



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO.166 OF 2014

BETWEEN

ROBERT MASINDE ANYEREAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal against conviction and sentence of death for the offence of robbery with violence c/s 296(2) of the Penal Code delivered on 28/10/2014 in Busia PMC.Cr. Case No.54 of 2013 by Hon. M.K. Nabibya, SRM)

J U D G M E N T

Introduction

1. The appellant was arraigned before the Senior Resident Magistrate's Court at Butali on two counts of robbery with violence c/s 296 (2) of the Penal Code. In count 1 the particulars were that on 15/01/2013 at Cheboso village, Kakamega North District Kakamega County, jointly with others not before Court, while armed with offensive weapons namely axes, pangas and iron bars jointly robbed Kenneth Khalisia [of] two mobile phones, make Samsung and LG valued at kshs.2,500/= and cash worth kshs.2,600/= and immediately before or after the time of such robbery wounded the said Kenneth Khalisia.
2. In count II, the particulars were that on 15/01/2013 at Cheboso village in Kakamega North District of the Kakamega County, jointly with others not before the Court, while armed with offensive weapons namely axes, pangas and iron bars robbed JONAH ALUSIOLA LWOYELO of cash kshs.1,600/= and one mobile phone make Nokia E-2 valued at kshs.5,000/= and immediately before the time of such robbery wounded the said JONAH LUSIOLA LWOYELO.
3. The appellant also faced an alternative charge to count II, namely the charge of handling stolen property c/s 322 (1) (2) of the Penal Code it being alleged that on the 17/01/2013 at Cheboso Primary School, Cheboso village in Kakamega County otherwise than in the course of stealing dishonestly retained one mobile phone make NOKIA E-2 knowing or having reason to believe it to have been stolen property.
4. The appellant pleaded not guilty to all the three counts, which led the prosecution to call 12 witnesses. After hearing all the prosecution witnesses, the learned trial Magistrate ruled that the appellant had a case to answer and put him on his defence. The appellant chose to remain silent whereupon the trial Court, after carefully considering all the evidence on record reached the conclusion that the prosecution had ably demonstrated that the appellant was involved in the commission of the offence in both counts and that there was no contrary evidence. She found the appellant guilty as charged on both counts 1 and II and convicted him accordingly. The appellant was sentenced to suffer death on both counts as by law

established. The sentence on Count II was left in abeyance.

The Appeal

5. Being dissatisfied by both conviction and sentence the appellant filed his Petition of appeal on 11/11/2014 setting out the following home-made grounds:-

- (i) THAT he did not plead guilty to the above appended charge(s)
- (ii) THAT the trial court convicted him on the evidence that was not corroborated, that was fabricated, malicious inconsistent and lacked probative values (sic);
- (iii) THAT the trial court did not consider that the appellant was the one who by good luck found and collected one of the alleged stolen phones along the road and as a good citizen decided to surrender the same to the authorities only to be implicated later with the robbery;
- (iv) THAT the trial court did not consider that there was no identification parade done to corroborate the evidence on record.
- (v) THAT the trial court did not consider that PW1 did not recognize the appellant as one of the attackers;
- (vi) THAT the trial court shifted the burden of proof onto the appellant;
- (vii) THAT the trial magistrate arrived at her decision based on rumours, anticipations and personal opinion which are not warranted for in law (sic), and
- (viii) THAT the trial court did not consider his defense which was cogent enough to exonerate him from any wrong doing.

The appellant prays that the appeal be allowed, conviction quashed and sentence set aside so that he may be set free.

Duty of this Court

6. This being a first appeal, we can not overemphasize the duty cast upon us by the law that the appellant expects us to submit the whole of the evidence on record to a fresh and detailed examination with a view to reaching our own decision in the matter as to whether or not the conclusions reached by the trial Court should be allowed to stand. Unless and until we do so, we would have no basis for reaching a conclusion either way. We have however to make allowance for the fact that we neither saw nor heard the witnesses who testified during the trial and this being the case any issues touching on the demeanor of witnesses can best be left to what the trial Court observed. The duty of the first appellate Court was well put by the Court of Appeal for Eastern Africa in the case of **Pandya –vs- Republic [1957] EA 336** at p.337 thus:-

“On first appeal from a conviction by a judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision. It has the duty to rehear the case and reconsider the witnesses before the judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made by the judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

7. With the above principles in mind, we now proceed to set out and analyze the evidence that was placed before the trial Court with a view to reaching our own decision in the matter and this will determine whether or not we agree with the findings of the learned trial Magistrate both on law and fact.

The Submissions

8. When the appeal came up before us for hearing the appellant who was unrepresented relied on his written submissions in urging us to allow the appeal. The main points raised by the appellant are that:-

- (i) The prosecution evidence was uncorroborated, malicious and fabricated against the appellant;
- (ii) The evidence of PW7 to the effect that the appellant tried to run away when confronted by the said witness could not have been true since PW7 was armed;
- (iii) No identification parade was conducted to rule out the issue of mistaken identity.
- (iv) The learned trial Magistrate did not consider the appellant's defence.
- (v) The prosecution did not clearly state how the appellant was identified during the night under difficult circumstances.

9. Mr. Omwenga, prosecution Counsel, opposed the appeal and submitted that the appellant was properly and positively identified by PW2 during the attack which took place when the electric lights in the house of PW2 were on. Further, that since PW2 had been seeing the appellant in the area, the identification of the appellant by PW2 was one of recognition of someone who was known as opposed to the identification of a stranger. Counsel also submitted that though PW1, could not clearly and positively identify the appellant during the robbery, the phone stolen from PW1 during the robbery was later traced to the appellant who sold it to PW3 for kshs.500/= and that PW4 saw the appellant selling the said phone to PW3.

10. Regarding the alleged defence by the appellant, Counsel submitted that from the record, the appellant chose to remain silent and there was therefore no defence which the trial Court is accused of not having considered.

11. Counsel urged us to dismiss the appeal and to confirm the judgment of the learned trial Court.

12. In his reply the appellant submitted that the trial proceeded before he was furnished with witness statements; that there was no identification parade and thirdly that the arresting officer was not called to testify. He urged us to give him the benefit of the doubt and allow his appeal.

The Prosecution Case

13. The prosecution case is that on 15/01/2013 at about 8.30p.m, PW1 Kenneth B. Khalisia was in his house watching television. He was together with Jonah Alusiola, PW2, his daughter in law, Soy Amunga and his grandchildren. He then he heard some noise. No sooner had he heard the noise than people entered the house through the rear door. It was his evidence that he was facing the opposite direction. One of the people who entered the house referred to PW1 as officer and then another voice said "Major fanya kazi." PW1 tried to stand up to see what was going on but before he could do that, a man standing on the right side of PW1 hit him on the head which sent him sprawling to the ground and into a state of unconsciousness. When he came to, PW1 found himself at the Highway Hospital. The rest of his family members were also at the hospital. He was bleeding from the nose and mouth and had a cut wound on the right cheek. The trial Court was able to see the healed scar. Later PW1 was taken to Aga khan hospital, Kisumu, for further treatment and stitching.

14. PW1 stated that during the attack, he lost kshs.26,000/=, 6,000/= of which was in his wallet while

kshs.20,000/= was in his shirt pocket. He also lost his L.G mobile phone LGGD 580 S/N(MEI)357232/03/245521-2. PW1's phone was later recovered. The phone together with its operations manual were produced as PExhibits 1 and 2 respectively. He identified the treatment notes from Kakamega Highway Hospital dated 16/01/2013 as PMFI – 3. Payment receipts from Aga Khan hospital Kisumu were also identified – PMFI – 4 (a) – (e). The P3 form issued to PW1 by Malava Police Station was identified as PMFI – 5.

15. PW2, Jonah Alusiola Luyelo who was in the same house with PW1 at the time of the attack was ordered to lie down after the attackers had hit PW1 behind the head using an iron bar. PW2 lay down as ordered. PW10, Anyango Phylis who was also in the same house was also ordered to lie down beside PW2. As PW2 and PW10 lay on the floor, the attackers ransacked PW1's pockets. One of them searched PW2's pockets and took away his wallet and phone. A moment later, PW10 was led outside the house by one of the attackers in order to show them where PW1's wife was. Later PW10 returned to the house and together with PW2, they tried to assist PW1 who was critically injured to get up but as they tried to assist PW1, PW2 was hit on the left cheek, breaking the lower cheek bone. PW2 was also hit on the left side of the occipital region and also cut on the left cheek. PW10 was again led outside the house and forced to tell the robbers where the mother of the home was.

16. The robbers left soon thereafter. Family members then started screaming. Neighbours came to the scene and helped to take the injured to hospital. On 19/01/2013, PW2 was visited at the hospital by a man called Isaya, PW11, who told PW2 that he had been sent by the sub chief to ask if he could identify his phone. PW2 was shown a phone, a Nokia E2, which he identified as his. PW2 described the identifying features on his phone namely a screen saver being the green transit that carries sugarcane. Isaya carried the phone back to the Assistant Chief after PW2 identified it.

17. PW2 also stated that during the robbery, he was able to identify the appellant because when the robbers entered the house, the appellant went past him and stood right in front of PW2 as he (appellant) commanded "Corporal fanya kazi". PW2 stated that apart from the television being on, electric lights in the house were also on. Apart from the Nokia phone, PW2 was robbed of kshs.1600/=. The Nokia phone was identified by PW2 and marked PMFI – 7. The initial treatment notes were marked PMFI – 6 (a).

18. During cross examination, PW2 stated that he knew the appellant by appearance because he used to see him seated on the road waiting for casual work with the tractors owned by PW1 and that on the night of the attack, he clearly saw the appellant inside PW1's house with two other men who are still at large. PW2 stated further that the appellant and other casual workers usually sat and waited at PW1's gate though some other casual workers waited at the gate to West Kenya factory and another group at Shadrack's gate. PW2 stated that he was a driver with West Kenya Sugar Company.

19. During cross examination PW 10 also stated that she clearly saw the appellant as he entered the house wearing a black cap bearing, the Kenyan flag. She also said that though she was seeing the appellant for the first time, there was enough electric light in the house to enable her identify the appellant clearly and without any problem.

20. Boniface Simwa Njonio who testified as PW3 stated that on 16/01/2013 at about 9.00a.m while in the general area of West Kenya Sugar Co. Ltd. where he works as a tractor driver driving tractor New Holland 9000 Registration No.KBC 155G, he met the appellant riding a bicycle. The appellant beckoned PW3 to move closer to where he (appellant) was. PW3 did so and that is when the appellant told him he had two phones for sale. PW3 was offered one of the phones which had a flap for kshs.2,000/=. Since PW3 did not have the sum of kshs.2,000/= on him, a deal was struck with the appellant whereby PW3 offered to pay the appellant kshs.500/= in cash and a Nokia 1616 as a trade in. The appellant asked for kshs.1,000/= plus the Nokia 1616 and gave PW3 some 3 days to pay the balance. With that arrangement in place, PW3 gave the appellant kshs.500/= (as per the handwritten notes of the Court) plus the Nokia 1616 in return for the LG phone which the appellant had.

21. When the LG phone could not work and PW3 could not trace the appellant, PW3 decided to take the LG phone to the area Assistant Chief and left the phone with the Assistant Chief as enquiries were made

about the appellant. On 20/01/2013, PW3 again went to the Chief's office and there he met with the village elder one Chalse K. Mutuvula PW5. On 22/01/2013, he went back to the Chief's office. PW1 also went to the Chief's office after he was discharged from hospital and there he found the LG phone and identified it as his own. The LG phone was identified as PMFI – 1. PW3 stated that he knew the appellant before as a sugarcane loader.

22. During cross examination, PW3 stated that when he purchased the phone from the appellant, the appellant was in the company of Ingosi PW4 and that before he entered into the sale agreement he had asked the appellant whether the LG phone truly belonged to him and that the appellant had given him the assurance that the phone was his although he (appellant) had no documents to support the claim of ownership. PW3 testified that when the appellant failed to show up on the third day after the deal, PW3 reported the matter to the authorities.

23. Joseph Ingosi, PW4 stated that he met the appellant on 17/01/2013 at around 7.00a.m. They met at the West Kenya premises where PW4 worked. When they met, the appellant told him (PW4) that he (appellant) had been blessed. It was also on that date that PW4 witnessed the appellant selling a phone to PW3.

24. When questioned by appellant's Counsel about his testimony, PW4 stated that he was only 20 metres away from the appellant and PW3 as the pair discussed the issue of the sale of the phone. PW4 also stated that earlier on, the appellant had shown him two phones, one Nokia China made phone and an LG phone. This was about 10.00am on 17/01/2013, though the appellant did not tell him whether he wanted to sell the phones.

25. PW5, Chalse K. Mutuvula a village elder from Cheboso sub location testified of how he came to know that the appellant had 3 phones which he (appellant) was selling. Acting on that information PW5 traced the appellant and found him in possession of one mobile phone which he (appellant) said he had picked along the way. Shortly thereafter, the appellant ran away and disappeared into the sugarcane plantation, leaving the phone behind. Later, PW5 learnt that PW3 had bought a phone from the appellant. The phone was later taken to the Police.

26. PW6, Khasoa Mbate Arunga, a daughter -in -law to PW1 was also in the house of PW1 during the night of the robbery. She said she saw 3 people on the corridor of the house when she came out of one of the rooms after she heard screams of "thief, thief." The 3 people were armed with a panga, an axe and an iron bar, respectively. The attackers pushed her into the sitting room and ordered her, PW2 and PW10 to lie down. The robbers hit PW1 on the back of the head with an iron bar and after he fell down, they searched his pockets as they also asked PW6 if she was the owner of the home. The robbers took PW6 to PW1's bedroom and asked her to show them where the money was but when she said she did not know where the money was, she was taken back to the sitting room and ordered to lie down, which she did. The robbers acted as if they wanted to go away but because someone had locked the door from outside, the robbers broke down the door using an axe and went out.

27. The robbers came back for a second time and found PW1 being helped to get up. They hit PW1 on the eye and hit PW6 on the head twice as they also hit PW2 on the jaw. PW6 stated that she was able to identify the appellant who had not concealed his identity. She also said the robbers were in the house for about 1 hour and that during that whole time the electricity lights were on.

28. During cross examination, PW6 stated that the victims could not scream because they had been warned not to scream. She also said that though she could not recall the clothes the appellant wore during the attack, she could tell his appearance because she concentrated on it.

29. PW7, Number 221898 APC John Letting testified that at about 11.30a.m on 17/01/2013, he was informed by PW5 that the appellant had a phone to sell. He was led to the appellant and after introducing himself he asked the appellant for the phone, and the appellant took it out and gave it to him (PW7). While he was still looking at the phone, the appellant ran away and disappeared into the nearby sugarcane plantation, leaving the phone in PW7's hand. The Nokia phone was identified as PMFI – 7.

30. Dr. Jacob Stephano Maleche, PW8, treated the victims of the attack at Kakamega Highway Hospital. PW2 was found to have 3 deep cut wounds on the head, fractures of the left upper and lower jaw and teeth on the same side were loose. PW2 was taken to the theatre and stitched to control bleeding. PW2 was discharged the following morning, but referred to a dental specialist. The medical notes Dr. Maleche prepared on PW2 were produced as PExhibit 6(a).

31. Dr. Maleche also examined and treated PW1 who had a swollen face, swollen neck and cut wounds on the face. PW1 also had loose teeth, he was referred to a dental specialist. The treatment notes on PW1 was produced as PExhibit 3.

32. Sifuna Kizito, a Clinical Officer at Malava Sub-County Hospital testified as PW9. He saw PW1 during the month of April 2013. On examination, PW9 established that PW1 had cut wounds across the right eye (below) approximately $\frac{1}{4}$ x 3cm long. The wounds had healed. PW9 opined that the injuries were inflicted by a blunt object. He classified PW1's injuries as harm. The P3 form he filled was produced as PExhibit 5.

33. PW9 also examined PW2 who had a swelling on the left mandible involving the left side of the chin and he also had a healed wound on the left occipital region (behind the head) measuring $\frac{1}{2}$ x 4 $\frac{1}{2}$ cm long. PW2 also had a healed wound on the left upper cheek which measured $\frac{1}{2}$ cm x 2cm in length. The same had been stitched. PW9 opined that the weapon used to inflict the injury was a blunt one. The P3 form on PW2 was produced as PExhibit 6 (b).

34. PW11, Isaya Sindani Andanje a community policing officer testified that on 15/01/2013, while he was at his home, he was informed that PW2's phone which had been stolen during the robbery had been found and was with the area Assistant chief. He fetched the phone from the Assistant Chief and took it to Kakamega Highway Hospital where PW2 had been admitted. At the hospital, PW2 was able to identify the phone as his through the screen saver.

35. PW12 was Number 63759 Cpl Benjamin Samoei of CID Kakamega North District and duty officer on 15/01/2013 between 6.00pm and 6.00a.m. At about 1.00am on the material night, he got instructions to proceed to the scene of the robbery herein but on arrival thereat he found all the victims had been taken to hospital. At about 7.00am the scene was photographed by scenes of crime photographic experts. Later, he learnt that the suspected assailants had been arrested. PW12 informed the Court that the investigations were done by a PC Otieno who had since died. He produced the recovered phones as exhibits. The prosecution then closed its case.

The Defence Case

36. At the close of the prosecution case, the learned trial Magistrate ruled that the appellant had a case to answer and placed him on his defence. After due compliance with Section 211 of the Criminal Procedure Code, Cap 75 Laws of Kenya, the appellant elected to remain silent and let the Court decide the case on the evidence that was before it.

Judgment of the Learned Trial Magistrate

37. After carefully analyzing the evidence of the 12 prosecution witnesses in light of the charges facing the appellant, exhibits and the relevant provisions of the law, the learned trial magistrate set out to determine whether the complainants in this case were violently robbed on 15/01/2013 and if so, whether it was the appellant who was responsible for the robbery. The learned trial Magistrate also sought to establish whether and in the alternative the appellant was guilty of the offence of handling stolen property.

38. In her judgment, the learned trial Magistrate also considered whether the Prosecution's failure to call the Investigating officer was fatal to the Prosecution's case. In her findings the learned trial Magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt and proceeded to find the appellant guilty as charged on both counts 1 and II and sentenced him to suffer

death as by law prescribed only ordering that the sentence on count II would remain in abeyance.

Issues for Determination

39. After carefully reconsidering and evaluating the evidence afresh, we find that the prosecution case against the appellant was premised on visual identification of the appellant. The issues that arise for determination are the following:-

- a. Whether the appellant was clearly and positively identified during the robbery;
- b. If the answer to (a) above is yes, did the prosecution prove the ingredients of the offence of robbery contrary to Section 296 (2) of the Penal Code; and
- c. Whether failure to call the Investigating officer was fatal to the prosecution's case.

The Law

40. The Courts have held again and again that where the prosecution case rests on the identification of an accused person the Court hearing the case must exercise great caution before convicting the accused person on such evidence. The purpose of this requirement in our view, is to ensure that there is no miscarriage of justice suffered by an accused person because of mistaken identity. The Court hearing such a case is also required to satisfy itself that the complainant had sufficient time to observe the accused person and that the conditions for doing so were favourable for an error free identification.

41. In the case of **Wamunga –vs- Republic [1989] KLR 424** at pages 429 and 430, the Court of Appeal stated the following on this troublesome question:

“We now turn to the more troublesome part of this appeal namely the appellant’s conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW13). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them. We have already recounted the material parts of this evidence and there is no need to recite it again. What we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well known case of R v Turnbull [1976] 3 All E.R 549 at page 552 where he said:

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

We entirely agree with the above propositions and note that even as we proceed to rehear this case, we must remain alive to the fact that though recognition may be more reliable than identification of a stranger, the possibility of mistaken identity in cases of recognition cannot be completely ruled out.

42. The law regarding the ingredients of the offence of violent robbery is contained in Section 296 (2) of the Penal Code which provides that robbery with violence is committed in any of the following circumstances:-

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

It is clear from the above that any one of the circumstances set out in (a) – (c) above, if proved beyond reasonable doubt by the prosecution will be sufficient to found a conviction of an accused person for violent robbery.

43. On the question of failure by the prosecution to call the Investigating officer, we are guided by the decision in **Kiriungi –vs- Republic [2009] KLR 638** where the Court of Appeal, at p.646 stated the following:-

“We think that in all cases, it would be good practice which prosecuting authorities ought to comply with, but the mere failure to comply with it i.e. calling an Investigating officer cannot automatically result in an acquittal. Each case would have to be considered on its own circumstances in order to determine the effect of such failure on the entire case for the prosecutor”

44. In the same Kiriungi case (above) the Court of Appeal cited with approval a passage from the case of **Rueben Gitonga Nderitu –vs- Republic Cr. Appeal No.349 of 2007** (decided in Nyeri on 15th May 2009) where the Court stated as follows:-

“With regard to the complaint that the Investigating officer was not called to testify is also neither here nor there. It is not mandatory that he be called unless there is an allegation that he would have said something adverse to the prosecution case. There is no such argument here nor do we believe his evidence would have added value to the overwhelming evidence before the Court. We are of the view that the learned Magistrate came to the correct conclusion that the case against the appellant was proved beyond reasonable doubt.”

45. Armed with the above principles of law, we now proceed to analyze the evidence and the submissions with a view to reaching our own decision in the matter.

Analysis and Findings

46. With regard to the issue of identification we are satisfied beyond any reasonable doubt that the circumstances favouring positive identification existed at the scene and apart from PW1 who was hit on the back of the head and rendered unconscious as soon as the attackers entered the house, all the other witnesses who were inside the house clearly identified the appellant. PW2 stated that when the attackers struck, electric lights in the sitting room were on. He said he was seated facing the television, but the appellant passed him from the rear door and went and stood right in front of the television as he ordered “corporal fanya kazi”. PW2 said and we believe him that he clearly saw the appellant before the robbers ordered him to lie down. In fact according to the evidence of PW2 during cross examination the issue of identification of the appellant was one of recognition as he said:

“I know your appearance. I used to see you seated on the road and you used to do casual jobs at the tractors owned by Mr. Kennedy (PW1)where you usually wait for is near Kennedy’s (PW1’s) gateI have been seeing you at the place since I started working at West Kenya.”

47. It is instructive to note that PW2 was living in the home of PW1 who was his relative and from the evidence on record, the home of PW1 is quite close to the gate of West Kenya Sugar Company Limited. PW2 walked through that gate every morning and every evening. We are therefore satisfied that the appellant was properly and positively recognized by PW2 during the robbery. The appellant was someone known to PW2 though not by name and he had been so known to him for a while.

48. PW6 also stated that at about 8.00pm on the material day she got out of one of the rooms of PW1’s house where she was feeding her baby when she heard shouts of “thieves, thieves”. As soon as she got out, she met 3 people on the corridors, one of whom was armed with a panga, another with an axe and the third man was armed with an iron bar. Regarding the appellant, PW6 stated: “I identified the assailant.

He is before CourtHe had not worn anything to conceal identity. They were in the house for 1 hour. The lights from electricity were on.” In cross examination, PW6 stated: “You were walking me around the home and I could see you properlyI concentrated on your appearance.” We are also fully satisfied with the testimony of PW6 concerning the identification of the appellant during the robbery.

49. PW10 Anyango Phylis said the following regarding identification of the appellant:-

“The one with a cap hit Kenneth (dad) with a metal rodthe cap was black with Kenya flag. There was electricity light. I saw you for the first time then. You were wearing a black cap.”

50. In our considered view and as far as visual identification of the appellant at the scene is concerned, there is more than sufficient evidence pinning the appellant to the scene of the robbery. All the witnesses confirmed there were lights from electricity and that the appellant who appeared to be the commander of the gang had not hidden his face behind a mask or anything of that sort.

51. There is further evidence which undoubtedly suggests that the appellant was part of the 3-man gang that robbed PW1 and PW2. PW3 a driver with West Kenya Sugar Company stated that at about 9.00a.m on 16/01/2013, hardly 12 hours after the robbery the appellant sold an LG phone to him for kshs.2000/=. PW3 who did not have the entire sum of kshs.2000/= entered into some partial barter arrangement whereby he gave the appellant kshs.500/= in cash and his (PW3's) Nokia 1616 phone as PW3 went to look for the balance which the appellant was to fetch from him in 3 days time. When PW3 tried to operate the LG phone it refused to function and that is when he handed it over to the area Assistant Chief. Eventually PW2 identified that phone as the one which had been stolen from him during the robbery on 15/01/2013. The appellant never even tried to find PW3 for the balance of the money but on 17/01/2013 at about 11.30a.m the appellant who had been apprehended by the local administration was presented to PW7 No.221898 APC John Letting at Cheboso primary school on allegations that he (appellant) had sold the LG phone to PW3. As PW7 was looking at the phone with a view to interrogating the appellant, the appellant took off into the nearby sugarcane plantation until he was arrested later on. Our humble view is that the appellant's act of bolting from the presence of PW7 was not the act of an innocent person.

52. The second issue for determination is whether the prosecution proved the ingredients of the offence of violent robbery. We are satisfied that the prosecution fully discharged its onus on this issue in more than one way. All the witnesses who were in the house on the fateful evening clearly stated that the appellant was in the company of two other people and that they were all armed with a panga, an axe and an iron bar. The appellant was armed with an iron bar which he used to inflict serious injuries on both PW1 and PW2. Dr. Jacob S. Malechi who treated these 2 victims at Kakamega Highway Nursing home confirmed the injuries suffered by both PW1 and PW2. He classified the injuries as harm. PW2 suffered 3 deep cuts on the head, fractures of the left upper and lower jaws and some teeth on the same side were loose. PW1 on the other hand had swollen face, swollen neck and had cut wounds on the face.

53. We are therefore satisfied beyond doubt that the offence under Section 296 (2) of the Penal Code was proved and that the appellant took part in the robbery and personally inflicted the injuries on PW1 and PW3.

54. The final point is whether the failure by the prosecution to call the Investigating officer was fatal to the prosecution case. The record shows that by the time the case was heard the Investigating officer, one PC Otieno had since died and therefore he could not be found. As stated by the Court of Appeal in the Kiriungi case (above) it would have been desirable for the prosecution to call the Investigating officer but in this case, he was dead. We are satisfied that there was sufficient evidence placing the appellant at the scene of crime.

Conclusion

55. For the reasons above stated, we find that the appellant's appeal lacks merit. The same is therefore dismissed in its entirety. We confirm the judgment of the learned trial Magistrate.

56. The sentence in respect to Count II will be held in abeyance.

57. The appellant has the right to appeal within 14 days from the date of this judgment.

Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 10th day of March 2016.

RUTH N. SITATI

NJOKI MWANGI

JUDGE

JUDGE

In the presence of:

Appellant present in person

Mr. Omwenga for Respondent

Mr. Anunda - Court Assistant