REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 59 OF 2004

(From original conviction (s) and Sentence(s) in Criminal case No. 29178of 2003

of the Senior PrincipalMagistrate'sCourt at Makadara (C.O. Kanyangi – S.P.M.

SYLVANUS KEYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant **SYLVANUS KEYA** was convicted of one count o**f ROBBERY** contrary to **Section 296(1)** of the **Penal Code**. He was sentenced to 10 years imprisonment with five years police supervision. He has lodged his appeal challenging the conviction and sentence.

The brief facts of the case are that the Appellant was alone walking to work at 7.15 a.m. when he reached a corridor between buildings. He heard a man giving an order that he should be stabbed with a knife. He was then held from behind and robbed of his mobile phone. He was also strangled and thrown down. The Complainant said that as the robbers walked away, they kept looking back and that way he saw and recognized the Appellant. He says he had been seeing the Appellant for about a year at a barber shop which is on his way to work. The complainant reported to PW2 and later identified the Appellant to him and he was arrested. In his defence, the Appellant denied any involvement in the offence. He said that he was arrested as he returned from Kariobangi where he had gone to buy spirit for use at his barber shop.

The first ground of appeal raised by the Appellant in his petition challenges the conviction based on the evidence of a single identifying witness. **MISS MWENJE,** leaned counsel for the state submitted that the identification by the Complainant, PW1, was proper. **MISS MWENJE** submitted that the incident took place at 7.15 a.m. and that there was sufficient light for PW1 to identify the Appellant.

The evidence of a single identifying witness can form the basis of a conviction. It is no derogation of evidence to say that the Appellant was identified only by a single witness. The prosecution has to prove that the identification was proper. I have considered the evidence of the Complainant in detail. The incident took place in broad daylight. The Complainant in his evidence established that he had an opportunity to see and recognize the Appellant after he was robbed. The Complainant stated that the Appellant kept looking back as he and his accomplices walked away. The Complainant also established that he had seen the Appellant for a period of one year at a barber shop. The Appellant confirmed in his

defence that indeed he worked at a barber shop and therefore confirming that the Complainant's evidence was not far fetched. The circumstances of identification were good and conducive for positive identification. The Complainant's integrity was not in issue. The learned trial magistrate however did not caution himself of dangers of convicting on a single witness. I have cautioned myself of the danger of convicting on the evidence of a single witness. In my view the evidence adduced by the Complainant was strong and safe to sustain a conviction. The case cited by the Appellant **JUMA NYONGESA vs. REPUBLIC CA 121 of 1991** is in all fours with my finding in the instant case. It does not assist the Appellant's appeal in any way.

The Appellant's second ground of appeal was that his defence was not considered. It was the Appellant's contention that in his defence he informed the court that the Complainant was not sure of his identity. That at the time he identified him (Appellant) to the police, the Complainant merely stated that the Appellant looked like one of his attackers. I have evaluated afresh the evidence of the prosecution adduced against the Appellant. PW2 **APC AROMA** told the Court that the Complainant identified the Appellant to him as one of those who had just robbed him. In cross-examination, the same witness came out clearly that at the time the Complainant identified the Appellant to him, the Complainant was definite that it was the Appellant with others who had robbed him.

I have also perused the judgment of the trial Court. The learned trial magistrate considered the Appellant's defence at length before concluding that the evidence against him was overwhelming. I am satisfied that the Appellant's defence was dully considered by the learned trial magistrate.

The Appellant's appeal against the conviction does not succeed and is dismissed.

On the sentence, it was the Appellant's contention in the first petition of appeal that the sentence was unsafe, manifestly harsh and excessive. **MISS MWENJE** submitted that the sentence was fair since such an offence calls for 14 years imprisonment. I do not agree with that submission. The prosecution submitted that the Appellant was a first offender. The Appellant in his mitigation urged the Court to consider that he was a first born with a dead mother and a sickly father and siblings who depended on him. The learned trial magistrate did not put both the submission of the prosecution and the Appellant into consideration before sentencing the Appellant. That gives this Court a right to interfere with the sentence. Taking into account that the Appellant was a first offender, that the offence was not aggravated. Taking into account the Appellant's personal circumstances as well, a sentence of 10 years was manifestly harsh and excessive. I set it aside and substitute it with one for three years imprisonment from the date of sentence. The Appeal succeeds only against the sentence.

The upshot of the appeal is that the appeal against conviction is dismissed. The appeal against sentence succeeds. The Appellant to serve a sentence of three years from date of sentence before the lower court.

Dated at Nairobi this 8th day of June 2005.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

LESIIT, J.

JUDGE