REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 158 of 2005

STEPHEN KARANJA WAINAINA…….……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGMENT

The appellant, **STEPHEN KARANJA WAINAINA**, was charged with robbery with the offence of violence contrary to **Section 296(2)** of the **Penal code**. The particulars of the charge against him were that on 12th July 2004 at Bondeni estate, Nakuru District within Rift Valley province jointly with others not before court, being armed with dangerous or offensive weapon namely pangas, they robbed Juma Kahero Nassir of a Samsung mobile phone R 220 and cash of Kshs.4,600/- all valaued at Kshs.13,200/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said Juma Kahero Nassir. He pleaded not guilty but after trial before the Senior Resident Magistrate at Nakuru he was convicted and sentenced to death. He has now appealed to this court against the conviction and sentence and listed 8 grounds of appeal which raise three main points. They are that the learned trial magistrate erred on convicting him on flawed identification, that there was no sufficient evidence to support the conviction and that the learned trial magistrate did not adequately consider his defence.

In his written submissions, the appellant contended that his was mistaken identification as the complainant did not give his name to the police when he reported the robbery. He further argued that the complainant tramped up this charge against him because of the grudge he had with the Appellant over some love affair they both allegedly had with some woman.

On his part Mr. Mugambi, learned state Counsel, submitted that the appellant's conviction was based on overwhelming evidence. He said that the robbery took place at about 6.00 p.m. when it was still daytime. Both the complainant and PW2 identified the appellant whom they knew before even by name. He urged us to dismiss this appeal.

We have considered these submissions and carefully read the lower court record. Both PW1 and PW2 claimed to have known the appellant but it is not clear from the record how they knew him and for how long. When they made the report to the police they did not give the appellant's name. If they did the police witness, PC Kimutai, PW3, should have said so but he did not. Both PW1 and PW2 said in their evidence that the robbery took place at 6.00 p.m. when there was still daylight and they were able to clearly see the appellant as one of the young men who robbed PW1. That evidence cannot be correct.

PW1 said he closed his shop at Pioneer Plaza at 6.00 p.m. and was walking home when he was robbed at Lion Primary School which is about 5 KM from Pioneer Plaza. PW1 must have taken quite sometime to walk the 5 KM stretch. So the robbery must have been long after 6.00 p.m. We doubt whether or not it was clear for him and PW2 to have clearly identified the Appellant as one of the robbers.

PW1 also claimed that on the date of arrest he was told by one Rono that the Appellant had been spotted around he marshaled support and got him arrested and taken to the police station. Rono did not testify and there is nothing on record to show how he came to know that the appellant had robbed PW1.

For these reasons the Appellant's identification as one of the robbers in this case is in doubt and we give him that benefit of doubt. Consequently we allow this appeal, quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless otherwise lawfully held.

DATED and delivered at Nakuru this 11th day of December, 2008.

M.KOOME

JUDGE

D. K. MARAGA

JUDGE