**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NYERI**

**Criminal Appeal 241 of 2007**

**MAINA MBUTHIA ……..……..…… APPELLANT**

***Versus***

**REPUBLIC ……..…… RESPONDENT**

***(Being an appeal against the conviction and sentence by V. W. NDURURU, Ag Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 696 of 2006 at MUKURWEINI)***

**JUDGMENT**

The appellant was charged with ***robbery contrary to section 296(1) of the Penal Code***. On being tried by the lower court he was convicted as charged and was sentenced to five years imprisonment. He has brought this appeal against conviction and sentence.

This court is duty bound to re-evaluate the evidence of the lower court. 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 12th August 2006 at 10 pm having just been dropped at Karumba Bus Stage began to walk home. He was carrying luggage containing shopping of various items he had purchased at Ukwala shop. As he walked he came across two men and lady behind them. One of the men shone his torch on his chest and ordered him to stop. PW 1 screamed and began to run. The two men chased him and when they were about to catch him he dropped his luggage. He reported the matter to the police. On the following day he went to the Karundu shopping centre. He met with PW 2 who worked at a bar. She told him that she was the lady who was walking behind the two men who had robbed him. The two men had asked her to step aside when they began chasing PW 1. She stated that the following day after the robbery one of the men namely Mwangi who was not apprehended gave her 2kg of sugar and 2kg rice. In giving these items to her Mwangi requested that she would not reveal their identity. Having given that information to PW 1 whilst in the company of police officers PW 2 directed them to the home of Mwangi where the wrapping of the luggage was found. Mwangi was however not arrested nor was he found. Appellant was not at his home but was later found at Karundu shopping centre intoxicated. PW 2 the barmaid confirmed that on 12th August 2006 at 10.30 she closed the bar. As she began to walk home the appellant and Mwangi were walking ahead of her. She observed PW 1 being dropped by a Nissan vehicle. He began to walk towards them. The appellant warned her not to follow them as they tried to intercept PW 1. They chased PW 1 until he dropped his luggage. That night she went home. The following day at 8.30 am the appellant's accomplice went to her home and gave her 2kgs of sugar and

rice. The following day she informed PW 1 of the identity of the appellant and Mwangi. PW 3 was the officer who received the report of the theft. He was also present when PW 2 surrendered the sugar and the rice. They also went to the home of Mwangi and recovered the wrapping of PW 1's shopping. The lower court found that the appellant had a case to answer. In his unsworn statement the appellant stated that on 12th August 2006 he became intoxicated at Karundu shopping centre and left there at midnight for home. Next day he went again to the bar and was arrested. In his defence he did not deny having participated in the offence. The learned trial magistrate found that the prosecution had met the criminal standard of proof. The trial court found that the evidence of PW 2 was damning against the appellant. I find that I am in agreement with the finding of the lower court. Not only was the evidence of PW 2 very clear and there seem to be no reason for fabrication but also the evidence of PW 1 was that the appellant was still wearing the same shirt he was wearing the night of the attack. Having considered the evidence I find no reason to interfere with the judgment of the lower court. I find that the appellants appeal has no merit and the same is dismissed.

**MARY KASANGO**

**JUDGE**

**DATED AND DELIVERED THIS 28TH DAY OF OCTOBER 2008**

**M. S. A. MAKHANDIA**

**JUDGE**