



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL NO.s 26 AND 32 OF 2014

(Consolidated)

BETWEEN

DICKSON LISANZA.....1ST APPELLANT

GEOFFREY SHITUKA CHERUTA2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence of death that was imposed by the

Senior Resident Magistrate's Court at Kakamega in Cr. Case No.430 of 2011 dated 05/03/2014)

J U D G M E N T

Introduction

1. The appeal herein arises from the conviction and sentence of the appellants in Kakamega Criminal Case No.430 of 2012. In its judgment dated 5th March 2014 the trial Court found that the appellants were guilty of the offence of robbery with violence contrary to section 296 (2) of the Penal Code as there was overwhelming evidence against them of their common intent to rob PW1 and PW2. They were convicted and sentenced to death on counts 1,2,6 and 7.

2. Briefly the appellants were jointly charged with others on various counts of the offence of robbery with violence which offences occurred concurrently. As per the charge sheet presented before the trial court the 1st Appellant DICKSON LISANZA was charged alongside JULIUS MAKAMU, GEOFFREY SHITUKHA CHILUTA, ELIUD MURULI LUSULI, ANSTON CHITILA ATSANGO and JARED MULWA CHIVOLO with seven (7) counts of Robbery with Violence contrary to section 296 (2) of the Penal Code. All the offences were allegedly committed in a series when violence was visited upon several houses in Mukhonje village. The particulars of the offences in count one were that on the night of 25th of February 2012 at Mukhonje village Lugusi sub location in Kakamega East District within Western province jointly with others not before court, while armed with dangerous weapons namely AK 47 Rifle, Pangas and Rungus robbed MATHEW SHILISIA LWOYELO cash kshs.44,000/=, a mobile phone make Nokia G3 valued at kshs.19,9000/=, Nokia G5 valued at kshs.21,000/= and Telecom Wireless valued at kshs.4,500/= and at the time of such robbery injured the said MATHEW SHILISIA LWOYELO.

3. In count two it was CHRISTINE INANGA SHILISIA who was allegedly robbed of kshs.10,000/=, a mobile phone make Nokia valued at kshs.3,700/= and at the time of such robbery the robbers injured her. There was duplicity of charge as count three was more or less what allegedly happened to MATHEW SHILISIA LWOYELO as particularized in count 1. In count four it was TOM MAKAMU who was allegedly robbed of kshs.7,000/=, a mobile phone make Nokia 1208 valued at kshs.3,000/= and who was at the time of the attack injured. In count five it was EMMANUEL ATYENDA M'MAYI who was robbed of kshs.150/= and a mobile phone make TECNO valued at kshs.2,000/= and a torch valued at kshs.150 and who was also injured during the said attack. On count six it was alleged the appellants attempted to rob LABAN ATYENDA LIVINGSTONE M'MAYI of kshs.40,000/= and at the same time of such attempted robbery shot him dead. Lastly in count seven they allegedly robbed ISAAC MAGANI LIYIAKHA of cash kshs.30,000/= and at the time of such robbery injured him.

4. The two appellants alongside the other co-accused denied the charges before the trial court and after hearing 11 Prosecution witnesses 9 of whom were complainants the trial court noted in its ruling that all witnesses from PW1 to PW8 did not mention some of the accused persons namely accused 2,4,5 and 6. The four were therefore not placed on their defence as the trial court found that it would serve no purpose and even if they elected to remain mute the evidence was insufficient to convict them.

5. The trial court also noted in its ruling on a case to answer that some complainants like those in counts four and five never attended court in order to testify and provide evidence in support of their complaints. In the absence of such evidence the trial court found that the two counts could not stand. Accused 2,4,5 and 6 were therefore found to have no case to answer and were accordingly acquitted under section 210 of the Criminal Procedure Code. The 1st appellant was found to have a case to answer on counts one, two and three but was acquitted on counts four, five, six and seven under Section 210 of the Criminal Procedure Code. The 2nd appellant was found to have a case to answer on counts six and seven of the charge, however on counts one two, three, four and six the trial court found that there was insufficient evidence to warrant placing him on his defence and was thus acquitted under section 210 of the Criminal Procedure Code.

6. From the above analysis by the trial court it is now clear that the two appellants were the ones who were put on their defence and who after giving their evidence and calling their witnesses were found guilty as charged, convicted and sentenced to death. They appealed against both conviction and sentence. The two appeals were consolidated by an order of this Court made on 05/03/2015. In his Petition of appeal the first appellant set out the following home-made grounds:

1. THAT he did not plead guilty to the charge.
2. THAT the trial magistrate erred both in law and in Fact in convicting him basing her judgment on evidence that was uncorroborated but misleading and that lacked probative value.
3. THAT the trial Court erred both in law and fact by not considering that PW1 may have heard someone else other than the appellant as voices sometimes resemble or can be imitated.
4. THAT the trial Court did not ask why PW1 had to go all the way to Kisumu for treatment a distance of over 100kms from the scene of the alleged crime instead of seeking treatment from local hospitals which includes Kakamega Provincial Hospital.
5. THAT the trial Court erred both in Law and in Fact by not noticing that PW1 was never a credible witness as his actions were questionable.
6. THAT the Trial Court did not consider the appellant's defence evidence which was cogent enough to water down the evidence of the prosecution.
7. THAT the appellant was not found with the alleged stolen goods.
8. THAT more grounds would be adduced upon receipt of lower court proceedings.

7. He wants the appeal allowed, conviction quashed and sentence set aside and he be set at liberty.

8. The 2nd appellant was also aggrieved and dissatisfied with the judgment, conviction and sentence of the trial court dated 5/3/2014 and prepared his appeal. The grounds of appeal in the appellant's own language were as follows:

1. THAT, the erudite trial exactor erred in both law and facts by failing to appreciate that the prosecution was insufficient, unconstitutional, conjecture, speculative, discredited and inconsistent in material values.

2. THAT, the erudite exactor erred in both law and facts by failing to observe that the circumstances prevailing at the purported scene of crime were not conducive enough to proper identification of the accomplice.

3. THAT, the erudite trial magistrate erred in law and facts by failing to point out that the evidence on how the witnesses developed familiarity with the appellant wasn't genuinely and expeditiously evaluated, hence perverted the course of justice.

4. THAT, the erudite trial magistrate erred in both law and facts by failing to consider that reliance on identification by recognition without evaluating the possibility of mistaken identity was a fatal omission and a failed jurisprudence.

5. THAT, the erudite exactor erred in both law and facts by failing to grant I the appellant the benefit of essential witnesses not availed for clarity, crime of scene expert, a scene of crime witness and neighbors of the complainant.

6. THAT, the erudite trial exactor erred in both law and facts by failing to take into account that there emerged a material discrepancies in the trial process on the failure of the key witness onto prompt report to first person in authority so as to clear doubts of the alleged identification by recognition.

7. THAT, the trial exactor erred in both law and facts by displacing I the appellant sworn defense without giving some tangible points to determination thereby rendered it plausible and insecure enough to warrant an acquittal.

8. THAT, I cannot recall all that transpired during trials, I humbly beseech this honourable higher court to furnish me with certified true copy of trial proceedings and judgment to enable me erect more supplementary grounds of appeal.

REASONS WHEREFORE, the 2nd appellant prays that this appeal be allowed conviction quashed and sentence set aside and that he be acquitted.

The Submissions

9. When the appeal came up before us for hearing the appellants relied on their grounds of appeal and written submissions duly filed which were opposed by the State. Briefly the 1st appellant submitted that the trial court was wrong in convicting him on the evidence of a single eye witness PW1 which to him was unsafe. He submitted that his voice which PW1 said was the basis of his recognition should also have been heard by PW2. He maintained that the trial Magistrate arrived at the decision to convict him on the basis of her personal opinion and belief which according to him is not the law. He claimed that the trial Magistrate fabricated stories to link him with this crime and also submitted that the testimony of PW1 and PW8 differed as to whether there was light or not. On voice recognition he submitted that the same was not corroborated and therefore was unsafe to rely on as anybody can imitate anyone else's voice in order to avoid being recognized. He concluded by submitting that the trial court rejected his defence and that of his defence witness on flimsy and imaginary grounds.

10. On his part the 2nd Appellant submitted that PW3's testimony in line 11 page 77 of the proceedings lacked evaluation to ascertain her family members who she did not name. Further that the weapons mentioned in the charge sheet were different and did not correspond with those mentioned by the prosecution witnesses. He submitted that the averments in line 19 page 77 should have been seconded by a first report and clarity of how she knew someone especially by name. He contended that what PW3 said she lost did not correspond with details of the items in the charge sheet and that there should have been an evaluation over the issues of light that enabled the identification by scenes of crime expert. He also submitted that upon cross examination PW3's averments lacked evaluation and probative value because of omissions in the first report. He also submitted that PW4 on cross examination averred that he did not see or recognize anyone's face and that PW5's testimony was marred with discrepancies, irregularities and contradictions and that in fact all witnesses described their attackers differently which was questionable. He maintained that PW6's averments in lines 10,11,12 and 92 are speculative and further that there were there no proper investigations to ascertain the allegations? In the second appellants view PW7's testimony was hearsay and that PW8's testimony proved that all averments had to be corroborated by the people alleged to be at the scene of crime. The 2nd appellant further submitted that PW9's averments were worth dismissal as they were inconsistent with those of other witnesses and that he did not treat the complainant in count six. He also contended that PW11's testimony was not adhered to because he clearly stated things adverse to this case. He relied on the case of RICHARD APPELLA – VS- REPUBLIC (1981) E.A.C.A.946 where it was held that two contradictory statements cannot be admissible in a court of law due to their contradictory nature. He also relied on the case of **ANJONONI & OTHERS –VS- REPUBLIC [1976] – 90 KLR 1566** where the Court held that, complainant who purports to have recognized an assailant he had known before but does not state such fact in his initial report to the Police makes the whole averment doubtful.

11. Miss Omondi for the State opposed the appeal and submitted that the appellants were properly identified by PW1 to PW7 who she said were able to identify the appellants using the security lights which were on at the time of the attack. She submitted that PW1 also had a torch and he was able to see the weapons the group used to attack him. She told the court in her submissions that PW1 identified the 1st appellant who he had known since child hood and was able to recognize his voice as he was also a neighbour. It was her submission that the evidence as to the source of light was corroborated by PW2 and added that apart from the security lights there was a florescent light which was on and that using that light, PW3 was able to identify the 2nd appellant who entered the house while the lights were on and said that one of the attackers was armed with a panga and the 1st appellant had a gun. Counsel also submitted that PW3 described the 2nd appellant as having a helmet which did not cover his face. She maintained that the evidence of PW2 was corroborated by that of PW3, PW4, PW6, PW7 and PW8 and that all the witnesses identified the 2nd appellant as the one who wore a helmet. She also submitted that PW6 was able to identify the attackers by the chimney lantern and by the torches used by the attackers and that PW6 had known the 2nd appellant since his childhood and was her neighbor and her student. She submitted that PW7 also identified the 2nd appellant with the aid of the security lights at the back of the house and was positive it was the 2nd appellant since they had worked together at the same bar and he also described the 2nd appellant as having put on a helmet which did not cover his face. It is Counsels submission that the evidence by PW1 was corroborated and remained consistent.

12. On the appellant's defence Counsel submitted that the same did not raise a defence of alibi nor did it raise doubt in the prosecution case. She also submitted that there was no mistaken identify because both appellants were positively identified by the witnesses. Regarding the hospital where the complainants were treated Counsel submitted that both PW1 and PW2 were first treated at Nala Hospital at Kakamega and thereafter at Kisumu. On recovery of stolen items she maintained that it is not a condition precedent for a conviction. She contended that the prosecution proved all the ingredients of robbery with violence which resulted to the conviction and sentence to death as provide by law and that the said sentence was proper and legal. Counsel finally submitted that the appeal herein lacks merit and should be dismissed.

First Appeal

13. This is an appeal on both conviction and sentence. Sentencing is always the discretion of the trial Court, and as such, appellate court will be slow to interfere with the exercise of such discretion unless it is exercised on a wrong principle. This being the 1st appeal it is the duty of this court to re-evaluate the evidence and draw its own conclusions only bearing in mind that it was not there when the prosecution witnesses and the defence were giving their evidence. See OKENO –VS- REPUBLIC [1972] E.A 32. As earlier analyzed the 1st appellant was found to have a case to answer on counts one, two and three while the 2nd appellant was found to have a case to answer on counts six and seven. We will therefore dwell on the evidence by the prosecution witnesses on these counts only.

The Evidence

14. The first person who was attacked was MATHEW SHILISWIA LWOYELO (PW1) a farmer from Lukose sub location. He told the court that the 1st Appellant was his neighbour whereas the 2nd Appellant was his friend and the 4th accused was his nephew who was in the same school with his child. He testified that he knew the 5th, 6th and 7th accused persons and that the 8th accused person was his uncle. PW1's evidence was as follows; On the 25/02/2012 at about 10p.m he heard dogs barking outside his house which prompted him to check what was happening. His house had security lights and he also walked out with his torch which was on. He met three people outside the house who included the 4th accused KAHY INYAMA who he said had a panga on the right hand and a slasher on his left hand. He described him as wearing a brown trouser and a green long sleeved shirt. He also said he was able to recognize Bernard Likabo Lwoyelo the 2nd accused who he said had a panga and a staff. He also saw another person with an army helmet who he said had an AK 47 rifle but he was unable to identify him. The attackers told him to switch off his torch which he did and retreated back sensing that they were bad people.

15. PW1 also testified that the 4th accused hit him on the left side of his face while the 2nd accused cut him with a panga and ordered him to sit down on the ground. When all this was going on his wife Christine Shilisa PW2, and children heard and went out to see what was happening and they too were ordered to sit down together with their servant Patroba who was not called to testify. He explained that his daughter MERCY MASITSA KARUMBA who is married and lives abroad had visited them and had stayed around for a while. He asked his wife to give the attackers money as demanded by the 4th accused and his wife entered the house with the children and closed the door, but the attackers told his wife that if she did not open the house they would kill him with the gun. Just then, 3 people emerged who he did not see clearly and the 3 were the ones who followed his wife to the bedroom. He did not recognize the others who remained with him. The attacker with the gun remained outside. He was asked to go to the bedroom by the 4th accused and the 2nd appellant. In the bedroom the 4th accused lit the bedroom lights and asked him for money. The 4th accused took kshs.14,000/= from his wallet and kshs.30,000/= from his drawer. The whole exercise took about 30 minutes. His wife was then brought to where he was by DICKSON SHIHONJERA whose voice he was able to identify and TITUS ALUSA who is in the Armed Forces and who were never arrested. He claimed that the one with the gun shot at the windows of the house several times as the robbers fled. Thereafter, PW1 and his family raised alarm. He realized his three phones were missing after the incident. These were one Nokia G5 worth 21,000/=, A Nokia G3 worth 19,900/= and another Nokia worth kshs.4,500/= ("MFI – P1). His daughter's Nokia G5N96 ("MFI –p2) worth 200 pounds was also missing. They were later rushed to Nala Hospital where they were admitted and later to Aga-Khan Hospital Kisumu for x-ray until the 25th morning. They were discharged on the 27th. He was interrogated by the Police. The two appellants were arrested that same day as they had been identified. The Police issued him with a P3 form ("MF -3") so was his wife (MFI – 4).

16. PW1 cross examined by the appellants and by his answers, he reiterated his statement that he knew the 1st appellant whom he had known for his (1st appellant's) lifetime and that it was 1st appellant who cut him on the hand. He maintained that he recognized the 1st Appellant's voice. He also said the 1st appellant had not worked for him and that he had no grudge with him. PW1 told the court that he never saw the 2nd appellant, and that as far as he could remember, the people arrested in his area were two.

17. PW2 CHRISTINE ENANGA SHILISIA the wife of PW1 told the court that she had known the 1st appellant who is their neighbour for over 20 years and that the 2nd appellant was a friend to her husband. She testified that on the 25/02/2012 at around 10p.m they were at home with their children who had visited from abroad when they heard dogs barking outside their house. She decided to go outside the house to find out what was making the dogs bark so persistently when she met with many people outside who ordered her to enter the house quickly and her husband also followed them with another group of people. Some had pangas and rungu while one tall one had a sword and the other had a gun. She explained that 4 of the attackers went to her bedroom and she managed to identify two of them, namely JAIRUS ALUSA who she says was in the Army at the time and NICKSON SHIHONJERO with the help of the light from the fluorescent tube. She also stated that her attackers told her that her daughters who had come from the U.K had brought money and that money was what they wanted. She was told by her husband to give the attackers money and she gave them kshs.10,000/=. She also testified that she was beaten with the blunt side of a panga and the rungu and she got injured. She could not see the person with the gun clearly but he wore a helmet. She was told by the attackers to go under the bed but because she could not fit under there, she was literally being hit by them. She then heard her husband calling the names KONI INJANA and BERNARD LIHABO and asking them why they wanted to cut him. She lost a Nokia N/888 and kshs.10,000/= and she was injured on the right side of her head and the leg. She maintained that it was DICKSON and TITUS who were assaulting her all the while. She testified that she and PW1 were assisted by a neighbour who responded to their distress calls and taken to Nala Hospital and then to Aga Khan Hospital where they were admitted. She identified "MFI-P4 which was her P3 form. She was unable to identify the two appellants during the attack. She described the attacker who had a gun as being of medium height and medium built and said that she gave out money since she did not want to be killed and that the two people she identified during the attack were not in court. On cross examination she said that she did not see either of the two appellants at the scene of crime.

18. PW3 AZIBETA KADENYI OJINDO MAKAMI testified that on the 25/02/2012 at around 10p.m she had just closed her shop and gone to the back of the said shop where she resides. The attackers broke her door using a crow bar and two of them entered the house. One was armed with a panga and the other with a gun. She screamed when the attackers entered the house, but she was told to stop screaming by the one carrying a panga and who had a helmet which did not cover his face. She identified him as the 2nd Appellant the one who cut her husband ISAAC MAGANI LUYAA and who she knew very well. She however told the Court that she was not able to identify the one with the gun but described him as tall and was wearing a leather jacket. She stated that the gun was visible. She said that she lost kshs.30,000/= and her mobile phone make Nokia which she stated was taken by the 2nd appellant. She was able to identify the attackers with the help of the electricity lights in her house. She described the helmet worn by the 2nd appellant which she said was black and white like those worn by motorcycle riders and that the face of the 2nd appellant was not covered. She also told the court that there were a series of attacks at Mukhonje village that night. Her husband was taken to Iringa Hospital and then to Kakamega Provincial Hospital. It was PW3's testimony that in her statement she told the Police that it was Geoffrey Shitukha who attacked her and who was later arrested. She said she knew the 1st appellant as a person from their area but she did not see him during the attack. She did not know the 2nd accused but the 4th accused was her landlord whereas the 5th and 6th accused persons were from the area.

19. On cross examination by the 1st appellant, she told the court that she did not see him on that night. Cross examined by Mr. Onsando for the 2nd appellant PW3 testified that she lost money and a phone and that she did not see the 1st appellant. On cross examination by the 2nd Appellant she stated that she opened a shop which was licensed though she did not have the license with her in court. She had run the shop for five (5) years. She reiterated that the 2nd Appellant had a panga and took from her kshs.30,000/= and he also cut her husband. She maintained that she saw the 2nd Appellant's face with the help of the electricity lights and that she also gave the full names of the 2nd Appellant as GEOFFREY SHITUKHA who she knew very well. She explained that before, the material day the 2nd appellant was working at a bar for Nangeni and that he was her neighbour but later was chased away. She also gave the details of the 2nd Appellant to the Police who wrote her statement. She denied the allegation by the 2nd Appellant that she was his girlfriend at any given time and explained that she did not know how he was arrested. She

told the trial court that she was afraid to give the name of the 2nd appellant to the Police because she was afraid he would kill her but maintained that she knew him very well. She admitted that she did not see the 4th to the 6th accused persons during the robbery.

20. PW4 ISAAC MAGANI LUYIAKHA a businessman from Mukohone village Lukose sub location, the husband to PW3 told the trial court that on the 25/02/2012 at around 10p.m as they were preparing to go to sleep they heard screams from a funeral nearby and noises from a bar called Nanjema. The screams were by a lady. He decided to go and see what was happening and upon opening the door, he saw a man holding a gun over a certain lady and another one with a panga and they were assaulting her near the bar. Three were security lights between the bar and their house. He was seen by the person who had a panga and he entered the house closing the door behind him. He recognized the voice of the person who he said saw him and who he identified as the 2nd appellant GEOFFREY SHITUKA who asked him to open the door but before he could comply, the door was banged open and the 2nd Appellant who he said wore a jacket and a helmet which showed his face entered together with a tall man who was carrying a gun but who he could not identify. The 2nd appellant then asked him for money and when he tried to run the 2nd appellant cut him on the head with the panga he was carrying. PW4 fell on the ground. His wife gave the 2nd appellant some money. He said he knew the 2nd appellant very well as he was a bouncer at Nanjema bar. PW4 was later treated at Ivinya Dispensary on 26/2/2012 and was also issued with a P3 Form "MFI – P8". He told the court that he knew the 1st and 4th accused persons. The 4th accused person was his landlord but he did not know the 2nd, 5th and 6th accused persons. On cross examination by Mr. Onsando he reiterated that he lost kshs.30,000/= and his wife's phone. On cross examination by the 2nd appellant, he explained that the attackers came from Nanjema Bar to his place, that he heard the 2nd appellant's voice which he knew very well as he used to work at the said bar with Shipati the watchman. He refuted the claims that his wife was the 2nd appellant's girlfriend.

21. PW6 ESTHER KHANIRI M.MAYI a farmer from Jukhone Lugubi sub location Vihiga location told the trial court that she knew all the accused persons except the 2nd accused as they came from Mukhonje area. She was married to one LABAN LIVINGSTONE ALIENDA MMAYI (Deceased). On the 25/02/2012 she was at home with her husband when at about 10.30p.m the village elder called her husband to tell him that there were armed robbers at the shopping center.

22. Before they could go outside they saw torches and also heard a loud voice ordering them to open the door. The door was kicked open and she saw two people one with a gun and the other with a Somali sword. One of the two people also wore a helmet which did not cover his face. The husband who was holding the door was injured on the left shoulder when it was kicked open and shot twice by the attackers who had gained access to the house. She was able to identify the one with the gun and the one with a helmet with the help of the light from the lantern which was on the table. When all this was happening she was screaming and calling for help and the attackers beat her and went to her bedroom where they took kshs.500/= and kshs.100/= which was on the table. She identified the person who was hitting her as GEOFFREY SHITUKHA son of CLERITA the 2nd appellant herein. She knew him since childhood and he was also her ex-student. She also identified the person who killed her husband with a gun as LOKEBO and the one who had a Somali sword as NIXON SHIHONJERO. The attack took 30 minutes. Her husband was taken to the mortuary and a postmortem was done as shown in the postmortem report marked "MFI – P9. The postmortem report, PExhibit 9 was produced by Dr. Dixon Mchana who testified as PW10.

23. On cross examination by Mr. Onsando for the 2nd accused PW6 told the court that when she was recording her statement she did not mention the attacker's names as she was traumatized. She gave the same answer when she was being cross examined by the 2nd appellant only adding that if she gave out the 2nd appellant's name he would harm her. She explained to the trial court that the 2nd appellant was a habitual offender who had committed many offences in the area. She reiterated that she identified the 2nd appellant with the help of the light from the lantern and maintained that her husband was killed by LUKEBO who had a gun that night.

24. PW7 BONIFACE KAMUKA SHIBANDA a farmer from Mukhonje and a watchman at Nanjema Bar told the trial court that on the 25/02/2012 at 10p.m the bar was closed and as he was manning the said bar 6 people emerged. He could see them with the help of the electricity lights. One of them had a gun and was dressed in Police Uniform while the other had a crow bar and a panga. He explained that the 2nd appellant said in Kiswahili “Si Shipati ndio huyu” and he went ahead and hit him on the right side while asking him for money of the day’s sales. When he said he had no money they started beating him. He only identified the 2nd appellant who he had worked with and who was from his home area.

25. The attackers then broke into the bar from the back and while they did so, he managed to escape during the commotion. He telephoned the Market Chairman and informed him of the incident. He told the trial court that the 2nd appellant wore a red helmet which did not cover his face and that he lost his torch and panga during the attack as he was raising alarm. He also told the Court that ISAAC and his wife were attacked and injured, Caro and her husband were also attacked and injured. They were taken to Ivinga Center also called Ileho Health Center. He later went to Kakamega Provincial Hospital where he was treated as shown in the treatment records “MFI – P10” and the P3 form “MFI –P11”. In cross examination by the 2nd appellant, PW7 stated that he did not know how to read and write and that it is the doctor who prepared the medical report. He insisted that he knew the 2nd appellant as they had worked together at the bar for five years and he did identify him by his looks and his voice.

26. PW8 ROSELINE DINA OBIMA a retired teacher told the court that on the 25/02/2012 after supper she heard screams from Mathew Masitsa’s home. Hardley Masitsa ran to her compound together with DICKSON LISANZA the 1st appellant and told her that Masitsa’s home had been attacked. The people who went to her home were Hardley, Kennedy and Dickson. She asked Dickson where he was coming from so late at night and he told her that he was from David Lwoyero’s place David Lwoyelo was a brother to Masitsa. The rest left and she was left with HARDLEY, KENNEDY a cousin to HARDLEY, NELSON and a friend. Hadley who said that he was from a bar together with Emmanuel, Tirus and Kennedy asked her if he could use her phone to contact the Police. Hadley who was also injured told her that they had met DICKSON LISANZA at the gate of their home when he was hit and that is why they went with him to her home. She knew the 1st appellant who came after Hardley. The 2nd appellant was riding a bicycle. She knew the 2nd accused by his looks and said the 2nd appellant was from Mukhone village, 4th accused was her neighbour and the 5th and 6th accused were persons from her area.

27. PW8 HARDLEY MULESHE a Procurement Assistant with the Retirement Benefits Authority told the court that on the 25/02/2012 at about 10.00p.m he went outside his house to find out why the dogs were barking. He heard a voice from his father’s main house ordering another not to make any noise while his mother was pleading for mercy. He decided to go to the main house but the lights had been switched off. As he approached he was hit on the shoulder so he decided to run away towards the main road when he met DICKSON LISANZA the 1st appellant standing who spoke to him. He was shocked to see him there. He then removed his phone and wanted to call an AP Officer who he knew but his call did not go through. After some few minutes three men approached namely Justus Khayumbi, Nelson Shitukha and Patrick Shitukha and after telling them what was happening they started screaming. A person then flashed them with a torch and they all ran in different directions. He went to PW8’s home and found them outside the house and explained to them what was happening. He showed them the injuries he had sustained and later on ran to the road where he met his parents being taken to the hospital. He was also treated at Nala Hospital. His parents were later taken to Aga Khan Hospital Kisumu. On cross examination by the 1st appellant he told the court that he met him at their gate standing and identified him by his voice. On cross examination by Mr. Onsando for the 2nd appellant PW8 testified that he had been treated at Nala Hospital. He also said he did not see the 2nd accused.

28. PW9 PATRICK MABIRI Senior Clinical Officer at Kakamega Provincial Hospital produced the P3 forms for the injured, namely PW1 – Exhibit P3, PW2 – Exhibit P4, PW8 – Exhibit P5, Fortunata Muhanja Exhibit P6, PW4 Exhibit P8, Hospital cards from Ileho Health Center Exhibit P7 (a) and (b), PW7 – Exhibit P10 the treatment notes and Exhibit P11 the P3 Form.

29. PW10 DR. DIXON MCHANA produced the Postmortem Report Exhibit P9.

30. PW11 No.65452 POLICE SERGEANT HEZRON MOKENYA attached to CID Kakamega told the trial court that he was among the officers who went on an operation at Mukhonje on 28/02/2012 following the attack on the 25/2/2012. He was accompanied by Corporal Otieno the Investigations Officer, the in-charge operations SOA Province and other officers from Kakamega Police Station. They arrested the 2nd accused following information they received but they did not recover anything from him. They also arrested the 1st appellant on the same day and after about four months they arrested 3rd, 4th, 5th and 6th accused persons who were arrested by Mr. Nyaosi. The 2nd appellant who was mentioned by witnesses as having been involved was arrested at Kipkaren to where he had fled.

31. PW11 also told the trial court that investigations done showed that other accused persons were not involved in the robbery but SHITUKHA was the main suspect. Two phones were recovered at the Mukhonje Market on the 25/02/2012 which were identified by PW1 and which were produced as Exhibit P1 and P2.

The Defence Case

32. As already stated the trial court found that the 1st and 2nd appellants had a case to answer. After due compliance with section 211 of the C.P.C, the two appellants gave sworn testimonies. The 1st appellant called 1 witness.

33. DW1 DICKSON AMALEMBA LISANZA from Mukhone Village Lukose sub location Ivihiga location testified that on the 25/02/2012 at around 4p.m he went to cut nappier grass for DAVID SHILISIA LWONYELO the brother to PW1 and finished the exercise at 6p.m. After finishing the exercise at about 6.00p.m he was escorted by the said David and while on their way they heard screams from PW1's home and went there. They found a group of four young men screaming who included PW8 who were running towards PW7's home. He claimed that they told PW7 of what was happening and PW8 borrowed a phone to call the Police but the call was not going through. Later they parted ways. He testified that David called him to find out where he was and they later met and went back to PW1's home and assisted them. He claimed to have been framed by PW1 who did not pay him after he cut the nappier grass for him. He was arrested three days later by Police and charged. He also claimed that nothing was recovered from him.

34. He was cross examined by the prosecution and explained that he was not with the 2nd appellant and that the incident was at 9p.m when he was with David. He insisted that he was not in the group that attacked PW1.

35. DW2 GEOFFREY SHITUKHA CHILUTA a farmer from Lukose sub location Ivinya location testified that on the 04/06/2012 he was at Kipkaren at 5pm when he was arrested and brought to Kakamega Police station. He claimed that on the 25/02/2012 he was at Kipkaren where he sells mitumba which earns him kshs.10,000/= per month. He explained that he used to work at Nanjema at the hotel and his services were terminated and that there were many people with helmets of different kinds. He claimed that Isaac's wife did not produce a license to prove that she had a shop and that she gave him kshs.30,000/=. He maintained that he did not cut her husband as claimed and that he was framed.

36. On cross examination by the Prosecution DW2 maintained that the 1st appellant was not his friend and that Isaac's wife lied to the court and that on the day of the incident he was at Kipkaren selling mitumba and his wife saw him. The appellant did not call any witness.

37. In its judgment the trial court found that there was overwhelming evidence against the 1st appellant for his involvement in the commission of the common intent to rob PW1 and PW2 in count 1 to 3 and found him guilty and sentenced him to death. The two were acquitted of counts 4 and 5 and on count 6 the trial Court found that there was no sufficient evidence against the 1st appellant but as for the 2nd appellant the trial court found that the Prosecution had proved the case against him beyond reasonable

doubt and was convicted accordingly under section 215 of the C.P.C.

38. On count 7 the trial Court found no sufficient evidence against the 1st appellant but found that there was overwhelming and uncontroverted evidence against the 2nd appellant and convicted and sentenced him to suffer death as by law provided.

Analysis and Findings

39. From the evidence on record, it is clear that on the 25/02/2012 at about 10.00pm there was an attack at Mukhonje village where one person lost his life and property stolen. Some items were recovered which were identified by the owners and persons arrested. There were a series of robberies on the same night at the home of PW1, at the home of PW3, at the home of PW5, at Nanjenya Bar where PW6 was the night watchman and various other houses which were witnessed by the prosecution witnesses. The witnesses identified the two appellants herein at the various scenes of crime which were not far from each other. Descriptions were made of what the 1st and 2nd appellant were wearing on the night of the attack.

40. After carefully analyzing and evaluating the evidence afresh, a number of issues arise for determination. The first issue is whether the evidence by the prosecution witnesses was corroborated. This court is more interested in what the witnesses said they saw. At PW1's home his testimony was well corroborated not only by his wife PW2 but also by PW7 and PW8. DW1 and DW2 also confirmed that there was an attack at the said home on that night of 25/02/2012 at night. We also find that PW3's testimony was corroborated by that of PW4 whose house which was behind PW3's house was attacked. PW6 corroborated the evidence of PW5. The evidence was corroborated as to the occurrence of the offences of robbery with violence at all the scenes and the time of such robbery, on the injuries sustained by the victims and on the identification of the appellants herein. The source of light they used to identify the appellants was also brought out by the witnesses. In a nut shell we find that the evidence by the prosecution was properly corroborated and the circumstances for visual identification were favourable. Infact in this case, it was identification by recognition because the appellants and the victims were family members and neighbours.

41. The second issue is whether it was safe for the trial court to rely on voice identification. We find that the prosecution witnesses did not only see the appellants but they heard their voices as they were ordering them around that night. For Instance PW1 on cross examination stated that he identified the 1st Appellant by his voice apart from seeing him with the help of the security lights. He also stated that he recognized the 1st appellant's voice since he knew him from birth and they had had some interactions as he was his neighbour. PW4 also stated that he recognized the voice of the 2nd appellant who asked him to open the door of his house during the attack. He said that he knew the 2nd appellant as he was a bouncer at the Nanjenya Bar which was close to his house. PW6 told the trial court that he identified the 2nd appellant when he 2nd appellant said "si Shipati ndio huyu". PW6 also stated he had worked with the 2nd appellant in the same place for 5 years. From their evidence PW1, PW4 and PW6 had known the appellants for a long time and they must have had some interaction. As stated in the case of ANJONI case (above) **"a case of recognition not identification, is more satisfactory, more assuring and more reliable than that of identification, of a stranger because it depends with the personal knowledge of the assailant in one form or the other"**

42. We need not belabor more on the issue as the 1st and 2nd Appellants were known to their victims by being relatives and neighbours. In a nutshell identification of the 1st and 2nd appellants was possible under strong electric lighting. At PW1's house, there were security lights in the compound and this was not disputed or challenged and thus he was able to see and identify his attackers even with the light in the house. PW3 and PW4 also identified the appellants with the help of the electricity light which was on at the time they were attacked. The bar also was well lit as per the evidence given by PW6 who was also able to identify his assailant with the help of the said light. PW5 was able to see the assailants with the help of the light from the lantern. From all this evidence, we find that the identification was proper and therefore it was safe for the trial court to convict the appellants on the basis of identification by

recognition.

43. We are satisfied that the prosecution witnesses were credible especially PW1 whose evidence was properly corroborated. The attack on his home was motivated by the presence of his daughter who the attackers alleged had brought the family money and they (attackers) wanted that money.

Conclusion

44. For the foregoing reasons, we find that the appeals herein, on both conviction and sentence have no merit. The same are dismissed in their entirety and we thus uphold the judgment of the learned trial Magistrate.

45. Finally, we have ourselves carefully considered the appellant's defences and find that the same did not in any way shake the Prosecution case against them. The appellant's complaints that the evidence by the Prosecution was speculative, discredited and inconsistent is far from the truth. We are satisfied that the trial Court fully considered both the Prosecution and defence cases before reaching the conclusion that the case against the appellants case watertight.

46. The appellants have also complained that the Prosecution failed to avail some crucial witnesses such as scene of crime witnesses who have sealed the prosecution case against the appellants. Our considered view is that the available evidence sufficiently proved the case against the appellants to the required standard.

47. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 4th day of February 2016.

RUTH N. SITATI

ANTONY C. MRIMA

J U D G E

J U D G E

In the presence of:

Present in Person 1st Appellant

Present in Person 2nd Appellant

Mr. Omwenga (present) Respondent

Mr. Lagat - Court Assistant