REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRA NO.25 OF 2009

(Appeal from original BGM CM CR. NO.483 of 2006)

GEOFFREY WANYAMA MIWANI.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Geoffrey Wanyama Miwani was convicted by Bungoma Senior Resident Magistrate of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. Being dissatisfied with the judgment, the Appellant lodged this appeal.

The petition and supplementary grounds raises the following issues:

a) That there was insufficient evidence to convict;

b) The evidence mainly came from a couple and ought to be treated with caution;

c) That there was no proper identification;

d) That the judgment was not in compliance with section 169 (1) of the Criminal Procedure Code;

e) That the voice identification was not tested;

f) The alibi offence was ignored by the trial court.

The state opposed the appeal. The learned state counsel Mr. Ogoti submitted that the evidence was properly evaluated and a conclusion reached in the judgment as required by the law. The Appellant was recognized by PW1 and PW6 as he struggled with them during the robbery. The witnesses said that the Appellant was a neighbour and well known to them. The Appellant was a customer to PW6. PW6 identified the Appellant through physical appearance and through his voice. The trial court found the evidence as a whole overwhelming.

The facts are that the complainant PW1 was sleeping at night in his house on the 4/1/2006. At around 12.00 midnight, thugs broke into his house. They had torches and pangas. The assailants assaulted PW1 before robbing him of cash Ksh.50,000/= and phone Nokia 2300. PW1 said he recognized the Appellant

whom he had known for five (5) years. The Appellant was later arrested and charged with the offence.

PW1 told the court that he struggled with the Appellant during the robbery and removed the cap (mavin) on his head. This is when PW1 was able to identify the Appellant using the light of the torch the Appellant was holding. The witness did not explain what the other assailants were doing at the time he struggled with the Appellant. It appears none of the thugs joined in the struggle to rescue their colleague from the grip of PW1. This sounds unusual in a robbery attack. PW1 said about four (4) men entered his house while PW6 said they were five (5). The light from the torch of an attacker during a struggle between that attacker and the victim is an unreliable source of light. PW1 did not explain whether the Appellant flashed the torch on himself for the witness to see him.

PW6 did not visually identify the Appellant. She told the court she heard the voice of a man who was her customer in her hotel for about six (6) months before the incident. PW6 did not tell the court the words the Appellant said during the robbery in order to prove voice identification. No parade was done to test the voice of the Appellant. We find this kind of identification unreliable.

None of the two witnesses (PW1 & PW6) gave the name of the Appellant to the police. The investigating officer PW4 visited the scene the same morning. In his testimony, he did not say that any name of any suspect was given to him.

PW6 told the court that the appellant was a neighbour who lived about 2 ½ to 3 kilometres from her place. The Appellant was arrested on 22/02/2006 which was about one and half months from the time of the incident with the assistance of PW2 a neighbour to PW1. He said that PW1 gave him the name of the Appellant on 19/2/2006 as one of the suspects in the robbery case. PW2 knew the Appellant and he led members of public to arrest the Appellant on 22/2/2006. The Appellant was handed over to the police. The delay in arresting the appellant was not explained by PW1 or even PW4 the investigating officer. Assuming that he had fled from his home, PW7 did not even hint that police had been looking for the Appellant since the incident.

PW4 the investigating officer visited the scene the same night. He did not recover any exhibits. Yet he told the court that later PW6 took to the police the headgear (mavin) believed to have been won by the Appellant during the incident. An administration police officer took a metal rod to Kiminini Police Station. It is not known who took the panga to the police station, yet PW4 produced the exhibits in evidence. The administration police officer was not called as a witness. The recovery and producing of the exhibits was quite uncoordinated.

PW1 in cross-examination said that the Appellant was armed with a panga held in his right hand. The left hand held a torch. He went on to say that the Appellant had a metal rod and that PW1 is the one who snatched the rod from him (Appellant). It is highly unlikely that one man could carry two weapons in his hand and still hold a torch. It is also highly unlikely that a man holding three objects in both hands was able to struggle with his victim for five (5) minutes without any of those items dropping on the ground. PW1 said in his testimony that as he struggled with the Appellant, the Appellant also held PW1's wife and children. The Appellant whom we saw in court during the hearing of the appeal had two hands like any other normal human being. The two hands could not manage to hold the two weapons, one torch, also hold the complainant, his wife and children at the same time.

PW5 the Clinical Officer whose name the court did not record, produced the P.3 form in evidence. He said he knew PW1 Vincent Wanjala and that it is PW1 who requested him to fill the P.3 form on 7/4/2006. PW5 said the complainant had a deep cut in the right shoulder caused by a sharp object. PW5 said that PW1 went to hospital three (3) days after the incident. I suppose PW5 must have been referring to treatment notes from another physician. The date PW5 filled the P.3 form was three (3) months after the incident. PW6 said her husband (PW1) was admitted for only three days. Why then did it take so long to fill the P.3 form? Why did PW1 have to personally request a Clinical Officer known to him to fill the P.3 form. It is the duty of the police to make this request from the nearest hospital and not the complainant. The accused had been arrested almost two months before the P.3 form was filled. A glance at the charge sheet gives the date of pleas as 14/6/2006 and the date of arrest as 22/2/2006. Where was

the Appellant all this time? There is a lot of delay without any explanation. The Appellant ought to have been charged within 24 hours after arrest.
After analyzing the evidence, we find more questions than answers in this case. There are major contradictions on how the robbery took place, how the exhibits were recovered and how the matter was investigated. The evidence of recovery of the exhibits does not add up. The delays in the arrest of the Appellant and his arraignment in court were not explained. Identification by both PW1 and PW6 was not positive. The conditions and circumstances were poor and could not lead to positive identification. It is not in dispute that the robbery on PW1 took place, but PW1 and his wife PW6 did not identify their assailants.

The finding of the trial court that there was positive identification was not correct. We allow the appeal accordingly. The conviction is hereby quashed and sentence set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

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

Judgment dated and delivered on the 18th day of July, 2011 in the presence of the Appellant and the state counsel.

F. N. MUCHEMI

JUDGE