REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUSIA

CRA NO.67 OF 2010

Consolidated with BGM CRA No.2004

(Appeal from original BSA SRM CR. NO. 794 of 2002)

WILBERFORCE TAABU MWALI...APPELLANT

~VRS~

REPUBLIC...RESPONDENT

JUDGMENT

The Appellant Wilberforce Taabu Mwali was convicted by Busia Senior Resident Magistrate of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. Being aggrieved by both conviction and sentence, the appellant lodged this appeal.

In his petition of appeal, the appellant cited three main grounds:

1) that there was no positive identification;

2) that all the ingredients of the offence were not proved;

3) that the evidence of the prosecution witnesses was contradictory.

The Appellant gave the court written submissions during the hearing of the appeal which substantiated his grounds of appeal.
Mr. Okeyo for the state conceded to the appeal on grounds that the evidence on identification was inadequate. There was no evidence of any property stolen during the robbery from PW1, PW2 and PW3. Mr. Okeyo further submitted that the property in question was stolen from another house not belonging or occupied by the complainants.

PW1 testified that he had known the accused before the 10th May 2002 when he came to his house to repair a door. On the 27th May, 2002, PW1 was in his house with his two children when the Appellant opened the door and entered. He cut one of the children namely J. with a panga on the head and also on both arms. He also attacked the second child called S. who was attempting to escape. PW1 said there were two lamps in the house which aided him to see the accused. PW1 did not describe the type of lamps and the intensity of the light. Neither did he say where the lamps were placed in the house as the Appellant came inside and as he attacked the children. PW1 did not describe in his evidence in chief how the Appellant was dressed during the incident. It is on cross-examination that he said that the Appellant had a black jacket, black trouser and a cap on the head. These descriptions ought to have come out in the evidence in chief of PW1 because they form an integral part of identification.

PW2 said that then the attackers entered, they ordered their victims to lie down. PW2 was cut on the head when he tried to raise it. The witness did not give the source of light which enabled him to see the accused. The incident took place at 9.00 p.m when it is normally dark. It is the prosecutor who prodded PW2 in the re-examination to say that there were two lamps in the house. This statement was not tested in cross-examination.

PW3 was in the same house. He said that when the appellant entered, he took one of the two lanterns in the house and threw it at him. The witnesses said that the attackers had powerful torches which they directed at his face. In the circumstances, PW3 was blinded by the powerful torch which lit his face. It is highly unlikely that PW3 could see and identify the man holding that torch or any of his accomplices. The intensity of the light from the remaining lantern was not described. The witness said the house had many rooms, the sitting room, kitchen, bedrooms and his mother's room but failed to say where the lantern was.

Similarly PW4 only talked of the presence of two lanterns in the house without giving their specific locations or describing the amount of light each provided.

It is doubtful that the four (4) witnesses were able to identify their attacker. None of them described his appearance as they saw him in their house. It was not clear whether there was any voice identification since the witnesses said that they knew the appellant before the incident. The four witnesses gave a similar version of the story about the attack that appeared rehearsed. These were two parents and their two children. We come to a conclusion that the trial magistrate reached a wrong finding that the witnesses positively recognized the Appellant. The conditions were not conducive to positive identification. We concur with the State counsel that there was a great possibility or error or mistaken identification.

The complainant PW1 was not injured or even touched during the incident. She said it was her two children PW2 and PW4 who were injured during the incident. This case is an important ingredient of the offence of robbery with violence.

It is our finding that the conviction herein was not safe having been based on shaky identification evidence. The offence was not proved beyond any reasonable doubt. This appeal is therefore merited and it is allowed. The conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

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

Judgment dated and delivered in open court in the presence of the appellant and the State counsel Mr Okeyo on the 9th day of June 2011.

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D. A. ONYANCHA
JUDGE