REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 232 & 234 OF 2012

(An appeal against both conviction and sentence of the Chief Magistrate's Court at Kakamega in Criminal Case No. 1875 of 20011

[S. M. SHITUBI, CM] dated 4th October, 2012)

MIKE SITUMA KENYATTA ……. 1ST APPELLANT

BONFACE WANJALA NEULULA alias

BOYI KETAMBE ……..……..…….. 2ND APPELLANT

VERSUS

REPUBLIC ….....…..……..…….. RESPONDENT

JUDGMENT

The two appeals were consolidated and heard together as they arise from the same trial.

The appellants were charged in the subordinate court jointly with robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the charge were that on 21/5/2011 at around 11.00 p.m. at Kaunda village, in Central Kakamega District within Western Province jointly with others not before court robbed Ignatius Ikina Makhulu of cash Kshs.8,000/=, TV, motor cycle, Nokia E2, Jibambe phone, woofer, 2 Sonitec DVD players, Nokia 1200 all valued at Kshs. 102,000/= and at the time of such robbery wounded the said Ignatius Ikina Makhulu. They denied the charge. After a full trial, each was convicted and sentenced to suffer death as provided by law.

Being aggrieved by the decision of the trial court, they have appealed to this court against both conviction and sentence. They filed separate appeals. The grounds of appeal were that PW1 and PW2 did not identify them. That the allegations against them were not corroborated. That ownership of the alleged robbed items was not proved. That their defences were rejected without cogent reasons. With the permission of the court, each of the appellants filed written submissions.

At the hearing of the appeals, the 2nd appellant stated that his name was not mentioned in the first report. In addition, he was arrested for a different offence of breaking and stealing.

Learned Prosecuting Counsel, Mr. Orinda, supported the convictions. Counsel submitted that the appellants were identified at the scene of crime.

In response to the submissions of the Prosecuting Counsel, the 2nd appellant stated that he was only

identified by PW1. This was the only witness who purported to identify him.

The prosecution case is that on the 21/5/2011 at about 11.00 p.m., the complainant PW1 Ignatius Ikina Makkulu was asleep in his house at Kaunda village in Kakamega Central. He was in the house with his younger wife called Martha Ikina, PW2. His elder wife Joyce Ikina was sleeping in a nearby house. Suddenly, about 10 people entered the house. They were in two groups. Some entered the house where Joyce Ikina was sleeping. They took various items including DVD players, a radio make Woofer, Nokia 1200 phone, Jubambe phone, motor cycle ignition key, motor bike and Kshs.8,000/=.

In the process of the ransacking of the house, the intruders asked PW1 to give them 100,000/=. When he did not produce the money, they cut his left leg with a panga. They also cut him several times on the head. They again put his left hand on the table and cut his fingers. That is what prompted him to tell them that he had Kshs.8,000/= in his wallet, which they took. They ransacked the house using bright torches. According to PW1, it was Bonface, the 2nd appellant who cut his leg. Mike, the 1st appellant, cut his finger. He saw them in the light of the torches. PW2, Martha Ikina stated that she witnessed the incident while lying down in the bed. She witnessed her husband PW1being cut with pangas. The appellants were arrested later, and charged with the offence.

When put on their defences, the 1st appellant Mike Kenyatta gave a sworn testimony. He stated that on 25/5/2011 at 7.30 p.m. he came home and three police officers came to his house. They told him that a Corporal wanted to see him at the police Station. He was then taken to Navakholo Police Station at 9.00 p.m. He was searched but nothing was found on him. He was kept in the cells until 26/5/11. He was told to give them a motor cycle or pay a complainant 50,000/= in order to get released. However, at about 5.30 p.m. the Corporal came and told him to go home. He was re-arrested later on 26/9/2011 for a different offence. He was however later charged with this present offence.

The 2nd appellant Bonface Wanjala also gave sworn testimony in his defence. He stated that on 26/9/11, he came from weeding sugar cane. He differed with his brother who had harvested and sold his sugarcane to private millers. At around 12.00 noon, while at the market, he saw an Administration Police Officer. The officer handcuffed him and told him to kneel down because his brother had identified him. He was taken to the Police Station. He was shocked to be charged with this offence.

Faced with the above evidence, the learned trial magistrate found that the prosecution had proved its case against the two appellants beyond reasonable doubt, convicted and sentenced them. Therefrom arose this appeal.

This is a first appeal. As a first appellate court, we are required to re-examine the evidence on record afresh and come to our own conclusions and inferences. See ***Okeno –vs- Republic [1972] EA 32***.

The conviction of the appellants is predicated on visual identification by the eye witnesses PW1, and PW2.

In the case of ***Wamunga -vs- Republic [1989] KLR 424 at page 430***, the Court of Appeal stated as follows -

> ***"Whenever the case against a defendant depends wholly or to great extent on the correctness of one or more identifications of the accused which he has alleged to be mistaken, the court has to warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."***

Though PW1 stated in evidence that in his first report he mentioned the names of the appellants, there is no independent evidence to support this. The police records did not contain this information. The appellants were arrested in the absence of PW1 and PW2. They were not found with any of the alleged stolen items. The investigating officer, PW4, Sgt. Augustine Mwakio confirmed in court that no identification parade was conducted.

We have evaluated the evidence of identification on record. This incident occurred during the night. The attack was sudden. The attackers were said to be 10 people. They used sharp weapons to cut PW1 on the head, the hand and the leg. His wife PW2 just lay in bed. She did not move out of bed. It must have been a scaring experience for both PW1 and PW2.

In our view, the circumstances of identification herein were difficult for both PW1 and PW2. There was a real possibility of error in the identification. Though PW1 stated that he knew the two appellants before, there is no evidence that they were arrested because of the description which he gave to the police. Recognition may be more reliable than mere identification. However, it is trite that even in cases of such recognition by a witness or witnesses the court should still critically consider whether or not such recognition could be mistaken. We rely on the English case of ***R. -vs- Turnbull [1976] ALL ER 549 at page 552*** where ***Lord Widgery CJ*** stated as follows with regard to recognition –

> ***"Recognition may be more reliable that identification of a stranger, but even when the witness is purporting to recognize someone he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

We find that the evidence of identification or recognition of the appellants was not free from the possibility of error. A conviction cannot be sustained on the same.

The appellants were arrested later at different places by different people. They were said to have been arrested by members of the public as well as Administration Police Officers. The appellants stated in their defences that they were arrested for different reasons. They were surprised to be charged with the present offence.

The persons who arrested the appellants were not called to testify in court. No reason was given for the failure to call them. In our view, those who arrested the appellants were important and crucial witnesses. They would have given the court the circumstances and the reasons for their arrest. They were not called to testify, and no reason was given for the failure to call them to testify.

In the case of ***Bukenya & Others -vs- Uganda [1972]EA 559*** the Court of Appeal for East Africa stated as follows –

> ***"……while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses if called would have been or would have tended to be adverse to the prosecution case."***

In the circumstances of this case and after evaluating all the evidence on record, we come to the inference that the evidence of the people who arrested the appellants would have been at variance with that of other prosecution witnesses. We must give the benefit of that adverse inference to the appellants and we do so.

In the result, we find merits in the two appeals. We allow the appeals, quash the convictions and set aside the sentence imposed. We order that both appellants be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 6th day of December, 2013

SAID J. CHITEMBWE **GEORGE DULU**

JUDGE **JUDGE**