



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Criminal Appeal 215 of 2006

THOMAS MOGESI BOKE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in the Principal Magistrate's

**Court at Migori Criminal Cases No.387 of 2004 by EZRA O. AWINO ESQ., AG.
P.M)**

JUDGMENT

The appellant was charged with robbery with violence contrary to **section 296(2)** of the **Penal Code** but he was convicted for simple robbery. It was alleged that on 25th April, 2004 at Nyamaharaga village in Kuria District, jointly with others not before court, the appellant robbed **Simion Cheche Mahere** of Kshs.3500/= and immediately before or immediately after the time of such robbery wounded the said **Simon Cheche Mahere**.

The appellant was sentenced to ten years' imprisonment. He was aggrieved by the said conviction and preferred an appeal to this court.

In his appeal, he argued that there was insufficient evidence to sustain a conviction. The brief facts of the case were as follows:

Simon Cheche Mahere, PW1, testified that on 25th April, 2004 he checked into a lodging room at Sirare. After a while he decided to go to the bar for some drinks.

When he was going to his room, he was confronted by someone who asked him to identify himself. The person followed PW1 and grabbed him. The assailant cut PW1 on one of his fingers and proceed to steal from him Kshs.3500/=. PW1 went to his room and began to scream. After a short while the Guesthouse Attendant and the Watchman went to the room of PW1. The police were called and when they arrived, PW1 told them what had transpired. The appellant was outside the bar and he was identified by PW1 before he was arrested.

The appellant denied having committed the offence. He said that he was arrested for riding a bicycle without a headlight. He was surprised when he was charged with robbery.

Having carefully considered the aforesaid evidence, it is clear that the appellant was convicted on the basis of evidence of a single identifying witness. The alleged offence was committed at night. Although there were lights in that bar, it was not stated how bright they were.

The Guest House Attendant and the Watchman who were allegedly present when the said offence was committed were not called to testify. No reason was given for that omission.

Where evidence rests on a single witness and the circumstances of identification are shown to have been difficult, there has to be other evidence, either direct or circumstantial, pointing to the guilt of an accused person from which the court may reasonably conclude that the identification is reliable; see **ODHIAMBO VS REPUBLIC** [2002] 1 KLR 241. There was no such other evidence to corroborate that of PW1.

It is also unusual for a person to commit a robbery in a bar and stay just outside that bar, even when such a person sees police officers going to the premises. The appellant's defence was plausible.

I find that the appellant's conviction was unsafe and allow his appeal, quash the conviction and set aside the sentence that was pronounced by the trial court.

The appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at KISII this 29th day October, 2008

D. MUSINGA

JUDGE

Delivered in the open court in the presence of:

1. The Appellant
2. Mr. Kemo, Senior Principal State Counsel for the Republic

D. MUSINGA

JUDGE