Kiboi v Republic (Criminal Appeal E017 of 2021)
[2023] KEHC 17640 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17640 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL E017 OF 2021

CM KARIUKI, J

MAY 25, 2023

BETWEEN

GABRIEL FREDRICK KIBOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against both the conviction and sentence of Hon. S. N. Mwangi (SRM) in Nyahururu CMCR no.1380 of 2019 delivered on 11th August 2021)

JUDGMENT

1. The Appellant was charged with two counts and one alternative count to count II. In Count I, the Accused was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Particulars stated that the Accused person on 28th March 2019, within Nyandarua County being armed with an offensive weapon, a kitchen knife, robbed MNK cash kshs. 1500/-

2. In the second count, he was charged with the offence of rape contrary to Section 3 (1) (a) (b) of the *Sexual Offences Act* No. 3 of 2006. Particulars being that the Accused person, on 28th March 2019 within Nyandarua County, intentionally and unlawfully caused his penis to penetrate the vagina of MNK by force.

3. In the alternative count, the Accused person was charged with committing an indecent act with an adult contrary to Section 11 (a) of the *Sexual Offences Act* No. 3 of 2006. Particulars stated that the Accused person, on 28th March 2019 within Nyandarua County, intentionally touched the vagina of MNK with his penis against her will.

4. The Appellant was convicted and sentenced to death and ten years imprisonment held in abeyance. Being aggrieved by both the conviction and sentence meted out against him by the trial court, he filed the instant appeal on the amended grounds of appeal: -

5. The learned trial magistrate erred both in law and fact in accepting the Prosecution evidence of identification without considering that no identification parade was carried out. PW1 was a single identifying witness, and no caution was given before conviction; relying on flimsy facts was an error in law.

6. That the learned trial magistrate erred both in law and fact by holding that robbery with violence defined under Section 296 (2) of the Penal Code was proved but failed to note that the elements of the offence were not proved against the Appellant.

7. That the learned trial magistrate erred in law by misconstruing the arrest of the Appellant on 25/5/2019, where he was charged with an offence of handling stolen goods and tried to connect him with a robbery purported to have been committed to one MNK committed on 28th March 2019 at Olkalou.

8. That the learned sentence awarded was that death is not only harsh but also degrading, it is against the Appellant's constitutional rights given under Article 50(2), (p), and (q) of *the Constitution*. Accordingly, he prayed that the sentence be reviewed.

9. That the learned trial magistrate erred in both matters of law and fact in shifting the burden of proof to the Appellant when he failed to evaluate the Appellant's defence of alibi conclusively alongside the Prosecution defence was not considered.

10. Reasons wherefore the Appellant humbly prays for the following orders: -

11. That the appeal be allowed.

12. That the conviction be quashed.

13. That sentence be set aside.

14. That the Appellant be set at liberty, or,

15. That the court be pleased to evaluate the Prosecution case against the defence case and make an independent finding on both conviction and proper sentence.

Appellant's Submissions

16. The Appellant submitted that from PW1's evidence, the circumstances were difficult for her to identify who committed the crime. He was assaulted alone and scared for her life; therefore, it was almost impossible to identify someone, given her little time and the circumstances. Reliance was placed on Kamau v Republic [1975] EA 139

17. It was contended that the circumstances of PW1's identification were that of dock identification in court. Further, PW1 stated that she knew the Appellant before the incident, but no proper descriptions were given. She came to identify him in court after the Appellant's arrest, yet she did not lead to the Appellant's arrest. He asserted that no identification parade was conducted after the Appellant was arrested, and no first report was recorded to show that the Complainant could identify her assailant; therefore, the evidence of identification by this witness was not proper and watertight.

18. Reliance was placed on Ajode v Republic [2004] 2 KLR 81, Roria v R [1967] EA 583, Matianyi vs Republic [1986] eKLR, Abdalla Bin Wendo & Another v Rep [1953] 20 EACA 166

19. The Appellant averred that the elements of the offence of robbery with violence were not proven. That PW1 testified that the assailant told her he had a pistol, yet the charge sheet mentions a kitchen knife. No exhibit was brought before the court to prove that a dangerous weapon was used. It was also argued

that the trial magistrate did not consider the second element that the offender is in the company of one person or persons. Lastly, there was no mention that PW1 was struck or that the assailant used violence.

20. Reliance was placed on Donald Atemia Sipendi v Republic [2019] eKLR

21. It was asserted that the Appellant told the court that he was arrested on 25th May 2019 for handling stolen goods. In September he was recalled to court only to be charged with the offence of robbery with violence, a case he did not understand. He stated that he was framed for an offence he did not commit.

22. Lastly, the Appellant pointed out that the sentence meted out was harsh and degrading. Reliance was placed on Muruatetu Case, Republic v Jackson Maina Wangui & Another [2017] eKLR, Thomas Mwambu Wenyi v Republic [2017] Eklr, etc. He implored the court to find that the mandatory nature of the death sentence under Section 296 (2) of the Penal Code is only a discretion sentence imposed on very heinous crimes, and the matter before the court is not one of such crimes.

Respondent's Submissions

23. The Respondent submitted that they had proven that the Accused had committed the offence of robbery with violence and established that each of the ingredients for the crime was verified.

24. Offenders must be armed with a dangerous or offensive weapon.

25. It was asserted that the Appellant was armed with an offensive weapon, a kitchen knife. That PW1 testified that on 28th May 2019 at around 5 am, the Appellant, who had gained entry into her house, had a knife that he used to threaten her with and eventually stole Kshs. 1,500/-. She saw the blade when he pushed her to her bed and tied her hands on her bed with a sisal rope/thread.

26. The Respondent contended that PW4, the police investigations officer produced the kitchen knife as P. Exhibit 3, which evidence was not challenged during cross-examination.

27. If he is in the company of more than one person

28. It was argued that the charge sheet stated that the Appellant was alone. However, that is not fatal to the Prosecution's case, as PW1 stated that the Appellant was alone when he attacked her, raped her, and robbed her of Kshs. 1,500/-

29. If at or immediately after the time of the robbery, they wound, strike, beat, or use violence against any person.

30. The Respondent averred that the Appellant tied a sisal rope around PW1's neck, rounded her mouth, and tightened it. In her bedroom, she had a knapsack sprayer's metal rod, which he put in her mouth and pushed in, and she got wounded and started bleeding. He then placed a tablecloth in her mouth so she could stop breathing.

31. It was asserted that PW2 corroborated that the Complainant had been injured and had bruises and tenderness on the right small finger, thighs, and bruises on the lower lip. She concluded that besides the rape, she was assaulted. She produced a P3 Form and treatment notes as P Exhibit 1 & 2, respectively. They, therefore, averred that this ambit was conclusively proved in that actual violence was occasioned on her, for she was wounded in the process of robbery and rape.

32. The act of stealing

33. The Respondent submitted that the charge sheet stated the Complainant's Kshs. 1,500/- was stolen by the Appellant. PW1 testified that during the ordeal, the Appellant told her that they used to say he was a thief, and he had decided on that day to steal and ensure that he was killed. Therefore, he demanded

money from her, but since she had no other money than kshs. 1,500/- he told him that it was in her pouch, which was on the table, and he took it and put it in his pocket.

Identification

34. It was stated that this was a case of identification by recognition. That PW1 testified that after the Appellant finished raping her, he started conversing with her, introduced himself as Gabu, and said he did not care if he told anyone it was him because he would commit suicide thereafter. That the Accused had taken a torch from her which he used to look around, and with the light from the torch, he shorn the light on his face, which made PW1 recognize him as Gabu, who was their neighbour's son who was born and grew up in the same staff quarters with PW1.

35. PW3 corroborated her evidence, for she was the first to arrive at the scene, and PW1 mentioned Gabu as the person who attacked her. She gave the same name to the police, and ultimately, the DNA report from the government analyst proved that her seat cover revealed both her blood and that of the Appellant. The Respondent asserted that there was no need for an identification parade which is merely an academic exercise.

36. Reliance was placed on Wamunga v Republic [1929] KLR 426, Douglas Muthanwa Ntoribi Vs. Republic [2014] eKLR and Criminal Appeal No. 274 and 275 of 2009 at Eldoret, Peter Omukaga & Another v Republic (unreported)

37. As regards count II, the Respondent stated that PW1's testimony was corroborated by PW2, a medical doctor who not only found her to have bruises on her lower lip, bruises, and tenderness on the small finger and thighs, but she also found that she had white vaginal discharge which was coming from her vagina and bruising coming from the vagina. There was also bleeding, which proves that penetration took place, and the same was not consensual but forceful.

38. The Respondent affirmed that the contents of the Appellant's unsworn evidence do not exonerate him from blame because he was positively identified as the person who committed the offences he has been charged with. That the Appellant did not explain where he was on the material date of the offence. Reliance was placed on Amber May v the Republic [1999] KLR 30.

39. As for sentencing, the Respondent confirmed that the death sentence was proper in the circumstances since it's the only sentence provided for the offence of robbery with violence. It was stated that the Muruatetu decision could not be f help the Appellant as it only applies to the offence of murder. Further, they stated that they supported the sentencing for the offence of rape by the trial magistrate, who was ten years imprisonment to be held in abeyance.

Analysis and Determination

40. Being the first appellate court, this court's duty is to re-evaluate the evidence presented at trial and draw independent conclusions. Except, it must bear in mind that it neither saw nor heard the witnesses give their testimonies. Thus, matters of demeanor are best observed by the trial court. (See Okeno v Republic [1972] E.A 32.}

41. Having perused the lower court record, the Appellant's grounds of appeal herein, the written submissions, and authorities relied upon by both parties. The issues for determination herein are: -

    a. Whether the Prosecution proved its case beyond a reasonable doubt; and

    b. Whether the death sentence meted out should be set aside.

42. The offence of robbery with violence is contained in Sections 295 and 296(2) of the Penal Code as follows:

    a. "295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

    b. 296(2). If the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more other person or persons, or if, at or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other personal violence to any person, he shall be sentenced to death."

43. The elements of the offence of robbery with violence were set out by the Court of Appeal in the case of Oluoch v Republic [1985] KLR thus:

    a. "Robbery with violence is committed in any of the following circumstances:

        i. The offender is armed with any dangerous and offensive weapon or instrument; or

        ii. The offender is in the company of one or more person or persons; or

        iii. At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person .....".

44. According to the case of Dima Denge Dima & Others v Republic, Criminal Appeal No. 300 of 2007:-

    a. "...The elements of the offence under Section 296 (2) are three in number and are to be read not conjunctively but disjunctively. For example, one element is sufficient to find an offence of robbery with violence."

45. Based on the evidence of PW1, the Complainant; woke on 28th March 2019 at around 5 am and went to warm water in the kitchen. There was no electricity so she had a torch and as she was in the kitchen, she saw that it was not in the order she had left. She got confused and shocked because she lived alone and decided to go to the bedroom to wait for it to get brighter. She testified that when she got in the bedroom, she saw a man behind the bedroom door, and before she could think of what was going on, he held her throat on the front side, and she fell on the floor. The man then took her knee and pressed it on her hands as he sat on her.

46. She testified that she started screaming, and the man told her to shut up as she continued to scream. She saw a knife in his hands and stated that she took the torch from her, took sisal rope, tied it around her neck and mouth, and tightened it. In addition, she had a knapsack sprayer's metal rod, which he took and put in her mouth and pushed in, and she got a wound that started bleeding. Further, she asserted that the Accused took a tablecloth and put it in her mouth so that she could stop breathing. He then took her and pushed her to the bed, and tied her hand on her bed with the sisal rope.

47. He stretched her legs and forced his penis into her vagina. After he was through, he asked her if he knew him, and she said she did not know him. He then told her that he was Gabu, and since he had the torch with him, he shone the torch on himself, and she saw that it was indeed Gabu. During the incident, the torch was still on, and it was a small rechargeable torch.

48. The Accused further went on to tell her that they used to say he was a thief, so he decided to steal and ensure he was killed that day. He then demanded money from her, and she told him she had kshs. 1,500/- on her poach, which he took and put in his pocket. The Accused told her that even if she had identified him, he did not care if she told anyone since he would commit suicide. After that, he took her phone, told her to put her pin, and turned it on. After looking through it, he threw it away.PW1 stated that the Accused then asked her for her keys and left.

49. Afterward, when she saw the light entering through the window, she went outside and called her neighbour Ruto and told him who her assailant was. She then went to report at the Police Station, and the police came to her house and found a black cap which she verified belonged to the Accused. They also found a sweater, jacket, cigarette filters, rope, and tablecloth, which they carried away.

50. She stated that she was sure that the Accused was her assailant and that she had no grudge against him, for he is a child, and she is like a mother to him. Furthermore, she had no bad blood with him and his family; they were just neighbours, colleagues, and nothing more.

51. PW2, Dr. Rachel Kinuthia, testified that she filled out the victim's P3 form on 28th March 2019. She stated that PW1 appeared distressed and tearful and had bruises on her lower lip. On further examination, she had bruises and tenderness on the right small finger and thighs, and she assessed that the probable type of weapon was a blunt object, and the estimated age of her injuries was hours. She also had vaginal discharge coming from her vagina and bruising and bleeding. A high vaginal swab was taken, and it was reported that there were some spermatozoa. She confirmed that there was penetration and that the same was not consensual. The P3 form and treatment notes were produced as P. Exhibit 1 and 2, respectively.

52. PW3, Jackson Ruto Kimuruok, the Complainant's neighbor, corroborated her testimony and testified that he was woken up by screams three times on a fateful morning, but there was a blackout. He went outside his house and heard a conversation in Kikuyu, which he did not understand then the screams stopped. He assumed it was a domestic issue between PW1 and her husband, so he went back to bed.

53. It was his testimony that at around 6 am, PW1 called him and told him to go to her house since she had been attacked, and it was then that he realized that what he was hearing was an attack. So he went through the fence and saw PW1 wrapped in a leso, she had a swollen face and a cut on her lower lip with blood. She told him that Gabu had attacked her.

54. He took the Complainant inside her house and saw a lamp on the floor, a sisal rope with blood, and another rope with blood stains, the knapsack sprayer pipe had blood. In the kitchen, there were banana peels all over. The Complainant explained that she had been raped, and he gave her kshs. 500/- and escorted her. He also stated that there was a black cap, cigarette filters, and a matchbox outside. He opined that it looked that the assailant did not pass through the gate but jumped over it.

55. PW4, No. 105061 PC Joy Chebet, the investigating officer, testified that she recorded the Complainant's report when she went to the station to report the matter on 28th March 2019 at around 0800 hours. She then visited the scene where they recovered several exhibits, including her petticoat, which had blood, the seat cover also had blood, a cap, rope, a kitchen knife, and a knapsack sprayer's pump plus the torch. In addition, she produced the sisal rope, knapsack sprayer metal pump, kitchen knife, and torch as exhibits.

56. She stated that the Accused was arrested in July. She did not know of any other relationship between the Complainant and the Accused besides being neighbours.

57. PW4 was later recalled, and she produced the exhibits that had been taken to the Government Chemist. The blood-stained cover was produced as P. Exhibit 8, the cap written Texas as P. Exhibit 9, and blood stained petticoat as P. Exhibit 10. She also produced the government analyst report as P. Exhibit 11. The conclusion of the report stated that:-

58. The blood stains on the seat cover item MNKIII generated mixed DNA profiles with major contributors matched the DNA profile generated from blood sample of the Complainant MNK with a probability random match of one in 8.038×10^{24}. In addition, the minor contributed a partial profile that matched the DNA profile generated from the blood sample GFKI Gabriel Fredrick Kiboi, the suspect.

59. The blood stains on the petticoat marked item MNKII generated a mixed DNA profile that matched the one from the blood sample of MNK, the Complainant, and another unknown female person.

60. During the defence hearing, the Accused elected to give an unsworn defence and testified that he was charged with this case for an offence he did not know well. Since 2017, he has been living in Mairo Inya, and during the weekend, he would go home to Olkalou to visit his parents. That the Complainant was his neighbour, and he could not tell if she used to see him going to visit his parents or not. He reiterated that the offence he is charged with is unknown to him, and he did not know it well, for it was his first time to come to court and be charged with it.

61. Accordingly, I find that there is overwhelming evidence against the Appellant to prove that he was the one who robbed the Complainant violently and raped her. Furthermore, I find that The Prosecution witnesses' evidence was credible, and they were all consistent in their testimonies which offered the sequence of events on how and who attacked the Complainant.

62. I agree with the trial magistrate that there was proof of the ingredient of theft of cash amounting to kshs. 1,500/-. Further, PW1 stated that the Accused was wielding a knife and that he attacked her with a knapsack sprayer metal rod that was in her bedroom. PW2 and PW3 corroborated the Complainant's account of how she was attacked and the injuries she suffered from that attack, and the rape. PW3 testified that when she found the Complainant outside her house, she had a bleeding cut on her lower lip and told him she had been raped. PW2 gave a detailed account of her injuries upon medical examination and also produced the P3 form. She also opined that a blunt object was the probable type of weapon.

63. The Appellant underpinned his appeal majorly on the issue of identification. He contended that the circumstances of his identification was dock identification and that PW1 stated that she knew the Appellant before the incident, but no proper descriptions were given.

64. In Hassan Abdallah Mohammed v Republic [2017] eKLR, it was stated that:

    a. "Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in Wamunga v Republic [1989] KLR 424 at 426 had this to say:

    b. "Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from the possibility of error before it can safely make it the basis of a conviction."

65. Accordingly, I find that there was sufficient evidence to prove the positive identification of the Appellant as the attacker by way of recognition. The Complainant articulated that he saw the Accused when he illuminated his face with the torch and recognized him when he identified himself as Gabu, his neighbour. She also stated that she could recognize his voice through their conversation as he

was the neighbour's son who had been born and grew up with Complainant in the same quarters. Furthermore, when her neighbour PW3 came to her aid, she told him that Gabu had attacked her, which PW3 corroborated. She also told the investigating officer as much when she reported the crime.

66. I associate myself with the finding of the court in the case of Anjononi & Others v Republic [1980] KLR 59, where the Court of Appeal held that:-

    a. "...recognition of an assailant is more satisfactory, more reassuring, and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another."

67. Ultimately, forensic evidence also tied the Appellant to the crime conclusively. His DNA profile was found on the blood-stained seat cover, which contained his and the Complainant's blood. I agreed with the trial magistrate when she asked what the Appellant's blood was doing on the Complainant's seat cover, yet they had no relationship with him being her friend and a frequent visitor in her house. I am satisfied that the Complainant recognized the Appellant, who knew him well. I am also satisfied with PW1's testimony that the assailant identified himself as Gabu. He also shone the light from the torch on his face, which enabled the Complainant to see him and instantly recognize him. PW1 saw him and could also identify him using his voice. Consequently, I am unable to find any loophole in the manner in which the Appellant was identified.

68. I uphold the trial magistrate's finding that there was no doubt that the identification of the Appellant as the Complainant's assailant was one of immediate recognition and that there was no evidence whatsoever that was adduced to prove any grudge or bad blood that the Complainant had with the Appellant or his family to warrant her to frame him up for such offences. Furthermore, it is a well-settled principle in criminal law that recognition is a better form of identification than identification of a total stranger. Additionally, there was no need for an identification parade since the Complainant knew and could recognize her attacker.

69. Furthermore, the Accused's defence was a mere denial. He feigned ignorance by stating that he did not know what he was being charged with, yet he had sat through the whole trial and cross-examined some witnesses. He did not offer up any account to displace the Prosecution's evidence or even explain his whereabouts on the material morning. He also did not explain why his DNA was found on the Complainant's seat cover.

70. I am satisfied that the Prosecution proved its case against the Appellant beyond any reasonable doubt on the offence of robbery with violence.

71. In analyzing the Prosecution's evidence against the Appellant for the offence of rape, I am satisfied that the Prosecution proved its case against the Appellant beyond any reasonable doubt. In the present case, the Appellant was also charged with the offence of rape. The statutory definition of rape is in Section 3 (1) of the *Sexual Offences Act*, which stipulates that:-

    a. "(1) A person commits the offence termed rape if—

    1. they intentionally and unlawfully commit an act that causes penetration with or her genital organs;

    2. the other person does not consent to the penetration; or

    3. the consent is obtained by force or by means of threats or intimidation of any kind."

72. I concur with the trial magistrate's finding that PW2's medical evidence proved that not only did the Complainant suffer physical injuries but also had vaginal discharge from her vagina, which also had

bruises and bleeding. The doctor further testified that the injuries were a result of non-consensual penetration. The medical evidence corroborated the Complainant's account of how the Appellant raped her on the fateful morning. She stated that the Accused took a tablecloth and put it in her mouth so that she could stop breathing. He then took her and pushed her to the bed, and tied her hand on her bed with the sisal rope. That he stretched her legs and forced his penis into her vagina.

73. According to Section 42 of the *Sexual Offences Act*:-

    a. "a person is said to consent if he or she agrees by choice and has the freedom and capacity to make that choice."

74. Additionally, In Republic v Oyier [1985] eKLR, the Court of Appeal held as follows:-

    a. "The lack of consent is an essential element of the crime of rape. The men's rea in rape is primarily an intention, not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

    b. To prove the mental element required in rape, the Prosecution had to prove that the Complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist."

75. As a result, I find that there was intentional and unlawful penetration by the Appellant on the Complainant's vagina and that the Complainant did not consent to the sexual act. The Complainant was threatened; she was pushed and tied down then the Appellant raped her. She could not consent or even resist the Appellant's gross attack.

76. The upshot of the above is that the Prosecution proved its case against the Appellant for both the offence of robbery with violence contrary to Section 296(2) of the Penal Code and rape contrary to Section 3 of the *Sexual Offences Act*, having established the necessary ingredients for each offence to the required standard of proof beyond a reasonable doubt.

77. Accordingly, the appeal on conviction fails.

78. The Appellant pointed out that the sentence meted was harsh and degrading. Reliance was placed on Muruatetu Case, Republic v Jackson Maina Wangui & Another [2017] eKLR, Thomas Mwambu Wenyi v Republic [2017] eKLR, etc. He implored the court to find that the mandatory nature of the death sentence under Section 296 (2) of the Penal Code is only a discretion sentence imposed on very heinous crimes, and the matter before the court is not one of such crimes.

79. Sentencing is the trial court's discretion, but such discretion must be exercised judiciously and not capriciously. The discretion is limited to the statutory minimum and maximum penalty for a particular offence. Further, as has been held before, an appellate court should not interfere with the discretion that a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.

80. The trial court imposed the death sentence as provided for in the Penal Code, which prescribes a death sentence for the offence of robbery with violence. The Appellant was also sentenced to ten years imprisonment for the offence of rape to be held in abeyance.

81. In the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR, the court did away with the mandatory nature of the death sentence in Section 204 of the Penal Code for being inconsistent

with *the Constitution*. Instead, it was held that the court has the discretion to impose a sentence other than death in accordance with the circumstances of the case.

82. The Appellant contended that the death sentence was no longer provided for, so the trial court imposed an illegal sentence and that the sentence was harsh and degrading. However, I hold that the death penalty is still prescribed in law.

83. In James Kariuki Wagana v Republic [2018] eKLR, Prof. Ngugi J (as he then was) observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. Finally, he noted that while force had been used in the case before him, it could not be said that the Appellant used excessive force, nor did he "unnecessarily injure the Complainant during the robbery" and was not armed during the robbery. He, therefore, reduced the Appellant's sentence of death to imprisonment for fifteen years from the date of conviction.

84. Accordingly, I find that the level of violence unleashed on the Complainant is sufficiently serious to warrant a death sentence. The Complainant was not only physically injured, but she was raped in the attack. The Appellant was brazen in his senseless attack against the Complainant, who had been his long-time neighbour. I believe that the Complainant's attack befits to be defined as the 'highest and most heinous levels of robbery with violence' as envisioned in the case above.

85. Moreover, I find that the Appellant did not argue his case on sentencing based on the case's law and facts and that there is no lawful reason to interfere with the trial court's discretion in passing a sentence.

86. In the circumstances, I find that the sentence meted by the trial court was appropriate and lawful.

i. I accordingly find that the appeal herein lacks merit and is dismissed. Accordingly, I uphold the trial court's decision on conviction and sentence.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 25ST DAY OF MAY 2023.

.....

CHARLES KARIUKI

JUDGE