REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 120 of 2008

PATRICK MACHARIA …… APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Lenaola & Ouko, JJ.) dated 25th February, 2008

in

H.C.CR.A. NO. 144 OF 2005)
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JUDGMENT OF THE COURT

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This is an appeal from the judgment of the superior court (Lenaola, Ouko, JJ.) dismissing the appellant's first appeal against conviction and sentence. The appellant was on 14th August, 2005 convicted by the Chief Magistrate, Meru for robbery with violence contrary to **Section 296 (2)** of the Penal Code and sentenced to death.

The particulars of the charge were in essence that on 25th July, 2004 the appellant jointly with others not before the court robbed Cathelene Nguta of Shs.1,200/= and a Nokia Mobile Phone worth Shs.6,000/= and at or immediately after the time of the robbery used actual violence on the said Catheline Nguta.

The prosecution case was briefly as follows: On the night of 25th July, 2004 at about 12.30 a.m. Catherine Nguta (PW1), the complainant, was going to her house at Makutano, Meru Town when she was confronted by three people outside the gate of her house. The three people who emerged from a nearby tree held the complainant, demanded money and her mobile phone and threatened to kill her if she did not comply. One of the three robbers whom she described as the appellant held her on the neck and knocked her down. She struggled with the robbers as she was screaming for help. The robbers stole her Shs.1,200/= and a mobile phone whereupon two of the robbers escaped. The complainant however, held one of them tightly while screaming. Meanwhile **Francis Mwiti** (PW2) (Francis) **Harriet Nthiira** (PW3) (Harriet); **James Felix Maina** (PW5) (James); who are neighbours of the complainant and other members of public went to the scene in answer to the screams and found the complainant on the ground while holding the appellant. They arrested the appellant and took him to Meru Police station. The complainant sustained injuries during the robbery and was taken to hospital for treatment.

The appellant testified at the trial, among other things, that on the material day he was doing casual work at Kaaga area; that he went to his house at Makutano at about midnight; that as he was opening the door of his house, he was held by the complainant who was screaming and who pulled him towards her house alleging that he had robbed her, and, lastly, that members of the public went to the scene beat him up and took him to the police station.

The trial magistrate evaluated the evidence and said in part:

"The accused denied the offence and contended that he was implicated for no good reason. However, the prosecution's

evidence against him is not only overwhelming but also reasonably credible. This therefore means that it could not have been possible for the complainant to merely confront the accused, scream and hold him for no apparent reason"

and further:

"The accused was as it were caught *"red handed"* **in the act. He cannot therefore be heard to plead innocence and maintain that he was apprehended by mistake for nothing. His defence is credibly disproved by the prosecution's evidence which established beyond reasonable doubt that he was correctly picked out and withheld (sic) as one of the offenders".**

The superior court on its part re-evaluated the evidence and said in part:

"…. the credibility of PW1 was faulted but we saw no substance in submissions along those lines because PW1, PW2 had parted for only a short while before PW1 screamed and PW2 rushed back only to find her struggling with the Appellant. PW3 and PW5 corroborated that evidence and we cannot see that at 12.30 a.m. on that night PW1 suddenly conjured up a plan to frame the Appellant! We see no substance in those submissions".

The appellant filed a memorandum of appeal containing three grounds, namely, that the superior court erred in law in failing to note that the prosecution case was not proved beyond any reasonable doubt; that the two courts below erred in law by failing to hold that PW1 was not a credible witness and, lastly, that the two courts below erred in law by failing to consider or adequately consider his defence.

The appellant's counsel subsequently filed a supplementary memorandum of appeal containing one ground, namely:

"The learned judges erred in law in failing to accord the appellant herein the benefit of doubt which was reasonably cast by his defence against the prosecution evidence and thereby acquit him".

That is the only ground relied on by Mr. Kimunya, learned counsel for the appellant. The appellant's counsel relied on the definition of the phrase *beyond a reasonable doubt*, in the Canadian case of **R v Lifchus** [1997] SCR 320 and particularly the following commentary:

"Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of doubt to the accused and acquit him because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt".

By **Section 361 (1)** of the *Criminal Procedure Code* a second appeal, like the present appeal, should be on a matter of law and not on a matter of fact. As this Court said in **M'Riungu v Republic** [1983] KLR 455, where a right of appeal is confined to questions of law an appellate court has royalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law and should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal court could have reached that conclusion.

In this case, there were concurrent findings of fact by the two courts below that the appellant was robbed by three people; that the complainant held one of the people who is the appellant while screaming; that Francis; Harriet and James went to scene and found the complainant still tightly holding the appellant; that the complainant was a credible witness and that the defence of the appellant was incredible. The prosecution case was dependent on the credibility of the witnesses. The two courts below found the prosecution witnesses as credible. This Court cannot properly interfere with the findings of the two courts below which were based on credibility of witnesses unless no reasonable tribunal could have made such findings (**Republic vs. Oyier** [1985] KLR 353). It has not been shown that no reasonable tribunal could have accepted the evidence and make such findings.

On true consideration of the grounds of appeal including the supplementary ground of appeal solely relied on by the appellant's counsel they are based on matters of fact. The two courts below rejected the evidence of the appellant and made a firm finding that the prosecution case was proved beyond any reasonable doubt. The two courts below did not entertain any doubt about the guilt of the appellant and hence it cannot be justifiably said that the appellant was denied the benefit of doubt.

This appeal being solely based on matters of fact is undoubtedly incompetent. The result is that the appeal is dismissed in its entirety. It is so ordered.

Dated and delivered at Nyeri this 19th day of November, 2010.
S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR