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

Criminal Appeal 82 of 2004

(From the original conviction and sentence in criminal case No. 6663 of 2003 of the Chief Magistrate's Court at Kibera – Ms. Siganga - SRM)

JAIRUS MUKOLWE OCHIENG…….……
APPELLANT

VERSUS

REPUBLIC …….……..RESPONDENT

JUDGMENT

JAIRUS MUKOLWE OCHIENG was charged with one Count of Robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge were that the appellant:

"……***On the 4th day of September, 2003 at Kibera Kianda within Nairobi area Province, jointly with others not before Court, while armed with dangerous weapons namely Pangas robbed Charles Ayoti Ouma a mobile phone Siemens A36 and cash Kshs 1,100/= all valued at Kshs. 7,100/= and at or immediately before or immediately after such robbery used actual violence to the said Charles Ayoti Ouma…….***"

The appellant was convicted and sentenced to death on the said count. It is from that conviction and sentence that he now appeals to this Court.

The facts of the prosecution case were that the complainants PW1 in the company of his cousin, PW2 were on 4th September, 2003 at about 4.30 p.m. walking home to Kibera Kianda from Kenyatta. They were using a shortcut through the forest. They reached a place near a river and his cousin excused himself to go and attend to the call of nature. P.W.1 then sat on a stone as he waited for his cousin. There was a boy nearby collecting firewood. Suddenly two men emerged and went passed P.W.1 and held brief discussions with the boy whereupon they came back and greeted P.W.1. One of the men then asked P.W.1 for Kshs 5/= for cigarettes. When P.W.1 said he had no money, one of them pulled out a panga with which he slapped him on the shoulder and ordered him to lie down and not to make any noise. They demanded for his cell phone which was valued at Kshs.5,990/= which he gave out. One of the men used a knife to cut P.W.1's rear trouser pocket, removed the wallet that contained Kshs.700/= took the money before throwing the wallet on the ground. They then left. Shortly thereafter they bumped into P.W.1's cousin, P.W.2 whom they also ordered to lie down. They frisked his pocket and removed his wallet which had Kshs.500/= which they took and then left. Accompanied by the boy collecting firewood, the two victims proceeded to Jamhuri police post and reported the incident. Apparently the boy knew one of the robbers as "Karis". The robbers were traced the same day and were arrested. "Karis" however, managed to escape. His accomplice, who is the appellant was not so lucky. Upon arrest he was

taken to the police station and was subsequently charged.

Put on his defence, the appellant in unsworn statement stated that he had gone to Slams bar, and had sent a bouncer to buy him some drinks. As he waited outside, he was arrested for no good reason by the police. He was taken to a youth office where he was informed of the robbery and was charged. According to the appellant the case was a frame up.

The appellant has basically raised two broad grounds of appeal. The first ground is that the learned magistrate erred in law and fact holding that the prosecution case was proved beyond reasonable doubt when the charge sheet was defective, evidence in support thereof inconsistent and when certain vital witnesses were not called. Secondly, the learned magistrate erred in law and fact in disbelieving the appellant's defence. In support of the appeal, the appellant tendered written submissions which we have carefully considered.

Mrs Gakobo, learned state Counsel appeared for the state in this appeal. She opposed the appeal. She submitted that the appellant was positively identified by P.W.1 and P.W.2. The offence was committed in broad day light when conditions of identification were perfect. Both P.W.1 and P.W.2 noted the appellants mode of dressing and when arrested the appellant was still wearing the same jacket had during the robbery. Counsel submitted that prosecution evidence was consistent and corroborated. Counsel conceded though that the boy who was collecting firewood when the offence was committed was a vital witness and ought to have been called, the omission to summon him did not adversely affect the prosecution case. Finally Counsel submitted that contrary to the submissions by the appellant, his defence was duly considered by the Learned Magistrate and was rightly rejected in the light of strong prosecution evidence.

We have carefully analyzed and evaluated the evidence adduced before the trial court. We have also borne in mind that we neither saw nor heard any of the witnesses as they testified and have given due allowance in terms of ***OKENO –VS- REPUBLIC (1972) E.A 32.***

From our perusal of the record we note that the appellant did not subject any of the witnesses to cross-examination, in which event the word of the witnesses went unchallenged. Although an accused person in a trial has a right not to cross-examine a witness, it is always desirable for the trial court to try and establish perhaps why the accused is not keen on cross-examining the witness. It could be that perhaps he does not understand the proceedings, or that he does not know that he has a right to cross-examine witness or may be he has a medical problem. In a serious case such as the instant one which upon conviction carries a death sentence, such an inquiry is all the more desirable. At this stage we are unable to determine one way or another as to why the appellant found it unnecessary to cross-examine any the witnesses. In any event it is not one of the grounds in the petition of appeal

The appellant was convicted on the basis of the evidence of visual identification by P.W.1 and P.W.2. It has been said severally that where the evidence relied upon to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction. See ***ERIA SEBWATO –VS- REPUBLIC (1960) E.A.1 74, KIARIE –VS- REPUBLIC (1984) KLR 739.*** It has also been held that the complainant's visual identification of the appellant need to be treated and tested with a greatest care especially when it is known that the conditions favouring positive identification were difficult. See ***MAITANYI –VS- REPUBLIC (1985) 2 KAR 75.***

The evidence on record by P.W.1 and P.W.2 and which was unchallenged was that the offence was committed at 4.30 p.m. in broad daylight. It was not committed suddenly. Indeed the perpetrators of the crime first went past P.W.1 and talked to the boy collecting firewood before they turned back on P.W.1. And when they turned on P.W.1 they did not suddenly attack him. They talked to him first asking him for money for cigarettes. It was when he refused to part with Kshs.5/= that he was attacked. When they were done with him they did not run but simply walked away. They then bumped into P.W.2 whom they also robbed. As they were committing the offences, they were not disguised at all. Nor had they concealed their faces. Indeed all the witnesses were able to note the jacket the appellant was wearing. Each of the witnesses described vividly the role played by the appellant in the robbery. Immediately after

the robbery, the witnesses proceeded to the police station and later to the LDP Youth offices and filed a report regarding the incident. At the LDP Youth offices they gave a description of the robbers. Based on the description the LDP youth were able to figure out who the robbers were. Indeed they immediately identified one of the robbers as "Karis" which name the boy collecting firewood had also given to the witnesses. The said "Karis" was later pursued arrested by the youths but managed to escape.

In our view and based on the recorded evidence, we are satisfied as indeed was the trial court that the circumstances obtaining at the scene of crime were favourable for positive identification. It should be noted that the appellant was arrested on the same night at about 11.00 p.m., 6 hours after the robbery. According to the witnesses, he was still in the same jacket as he was wearing during the robbery. One may argue that the mere fact that the appellant was wearing a similar jacket as that one worn by one of the robbers during the incident cannot by itself place him at the scene of crime. That perhaps he could be a victim of mistaken identity as there was nothing unique about that jacket that could irresistibly be associated with the appellant or with one of the robbers at the scene of crime. This may be so. However, there is other evidence linking the appellant to the crime. There is evidence of recognition. According to the complainant he

"…***used to see accused in that area in Kianda, so I knew him during the robbery by his appearance. I saw his face during the incident…"***

In ***ANJONONI & OTHERS –VS- REPUBLIC (1980) KLR 59,*** the Court of Appeal stated:-

*"…..**the proper identification of robbers is always an important issue in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable…….. This was however a case of recognition, not identification of the assailants. Recognition of an assailant is more satisfactory, more assuring and more reliable that identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other……..."***

On our part, we are satisfied that the appellant was properly identified as having been a member of the gang that robbed the complainant. The two witnesses had ample time to see and visually identify and also recognize the appellant as he and his accomplice moved up and down. We also note that the appellant was arrested barely six hours after the incident, when the memories of both witnesses were still fresh. They could not have mistaken the appellant for somebody else.

The appellant submits that the charge sheet was defective in that it is at variance with the evidence tendered. That whereas in the charge sheet it is stated that a mobile phone and cash Kshs 1,100/= all valued at Kshs.7,100/= was stolen from P.W.1, in his evidence however, P.W.1 stated that his mobile valued at Kshs 5,990/= and cashKshs.700/= was stolen from him. In our view this discrepancy is not material as it does not go to the root of the prosecution case. Neither did it occasion the appellant any prejudice and it is certainly curable under the provisions of section 382 of the Criminal Procedure Code.

The appellant also submits that essential witnesses such as the boy who witnessed the robbery as well as the investigating officer were not called to testify. In ***BUKENYA & ANOTHER –VS- UGANDA (1972) E.A. 549***, the Court of Appeal for East Africa, held that the prosecution is duty bound to make available all necessary witnesses to establish the truth, even if their evidence may be inconsistent to its case. Otherwise failure to do so may in an appropriate case lead to an inference that the evidence of witnesses not called to testify would have tender to be adverse to the prosecution. An adverse inference can only be raised if the evidence in support of the charge is barely sufficient. In the instant case, the evidence against the appellant is overwhelming. The evidence of P.W.1 and 2 was largely unrebutted as they were not subjected to any cross-examination. There were no unbridgeable gaps in the prosecution case that would have warranted the testimony of the investigating officer. Similarly, we do not think that evidence of the boy who witnessed the robbery would have added anything new to the prosecution case other than just perhaps buttressing prosecution case.

The appellant maintains that he was framed in the case. We do not see any reason why this should

have been the case. The 3 witnesses had nothing to gain from framing the appellant. There is no evidence that three witnesses had any previous misunderstanding or grudge with the appellant as would have provided the excuse to nail the appellant.

Finally, the appellant feels that his defence was not considered properly before being rejected. This submission cannot possibly be true. Indeed the learned magistrate devoted a lot of time considering the appellant's defence before rejecting it. The learned magistrate gave reasons why she found the defence unmerited. We have also considered this defence and find that the learned trial magistrate was right in rejecting it especially in the face of the evidence of identification and circumstances of the appellant's arrest.

Having considered this appeal, we are satisfied that the conviction entered against the appellant herein was safe we accordingly dismiss the appeal, uphold the conviction and confirm the sentence.

Dated at Nairobi this 26th day of September, 2006

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LESIIT

JUDGE

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MAKHANDIA

JUDGE