REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 290 OF 2007

DERICK MUCHIRI NYAMBURA ……..…….....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 7560 of 2005 in the Chief Magistrate's Court at Kibera – Mrs. H. Wasilwa (PM) on 16th July 2007)

JUDGMENT

1. **Derick Muchiri Nyambura**, the appellant herein, filed an appeal following his conviction by Mrs. G. W. Macharia, the Senior Principal Magistrate at Kiambu law courts (as she then was), in one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The appellant was sentenced to death as by law prescribed.

2. The appellant had faced two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in which the chief particulars were that on the 22nd day of December 2006 at Kahawa West of Kasarani division within Nairobi area, jointly with others not before the court, they robbed John Wambua Kando of Kshs.2,800/= in count I. That on the same date and place they robbed Benedict Oundo Onyango of one wrist watch valued Kshs.1,800 in count II. It was further said that at, or immediately before or immediately after such robbery they used actual violence against the two complainants. He was convicted in count I and acquitted in count II.

3. Upon conviction the appellant filed an appeal against both conviction and sentence, advancing nine grounds of appeal whose main thrust was that the prosecution's evidence of recognition was not tangible, and neither was the evidence as a whole conclusive. He further submitted that the evidence of vital witnesses was not considered, and that some of them were not summoned. He also argued that the circumstances of identification were not favourable.

4. The state opposed the appeal through learned counsel Mr. Kadebe who submitted that the issues raised by the appellant on appeal had been canvassed at the trial. On the ground that vital witnesses were not summoned to testify, Mr. Kadebe contended that this was not true since two civilians who were the primary witnesses, and two police officers testified in the case, and were able to demonstrate that the appellant was guilty of the charges he faced. On the appellant's submission that there was a letter demanding money from the mother of one Sam as an inducement to drop the charges, Mr. Kadebe submitted that whether or not the letter was written and irrespective of whoever wrote it, does not detract from the standard of proof or the ingredients

of the offence under **Section 296(2)** of the **Penal Code** which the prosecution proved to the required standard. That, in any case, the letter was not considered by the trial court, to reach her conclusion.

5. On identification, the appellant averred that there was discrepancy in the evidence of **PW1** with regard to initial identification on the night of arrest and later on. Mr. Kadebe responded that the appellant was well known to **PW1** and **PW2**, and there was sufficient light to enable both of them identify him at the scene. He also submitted that **PW1** and **PW2** referred to the appellant as Sam, and testified that he was variously known as "Sam" or "Sammy" and "Elija".

6. Lastly the appellant argued that **PW1** told the court that he recognised the appellant but did not say so in his statement, to which Mr. Kadebe responded that this did not discredit the complainant's testimony concerning the attack.

7. We have exercised great caution in scrutinizing and re-evaluating the evidence of identification warning ourselves of the dangers inherent in basing a conviction on the evidence of identification alone. This is in line with **KARANJA AND ANOR. VS REPUBLIC [2004] 2 KLR PG 140**. We also considered the circumstances under which the two identifying witnesses identified the appellant, since the robbery occurred at night. We are alive to what was stated in the case of **Republic Vs. Turnbull & others (1976) 3 All ER 549**, that mistakes can be made even in cases of recognition and that an honest witness may none the less be mistaken. We examined the evidence to establish the manner of lighting and the position of each witness during the robbery, viz-a-vis the attackers.

8. The prosecution case in a nutshell is that **PW1** and **PW2** went to a bar at Kahawa West on 22nd December 2006 at about 8.p.m. **PW2** waited outside as **PW1** went inside to meet someone. Suddenly a man appeared and boxed **PW2** in the face. A gang of six joined in and beat and robbed him of a watch. He fled and watched from a distance as the gang turned on **PW1** and also beat him. **PW1** himself testified that he was dragged by the neck from the bar and brought outside by the appellant, who started to beat him before he was joined by the gang of six.

9. In the melee **PW1** lost Kshs.2,800/=, while **PW2** lost a watch. They reported the attack at Kahawa A P Camp and also to some police officers on patrol whom they met on their way home. The patrol police helped them to arrest the first man that same night at about 10 p.m. The appellant was arrested three days later in a police swoop. Both were subsequently charged, but at the end of the trial the other man was acquitted.

10. The circumstances of the robbery are that no recoveries were made from the appellant at the time of his arrest. There was no evidence that any of the two witnesses saw or had a good look at the assailants who attacked them before they were attacked. There was also no evidence led as to the manner of the lighting that was outside the bar where the robbery occurred. From the brief facts of the case set out above, it is difficult to comprehend what chance the two witnesses had of seeing and identifying those who were assaulting them, let alone those who were assaulting the other witness respectively.

11. It is also instructive that in their evidence in court, both witnesses stated that they knew two of their assailants prior to the attack and that this had been captured in their statements to the police. When however, those statements were availed in court during cross-examination they showed that the witnesses did not mention the names of their attackers nor supply their physical descriptions when they made their report to the police, as they had led the court to believe. During cross-examination when they were referred to those statements, **PW1** answered as follows:

> **"It does not show I told police I knew**
>
> **the person who attacked me."**

PW2 also stated as follows:

"The statement shows that I said I was attacked by a group of people."

12. The appellant was arrested in a police swoop three days after the robbery and was connected to the offence because while at the police station, he saw **PW1** and shouted that **PW1** had caused his arrest. **PW1**'s evidence was that:

"**That is when I recognised he is the**

man who had attacked me (sic).**"**

It would appear therefore, that he was not sure of the identity of his attacker until the appellant shouted at him at the police station. We find however that when the appellant shouted that **PW1** caused his arrest, this could be in any number of ways and not necessarily that the appellant was one of the robbers who attacked **PW1**.

13. That being the matrix of this case, we find that a reasonable doubt exists in the evidence of the prosecution in regard to the identification of the appellant, reasons for which, the conviction against the appellant cannot be sustained.

14. The conviction against the appellant is quashed and the sentence following therefrom set aside. It is ordered that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and **DELIVERED** in open court this **2nd** day of **July 2013**.

A. **MBOGHOLI MSAGHA** **L. A. ACHODE**

JUDGE **JUDGE**