



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 32 OF 2020

JACKSON OMWENGA ATUYA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal against the conviction and sentence in Criminal Case No. 625 of 2017 at Kisii Law Courts before Hon. S.K. Onjoro (S.R.M) delivered on the 11th June 2020)

JUDGMENT

1. The appellant, **JACKSON OMWENGA ATUYA alias CHUI MOSIOMA** was one of three accused persons charged before the trial court. He was charged alongside, David Okari Mosioma who was the 2nd accused person and James Ateka Anari who was the 3rd accused person. Three counts were preferred against the appellant. The first count was **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that he and the 2nd and 3rd accused persons on the night of 8th and 9th day of March 2017 at Irundi village Taracha location within Kisii County, jointly with others not before court, while armed with crude weapons namely pangas, rungus, metal bars and torches robbed **Rosemary Kerubo Ombongi** of cash Kshs. 18,000/= an empty K-gas cylinder, a solar inverter, two mobile phones make Tecno and Huawei Y-360 and a sweater all valued at Kshs. 32,000/= and immediately before the time of such robbery threatened to use personal violence to the said **Rosemary Kerubo Ombongi**. The second count was also **robbery with violence**. The particulars of that offence were that on the night of 8th March 2017 at Irundi village Taracha location within Kisii County, jointly with others not before court, while armed with crude weapons namely pangas, rungus, metal bars and torches robbed **Elphas Nyakundi Ombongi** three power saws make Husquavama, cash Kshs. 49,000/= and a jacket all valued at Kshs. 228,000/= and immediately before the time of such robbery threatened to use personal violence to the said **Elphas Nyakundi Ombongi**.

2. On the third count, the appellant was accused of defilement contrary to **Section 8 (1) (3)** of the **Sexual Offences Act**. The particulars of that offence were that on the night of 8th and 9th day of March 2017 at [Particulars Withheld] village Taracha location within Kisii County, he intentionally caused his penis to penetrate the vagina of EO a child aged 14 years. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act** based on the same particulars.

3. This being a first appeal, this court has a duty to re-evaluate all the evidence given at trial and come to its own independent conclusion being aware that it never saw nor heard the witnesses testify and therefore make due allowance for that. (See **Okeno v R [1972] EA 32** and **Kariuki Karanja v R [1986] KLR 190**)

4. RB (PW1) recalled that on the night in question at about 1.30 a.m. she noted light emerging from her daughter PW2's bedroom window. She then heard people come from PW2's window claiming that they were police officers. They shone light on her and asked her to cover her face and give her money lest they kill her. PW1 testified that the people she saw were 3. She gave them money amounting to Kshs. 17,000/= shillings and another Kshs. 1,000/= in her pocket. They then brought PW2 to her room and asked her to tell her to give them money or they would kill them.

5. PW1 recalled that one of the intruders was shining a torch on her face and his face was near the light. She noted that one of his front tooth was missing. She also recalled that one of them had a *rungu* and a *panga*. After about an hour, the assailants left. They realized that 3 power saws, cooking gas, inverter, 2 phones and a jacket belonging to her son were missing. She also learnt that PW2 had been defiled. She recalled that they found the 3 missing power saws at Nyamira police station. She also testified that

6. she participated in an identification parade where she identified the appellant who had a missing tooth.

7. **EKO (PW2)** told the court that at the time the offence occurred, she was 14 years old. She produced her birth certificate in support of her assertion. She remembered seeing light from torches shining outside and her mother asking her whether she was still studying. Suddenly, 4 people entered the house. She recalled that the appellant had shone his torch on his face and told her to lie on the ground. Some of the men went to her PW1's room and others went and opened the door letting in about 10 people who took her to PW1's room. She recalled that her mother had removed a purse and given them money and the appellant had complained that the money PW1 gave him was too little as they

had information that she had a lot of money. They ransacked the house and took 3 power saws and her brother and mother's phone as well as a black solar battery charger and a small 6kg gas cylinder. The appellant then asked her to go and call her PW3 who stayed in the kitchen outside the house but she found that he had been tied up and placed under her bed.

8. PW2 recalled that the appellant had taken her to the kitchen and asked her to go to the bed and remove her clothes. When she refused, he threatened to cut her with a *panga* he had. PW2 testified that the appellant removed his penis and inserted it into her vagina and defiled her. After he had finished having sex with her he asked her to put on her clothes and took her back to the main house where he instructed another man to tie her up. She testified that they later on managed to untie themselves and reported the matter at Keumbu police station. She testified that she received treatment at Kisii Referral Hospital and a DNA test was also carried out. She was also called for an identification parade at Kisii police station but could not pick out anyone. She however insisted that she saw the appellant at their home that night and stated that he was the one who defiled her. She testified that there was very bright light from the torches that night and the assailants had stayed in their house for about 2 hours. When cross-examined by the appellant, PW2 stated that he had shone a torch on his face and even asked her whether her boyfriends looked like him. She testified that there were over 10 people at the identification parade who all looked familiar as such she could not identify anyone.

9. **Elphas Nyakundi Mbongi** (PW3) testified that he normally slept in the kitchen. On the material night, as he was sleeping, he heard people banging on the door claiming that they were police officers. The people tied him up, took him to the main house and placed him under his PW2's bed, together with his brother. They then started demanding for money. PW3 testified that they took Kshs. 49,000/= from his pocket. He managed to see the appellant who had a gap on the front teeth from under the bed. He was also the most vocal. PW3 recalled that the assailants had stayed in the house for about 2 hours. They took his sister PW2 out and sometime later she was brought back and tied with a wire on a table. PW2 later informed him that she had been raped. PW3 testified that when the assailants left, they managed to free themselves and raised alarm which drew their neighbours. During the hearing PW3 identified two power saws from photographs and produced two receipts to show that the power saws belonged to him. He added that his Huawei phone make Y360 and PW1's Techno phone were also stolen. PW3 recalled that he had attended an identification parade where he was able to identify the appellant from his voice and the gap on his teeth. During cross examination, PW3 testified that the assailants who were about 10 in number were shining light around the house.

10. **Inspector Hoddick Juma** (PW4) recalled that in March 2017 he was stationed at Nyamira County CID. On 9th March 2017, they got a report that 6 thieves were headed to Kisii having stolen at Keumbu area. He and his colleagues followed them to Kisii and also got reinforcement from flying squad. He testified that they managed to nab the appellant and the 2nd and 3rd accused person at Judy bar and took them to Kisii police station. The other persons in the company of the accused persons escaped. As they conducted their investigations, they heard that some people had been seen at Ekerenyo with three power saws. They followed the information and intercepted a vehicle. PW5 and Inspector Marucha boarded the vehicle and the rest followed behind in a vehicle. At shell petrol station in Kericho they managed to arrest the 3rd accused person but the other 2 people ran away. They arrested them and had them charged.

11. **PC Walter Kiprono Menjo** (PW5) testified that he worked at the CID at Nyamira. PW4 informed him that a series of robberies was happening in Nyamira and surrounding counties. They formed a team with the flying squad and went in search of the assailants at St. Jude near Kisii main stage. He testified that there were 6 people but they managed to arrest 3. On 11th March 2017, they got information that some stolen items were being transported to be sold in Kericho. At the Shell petrol station in Kericho they waited to see who would offload the three power saws suspected to be stolen. He testified that he personally arrested the 3rd accused at the petrol station in Kericho but admitted that he did not find the appellant with any stolen items.

12. **Corporal Jonathan Shirengo** (PW6) testified that while he was working with flying squad Kisii, PW3 reported the case of robbery and defilement. He went with PW3 to Kisii Teaching and Referral Hospital where PW2 was and later went to the crime scene at Irondi village with PW3. They found PW1 who appeared traumatized by the ordeal. PW6 recalled that they recovered weapons including a *rungu*, metal rod, rope and electricity wire which had been left by the accused persons. He participated in the operation where the appellant and the 2nd accused person were arrested at St. Jude in Kisii. PW6 testified that after the arrest, they organized an identification parade and the appellant was identified by PW1 and PW3. The 3rd accused was later arrested by officers from Nyamira. Blood samples were also taken from the accused persons following a court order and a DNA analysis conducted. PW6 produced an exhibit memo forwarding the saliva swap from complainant as PEX 14 and an exhibit memo form for blood samples marked PEX 15.

13. **Daniel Nyameino** (PW7) a senior clinical officer working at Kisii Teaching and Referral Hospital testified that he examined the minor on 16th March 2017. The treatment notes showed that her private parts were bruised and the hymen was freshly torn. He testified that the child was bleeding from her private parts. Samples were taken for testing. The urine sample showed presence of blood and epithelial cells and puss cells and sperms. There were sperms, red blood cells and puss on vaginal swab being conducted. PW7 concluded that the weapon used to cause the injuries was an erect penis. He testified that it was evident that the victim had been defiled. In cross examination, PW7 stated that the injuries on the minor were about 1week old but admitted that he had not indicated the approximate age of injuries. He testified that from his personal assessment, the minor was between 13-14 years.

14. **Richard Langat** (PW8) a government analyst working at government chemist testified that he received an exhibit memo form marked CID Kisii CR 641/84/17 on 20th and 27th March 2017 from a police officer forwarding the following items for DNA analysis:

- a. Swab from E.O.
- b. Blood sample from Jackson Omwenga Atuya (marked S. 1)
- c. Blood samples from David Okari (marked S. 2)
- d. Blood samples from James Ateka (marked S. 3)

e. Swab from mouth of Elmelda Ombongi (Marked E.O)

15. DNA was extracted from the above listed items and an extract taken to the DNA analyzer. All generated DNA profile were put in the table. PW8 testified that the DNA profile generated from item (a) above was a mixed profile of the appellant and E.O. DNA from 2nd and 3rd accused persons was not seen.

16. **Inspector George Ochieng'** (PW9), who was in charge of the flying squad, Kisii recalled that on 14th March 2017, he received a request from the investigating officer Corporal Langat to conduct an investigation report on suspects arrested on a robbery incident. He went to Kisii police station and collected the appellant from the cells. He informed him of his rights and asked if he wished to be represented by a friend or solicitor. He said he had no friend or solicitor. He testified that PW3 identified the appellant by touching him. He asked the appellant whether he had any objection to the identification. He said he was satisfied and appended his signature.

17. **Inspector Collins Omondi Odhiambo** (PW10) the deputy OCS from Nyamira police station, testified that he had conducted an identification parade on 14th March 2017 between 15.00hrs to 15.18hrs. He stated that although the investigating officer Corporal Joel Langat was present, he didn't conduct the parade. He informed the appellant of the purpose of the parade and asked if he consented to appear in parade and he said yes. When asked whether he desired the presence of a friend or solicitor, the appellant said that there was no need. The appellant placed himself between person number 2 and 3 on the parade. PW1 came and identified the suspect by touching. PW10 asked the appellant whether he was satisfied with conduct of parade and he said that he was not since the witness had been informed of his missing tooth. PW10 produced his identification parade report as P. Exh. 17.

18. In his defense, the appellant stated that he did not know of the charges he was facing. He testified that on 10th March 2017, his mother had fallen sick and was at Kisii Level 5 hospital. He left home and was about to board the vehicle, when he met his friend Benard Nyangau, a boda boda rider who gave him a lift to Kisii. He saw his mother in hospital until 5pm and decided to go back home with Benard. He testified that they decided to go to St. Jude building and as he was leaving the building, he met police officers who arrested him after confirming that he was Jackson Omwenga. They took him and Bernard to Kisii police station. They also brought in the 2nd accused person. He stayed in the cells until next morning when he was informed that he was being charged with robbery with violence.

19. He testified that he was taken to an identification parade. PW1 came to the parade and did not pick anyone. PW2 and PW3 also came and identified one *boda boda* rider. The *boda boda* rider was released but the appellant was taken to the cells for 5 minutes and returned to the parade and asked to sign a document which he did. He was later taken to Nyamira where he met 4 people and asked if he knew them but he did not. He was asked whether he had seen 2 power saws at the police station but he denied that he had seen them. He testified that at 2pm an identification parade was held and PW1 came but was unable to identify anyone. He testified that she asked the police to ask them to say "toa pesa" which they did. On reaching him, PW1 asked him to open his mouth and show her his teeth which he did and she chose him. The appellant testified that he had complained that the parade was done twice but no one wanted to hear him. PW3 also came and asked them to show their teeth which they did and he chose him. He testified that a 3rd person also came but he complained that she had done a parade on him in Kisii and the OCS withdrew her. At 3pm they were taken to Nyamira hospital where samples were taken. The police were given 7 days to complete investigations. He was taken to an identification parade and taken back to the cells.

SUBMISSIONS

20. At the conclusion of the case, the trial court found the appellant guilty of the first two counts of robbery with violence and the charge of defilement. Being aggrieved by his conviction and sentence, the appellant lodged this appeal. In his Petition of Appeal and submissions, the appellant attacked the trial court's decision on the ground that the prosecution had numerous contradictions. He submitted that the amendment of the charge sheet to include the offence of defilement was an afterthought.

21. He also challenged the medical reports before the trial court. He argued that the medical report had been prepared more than 5 days after the incident. From the evidence it was also not clear who had accompanied PW2 to hospital. The appellant also argued that the clinical officer was not certain about the age of the minor. He complained that the matter had been adjourned severally and an arrest warrant issued against the medical officer who brought questionable evidence. According to the appellant these were signs that the medical report was not genuine. The appellant also contended that since no pant or sperms or clothing of blood had been taken from PW2, it was impossible for the government chemist to link him to the crime.

22. The appellant also submitted that the identification parade had violated the police standing orders. PW2 had indicated that all people were familiar and she was unable to identify the attackers but also stated that she was able to identify the appellant by the gap in his teeth. This contradiction in PW2's evidence, was in the appellant's view, proof of coaching of the witness. The appellant claimed that the police removed his teeth and took advantage of that to coach the witnesses on what to look out for during the parade. He also urged the court to disregard PW3's testimony that he was able to recognize him by his voice. He argued that it was very difficult to master a stranger's voice once it was night time. He submitted that during the identification parade he had not been asked to speak. PW3 had also testified that he had been placed under the sister's bed yet he was able to identify him.

23. The appellant further submitted that PW1 and PW2 were not consistent on how the robbers gained access to their home. PW1 testified that she saw 3 people while PW2 stated that she saw 10 people. He submitted that he was not found with any stolen property. He argued that the testimony of PW1 and PW2 on the stolen power saws contradicted with the evidence of PW3 who testified that only 2 rather than 3 power saws were missing. The receipts produced by PW3 were also with respect to 2 power saws only.

24. Counsel for the State opposed the appeal in oral submissions made before this court. He argued that the evidence in the lower court proved that the appellant committed the offence and also raped someone during the incident. PW1, PW2 and PW3 had properly identified him as the incident had taken 2 hours and he had a torch which he shone on himself. PW1 and PW3 also identified him in the identification parade. PW 2's testimony that the appellant had raped her was corroborated by DNA analysis given by PW8. Counsel also agreed with the sentence imposed by the trial court. He submitted that the trial court had imposed a sentence of 25 years as opposed the death sentence, thus

exercising its discretion properly.

ANALYSIS AND DETERMINATION

25. The appellant contends that the amendment of the charge sheet to include the offence of defilement was fabricated and an afterthought. The record shows that the charge sheet was amended to include the third count of defilement on 17th January 2018. **Section 214** of the **Criminal Procedure Code** provides that a charge sheet may be amended at any time provided that the conditions set out thereunder are adhered to. The provision stipulates;

214 (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that-

i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

...

23. The Court of Appeal in **Josphat Karanja Muna v R [2009] eKLR** held:

“On noncompliance with section 214 of the Criminal Procedure Code, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness... That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word... We do not accept that the noncompliance with the provisions of section 214 of the Criminal Procedure Code resulted into injustice to the appellant.”

24. In the present case, the appellant took fresh plea on the altered charges. The court directed that he be supplied with a copy of the amended charge sheet but failed to inform the appellant of his right to recall witnesses. The appellant was however not prejudiced by this omission, as the third count of defilement was included before the minor (PW2) was called to testify. The appellant had the opportunity to hear her evidence and cross examine her and other vital witnesses to the charge of defilement. Whether or not the inclusion of 3rd count was fabricated, remains to be seen from the prosecution’s evidence on the charge.

25. The appellant was charged with the offence of defilement contrary to **Section 8(1) (3)** of the **Sexual Offences Act** which provides as follows;

8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years;

26. The prosecution was required to lead evidence to ascertain the age of the child, penetration of the child’s genitalia and the identity of the appellant as the assailant to prove its case against him. The appellant contends that there was uncertainty as to the child’s age. He submitted that PW7 merely estimated the child’s age and was not certain on what her exact age was. PW7 stated that from his personal assessment, the minor was between 13 and 14 years old. At Part “C” of the P3 form, PW7 indicated that the estimated age of the minor was between 13 and 14 years.

27. In a similar case, the Court of Appeal in **Evans Wamalwa Simiyu vs R Criminal Appeal No. 118 of 2013 [2016] eKLR** held:

“As to whether the appellant’s age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant’s mother did not offer any useful evidence in this regard as she did not say anything about the complainant’s age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under part C of the P3 form the age required is estimated age and under the Children’s Act “age” where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years.”

28. The minor in this case testified that she was 14 years old at the time she was defiled. She produced her Certificate of Birth which established that she was born on 2nd June 2003 and was three months' shy of her 14th birth day. Her evidence coupled with that of PW7 established that she was within the age bracket laid out under Section 8 (3) of the Sexual Offences Act.

29. The medical evidence adduced by the prosecution was also challenged by the appellant on grounds that it was not credible as it had been taken several days after the incident took place. PW2's outpatient treatment card and receipts which were produced as PEX 3, showed that she first visited Kisii Teaching and Referral Hospital on 9th March 2017, which is when the offence occurred. PW7 filled the P3 form on 16th March 2017. From the P3 form it is clear that some of the information had been extracted from earlier treatment notes. PW7 testified on a urine test and vaginal swab test but it was not clear from his evidence when the urine samples and vaginal swab had been taken. During cross examination, PW7 stated that there had been no need to conduct another test. He claimed that he had examined the minor but it was clear that he merely referred to earlier hospital records and filled the P3 form. **Section 77 of the Evidence Act** provides that courts will generally admit reports of a medical practitioner in criminal proceedings without requiring the presence of the maker. However, in this case, PW7 did not produce the earlier treatment notes or reveal to the court the author of those treatment notes. Hence his evidence amounted to inadmissible hearsay evidence.

30. Other than the medical evidence, the prosecution also relied on the evidence of PW2 to prove the element of penetration. PW2 testified that after tying up her mother PW1 and brother PW3, the appellant frog-marched her to the kitchen which was separate from the main house and defiled her there. She recalled that the appellant was armed with a *panga* and had threatened to kill her if she did not undress. She told the court that the appellant removed his penis and inserted it into her vagina and defiled her. PW2's testimony on the element of penetration was cogent and unshaken in cross-examination. PW3 also confirmed that PW2 had been taken away for some time that night and later brought her back.

31. Although PW2's testimony on the element of penetration was consistent, her evidence on the identity of her assailant was shaky. She was unable to identify the appellant during the identification parade. She was adamant that the appellant was the one who had defiled her but her evidence amounted to dock identification which is in most circumstances deemed worthless.

32. The DNA analysis conducted by PW8 linking the appellant to the defilement of the minor was also unreliable given the questionable chain from extraction of the high vaginal swab to analysis. As indicated to earlier, PW7's testimony on the manner in which the vaginal swab had been taken from PW2 was vague. It was only in cross examination that PW6 indicated that he took a HVS swab from the minor but did not produce an Exhibit Memo to support his assertion. He produced an Exhibit Memo for a saliva swab from the minor which would not have been helpful in ascertaining whether the appellant had defiled the minor. The prosecution was required to prove all elements of the charge of defilement against the appellant but in this case there remains doubt as to identity of the appellant as the minor's assailant. I find that the appeal against the conviction and sentence on the charge of defilement is merited. The conviction against the appellant is hereby set aside of the charges on the 3rd count. The sentence of 25 years' imprisonment on the 3rd count is set aside.

33. The appellant also challenged his conviction on the two counts of robbery with violence. In the first count, the appellant was charged with robbing PW1 of Kshs. 18,000/= an empty K-gas cylinder, a solar inverter, two mobile phones make Tecno and Huawei Y-360 and a sweater all valued at Kshs. 32,000/=. In the second count of robbery with violence, he was accused of robbing PW3 three power saws make Husquavama, cash Kshs. 49,000/= and a jacket all valued at Kshs. 228,000/=.

34. While the appellant was not caught with any of the stolen items, he was placed at the *locus in quo* by the prosecution witnesses. He was identified by PW1, PW2 and PW3 as part of the gang that had broken into their home that night and soon after they left, the witnesses noticed that some items were missing. PW1 testified that she noted that 3 power saws, cooking gas, inverter, 2 phones and a jacket belonging to her son were missing. PW2 testified that the robbers ransacked the house and took 3 power saws, PW1 and PW2's phones, a black solar battery charger and a small gas cylinder. PW3 testified that the robbers had stolen his Huawei phone make Y360 and PW1's Techno phone and 2 power saws and his Kshs. 49,000/=.

35. The appellant complained that the identification parade was not done in accordance with the police standing orders but an evaluation of the evidence shows that he was correctly identified. The appellant was identified by PW1 in an identification parade conducted by PW 10 on the request of the investigating officer. According to the report prepared by PW10, there were 8 people and the appellant chose to stand between the 2nd and 3rd members of the parade. He also declined to have a solicitor or friend present during the exercise. PW1 identified the appellant by touching. PW3 also identified the appellant by touching in an identification parade conducted by PW9. PW9 had been requested to conduct the parade by the investigating officer. The appellant elected to stand between the 6th and 7th members of parade who were 9 in total. The appellant was informed of his rights and asked if he wished to be represented by a friend or solicitor but stated that he has no friend or solicitor. Based on the evidence of PW1, PW2 and PW3, the appellant and his accomplices had spent more than an hour in their home. They had torches which provided sufficient lighting for identification.

36. The appellant also submitted that the prosecution's case was inconsistent as PW1 had testified that 3 people had come to her room while PW2 had testified that there were 10 assailants that night. Having considered the totality of the evidence, I find that the inconsistency in the evidence of PW1 and PW2 is explainable given their interaction with the robbers. In the case of **Philip Nzaka Watu v Republic Criminal Appeal No. 29 of 2015 [2016] eKLR** the Court of Appeal held that some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. PW1 testified that the robbers got into the house through PW2's window and demanded money from her. As the robbers preoccupied PW1, PW2 saw some of the robbers open the door and let other assailants in. PW2's contact with the robbers was longer as she was sent to call her brother PW3 who stayed in the kitchen outside the main house but found that he had already been tied up. PW3 also testified that he saw close to 10 robbers that fateful night.

37. Based on my foregoing analysis, I find that the trial court properly convicted the appellant for both counts of robbery with violence. There was sufficient proof that the appellant was armed and in the company of others who threatened to use violence on PW1, PW2 and PW3 as they stole from them.

38. Lastly, the appellant argued that the sentences imposed by the trial court were harsh and excessive. The trial court imposed a sentence of 20 years' imprisonment for the 1st and 2nd accounts of robbery with violence. The Penal Code prescribes the death sentence for the offence of robbery with violence. The sentence of 20 years' imprisonment therefore took into recent jurisprudence that the court should not be shackled by minimum mandatory sentences in exercising its discretion on sentence and is hereby upheld. Accordingly, the appeal against the conviction and sentence on the 1st and 2nd counts of robbery with violence is hereby dismissed.

Dated, Signed and Delivered at Kisii this 28th day of May 2021.

R.E. OUGO

JUDGE

In the Presence of:

Appellant	Present in Person
Mr. Otieno	Principal State Counsel ODDP
Ms. Rael	Court Assistant