REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 713 OF 2006

BONIFACE KHAYUMBA KATUMANGA…….....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 36 of 2005 in the Principal Magistrate's Court at Kikuyu – Mrs. M. W. Murage (SPM) on 29th January 2006)

JUDGMENT

1. **Boniface Khayumba Katumanga**,the appellant, was tried and convicted by Mrs.Murage the Principal Magistrate at Kikuyu law courts (as she then was), for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death as by law prescribed.

2. The brief particulars are that on the 2nd day of November 2005 at Gikuni village in Kiambu District within Central Province jointly with another not before court, while armed with offensive weapons namely rungus and pangas, they robbed Samuel Bett Rotich of one mobile phone make Sagem MC 939, one pair of shoes, one pair of trousers, one jacket, ½kg onions, ½ kg tomatoes, one loaf of bread and cash Kshs.200/= all valued at Kshs. 10,000/= and at or immediately before or immediately after the time of such robbery used actual violence against the said Samuel Bett Rotich. In the alternative he was charged with the offence of handling stolen goods contrary to **Section 322(2)** of the **Penal Code**.

3. The appellant subsequently filed an appeal against both conviction and sentence. He advanced five grounds of appeal in which he contended that there was no positive identification by recognition, neither did circumstances favouring concrete identification exist. He also argued that the evidence tendered was not conclusive regarding the mobile phone, and that the prosecution did not prove their case beyond reasonable doubt. Lastly, he averred that his defence was rejected without good reason.

4. The state opposed the appeal through learned counsel Mr. Mulati. On identification, Mr. Mulati submitted that **PW3** testified that he knew the appellant prior to the attack, and there was moonlight at the time of the attack which enabled him to see and identify the appellant.That in his first report he told the police that he was able to identify his attackers.Mr. Mulati further submitted that the appellant was properly convicted as the case was proved beyond reasonable doubt and that the sentence imposed upon him was lawful.

5. We have anxiously re-evaluated the evidence on record bearing in mind that the duty of the first appellate court, is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion, but to make our own findings and draw our own conclusions, in line with **Boru & Anor V Republic Cr. App No. 19 of 2001 [2005] 1 KLR 649.** In the foregoing case the learned judges of the Court of Appeal held *inter alia* that:

"A duty is imposed on a court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as to deal with any questions of law raised on the appeal"

In re-evaluating the evidence we bore in mind that we did not have advantage of seeing or hearing the witness as they testified.

6. The gist of the prosecution case is that the complainant, **PW3**, was on his way home on 2nd November 2005 at around 7.30 p.m. when two people emerged from the side of the road and attacked him. They stripped him naked and robbed him of his personal effects before they escaped. He made a report to the police and three days later the appellant was arrested and charged as read in the charge sheet.

7. There is no dispute that the complainant was attacked on the stated date and time and robbed of his personal effects set out in the charge sheet. The ingredients of the offence of robbery under **Section 296(2)** of the **Penal Code** have been satisfied since he was attacked by two persons who also wielded a machete and who took away his property worth about Kshs.10,000/=, according to his testimony which was not controverted. The question for determination therefore, is whether the complainant properly identified the appellant as one of those who robbed him.
8. On the question of identification we have considered the decision in **KARANI -vs- REPUBLIC, CR. APP. NO. 181 OF 1984 [1985] KLR 290,** in which Nyarangi, Platt & Gachuhi JJA of the Court of appeal, sitting at Kisumu, rendered themselves thus:

1. **(*Following Roria v Republic [1961] EA 583*) 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 in respect of identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances there is need for other evidence.**

9. We are also mindful of the fact that honest errors can be made in identification. This was the finding of the Court of Appeal in the case of **Abdalla Bin Wendo Vrs Republic [1953] EACA 166,** where the Court of Appeal of East Africa had this to say:-

> ***'…… but on identification issue a witness may be honest yet mistaken and may make erroneous assumption particularly if he believes that what he thinks is likely to be true ……'***

We are however persuaded that there was no error in the identification of the appellant in the case before us. Although this was a case of a single identifying witness, the complainant knew both his assailants prior to the attack and there was moonlight by which, according to his testimony, he could see clearly and identify them.

10. The appellant contended that the attack was quick and sudden and that the complainant was under shock and panic as evinced by his own words **"I was scared."** We however, note that the assailants were not camouflaged and they spoke to the complainant ordering him to surrender everything that he had. They took time to undress him and also take his shoes. The complainant on his part pleaded with them to no avail, to give him back his clothes. He later arrived at the police post in his natural state without any cover of clothes when he went to report the matter. This was confirmed by **PW1** Police woman CPL Ndirangu.

11. The complainant identified one assailant by the name of Tarusi, but only identified the appellant as a person who worked as a watchman at a bar in Gikuni, although he did not know his name. **PW1** who received his report at the police station confirmed that he said that he had identified one of his attackers. The appellant conducted his own investigations and three days later, he established where the appellant lived. It was he who led the police to arrest the appellant. During the arrest, the police recovered from the appellant, the complainant's phone which was stolen during the robbery.

12. The appellant in his testimony, tendered without oath and without calling witnesses denied the offence. He admitted that he and the complainant were known to each other and stated that he owed the complainant some money.He further testified that the complainant had threatened to do something to him if he was unable to repay the money, hence the arrest. He stated that the phone allegedly recovered from him was planted on him by the police during his arrest.We note that none of the issues raised in his defence were put to the complainant in his cross-examination except the issue of the money that the complainant allegedly lent him. The complainant denied that he was owed any money by the appellant.

13. We are satisfied that there was no reason for **PW1** to go along with the complainant's story, and testify that **PW3** came to the Police Post naked, or that his phone was recovered from the appellant at the time of arrest, if indeed the story was contrived just to fix the appellant. She did not know the appellant before the report and therefore, had no grudge against him. It is also unbelievable that the complainant would show up at the police station in the nude for a case that was only intended to frame the appellant. In our view therefore, these issues were raised as an afterthought to exculpate the appellant from this offence, and the appellant's defence considered in the context of the rest of the evidence on record is not tenable. We reject it as did the learned trial magistrate.

14. In light of the above, we find that the trial court directing itself to the evidence before it and the law applicable reached the correct conclusion.The conviction was proper and so was the sentence imposed against the Appellant by the learned trial magistrate.As a result the appeal lacks merit and is **dismissed**.

It is so ordered.

SIGNED DATED and DELIVERED in open court this 1st day of July 2013.

MBOGHOLI MSAGHA **L. A. ACHODE**

JUDGE **JUDGE**