REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 332 of 2004

ALEX KIPCHUMBA ……..……. APPELLANT

VERSUS

REPUBLIC ……..……. RESPONDENT

(Appeal from original conviction and sentence in Eldama Ravine Criminal Case No. 641 of 2003 – Kagendo W. M – RM)

J U D G M E N T

The Appellant was convicted by the Resident Magistrate's Court Eldama Ravine on a charge of Robbery contrary to section 296(1) of the Penal Code and he was, after a full trial sentenced to 4 years imprisonment. The Appellant was jointly charged with a second (2nd) accused and another one who was not present in court. The Appellant being dissatisfied with both the conviction and the sentence has appealed before this court.

The evidence that was adduced and that lead to the conviction was that the complainant was at an all night party on the night of 11th day of August 2003 at Metipso area in Koibatek District within Rift Valley Province, jointly with others not before the court, robbed KIPLANGAT CHERUIYOT of Kshs.7,000/- and at the time of such robbery used actual violence on the said Kiplangat Cheruiyot.

The evidence that was adduced that lead to the conviction was that the complainant was at an all night party on the night of 11th August, 2003. The Appellant together with the 2nd accused person and a 3rd person called Kipkemoi Cheruiyot were also at the same party. The complainant said that he spent the whole night and was in possession of Kshs.7,100/- which were from the proceeds of a sale of a cow. He removed Kshs.100/- to contribute for the party and kept the rest of the money in the pocket we while being waited by the 1st and 2nd accused person.

He started going home at around 5.00am and while on the way home he was waylaid by two people that is the 2nd accused and the other person who was not before court. It is at this point after the complainant was knocked down and the 2nd accused stabbed him with a knife that the Appellant found them. The Appellant was armed with a stone and hit the complainant on the ribs. The complainant managed to run after the 2nd accused who ran up to his house and locked himself inside. The complainant tried to push the door and was hit with a stone from behind by the Appellant it however missed him and hit the door. At this time the parents of the second accused were awoken by the commotion and the complainant

explained to them that the 2nd accused had stolen the Kshs.7000/- and stabbed him with a knife. When the parents did not take any action, the complainant decided to go back to the place where there was a party and reported to the patrons what had happened. He was immediately taken to hospital and reported the matter to the police. Later in the day he led the police who re-arrested the Appellant who had been arrested by the members of the public following the complainants reported at the party by the complainant. The Appellant's grounds of appeal have principally attacked the weight of the evidence especially on identification and lack of evidence to support the allegation that the complainant had even been robbed of a sweater which was never produced as an exhibit. The Appellant also requested the court to consider that even the knife that was produced as an exhibit by the complainant himself and therefore there was no evidence to connect it with the charges.

I have carefully re-evaluated the evidence and the judgment of the subordinate court.

This is necessary especially due to the fact that the Appellant was convicted on the evidence of a single identifying witness. As it is well established in various Court of Appeal decisions and it is trite law a fact may be proved by the testimony of a single witness, this does not lessen the need for testing this evidence with the greatest care. The evidence of a single witness respecting the identification especially when it is known that the conditions favouring the correct identification could have been difficult.

In this case, the complainant who identified the Appellant said that he had always known the Appellants as a neighbour, they were together at the all night party and the Appellant emerged from behind and hit him with a stone and tried to hit him once again with another stone when the complainant was pursuing the second accused to his house and was trying to push the door open. Although this was in the wee hours of the morning, I am satisfied that the learned Magistrate warned herself sufficiently and after considering all the impressions made from the complainant's evidence whom the court found cogent and credible proceeded to convict the Appellant. While considering this case, I have looked at some decisions by the court of appeal especially the case of ***MAITANYI VS REPUBLIC 1986 KLR*** page 198 especially the reflection of the holding taken from the celebrated case of ***ABDULLA BIN WENDO & ANOTHER VS REPUBLIC*** (1953) 20 EACA where it was held:-

"***Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the condition, favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether circumstantial or direct pointing to the guilt, from which a judge or jury can personally conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."***

I am satisfied the learned magistrate took all the necessary precaution and arrived at the decision that this was an identification based on recognition of the Appellant by the accused person. The complainant gave the proper identification of his assailants to those with whom he was at the party that led to the arrest of the Appellant on the same day.

In this case the magistrate arrived at the proper conclusion and convicted the appellant.

As regards the sentence, the maximum sentence permitted by law is (14) fourteen years and I find the sentence of four(4) years appropriate.

In the sum total this appeal fails and is accordingly dismissed.

Judgment read and signed on 2nd March, 2006.

M. KOOME

JUDGE

2ND MARCH, 2006