REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 124, 124 & 124 OF 2012

(CONSOLIDATED)

(AN APPEAL AGAINST BOTH CONVICTION AND SENTENCE OF THE PRINCIPAL

MAGISTRATE'S COURT AT VIHIGA IN CRIMINAL CASE NO. 346 OF 2009

[G. MMASI, PM] DATED 23RD MAY, 2012)

1. **JOHN ALIGULA LUGONGO**
2. **PATRICK ISAVUA LUGONGO …. APPELLANTS**
3. **OSCAR SIMIDI TSISAGA**

VERSUS

REPUBLIC …….....……..RESPONDENT

JUDGMENT

The three appeals were consolidated and heard together as they arose from the same trial in the subordinate court. The three appeals were registered under the same number 124 of 2012.

The three appellants, with another, were charged in the subordinate court jointly with robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of charge were that on 1st March 2009 at about 11.55 p.m. at Chavogere village, Chavogere Sub-location, East Busali Location, Vihiga District in Western Province jointly while armed with offensive weapons namely pangas and torches robbed Betrulynda Kanaga her DVD player make Sony, LG television set 21", two remote controls, an amplifier make SAY, two torches, four bags, one towel, one mobile phone make Motorola, one radio cassette and 200 CD compacts all valued at Kshs. 61290/= and at or immediately before or after the time of such robbery used actual violence against Betrulynda Kanaga.

The co-accused, who was later acquitted, was charged with an alternative count of possessing stolen goods contrary to Section 322 (2) of the Penal Code. The particulars of charge were that on 30th May 2009 at 21.55 hrs at Guruma village, Chavogere sub-location, Busali Location, Vihiga District within Western Province otherwise in the course of stealing retained one electric torch knowing it to be stolen property.

All denied the charges. After a full trial, the 4th accused Abraham Kayesa Ngahi was acquitted of the main count of robbery with violence and the alternative charge of handling stolen goods. The three appellants however were convicted of robbery with violence. They were sentenced to suffer death as the law provides.

Being dissatisfied with the decision of the trial court, they have now appealed to this court on several grounds. Each of them also filed written submissions, which we have perused.

The learned Prosecuting Counsel Mr. Oroni, opposed the appeals. Counsel submitted that all the three appellants were positively identified by PW1, the complainant. Counsel emphasized that the 1st appellant actually switched on the solar lights and their faces were not covered. This enabled PW1 identify all of them.

The prosecution case is that on the 1st of March 2009 PW1 was at her home sleeping with her children. In the middle of the night, her young child started crying and she woke up to breastfeed. Her husband was at his place of work at Moi University. Suddenly, the door was banged with a solid object. It was broken and people entered the house. She came out of the bedroom to the sitting room and saw the 1st appellant who switched on the solar lights. The intruders were also flashing torches. PW1 also saw the 2nd and 3rd appellants carrying pangas. They demanded money but she did not give them any. They ransacked the house, took the TV set and several other items. They forced her to assist them carry the stolen goods for about 3 kms to a river.

She carried her young child along. They then released her. She went back home and reported the incident to neighbours. They tried to call the assistant chief on the phone but he did not respond. She used a neighbours telephone to call her husband at Moi University, who managed to get the assistant chief on the phone. The assistant chief advised them to sleep until the following morning as it had rained and it was dark. In the morning, the assistant chief, PW3 came to the scene and with the assistance of the husband of the complainant PW2, traced foot prints and arrested the three appellants. Later, a worker in the robbed homestead called Geoffrey mentioned the name of the accused who was acquitted at the trial as one of those involved in the robbery.

The complainant PW1 identified the three appellants at the chief's office. None of the stolen household items were recovered.

When put on their defences, each of the appellants denied the charges. They described the circumstances under which they were arrested.

Faced with this evidence, the trial court found that the three appellants were guilty of robbery with violence, convicted them and sentenced them to suffer death. Their co-accused was acquitted of both the main and alternative charge. Therefrom arose these appeals.

This is a first appeal. We have to remind ourselves that, as a first appellate court, we are duty bound to re-evaluate all the evidence on record and come to our own conclusions and inferences - see the case or **Njoroge -vs- Republic [1987] KLR 19**.

We have re-evaluated the evidence on record. None of the items allegedly robbed by the appellants were recovered. The conviction of each of the three appellants is grounded on the evidence of identification by PW1, the complainant. It is trite that whenever a case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which is alleged to be mistaken, the court must warn itself of the need for caution before convicting an accused person on the same. See the case of **Wamunga -vs- Republic [1989] KLR 424.**

Though the learned trial magistrate convicted the appellants on the evidence of visual identification by PW1, there is no evidence that PW1 described any of the appellants to anybody before they were arrested. The appellants were arrested after the assistant chief PW3 and others followed footprints to a homestead of a certain person who was not called to testify. The three young men who were found in that homestead were arrested, not because PW1 had identified them as the robbers, but because the footsteps had stopped at that homestead. The three are the appellants herein. That is not evidence to connect them to the crime.

In addition to the above finding, all the three appellants were not identified by PW1 in an identification

parade after arrest. No identification parade was conducted. Instead, the three were put together after arrest and shown to the complainant PW1 at the chief's office and she stated that these were the robbers.

The law and rules governing identification parades were not complied with. For a proper identification to be done, each of the suspects was required to be put among eight (8) or more similar people and be identified separately. Putting the three suspects together and calling a witness to come and confirm whether they were the robbers cannot be said to be identification. In our view, there was no evidence to connect the appellants with the incident. They were wrongly convicted.

In conclusion, we find that the conviction of the three appellants is not sustainable. We quash the convictions, set aside the sentence and order that each of the three appellants be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 11th day of February, 2014

GEORGE DULU **HELLEN WASILWA**

JUDGE **JUDGE**