



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

Criminal Appeal 95 of 2008
(From original BGM CM CR. NO.1885 of 2007)

CHRISPINUS WANJALA MAONDO..... APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Chrispinus Wanjala Maondo was convicted by a Bungoma court of the offences of burglary and stealing contrary to sections 304 (2) and 279 (b) of the Penal Code. He was sentenced to serve three (3) and two (2) years imprisonment respectively. In his petition, the Appellant appeals against both conviction and sentence.

The state did not oppose the appeal. Mr. Ogoti Senior Principal State Counsel submitted that the evidence of the two key witnesses PW1 and PW2 did not establish positive identification. He took the court through the relevant parts of the evidence. He asked the court to allow the appeal.

The petition has three grounds of appeal:

- a) Lack of positive identification.
- b) The alibi defence of the Appellant was rejected.
- c) The sentences were harsh and excessive.

During the hearing of the appeal, the Appellant handed over to the court submissions which raised three new grounds. These

include violation of constitutional rights in over-detaining the Appellant, language used not indicated, Section 211 of Criminal Procedure Code not complied with and that the court did not provide an interpreter during the trial. There was no leave sought to include the new grounds in the submissions and were just handed in to court. The court will only deal with the grounds in the petition.

On identification, PW1 said that the thugs found him in the bedroom after entering forcefully. He had a torch but did not use it because the thugs flashed their bright torches on him. He further said that he was not in a position to identify any of the intruders because they had covered their faces and had bright torches. PW2 said that at the material time, he had covered himself with a blanket and did not bother to uncover himself. He lay still during the incident. I entirely agree that the two key witnesses did not identify the attackers. They clearly told the court so. Interestingly, the trial court made findings which were not supported by the evidence on record that the Appellant had been positively identified. The conviction was based on that wrong finding which has no evidential basis.

The Appellant gave a sworn statement of defence. He said that at the material time, he was not at the scene of crime. The Appellant who was an employee at Chitambe in Webuye was at his place of work sleeping in a lodging room with four (4) of his co-workers. Timothy Rono (DW2) was one of the people with the accused. Timothy gave evidence and supported the defence of the Appellant. The Appellant was arrested on 16/08/2007 about a week after the incident. On perusal of the judgment, I find that the trial court did not evaluate the defence adequately. It was summarily rejected and a conclusion made that it was not true. This confirms the petition of the Appellant that his alibi defence was rejected. The trial court erred in failing to sufficiently evaluate the defence. The contradictions in the evidence of PW1 and PW2 were not addressed at all.

As for the sentences, I find that they were neither harsh nor excessive given that the maximum under the law is ten (10) years imprisonment.

Having found that positive identification was not established by the prosecution, and that the court failed to adequately evaluate the evidence on record including the defence of the Appellant, I find that this appeal must succeed. I therefore allow the appeal, quash the conviction and set aside the sentence. The Appellant is therefore set at liberty unless otherwise lawfully held.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered in open court on the 15th day of July, 2010 in the presence of of the Appellant and the state counsel Mr Ogoti.

F. N. MUCHEMI
JUDGE