



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRA NO.45 OF 2010

(Consolidated with CRA No.46 of 2010)

(Appeal arising from BGM CM. CR. NO.2411 of 2008)

- 1. MARTIN WAFULA alias MULATI1ST APPELLANT**
- 2. PATRICK WANYONYI WANJALA.....2ND APPELLANT**

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants Martin Wafula and Patrick Wanyonyi Wanjala were convicted by Chief Magistrate Bungoma of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. This appeal is against both conviction and sentence.

The grounds of appeal include lack of positive identification, contradictory evidence and failure to consider the defences of the Appellants.

Mrs. Leting for the State Counsel conceded to the appeal on grounds that there was no identification and that the AK 47 rifle produced in evidence was not found in possession of the Appellants.

We have perused the evidence on record. The complainants in the three counts of robbery with violence testified on how they were accosted in their respective houses by men who identified themselves as police officers. They heard gunshots from outside. PW1 ran out through the rear door and saw a man with a gun whom he did not identify. He was pushed back to the house where he was robbed of cash Ksh.2000/= and other items. He sustained injuries as shown by the P.3 form. However, PW1 did not identify any of his attackers.

PW2 and PW4 similarly did not identify their attackers. There were gunshots in each of the incidents.

PW3 testified on how he recovered the AK 47 rifle in Sibbo village in Bungoma town accompanied by several police officers. The search party went to the house of the first Appellant who led them to the house of the 2nd Appellant about seventy (70) metres away. There was no one in that house since the 2nd Appellant was in police custody in relation to another offence. They excavated the ground and recovered the firearm wrapped in a polythene bag.

We note that there was no identification of any of the Appellants by any of the complainants. The rifle was recovered in a house about seventy metres from that of the first Appellant and there was no

occupant at that time. The prosecution adduced no evidence to show that the house belonged or was rented and occupied by the second Appellant at the material time. It is not possible to connect any of the Appellants with the gun.

The report of the ballistic expert was positive that all the five spent cartridges collected from the scene were fired from the AK 47 rifle, s/no.1310040965. However in the absence of any connection with the exhibits to the Appellants, the evidence is not of any probative value to the prosecution.

In its judgment, the court failed to address the issue of recovery of the gun and analyze the evidence as to the connection of the exhibit with the Appellants. The issue of lack of identification which is a core ingredient in an offence of this nature was not addressed by the trial court.

We therefore find that the trial court erred both in fact and law in convicting the Appellants of the three counts of robbery with violence against the weight of the evidence. We allow the appeal, quash the convictions and set aside the sentences. The Appellants are set at liberty unless otherwise lawfully held.

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D. A. ONYANCHA
JUDGE

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F. N. MUCHEMI
JUDGE

Judgment dated and delivered in open court on the 18th day of may 2011 in the presence of the Appellants and Mr Ogoti.

F. N. MUCHEMI
JUDGE