huka

For the Respondent: Ms. Gakobo

Appellant in person