**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT BUNGOMA**

**Criminal Appeal 44 of 2009**

***(Appeal originating from BGM CM CR. Case No.304 of 2009)***

**GEOFFREY KAMAU KIMANI ::::::::: APPELLANT**

**~VRS~**

**REPUBLIC ::::::::::::::::::::::::::::::::RESPONDENT**

**JUDGMENT**

The Appellant Geoffrey Kamau Kimani was convicted by Bungoma Chief Magistrate court of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to serve the mandatory death sentence. He felt aggrieved and appealed to this court against both conviction and sentence.

Mr. Ocharo argued the appeal and mainly dealt with three main issues arising from the petition of appeal:

**a) That the conviction was based on contradictory evidence and that the evidence fell short of the standards required in criminal cases;**

**b) That the evidence on identification was not sufficiently considered;**

**c) That the defence of the accused was not considered.**

The appeal was opposed by the state. Mr. Ogoti agreed that identification was not established. However, he argued that the trial court was correct in finding the accused persons guilty of the offence relying on the evidence of recent possession which evidence was reliable.

The facts are that on the material day around 8.00 p.m, PW1 was accosted by four (4) men in his compound who were armed with rifles. He was driving his car reg. no. KBC 258 Z, Toyota Corolla from his place of work. He parked safely and disembarked from the car. The four men pushed him back into the car and forced him to drive to a petrol station to fuel the car. He was taken to his shop in town where he was robbed of his bank ATM card, mobile phone, credit cards and cash Ksh.22,800/=. PW1 was later abandoned in the bush along Webuye – Bungoma road while the thugs escaped in his car. From the evidence of the witnesses, it appears that the car was not recovered.

The trial court found correctly that identification was not established. The Appellant was convicted of

the offence based on application of the doctrine of recent possession. The Appellant argues that the witnesses contradicted themselves on what was recovered in the house of the Appellant. On perusal of the record, PW1 testified that police recovered a radio cassette from the house of the Appellant. PW1 accompanied police during the recovery. PW3 and PW4 the police officers testified that they recovered a car radio cassette head which was printed on it the registration number of the complainant's car. None of these witnesses told the court when and where the item recovered had been stolen from. PW1 did not say he was robbed of such an item. The charge sheet does not contain such an item. Assuming it was removed from the car of PW1, this ought to have been explained to establish a nexus between the recovery and the Appellant. Although the court convicted the accused of the offence due to the recent possession, the item recovered was not connected with this case in any way as seen from the judgment.

The Appellant denied the offence in his sworn defence. He said he was arrested from his shop by police for the offence of being in possession of music copy rights. The officers led him to his house where they showed him a car radio cassette head. He denies the item was in his house. He was then forced to sign an inventory. The defence was not sufficiently considered by the trial court. We find the defence of the Appellant quite strong in comparison with the shaky evidence of the prosecution on recovery. We do not agree with the trial court that this case was proved beyond any reasonable doubt as he has concluded in his judgment. The defence of the accused was not fully considered. The trial court also failed to address several contradictions in the complainant's evidence which would have led to a different finding.

It is our finding that the trial court erred both in law and fact in convicting the appellant on evidence that could not prove the offence to the standards required in criminal cases. We find the appeal merited and allow it 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 in open court on the 17th day of June 2010 in the presence of the Appellant Mr Onkangi for Ocharo for appellants and Mrs letting for the state.