REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1139 of 2002

(From original conviction(s) and Sentence(s) in Criminal Case No. 4930 of 2002 of the Senior Principal Magistrate's Court at Kibera (Mrs. Karanja -SPM)

K P K.……..……..……..……APPELLANT

VERSUS

REPUBLIC…… ……..RESPONDENT

J U D G M E N T

K P K had been charged with two others with the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. It was alleged that on 25th June 2002 at Kiserian, Kajiado District, while with others and while armed with dangerous weapons namely simis and rungus robbed the Complainant of a wrist watch valued at Kshs.60/- and cash Kshs.200/- and used actual violence on the Complainant. The Appellant was convicted after the trial and sentenced to death as prescribed in the law. It is against the conviction and sentence that he lodged this appeal.

The Appellant filed written submissions in which he relied with the court's leave on amended grounds of appeal. There were four grounds cited in the amended grounds of appeal to wit; failure by the learned trial magistrate to confirm the Appellant's mental status, that the learned trial magistrate erred in finding the charge proved while failing to consider the massive contradictions and discrepancies in the prosecution case and finally for convicting the Appellant for the aggravated charge of robbery before informing the Appellant of his right to an advocate.

The State opposed the appeal and **MR. MAKURA** represented the Attorney General's office.

We have carefully considered the appeal and evaluated and analyzed afresh the entire evidence adduced before the lower court as expected of us as the first appellate court. **See (OKENO vs. REPUBLIC 1972 EA 32**).

We summarize that evidence as follows. The Complainant in this case, PW1, was riding at the rear open of PW2's pickup with two others. In the driver's cabin was PW2, the driver and one passenger PW4. As PW2 slowed down at a bumpy section of the road, the Complainant was pulled out of the pick-up by the Appellant whom he knew very well before and a group of five men set on him, beating him severely. PW2 and PW4 saw and recognized the Appellant as the one who was armed with a sword and who stole the Complainant's money. The matter was reported to the Police and the Appellants name given to them. The Appellant was thereafter arrested and charged. In his unsworn defence all the Appellant stated was that he did not commit the offence. The Appellant was charged with 2 others who were acquitted after their defence.

MR. ODHIAMBO, Counsel for the Appellant in his written submissions contended that the Appellant was a minor at the time the offence was committed and that therefore the learned trial magistrate in failing to assess his age and also failing to inform the Appellant of his right to legal representation occasioned a miscarriage of justice.

There was no evidence before us to show that the Appellant was a minor at the time the offence was committed. This is an issue that ought to have been raised in the lower court and ventilated at that stage. Learned counsel for the Appellant did not raise the issue until in his written submission which he did not highlight. As a result, **MR. MAKURA**, for the State, did not know of that issue and we have not had the benefit of his submissions on the same. The issue is an afterthought. The Appellant's advocate did not substantiate that claim at all. We reject that ground as a non-issue, an afterthought and judging from how it was raised, seems to us to have been mischievous

On the issue that Appellant needed representation due to his age, there is no law requiring representation of accused persons by advocates except those charged with murder contrary to **Section 202** of the **Penal Code**. That issue has no basis in law and is also rejected. **MR. ODHIAMBO** also submitted that the Complainant's evidence that the Appellant robbed him was not corroborated and could not stand. That corroboration should have been from his statement to the police which was missing. In the Court of Appeal case of **ODHIAMBO vs. REPUBLIC (2002) 1 KLR 241:**

"***The law on identification is not in doubt. It has been stated and restated in several judicial decisions by this court and by the High Court. The court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification where evidence of identification rests on a single witness and the circumstances of identification are known to be difficult, what is needed is other evidence either direct or circumstantial pointing to the guilt of the accused persons from which, the court may reasonably conclude the identification is accurate and free from the possibility of an error."***

The fact that the prosecution relied on the evidence of identification by a single witness without corroboration would not result in an acquittal unless the circumstances of identification were not conducive for positive identification. Statements made to police by the Complainant could only be used to show consistency and not corroboration of the Complainant's evidence. In the instant case, the incident took place at 5.00 p.m. The conditions of identification were favourable. The evidence of identification by the Complainant was also corroborated by two other witnesses. PW2 saw a commotion at the rear of the vehicle he was driving and he stopped and went out to see the Appellant and one N both of whom he knew before, and four others beating the Complainant and robbing him before they ran away. PW2 had a full view of the incident from a very close distance since all of it happened at the rear of his car and he went out to see. Both PW1 and PW2 gave the Appellant's name to the police and PW3, caused his arrest.

PW4 on the other hand did not have a very good view since she saw the incident through the mirror while seated in the car. The evidence of the Complainant was fully corroborated by PW2 and their evidence was strong enough in our view to sustain a conviction. We agree with Mr. Makura for the State that this evidence was overwhelming and safe to sustain the conviction.

MR. ODHIAMBO submitted that there were contradictions, major inconsistencies and discrepancies in the prosecution case. According to **MR. ODHIAMBO** the inconsistency was failure by people who sat at the rear of the pick up with the Complainant to assist the Complainant against the attack. That cannot be evidence of inconsistency. If anything the evidence of the Complainant and PW3 gave insight as to why the two who sat with the Complainant did nothing. PW1 described one as an "old mzee" and PW2 said the other was a woman. The fact they did nothing to prevent offence or assist the Appellant is neither here nor there and neither does it raise doubts in the prosecution case.

MR. ODHIAMBO submitted that while the Complainant spoke of being with one person at the back of the pick-up, PW2 said they were two. In our view, the inconsistency is immaterial as it does not go to the substance of the case. We are satisfied that it was minor and that it did not cause the Appellant any

prejudice.

Counsel submitted that the learned trial magistrate acquitted the Appellant's co-accused despite the evidence of recognition by PW2. Counsel submitted therefore that the same benefit of doubt ought to have been extended to the Appellant. The learned trial magistrate in her judgment at page J3 and J4 clearly analyzed the evidence against the Appellant before convicting him. The learned trial magistrate also evaluated the evidence against the Appellant's co-accused and found it unreliable. The learned trial magistrate found that the evidence of recognition by PW2 was uncorroborated. Secondly learned trial magistrate also considered the defence by the two accused persons which she found explained the reasons for their arrest. Unlike the Appellant whose name was given to PW3, the arresting officer, at the first instance, by the Complainant and PW2 the learned trial magistrate noted that the names of the Appellant's co-accused were given by the Appellant. The evidence against the Appellant was therefore not similar to that against his co-accused and therefore the test applicable to the case of each accused person could not have been the same. The fact that the Appellant's co-accused benefited from doubt arising out of the evidence before the court does not necessary follow that the Appellant ought to benefit from the same doubt. Each case needed to be examined and analyzed in its own merit and that is what the learned trial magistrate did. The trial court's judgment cannot therefore be faulted.

Having considered this appeal we are satisfied that the same has no merit whatsoever. We dismiss it in its entirety, uphold the conviction and confirm the sentence.

Dated at Nairobi this 6th day of May 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. Makura for State

Mr. Odhiambo for the Appellant

CC: Tabitha

…….**...**

LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE