REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 56 OF 2009

(ARISING FROM BUNGOMA CRC NO.744/08)

HARRIS WANGILA WANJALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant Harris Wangila Wanjala was convicted by Bungoma Senior Resident Magistrate of the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code and sentenced to death. Being aggrieved by both the conviction and sentence, he appealed to this court.

The grounds of appeal focus on the issues of lack of identification and lack of sufficient evidence. The appellant in his submissions which were entitled called "supplementary grounds" raised several issues in support of his appeal. Firstly, he argued that the incident took place at night and that the trial court failed to address the issue of source of light and visibility in its judgment. Secondly that the witnesses failed to indicate the distance of the place of ambush to the scene of crime. Thirdly that the witness (PW3) who led to his arrest was confused as to the names of the appellant.

The appeal was opposed by the State Counsel Mrs Leting who argued that the case was proved beyond any reasonable doubt. The accused was held by PW2 in the course of the robbery until his accomplice rescued him. PW 3 arrested the accused after ambushing him. The two witnesses, it was argued, identified the accused positively.

Briefly the facts of the case are that the complainant PW 1 was asleep in his house with his wife on the 16th April 2008 around 12.30am. They heard a bang and then saw people in their bedroom. PW 1 was cut with an axe on the head and neck and lost consciousness. PW 2 struggled with the robbers and grabbed one of them in self-defence. The robbers later fled and did not steal any property. The appellant was arrested the same night with the help of PW1's neighbours and charged with the offence.

PW 1 testified that on the material night, he was asleep when he heard a loud bang on the door of his house. Before he woke up, he saw people in his bedroom flashing torches. One of them cut PW 1 on the

head using an axe. He lost consciousness and found himself at Malakisi hospital. He further said that when the torch was flashed he saw the appellant whom he identified as his neighbour called "Wanjala". He identified him by his physical features.

PW 2 was the wife of PW 1 and was present in the house during the attack. She testified that when the robbers entered, one injured her husband using an axe. She grabbed one of them whom she identified later as Wanjala her neighbour. The appellant called his accomplice who hit PW 2 forcing her to release the appellant. The two robbers ran away but the appellant was arrested by neighbours and brought back to the scene before PW 2 was taken to hospital.

PW 3 was a neighbour to PW 1 and PW 2. He testified that he heard a loud bang from the house of his neighbour who was calling his (PW 3's) name out loud. PW3 went outside to check what was happening. He heard more screams and went to the road. The witness had a torch and on flashing it he saw four men walking. He identified one of them as "Shadrack", the appellant herein. PW 3 held the appellant but he was hit by something forcing him to release the appellant who escaped. PW 3 was joined by other members of public and they went to the house of the Village elder of the appellant's home village PW 6. The elder led PW 3 and other members of public to the house of the appellant. He was arrested and taken to the house of the complainant where PW 2 identified him as one of the robbers who had attacked her and her husband.

The other witnesses never witnessed the incident and neither did they take part in arresting the appellant.

During the trial, the appellant made a successful application to recall PW 1, PW 2 and PW 3 for cross-examination. From the evidence of PW 1 and PW 2, the attackers found them in the bedroom immediately after hearing a bang. PW 1 was attacked using an axe by one of the attackers and he lost consciousness. He told the court he found himself in hospital later. When PW1's wife PW2 herein was struggling with the appellant, PW 1 had lost consciousness and could not be expected to see or appreciate what was happening. Indeed, he told the court that "they (meaning the attackers) did not deal with my wife". PW 1 went on to say that the man who injured him was the appellant. There was no light inside the house when the robbers struck which evidence was supported by PW 2. PW 1 said he saw the appellant with aid of light from a torch. In cross-examination, PW 1 said that "the torch was flashed at me". If the torch was flashed at him, it is not possible for him to see another person using the same light. I suppose that PW 1's eyes were already strained by the torch light directed at him. PW 1 also said that he did not know how many people entered his house. It was a dark night, he told the court.

PW 2 on the other hand said she held one of the attackers and struggled with him until the 2nd accused came to his rescue. She also said it was dark inside the house. She then added that as the man left the house, there was moonlight outside which aided her to see and identify the man she had grabbed as the appellant. It is important to note that the attackers were four or more.

When PW 1 was recalled it was about three and half (3 ½) months after she gave her testimony. PW1 said in cross-examination that she identified the appellant through light from a torch which was flashed at him by an accomplice. The witness did not talk about moonlight.

PW 3 heard screams from houses of neighbours and went to the road. This is where he saw four (4) men walking. He flashed his torch and identified the appellant. This was around 1.00am about 30 minutes from the time PW 1 was attacked. Unfortunately, the witness did not indicate the distance from the road where he met the appellant to the house of PW 1. Neither was the distance between PW 3's house and that of PW 1 given. Members of the public came to the scene. They joined PW 3 and went to the house of the appellant's village elder who led them to arrest the appellant in his house around 2.00am. He was found sleeping and his house was surrounded. None of those people saw the appellant at the scene of crime. Neither had anybody told them that he had seen the appellant at the scene. The distance from PW 1's house to the road where PW3 saw the appellant is not known. Neither was the distance of the road to the house of the appellant given. The mob arrested the appellant and took him to PW 1's house. They asked PW 2 to confirm whether the appellant was among the robbers. PW2 answered in the affirmative. PW 3 and the mob took upon themselves the role of the arresting the suspect and investigating the

crime. The appellant was not arrested at the scene of crime. At the time the appellant was dragged to PW2's house by the mob she had
not given his name to any neighbour or to the police. PW2 acted on guesswork when she was shown the appellant by the mob and said he was one of her assailants.

PW 6 the village elder said that the appellant admitted having committed the offence. No confession was recorded from the appellant and that evidence is inadmissible.

The investigating officer PW 7 in cross-examination said that he relied on the evidence of PW 2 when he charged the appellant. There was no independent evidence of identification in this case. It was only PW 1 and his wife PW 2 who said they identified the appellant. I agree with the appellant that the trial court did not address the issue of the source of light which aided the witnesses to identify him. In the judgment, the magistrate said the following:

"Indeed PW 1 and PW 2 said they used the light of the torches of one of the robbers".

The court did not analyse or evaluate the evidence relating to identification which is the backbone of conviction in a robbery case. The evidence on record as regards identification is inadequate and cannot sustain a conviction. PW 1 and PW 2 contradicted themselves and each other's evidence on identification.

I rely on the case of **Kamau Vs Republic (1975) E.A. L.R. 139** where the Court of Appeal held:

"The most honest of witnesses can be mistaken when it comes
to identity".

Similarly in the case of **Cleophas Otieno Wamunga Vs Republic Criminal Appeal No.20 of 1989 (C.A)**
It was stated:

"Evidence of visual identification in criminal cases can bring a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize that danger".

After evaluating all the relevant evidence, we find that the evidence on identification was not watertight. The circumstances were not conducive to positive identification. We do not agree with the trial court that the appellant was positively identified.

All the other issues raised by the appellant relate to identification.

We find that this appeal has merit and therefore allow it accordingly. The conviction is hereby quashed and sentence set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

D.A. ONYANCHA **F.N. MUCHEMI**
JUDGE **JUDGE**

Judgment dated and delivered on the 31st day of may 2011 in the presence of the appellant and the State Counsel Mr Ogoti.

D.A. ONYANCHA **F.N. MUCHEMI**
JUDGE **JUDGE**