



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CRIMINAL APPEAL NO.131 OF 2009**

**Consolidated with CRA NO.132 of 2009**

*(Appeal arising from BGM CM CR. NO.476 of 2009)*

**REPUBLIC.....APPELLANT**

**~VRS~**

**DICK JUMA KINGI.....1<sup>ST</sup> RESPONDENT**

**NYONGESA KHANGASI OTUBA..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Republic appeals against the judgment of Bungoma Chief Magistrate in criminal case no.476 of 2009 where the Respondents were acquitted of the offence of robbery with violence contrary to section 296 (2) of the Penal Code. It was alleged in the charge before the Chief Magistrate that the Respondents, on the 24/02/2009 at Namwacha Market in Bungoma South District, jointly with others not before the court, while armed with dangerous weapons, robbed Rukia Nelima Barasa of cash Ksh.36,000/= and at, or immediately before or after the robbery used actual violence on the said Rukia Nelima Barasa. The Respondents denied the charge.

The grounds of appeal are that the magistrate erred in reaching a conclusion that the prosecution had not proved the case against the Respondents beyond any reasonable doubt. Secondly, that the evidence of identification by recognition was disregarded by the court as uncorroborated while both visual and voice identification existed. Thirdly, that the court misunderstood the basic ingredients of the offence of robbery with violence.

The facts of the case are that on 24/02/2009 the complainant, PW1 was asleep in her house with her children around 4.00 p.m when they were attacked by four (4) armed men who demanded money and a sale agreement from PW1. PW1 was robbed of the cash Ksh.36,000/= after being assaulted resulting to loss of consciousness. PW1 was taken to hospital by neighbours where she was admitted for three days. The two Respondents who are relatives of the complainant were later arrested and charged with the offence.

PW1 testified that she identified the two Respondents whose names she gave in court as Nyongesa Kangasa Otuba and Dick Juma Kingi and one Peter Odoyo her brother-in-law who was still large at the time of the trial. PW1 said that although there was no light in the house, she was aided by the light from the torches of her assailants.

PW2 was the daughter of PW1 aged nine (9) years and who gave evidence on oath after the relevant

*voire dire* test was conducted. PW2 testified on how her mother was accosted by the four ((4) men and robbed of cash money amounting to Ksh.32,000/=. The men were armed with a knife, a club and a panga. They also had torches at the material time. It was PW2's evidence that PW1 was tied with a rope after the robbery. PW2 identified the Respondents by their names in court and said the two lived near her aunt's home in the neighbourhood.

PW3 is a neighbour to PW1 and was attracted to the scene by screams. He went to the house of PW1 and found that the attackers had left. PW3 saw the complainant in a coma and tied with a rope. The witness assisted to take PW1 to hospital. He was told by the children that the Respondents whom they knew were among the people who robbed PW1.

PW4 did not witness the incident. He heard a distress call from PW1's home and rushed there. The witness assisted PW3 to take PW1 to hospital. PW4 said he picked a letter at the scene which was written in Bukusu language. The letter was to the effect that the Respondents were to share the proceeds of the robbery in a manner described therein. The two Respondents are PW4's relatives.

PW5 was the doctor who treated the complainant and produced the P.3 form. He assessed the injuries as grievous harm.

PW6 was the investigating officer who received the robbery report from the complainant's neighbour and an administration police on 24/02/2009 at 6.15 p.m. At the time of making the report, the complainant had been taken to hospital. PW2 gave PW6 the name of her uncle Peter Odoyo as one of the suspects. The suspect was later lynched by members of the public. PW6 was given the letter collected from the scene and produced it in evidence.

This appeal was opposed by the Respondents who argued that they were rightly acquitted since there was no sufficient evidence to sustain a conviction.

In her evidence PW1 told the court that there was no light in the house. The incident took place at night around 4.00 a.m. The attackers had torches which were flashed around. The evidence adduced was that the complainant was assisted by the torchlight to see and identify her assailants. Normally, the light from a torch used by an attacker will be directed at the victim rather than at himself. This source of light is unreliable and not conducive to positive identification. The complainant was being assaulted and robbed by four (4) men. It was at night and the attackers found her right in the bedroom. The circumstances of identification were difficult and it is highly unlikely that PW1 identified her assailants. PW2 the daughter of PW1 said she identified the two Respondents but she told the court that there was light in the house without giving the source of the light which aided her to see the assailants at night. This contradicts the evidence of PW1 who said there was no such light. PW2 did not give the name of the respondents but only gave that of her uncle "**Baba Odoyo**" who was later lynched by the mob. It is also highly unlikely that PW2 identified any of her mother's assailants. PW6 the investigating officer, said he only got the name of Peter Odoyo from PW2 when he interviewed her. PW6 did not say that any names of the Respondents were given by the complainant. Had PW1 and PW2 given the names of the Respondents to PW6, he would have included those names in his statement and in his testimony.

PW2 said her mother was attacked by four (4) people. During cross-examination by the 2<sup>nd</sup> Respondent, PW2 said that she saw six men and that she knew four (4) of them. Yet PW2 never gave any name of any of the four (4) people she said she knew.

In their defences, the Respondents denied the offence and dismissed the charges as a frame-up. The magistrate observed that PW1 and PW2 contradicted themselves as to the source of light and that the distance from the witnesses to the assailants was not given. He also noted that no special features of the Respondents were given by the witnesses and which the court noted were necessary in case of recognition. The time taken to observe the Respondents was not given. The court therefore found that there was no positive identification and that the prosecution had failed to discharge the burden of proof.

We have evaluated the evidence of the two key witnesses PW1 and PW2. It is our finding that the

same is wanting as far as identification of the Respondents is concerned. The evidence does not pass the test laid down in the case of KAMAU –VRS- REPUBLIC 1975 EALR 139 where the court held:

***“The most honest witness can be mistaken when it comes to identification.”***

All courts must treat identification evidence with caution to avoid miscarriage of justice. We agree with the magistrate that there was no positive identification of the Respondents in this case. It is our finding that the acquittal of the Respondents was proper. We uphold the judgment of the magistrate and dismiss this appeal for lack of merit.

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**D. A. ONYANCHA**  
**JUDGE**

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**F. N. MUCHEMI**  
**JUDGE**

Judgment dated the 18<sup>th</sup> day of May, 2011 in the presence of the State Counsel Mr. Ogoti for the Appellant and the Respondents.

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**F. N. MUCHEMI**  
**JUDGE**