REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NOS. 115, 116 AND 117 OF 2013

(CONSOLIDATED)

(Being appeals arising from the Judgment of Hon. B. N. IRERI, PM delivered on 7th June, 2013 in Vihiga Senior Resident Magistrate's

Court Criminal Case No. 9 of 2012)

LUCAS MUNUBI …..1ST APPELLANT

JAMES KIBETO …..2ND APPELLANT

PETER MBOGA …..3RD APPELLANT

VERSUS

REPUBLIC …..RESPONDENT

JUDGMENT

The three appeals herein were consolidated and heard together as they arose from the same trial before the subordinate court.

The appellants were jointly charged with one count of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on 30th December, 2011 at Musawa village, Gamalega sub-location in Vihiga County within Western Province jointly with others not before court while armed with dangerous weapons namely pangas and knives robbed James Ariambe Ruto of a wrist watch make Seiko five and a plastic torch all valued at Kshs.950/= and at the same time used violence and wounded him. They were also charged jointly with others not before court with a second count of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**. The particulars of the charge were that on the same day and place, jointly and unlawfully assaulted John Kiaga Ruto and occasioned him actual bodily harm.

After a full trial, they were found guilty on both count I and II and convicted. They were sentenced to suffer death in respect of count I. They were sentenced to serve 2 years imprisonment on count II. This sentence was suspended, in view of the death sentence in count I.

Being dissatisfied with the decision of the trial magistrate, they have now appealed to this court on several grounds. They also tendered in court joint written submissions which we have perused.

The learned Prosecuting Ccounsel, Mr. Oroni opposed the appeals. Counsel relied on the evidence of PW2 and PW3 and submitted that indeed a robbery had occurred at the gate of PW2 at 3.30 a.m. In counsel's view, the security lighting at the scene was adequate for identification of the appellants as they did not conceal their faces. Counsel also emphasized that the appellants were also known to PW1 and PW2 before.

In brief, the prosecution case is that on 30th of December, 2011 at 3.30 a.m., PW2, James Ruto and his brother PW3, John Ruto were coming back home from a meeting for funeral arrangements. When they arrived at the main gate of the house of PW2, some 5 people appeared. PW2 saw the 2nd and 3rd appellants as part of the group.

These people attacked PW2 and PW3. They used pangas and injured them. They also snatched items and ran away.

PW4, Julius Kipsaina heard screams and went to the scene. He found PW2 and PW3 in the house of one Henry Kipruto. He recovered a torch on the groundwhose light was on, which belonged to PW2.

PW2 and PW3 knew all the three appellants before. They saw them at the funeral meeting. The appellants were later arrested by members of the public and charged.

In their defences, the appellants gave unsworn testimony. They denied committing the offences.

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

This being a first appeal, we have to start by cautioning ourselves that as a first appellate court, we are duty bound to weigh the conflicting evidence on record and draw our own inferences and conclusions while bearing in mind that we neither saw nor heard the witnesses testify and make due allowance for this fact. See the case of **Njoroge -vs- Republic [12987] KLR 19**.

We have evaluated the evidence on record afresh. The conviction of the appellants was predicated on visual identification or recognition at the scene by PW2 and PW3. Where a case depend on visual identification or recognition, the court has to warn itself of the special need for caution before convicting on reliance on the correctness of such identification or recognition. See the case of **Wamunga -vs- Republic [1989] KLR 424**.

In our present case, the incident occurred at night. The attack was sudden. PW2 and PW3 stated that there was light from the security lamp that enabled them identify or recognise the appellants. PW2 stated he recognized two of the appellants when he flashed his torch on them.

Though there might have been light at the scene, the trial court should have reviewed all the circumstances underlying positive identification or recognition of the appellants, in order to exclude any possibility of error. If there was the possibility of error in the recognition or identification, the benefit of such should have been given to the appellants.

We note that PW4, Julius Saina came to the scene shortly after the incident. No evidence was tendered that the complainants informed him that they could recognize the assailants or any of them. PW4 also found the two complainants in the house of one Henry Kipruto. There is no evidence that the complainants informed Henry Kipruto that they had recognized or identified any of the appellants. In our view, the evidence of identification or recognition of the appellants is wanting. It was not positive. There is a real possibility or error, the benefit of which must be given to the appellants.

In addition, very important and crucial witnesses were not called by the prosecution. These were Henry Kipruto in whose home PW4 Jullius Kipsaina, found both complainants shortly after the incident. He was a crucial witness who could state how and when the complainants came to his home and they mentioned any of the appellants as having been involved in the crimes. The other crucial witnesses were the people who arrested the appellants later. None of them was called to explain the circumstances and reasons for the arrest of the appellants. Though the prosecution is not required to call a multiplicity of witnesses, where crucial witnesses are not called to testify and no explanation is given for the failure to do so, the court is entitled to make an adverse inference against the prosecution case. See the case of **Bukenya & Others -vs- Uganda [1972[EA 549**.

In the circumstances of the present case, the failure to call these crucial witnesses in our view, weakened the prosecution case to such an extent that the prosecution failed to prove beyond reasonable doubt that the appellants were connected with the crimes.

In conclusion, we find that the appeals have merits. We allow the appeals, quash the convictions and set aside the sentences imposed. We order that each of the three appellants is set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered this 11th day of February, 2014

GEORGE DULU	**HELLEN WASILWA**
JUDGE	**JUDGE**