

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 48 of 2006

JAMES GICHOHI ALIAS COMMANDO APPELLANT

Versus

REPUBLIC.....
RESPONDENT

(Being an appeal from the conviction and sentence of

R.N. Muriuki Senior Resident Magistrate in Senior Resident

Magistrate's Criminal Case No. 2032 of 2005 at Nanyuki)

JUDGMENT

The appellant was charged with attempted ***robbery with violence contrary to section 297(2) of the Penal Code***. He was convicted by the lower court as charged and sentenced to suffer death as provided under the law. He was aggrieved by that conviction and sentence and preferred this appeal.

This court is duty bound to re-evaluate the evidence of the lower court. That duty is succinctly set out in the case of OKENO vs REP (1972) EA 32. In that case the Court of Appeal had the following to say:-

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya VS R., (1957) E.A. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R. (1957) E.A. 570).*”**

It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finds and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958) E.A. 424.”

The complainant recalled that on 13th September 2005 between 6.30 – 7pm he left his place of employment. On his way to purchase some flour for his shop he was caught up by the rain which caused him to seek shelter in Majengo Area. When the rain subsided he left his place of shelter and as he began to walk he saw three people emerge and began to attack him. One of them hit him on the leg. He fell down. The other one strangled him. The third one put his hands in his pocket. They were according to him attempting to rob him. He had placed Kshs.4,500 in his shoes. One of the robbers attempted to remove his shoes. In that fracas he managed to get hold of one of them and began to call for help. That man tried to run but slipped and fell and the complainant managed to get hold of him again. Members of public responded to his cry for help and the appellant was apprehended and handed over to the police when they arrived. PW 2 on that day was in his house at Majengo estate. He heard screaming and when he went out in response he found PW 1 holding on to a man. The other two had ran away. He identified the man that was being held as the appellant in the dock. Similarly PW 3 responded to the screams of the complainant and on going to the scene found him holding on the appellant. PW 4 was the police officer who went to the scene and re-arrested the appellant. At the close of the prosecution case the learned magistrate found that the appellant had a case to answer. The appellant in his defence gave an unsworn

statement. He stated that he was a resident of Majengo estate. He was employed as a watchman. He said that at 7 p.m. at Majengo without stating the day he met a man that was drunk. He thereafter was arrested on allegation that he had robbed someone. The learned magistrate found that the prosecution had proved its case against the appellant. The defence offered by the appellant was rejected by the trial court. The appellant in support of this appeal submitted written submissions which we have had opportunity to consider. In our view the evidence against the appellant was not one of identification as the learned magistrate stated. We rather find that it is evidence of being apprehended whilst trying to rob the complainant. In our view the prosecutions evidence is very clear that the appellant was grabbed by the complainant whilst the attempted robbery was taking place. The complainant did hold on the appellant. Even though he attempted to run away he slipped and fell. PW 2 and 3 confirmed that they found the complainant still holding on to the appellant. We find that the prosecution did indeed prove a case against the appellant beyond reasonable doubt as required by the criminal standard of proof. We cannot fault the conviction and sentence by the learned magistrate in the lower court. We therefore hereby dismiss the appellant's appeal.

Dated and delivered at Nyeri this 2nd day of October 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE