



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 161 OF 2011

NICHOLAS MURIITHI NJERU 1ST APPELLANT
BONIFACE KARANI NJERU 2ND APPELLANT
GEORGE KINOTI 3RD APPELLANT
HARISON KINYUA GIKUNDI4TH APPELLANT
EDWARD KIMATHI GABRIEL5TH APPELLANT
EMMANUEL KINOTI MUGAMBI 6TH APPELLANT
COSMAS MUTUGI7TH APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Being appeal Nos. 161/2011. 162/2011. 164/2011, 160/2011, 159/2011, 167/2011 and 163/2011 from original conviction and sentence in criminal case No.588/2009 at Nkubu SPM's Court before Hon. Githinji S.M. – SPM on 10th November, 2011)

R.P.V. WENDOH AND J. A. MAKAU JJ

JUDGMENT

The Appellants **NICHOLAS MURITHI NJERU, BONIFACE KARANI NJERU, GEORGE KINOTI MEME, HARRISON KINYUA GIKUNDI, EDWARD KIMATHI GABRIEL, EMMANUEL KIMATHI MUGAMBI, MARTIN MAWIRA MUTEMBEI** and **COSMAS MUTUGI NJERU** (formerly Accused 1-8) were charged with two counts of robbery with violence, contrary to **Section 296 (2) of the Penal Code CAP 63 of the Laws of Kenya.**

The particulars of the offence were that on the 26th day of March 2009 at Kuiru village Igoji Location in Imenti South District, jointly with others not before court, while armed with crude weapons, robbed **BLANDINA MUTHONI MBURIA** of cash Ksh.300/=, Nokia mobile phone, one Toshiba DVD player, four pairs of shoes, one axe, two pangas and one textbook, all valued at Kshs 12,499 and at or immediately after or before the time of such robbery used actual violence to the said Blandina Muthoni.

The particulars of the offence in count two are that on the same night and place, jointly with others not before court while armed with crude weapons robbed **DOMIANO MUTEGI** of cash Kshs.200/=, one Nokia mobile phone, one torch and one panga all valued at Kshs 3,250 and at or immediately thereafter used actual violence on the said Domiano Mutegi. The appellants were initially 8 but Accused 7, Martin Mawira Mutembei jumped bail before the case as determined.

The 7 Appellants were tried, convicted and sentenced to life imprisonment. The Appellants were aggrieved by the convictions and sentence and they filed these appeals: CRA 161/2011 Nicholas Njeru v Rep; CRA 159/2011 Edward Kimathi Gabriel v Rep; CRA 160/2011 Harison Kinyua Gikundi v Rep; 162/2011 Boniface Karani Njeru v Rep; CRA 163/2011 Cosmas Mutugi v Rep; CRA 164/2011 George Kinoti v Rep and CRA 167/2011 Emmanuel Kinoti Mugambi v Rep which were consolidated because they arise from same trial. The lead file in CRA 161/2011. In summary, the grounds of appeal were as follows:

1. **That the charge was defective;**
2. **The first report to police on 27/3/2000 was at variance with the evidence;**
3. **That the conditions at the scene were not favourable for a positive identification/recognition;**
4. **That the Learned Trial Magistrate erred in law and fact in failing to consider that there was an existing grudge between PW1, the 1st, 2nd, 3rd and 4th appellants' families;**
5. **That there were inconsistencies in the evidence of the prosecution witnesses;**
6. **That vital witnesses were not called to testify;**
7. **That the Learned Trial Magistrate contravened the provisions of Section 169 (1) of the Criminal Procedure Code CAP 75 of the Laws of Kenya;**
8. **That the court did not consider the appellants' defences;**
9. **That the court failed to consider the age of 7th appellant.**

The applicants pray that the convictions be quashed and sentence be set aside and appellants be set at liberty. All the appellants save the 3rd, appeared in person and relied on their written submissions. The 3rd appellant was represented by Learned Counsel, Mrs. Ntarangwi. The appeals were opposed by Learned Counsel, Mr. Kariuki Mugo.

Mrs. Ntarangwi, in support of the 3rd appellant's appeal condensed their grounds into two, namely, the issue of identification and the failure by the trial court to comply with **Section 169 of the CPC**. Counsel urged that the 3rd appellant was only identified by one witness and the court failed to test the evidence of recognition; that PW1 said she put on the lights but she did not say which ones, sitting or bedroom lights; that from PW1's explanation that the robbers shone torches while she was on the corridor, there was no evidence that the torch fell on the face of any of the robbers. Counsel further submitted that PW1 stood against the wall and cut the robbers till they retreated meaning that they did not see her. She further contended that PW1 referred to 3rd appellant as Ntongai though his names are George Kinoti; that the charge sheet did not indicate that he was *alias* Ntongai and there should have been evidence adduced to confirm that 3rd appellant was also known as Ntongai and that the trial court believed PW1's theory without any evidence in support thereof. Counsel further urged that though PW1 testified that she inflicted injuries on the intruders, 3rd appellant did not have any injuries; that the 3rd appellant was arrested by one Titus (PW3) who was not an eye witness to the offence and his name was not found in the OB or statement.

On identification, Counsel said that 3rd appellant was only identified by one person yet the trial court found that he had been identified by three people. She relied on the case of *Etole v Rep CRA 241/2000* where the court said that if the case depends wholly on substantially on correctness of one or more identifications, the court should warn itself of the special need for caution and examine the evidence of each identifying witness closely.

On **Section 169 of the CPC**, Counsel submitted that the court made a finding of guilty before analyzing the evidence and in the end prejudiced the 3rd appellant and that he was found guilty even before his defence was considered.

The appeal was opposed by Mr. Kariuki, Counsel for the State who submitted that the appellants were recognized by PW1, 2 and 6 who were well known to the appellants prior to this incident; that the prosecution evidence was detailed, consistent and logical leaving no doubt as to how the offence took place. Counsel also urged that the appellants' defences were considered and the judgment complied with **Section 169 of CPC** and urged the court to dismiss the appeals.

This being the first appellate court, we have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis and will draw our own conclusions. We are alive to the fact that we neither saw nor heard any of the witnesses and so cannot comment on their demeanor. We are guided on the duties of a first appellate court by the Court of Appeal decision of *Kiilu and Another v Rep (2005) 1 KLR 174* where the Court of Appeal held thus:

“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions..”

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..”

The prosecution’s case was as follows; On 26th March 2009 at around 3.00 a.m. **BLANDINA MUTHONI (PW1)** was asleep in her house when she heard sounds of people in the house. She asked the children if they were the ones making noise but they responded in the negative. She then put on the lights and opened the bedroom door and saw many people in the table room and on seeing her, the people directed their torches at her and they faced each other and told her “*woman we have come*”. She returned to the bedroom and tried to bolt the door but she panicked and got into the wardrobe and got her husband’s *panga*. The men tried to push the door open and the door was slightly open and she cut the one who opened 1st on the shoulder whereupon he retreated shouting “*I have been cut, I have been cut*”. The 2nd and 3rd men all tried to enter but she cut them and they all retreated vowing to kill her. The men then went outside and came armed with stones. They struck the door with stones till the door fell off and the children who had now woken up were screaming. The children shouted and asked her to give the people money and phone and she threw her phone, a Nokia 1202 at them but they told her that they had been sent to collect her better phone. They then entered the house and ransacked the bedroom and there was a man who was peeping through the window and she cut him. She then heard noise outside asking her to put on the security lights and she thought it was one of the men but it was one Titus Mugambi her brother-in-law (PW3). Her husband also came and she was able to identify Muriithi (1st appellant), and his brother Karani (the 2nd appellant), Kimathi (5th appellant), Mawira (7th accused) and one Ntongai whom she knew by that name but identified him as 3rd appellant. It was her further testimony that all the appellants were neighbours and her son said that “Cosi” (7th appellant) took their shoes. She testified that the appellants took her travelling bag, DVD player, CD’s, two blankets, 5 pairs of shoes, two *pangas*, an axe, Kshs.200/= and a Nokia phone. She later reported the incident at Kia Ndege police post and PW1 was

treated at Chogoria hospital. PW1 identified 1st to 6th appellants save for the 7th appellant who was identified by her child and that she knew them since 1983. No recovery of the stolen items was made.

PW2 DOMIANO MUTEGI testified that on 26th March 2009, he was at home sleeping when he was called by the assistant chief (PW3) who told him that there were thugs at the home of Blandina Muthoni (PW1). He told him to mobilize people to go and help and as he was going, he met a group of about 15 people and he thought that they were going to help. He recognized one of the people as Muriithi and he sensed danger since he knew him as a member of a gang which was involved in stealing. He testified that he knew Muriithi (Maesh) as a neighbor since childhood and they asked him where he was going. He told them that he had been called by the sub chief to help in a home where thieves had invaded and they started beating him. Muriithi (1st appellant) hit him with the side of the panga and he fell down and took Kshs 200/=, a torch, panga, and a mobile phone. He testified that the 1st appellant was the one commanding and directing the rest. He said that he was able to see 1st appellant because as they used the torches, the light fell on his face. They then left him lying on the ground and he slowly crawled into his brother's house whereupon he was taken to hospital with PW1 by PW1's husband. He further testified that he did not know or recognize the rest of the gang other than the 1st appellant.

PW3 TITUS MUGAMBI testified that on the material day at about 4.00 a.m., he was at his friend's place, one Kimathi when he was called by his sister one Kajiru who told him that his brother was being attacked by thugs. He called police and friends (among them PW2) and informed them about it as he was not near and he headed to that area. He went to the house and found PW1 in the house having sustained injuries on the breast and leg. They later went to Kia Ndege police station and took PW 1 to hospital and met PW 2 who had a cut on the leg. He told them that he had met a group of youth who attacked him and took his valuables and he was able to recognize one of them namely Muriithi (the 1st appellant) alias Maex. Later on, they were informed that there were suspects seeking treatment having sustained cut injuries whereupon they went there and found the 1st-3rd appellants and arrested them and took them to Kia Ndege police post. He further testified that the appellants had been mentioned by PW1 as suspects.

PW4 JOHN MBURIA testified that on the material day, he was at home at Kiriane Boys' High School when he was called by his employee one Bernard (PW5) and informed that his house had been invaded by thugs. He woke up the head teacher and the accounts clerk and used the accounts clerk's vehicle to go home whereupon on arrival they found doors open and the house disarranged. He found his wife injured and administered first aid and took her to hospital. On the way, they met a neighbor one Damiano Mutege (PW2) who informed them that he had been cut by thugs as he was rushing to help his wife and that he recognized one of the thugs as Muriithi (1st appellant).

PW5 BERNARD KOBIA testified that on the material night he heard the wife of his employer and children screaming. He got out and saw the front door open. As he returned to the house, he met three persons who had torches and as they approached him he ran away and called his employer (PW4) who was at his place of work. He later returned to the house and found that the robbers had gone.

PW6 NICKSON MURIITHI testified that on the material night, he was sleeping with his twin brother in the same room when they heard their door being banged and being opened forcefully. Their mother (PW1) asked them if they were the ones hitting the door and they responded in the negative. They then heard people talking outside saying "*mama tumekuja*". Their mother did not open the bedroom door and then he saw two men along the corridor and one Cosmas (7th appellant) entered their room and took two pairs of shoes. He referred to 7th appellant as 'COSI'. He testified that he knew Cosmas prior to this incident and a tall man came and cut mosquito nets while threatening to kill them. The men remained there for a while then left. They then went to their mother's bedroom and found that she had been injured. He further testified that he recognized the 1st appellant who had entered their room, their eyes met; that 1st appellant was well known to him prior to this incident having been his neighbor and that he could not be able to identify the tall man who cut the nets and threatened to kill them. He said that there were electricity lights on in their room and the corridor. According to him, the robbers put on the lights. He also said that the door to their bedroom always remained open to the corridor.

PW7 JOHN SILUNDA testified that on 16th March 2009, he was at Igoji police post when the complainants (PW1 and 2) came to the police station and reported the incidents. He testified that PW1 had visible injuries and she told him that she had cut some assailants and that she had recognized some of them. He further testified that at 7.00 a.m. in the morning, he was informed of people who had been injured and were being treated at Kanyakine Hospital. He proceeded to the hospital in the company of PC Richard Opui and PW3. They met the 1st, 2nd and 3rd appellants, and questioned them on how they had received the injuries but they were unable to explain. They arrested and took them to Igoji police post. They later went to Blandina's house (PW1) and found that the bedroom door had been knocked down and the bedroom in disarray. Later on, he was informed by PW3 that there was another suspect at Kia Ndege centre and proceeded to the market and arrested the 4th appellant. The 5th and 6th appellants were later on brought by PW3 while the 7th appellant was brought by Administration police in another case.

PW8 DR. ISAAC MACHARIA testified having examined Cosmas Mutugi and Christine Karegi on 23/11/2009 who had been assaulted by persons known to them. They had swollen bruised, tender lips and cuts on the right thumb and right small finger respectively.

PW9 SEBERINA KAIMATHERI testified and produced P3 forms in respect of Blandina Muthoni (PW1) and Domiano Mutegi (PW2) who were alleged to have been assaulted by persons known to them.

At the end of the trial, the appellants were found to have a case to answer and were put on their defence with the 1st appellant opting to give unsworn testimony and called one witness and the 2nd appellant gave sworn evidence and called one witness respectively. All the other appellants opted to give sworn evidence and did not call witnesses.

The 1st appellant's defence was that on the material day he was asleep when he was woken up by the 7th appellant and told that his mother (DW2) was calling him to see what had happened to their brother (the 2nd appellant) whereupon he went to the 2nd appellants house and found that he had been cut several times; that the 7th appellant also had several cuts and the 1st appellant was told that they had been cut by PW3. DW2 Edith (the 1st appellant's mother) asked the 1st appellant to assist in taking them to hospital but the 1st appellant had no money. They passed by the 3rd appellants home who gave them Kshs.1000/= and DW2 was told to report to the police. The injured were later arrested while undergoing treatment at Kanyakine Hospital.

DW2 EDITH MUGURE testified that the 2nd appellant, Karegi and the 7th appellant had been injured. They left with the 1st appellant to go to Kia Ndege police post for a P3 form but were not given. She found one police officer and told him/her that her sons had been injured but was told that she will state so in another police station.

THE 2ND APPELLANT in his defence testified that on the material day, he was asleep when PW3 broke his door and entered and cut him on the head, neck and left leg. He further testified that the 8th appellant also had an injury on the mouth and the 2nd appellant lost consciousness and regained it in hospital.

THE 3RD APPELLANT testified that on the material day he was asleep in his house when the 1st appellant woke him up to assist his brother who had been allegedly injured by PW3. They went to Kanyakine hospital and PW3 went to the said hospital and arrested them.

THE 4TH APPELLANT HARRISON KINYUA, testified that he was called by his sister Edith Karambu to assist her harvest maize and completed the work in February whereupon he decided to raise money to get back to Maua. He was directed to the 1st appellant who hired him to deliver Napier grass to his cows. He worked for 5 days after which he was taken to a construction site at Kieni Kia Ndege on 16th and was arrested along the way. He further testified that he was not told the cause of his arrest.

THE 5TH AND 6TH APPELLANTS EDWARD KIMATHI AND EMMANUEL KIMATHI, each

testified that they were from their places of work when they were arrested by PW3 for no reason at all and were charged with people they did not know at all.

THE 7TH APPELLANT COSMAS MUTUGI, testified that he was a pupil at St. Joseph primary school and that on 18th July 2009, he went to school when he met administration police who arrested him and took him to Kia Ndege police post and was not told the cause of his arrest. On 20th July 2009, he was charged and pleaded guilty to the offence, was jailed for a month, finished serving his sentence and went home. He was then arrested and charged with the current offence.

Having carefully considered the grounds of appeal, the evidence adduced in the trial court and submissions by the rival parties, there is no doubt that the offences were committed in the deep of the night about 3.00 a.m. and 4.00 a.m. as per the evidence of PW1, 2, 3, 4, 5, and 6. PW1 said her family which included PW6, were woken up from sleep. The circumstances under which the offences were committed were therefore, not favourable for positive identification. The importance of proper identification in such cases which turn on identification was considered in the case of *Anjononi v Rep (1981) KLR*, which is repeatedly cited in the 3rd appellant's authorities of *CRA Daniel Kimanyi Kimani v Rep CRA 104/2013* and *Zacharia Kokot Londopesh v Rep CRA 106/2013*. The Court of Appeal said:

The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable.

In the case of *Wamunga v Rep (1989) KLR 424*, the court said as follows at page 426:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

Also see *Paul Etole v Rep (Supra)*.

In the instant case, none of the stolen goods were recovered and therefore, the only evidence that this court should examine closely and re-evaluate carefully is that of identification. According to PW1, when she heard noises in the house, she switched on the lights in the bedroom and the corridor. She also told the court that the attack took long because she fought back and injured some of the robbers. Her son, PW6 said that it took about an hour. PW1 said that when the assailants entered, the lights were still on and that the robbers took time searching for valuables. PW6 corroborated PW1's evidence that there were electric lights on in the corridor and even in his bedroom. PW6 said the door to their bedroom was open as it usually was and he was able to see the people well. PW1 told the court that she was able to identify Muriithi, the 1st appellant, his brother Karani, the 2nd appellant and the 3rd appellant whom she knew as Ntongai and the 4th appellant whom she did not know by name but gave the description as the person who had come to stay at the 1st appellant's house. PW6 said that the 7th appellant entered their room and took two pairs of shoes and that his eyes met those of the 1st appellant's and he looked down. The 1st, 2nd and 7th appellants are neighbours to PW1 and 6.

PW2 who had been sent by the Assistant Chief to go to PW1's rescue said he met a gang of about 15 people and only managed to identify Muriithi, the 1st appellant, also known as Maex or Maesh because they had torches and the torches were shone on his face. PW2 said he knew Muriithi as a neighbor. He said it is Muriithi who was leader of the group as he was directing them on what to do. PW2 stated:

“As they used torches, the light fell on Muriithi and I recognized him. He is a neighbor. I have known him since his childhood ... They asked me where I was going ... Muriithi was commanding and directing the rest. He was referring to them as major, corporal, OCS, walia etc, telling them they were running short of time and

should work fast.”

During cross examination of PW2 by Mr.Gikunda, he said that he knew the 1st appellant's voice. The 1st appellant was talking as he gave directions and therefore afforded PW2 to know and recognize the 1st appellant's voice. When PW3 and 4 arrived at the scene of crime, PW2 immediately informed them that he had recognized Muriithi (1st appellant) in the group of robbers.

After carefully analyzing the above evidence of PW1, 2 and 6, we are satisfied that though the circumstances for a favourable identification were lacking, PW1, 2 and 6 positively identified the 1st appellant as one of the robbers. He was also mentioned in the first report made to PW3 and PW7 (Chief and Police).

There was unchallenged evidence that PW1 injured some of the robbers as she tried to ward them off. The 1st, 2nd and 3rd Appellants were arrested at Kenyakine Hospital where they had taken the 2nd appellant for treatment on same morning. Although the 1st, 2nd and 7th appellants attempted to blame PW3, that he assaulted them at their home, PW3 categorically denied that fact. They admitted that they did not make any report anywhere after the alleged assault and did not explain why. The 7th appellant was examined by PW8 on 24/4/09. He was found with injuries. The 7th appellant was not arrested together with others but was arrested much later when he committed another offence. He may have been injured in another incident.

DW2, the mother of PW1, 2 and 3 could not tell when she was allegedly injured by PW3. The 2nd appellant in his defence claimed to have been beaten till he lost consciousness and only came to while in Hospital yet there is evidence that PW3 and 7 found him lining up to be treated at Kenyakine Hospital. The evidence of DW2 contradicted that of the 1st and the 8th appellants to the extent that she claimed to have gone to Hospital with the 8th appellant who was injured on the same night but the 8th appellant, although he claimed to have been injured by PW3, he did not go to Hospital that day. Otherwise he could have been arrested together with the 1st, 2nd and 3rd appellants.

After considering all this evidence, we are satisfied that the appellants were trying to divert attention from themselves to PW3. We find that the 2nd appellant must be one of those injured when PW1 was fending off the robbers. The injury inflicted on the 2nd appellant linked him to the scene of the robbery. PW1 said she had cut one of the robbers on the shoulder and it turned out to be the 2nd appellant. PW7 confirmed that PW1 had reported having cut the 2nd appellant on chest. PW1 had seen him at her house. PW1 told the court that she had put on the lights and was able to see him. She made a report to the police the same day and named him as one of the robbers.

As regards the 3rd appellant, PW1 told the court that she saw those who entered her bedroom, where there were lights. She referred to the person who entered her house as 'Ntongai'. The charge indicates that the 3rd appellant is known as George Kinoti Meme. There was no attempt by the prosecution to explain whether 'Ntongai' was the 3rd appellant's other name. The charge should have read 'George Kinoti Meme alias Ntongai' or at least confirmation that he is one and the same person. In addition to the above, the Investigation Officer (PW7) denied that he was one of those mentioned in the first report.

PW3 talked of PW1 having told him that she saw Ntongai but he never recorded that information in his statement to police. As earlier noted, the court was not told if the 3rd appellant was one and the same as "Ntongai". Failure to name the 3rd appellant in the first report left doubt in the court's mind as to whether he was one of the culprits. The fact that he was found with the 1st and the 2nd appellant at Kenyakine Hospital is not proof of his involvement in the commission of the offence. The 3rd appellant's explanation for being at the Hospital with the 1st and 2nd appellants was that he escorted the 2nd appellant home. We cannot, however, rule out the fact that he is a prime suspect.

Whether the 4th appellant was identified as one of the robbers? PW1 claimed to have seen him on the night of the robbery as the person who used to reside with the 1st appellant. Indeed the 4th appellant admitted to have been working for the 1st appellant at the said time. However, it is interesting that she never mentioned him to PW3 and PW7 in the first report. PW1 had not described the 4th appellant to the Investigation Officer at the time of the 1st report and this raises doubts in our minds whether PW1 identified him as one of the robbers. PW7 categorically denied that the 4th appellant was ever mentioned by any of the victims. It is not clear how he came to be arrested. We find that PW1's evidence on identification of the 4th appellant was not sufficiently corroborated.

In respect of the 5th appellant, PW1 never mentioned him specifically in her evidence in chief. When 5th appellant cross examined PW1 is when she said that she saw him go to the girls' bedroom. She said that she knew him before as Kimathi and a neighbor. She mentioned him to PW3 soon after the offence. PW7 confirmed that the appellant had been mentioned by PW1 and that is why PW3 arrested him. In his defence, the 5th appellant attempted to raise the issue of an existing land dispute between him and PW1 which he never put to PW1 when he cross-examined her. We do not believe the defence. It was both a bare denial and an afterthought.

We also note that PW6 was categorical in his testimony that he saw Cosmas (7th appellant) take their shoes. Electricity lights were on in the room. He knew Cosmas before. He informed PW1 about it immediately, then later, PW3 and 7. We are satisfied that PW6 did see the 7th Appellant at the scene of crime.

In this case, we are satisfied that the 1st, 2nd, 5th and 7th Appellants were not only identified but recognized by the witnesses. **In Turnbull v Rep (1976) 2 ALL ER 549** the court said:

“Recognition may be more reliable than identification of a stranger but even when the witness in purporting to recognize someone whom he knows, the family should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

Anjononi & Others V Rep (1980) KLR the court went on to say:

“Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

As respects the 3rd, 4th and the 6th appellants, we are not satisfied that they have been satisfactorily identified as part of the gang of robbers. PW1 did not name the two in her evidence in chief. It is only during cross examination that she claimed to have recorded their names in her statement. PW7 denied that they were ever mentioned by the complainant as some of the robbers when she made her report. The complainant recorded her statement after she had been discharged from Hospital after treatment. In fact, PW1 denied having known the 6th appellant's name and it is not clear how he was arrested. For the above reasons, we are of the view that the identification of the 3rd and the 6th appellants was not watertight.

To buttress the identification of the 1st, 2nd, 5th and 7th appellants by PW1, 2 and 6 they were mentioned in the first report to PW3 and 7. The first report to another person or the authorities is usually more believable because such evidence is yet to be influenced by others or gauged. In the case of **Mailonyi v Rep (1986) KLR 198**, the court held that:

“There is a second line of enquiry which ought to be made and that is whether the complainant was able to give some description or identification of her assailants, to those who came to the complainant's aid or to the police....

If a witness reserves a very strong impression of the features of an assailant, the witness will usually be able to give some description.

In the case of *Terekali v Rep (1952) EACA*, the court considered the importance of the first report when it said:

”... Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against late embellishment on made up case. Truth will always come out from a statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others ...”.

We find that the first reports did go to strengthen PW1, 2 and 6’s identification of the robbers (1st, 2nd, 5th and 7th appellants). The Appellants complained that the charge was defective in that it does not bear the particulars of the offence as stipulated in the second schedule of the CPC because the words **“armed with dangerous weapons”** are not included. The particulars of the first charge read as follows:

“On the 26th day of March 2009 at Kuiru Village, Igoji Location in Imenti South District, jointly with others not before court, while armed with crude weapons robbed Blandina Muthoni Mburia of cash Kshs.300/=, and at or immediately after or before the time of such robbery used actual violence to the said Blandina Muthoni Mburia.”

Section 134 of the CPC provides that:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offences or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

In the instant case, the only omission in the charge is the use of the word of **‘crude weapons’** instead of **“dangerous weapons”**. In our view, the particulars of the charge give reasonable information as to the nature of the offence which the appellants faced and it complied with the requirements of **Section 134 CPC**. There is no evidence that the appellants will suffer any prejudice as a result of the use of the said wording and none was alluded to. PW1 and 2 testified that the robbers were armed with *pangas* and injured them with them. They also hurled stones at PW1. PW1 was cut with a *panga* and so was PW2. The injuries were confirmed by PW9.

In any event, even if there was any defect in the charge, it is curable under **Section 382 CPC** which states:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

We find no merit in this ground.

The appellants complained that the prosecution failed to call vital witnesses. However, the appellants did not point to any witness that should have been called and was not called. It is the discretion of the prosecution to call whichever witness is relevant to the case and who will help the court establish the

truth. That discretion can only be challenged if failure to call a witness is for an ulterior motive. Otherwise, under **Section 143 of the Evidence Act**, one witness can prove a fact unless the statute provides otherwise.

Whether the appellants' defences were considered? **Section 169 of CPC** provides a guide on how a well structured judgment should be. It should be written in the language of the court, contain the point or points for determination, the decision thereon and the reasons for such decision and it has to be dated and signed. In the instant case, the court did summarise the evidence but failed to analyse the evidence in detail and instead went directly to making its decision without giving the reasons for the said decision. We agree that the judgment did not entirely accord with **Section 169 of CPC**. However, this court is required to examine all the evidence adduced in the trial court, analyse it and consider the points for determination and make determinations and give reasons for the them which this court has done. The applicants will therefore, suffer no prejudice.

The appellants claimed that there existed a grudge between PW1 and the family of the 1st, 2nd, 3rd and 7th appellants but that was not alluded to in their defences or during the cross examination of the prosecution witnesses. The appellants cannot raise an issue that never arose during the trial. That ground is untenable.

Lastly, the appellants complained that their defences were not considered. The trial court dismissed their defences in two sentences that the 9 witnesses who testified could not have colluded to fix them. In this judgment, we have considered the appellants' defences and have not believed the defences of the 1st, 2nd, 5th and 8th appellants for reasons we have stated earlier.

In the case of **Oluoch v Rep (1985) KLR** the Court of Appeal stated that an offence of robbery with violence is committed when:

- “(a) the offender is armed with any dangerous and offensive weapon or instrument;***
- (b) the offender is in company with one or more person or persons; or***
- (c) At or immediately before of immediately after the time of the robbery the offender wounds, beats, strikes, or uses other personal violence to any person ...”***

In this case, we are satisfied that all the three ingredients were fulfilled though only one of them needed to be proved, to establish an offence of robbery with violence. We are satisfied that there is sufficient evidence that the 1st, 2nd 5th and 7th appellants were recognized by PW1, 2 and 6 as the robbers. We find that they were properly convicted. We confirm the conviction.

However, in respect to the 3rd, 4th and 6th appellants, the identification was not watertight and though they may be prime suspects, suspicion alone cannot be a basis for a conviction and we quash their convictions and set aside the sentence against each of them.

One of the grounds of appeal by 7th appellant is that he was a minor at the time offence was committed and the court erred in not treating him as a minor. PW1 told the court that the 7th appellant was attending a primary school then and PW7 did confirm that he was a minor. Having heard that the 7th appellant may be a minor, the court should have had his age assessed so that during sentencing he could have been dealt with in accordance with Section 191 of the Children's Act.

Having failed to do so, this court will still go ahead to order that the 7th appellant's case be assessed before the court can decide whether or not to confirm the sentence. 1st, 2nd and 5th appellants were sentenced to life imprisonment. We find that sentence to be unlawful because under Section 296 (2) of the PC, there is only one sentence provided, that is death. We hereby set aside the sentence of life imprisonment and instead, sentence the 1st, 2nd and 5th appellants to suffer death.

DATED AND SIGNED AT MERU THIS 29TH DAY OF OCTOBER, 2015.

R.P.V. WENDOH

J. A. MAKAU

JUDGE

JUDGE

DELIVERED AT MERU THIS 29TH DAY OF OCTOBER, 2015

R.P.V. WENDOH

J. A. MAKAU

JUDGE

JUDGE

PRESENT

Mr. Mulochi for State

Mrs. Ntarangwi for Appellants

Ibrahim/Peninah, Court Assistants

6 Appellants, Present