REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO.125 OF 2019

WRIGHT KINYATTA alias BROWNIE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Honourable H.M NYABERI in Magistrate's court Criminal Case No. 1057 of 2016 dated 25th July, 2019)

JUDGMENT

1. On the 27th of September 2016, the appellant herein together with 3 others were charged with two counts namely; robbery with violence contrary to *Section 295* as read with *Section 296(2)* of the *Penal Code* and Kidnapping with intent to confine contrary to *Section 256* as read with *Section 259* of the *Penal Code.*

2. The particulars of offence as contained in the charge sheet dated the 27th of September 2016 are that on the 20th day of September 2016 in Eldoret West Sub-County within Uasin Gishu County, the appellant and his co-accused while armed with offensive weapons namely knives, robbed Dr. Godfrey Barasa Wasike of a motor vehicle Registration Number KBQ 296 F make Nissan Wing Road Silver in Colour, One black travelling bag containing one Sony video Camera serial number 3630629, One Samsung note IMEI Number 356980/05/381331/0, One Compaq Mini Laptop Serial Number CNU9434YKB, one IPAD make Techno IMEI Number 869874006265761, one power bank make Huawei Serial Number 21024519312M6403-3924, one mobile phone charger, one black USB Cable, one white USB cable, one driver's licence C of C No. KVU163, one mobile phone make Techno IMEI Number 3581100749673-03, one Kenya Commercial Bank Cheque Book, one operating Loupe, one laptop charger, one Tetra byte Hard Drive make Transcend, nine surgical gloves, two note books, two packets of Valtas OD 500mg tablets, one pair of shoes, one National Bank ATM card, one Kenya Commercial Bank ATM Card and Cash Kenya Shillings 3,000/= all valued at Kenya Shillings 1,300,000/= the property of the said Dr. Godfrey Barasa Wasike and at the time of the said robbery used actual violence to the said Dr. Godfrey Barasa Wasike.

3. On the second count of kidnapping, the particulars are that on the said date and same location, the appellant while armed with offensive weapons namely knives with intent to cause Dr. Godfrey Barasa Wasike to be secretly and wrongfully confined, kidnapped the said Dr. Godfrey Barasa Wasike.

4. The appellant together with his co-accused persons took plea on the 27th of September 2016 and pleaded not guilty to all counts.

5. At trial and in discharge of its burden, the prosecution called a total of 14 witnesses and rested its case while the appellant gave sworn evidence in his defence.

6. On the 25th of July 2019, the learned magistrate after evaluating the evidence found the appellant guilty on both counts and sentenced him to death on count one and to 4 years imprisonment on count two. Given the sentence in count 1, the sentence in count 2 was held in abeyance.

The Appeal

7. Being aggrieved by the decision of the learned magistrate, the appellant herein filed an appeal against the judgement on both conviction and sentence providing 5 grounds of appeal as contained in the amended grounds of appeal filed on the 23rd of October 2020.

8. In particular, the appellant's grounds of appeal are that:

> *a.* The learned trial magistrate erred in law by convicting the appellant on a defective charge sheet under *Section 295* as read with *Section 296(2)* of the *Penal Code*; the charge was therefore duplicitous and could not support a conviction as the appellant should have been charged only under *Section 296(2)* of the *Penal Code.*

b. The learned trial magistrate erred in law by awarding a mandatory death sentence without considering the appellant's mitigation and circumstances that prevailed during the commission of the offence as was observed in the case of Francis Karioko Muruatetu.

c. The learned trial magistrate erred in law and facts by holding that the offence of robbery with violence was proved beyond reasonable doubt but failed to note that the ingredients under *Section 296(2)* of the *Penal Code* were not proved.

d. The leaned trial magistrate erred in law and facts by holding that the offence of kidnapping with intent to confine contrary to *Section 256* as read with *Section 259* of the *Penal Code* was proved as against the appellant but failed to note that the evidence on record does not point on the appellant as one of the kidnappers.

e. The leaned trial magistrate erred in law by failing to analyze the appellant's defence against the prosecution availed evidence.

Appellant's Submissions

9. The appellant filed his written submissions on the 23rd of October 2020 expounding on his grounds of appeals.

10. On ground one, the appellant submitted that the charge sheet is defective due to its duplicity. In this regard, he submitted that the charge sheet was framed in duplex form that is robbery with violence contrary to *Section 295* as read with *Section 296(2)* of the *Penal Code*, which he submitted is erroneous. In particular, the appellant submitted that *Section 295* is a general definition provision for the simple felony of robbery by a person and creates no punishment while *Section 296(2)* of the *Penal Code* creates a capital offence and not a felony, whose punishment is death. Consequently, the appellant stated that this amounts to duplex charge that goes to the root of his case and cannot be cured under *Section 382* of the *Criminal Procedure Code*. Further, the appellant relied on *Section 134 & 135* of the *Criminal Procedure Code* and the authority in ***Ibrahim Mathenge vs Republic, Criminal Appeal No. 222 of 2014*** where the court affirmed that duplex charges goes to the root of a conviction and is incurable. The appellant further relied on the decision in ***Joseph Mwasura Njuguna & 2 others vs Republic [2013] eKLR*** which cited with approval the decision in ***Joseph Onyango Owuor & Cliff Ochieng Oduor vs Republic [2010] eKLR*** to the effect that Section 295 is merely a definition section and Section 296(1) & (2) deals with the specific degrees of the offence of robbery.

11. On the second ground, the appellant submitted that the sentence passed was applied without considering his mitigation and circumstances of the case. In this regard, it was submitted that the learned magistrate did not take into account the fact that the appellant was a first offender and had no criminal records and further that the learned magistrate did not advice the appellant to give a meaningful mitigation considering that he was unrepresented and did not understand the law. The appellant relied on the case ***Francis Karioko Muruatetu & another vs Republic [2017] eKLR*** submitting that the Supreme Court held that during mitigation, the court must take into account certain aspects which may call for pity more than censure. Thus, the appellant submitted that it was a misdirection for the trial court to award a death sentence without first listening to the mitigation of the appellant and without weighing the circumstances of the whole case. The appellant also relied on *Article 10* and *25(c)* of the Constitution noting that the award of death sentence without considering the mitigating factors offends the right to fair trial and further, that *Section 204* of the *Penal Code* deprives the court the use of judicial discretion in a matter of life and death and thus the sentence as imposed offends the right to fair trial.

12. On ground three, it was submitted that the offence of robbery with violence was not proved as the necessary ingredients of the offence were not duly established. The appellant thus relied on the case of ***Johana Ndung'u vs Republic, Criminal Appeal No.116 of 1995*** where the court of appeal held that the essential ingredients of robbery under *Section 295* is the use of or threat to use actual violence against any person or immediately after to further in any manner the act of stealing. In this regard, the appellant submitted that for the offence of robbery with violence to occur under *Section 296(2),* it must be shown that the offender was armed with a dangerous or offensive weapon or instrument or he was in the company with one or more other person or persons or that at or immediately before or immediately after the time of robbery, he wounded, beat, struck or used any other violence to any person.

13. Analyzing the above facts, the appellant submitted that the major factor to take into account is whether at the time of the robbery, the appellant was armed with a dangerous or offensive weapon. The appellant thus submitted that the facts of the case shows that at the time of the alleged robbery, there were two knives of military type but it is not clear whether or not the appellant was in possession of the said lethal knives. In this regard, the appellant submitted that PW12 told court that the knives were in a black bag while PW5 informed court that the bag had been given to the counter attendant known as Joan. It was thus submitted that the said Joan should have been called to testify as a witness and without her evidence, it is difficult to know who kept the bag there. The appellant thus submitted that the learned magistrate misdirected himself when he held that the appellant was in possession of the 2 knives. The appellant relied on the case of ***Bukenya & others vs Uganda [1972] EA*** where it was held that the prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

14. Secondly, the appellant submitted that the there was inconsistent/uncorroborated evidence as regards whether the appellant was in the company of the 1st and 3rd accused as PW12 testified that he only arrested the appellant alone. Further, the appellant submitted that there is a discrepancy between the testimony of PW12 and the O.B Report which showed that the appellant was arrested on the 20th of September 2016 while PW12 testified that he arrested the appellant on the 21st of September 2016. Furthermore, the appellant submitted that the description given by PW2 in reference to the appellant is a description that can fit any short brown person. It was further submitted that no first report and no parade was ever conducted to allow PW2 to properly identify his assailants and the appellant relied on the cases of ***Kamau Njoroge vs Republic [1988], Robia vs Republic [1967] EA 583 & Maitanyi vs Republic [1986]*** noting that the failure to conduct the parade prejudiced the appellant and deprived him his constitutional rights under *Article 25(c)* and *Article 50* of the *Constitution*. The appellant thus submitted that he was not positively identified as one of those who robbed PW2 and further that there is no evidence that the alleged theft took place. Consequently, the appellant submitted the standard of proof in criminal cases that of beyond reasonable doubt, has not been met as was held in ***Moses Nato Rahael vs Republic [2015] eKLR***.

15. On ground four, the appellant submitted that the offence of kidnapping with intent to confine was not proved against him. The appellant's argument is that the framing of the charge was a misdirection since the appellant was charged with abduction under *Section 256*

and also kidnapping under *Section 259.* Secondly, the appellant submitted that as per *Section 134* of the *CPC*, it was paramount for the appellant and the court to be sure if the charge was one of abduction or kidnapping as the two offences have different ingredients and therefore attract different defenses. Thirdly, it was submitted that there was contradictory inconsistency and uncorroboration of evidence which cannot support a conviction and sentence and the appellant relied on the decision of the Nigerian Court of Appeal in ***David Ojeabuo vs Federal Republic of Nigeria***. In this regard, the appellant reiterated the fact that there is discrepancy as to when the appellant was arrested noting that PW12 testified that he arrested the appellant on the 21st of September 2016 while PW14 stated that the appellant was arrested on the 14th of September 2016, 6 days before the occurrence of the alleged offence. The appellant also challenged the recovery of the stolen items submitting that it is not clear who was found with them since the appellant was not arrested in possession of any of the allegedly stolen goods and further that it is not clear where the stolen items were found.

16. The appellant as well submitted with regard to MPESA Records and data, that since the appellant was unrepresented and was not aware of the procedures of court, the investigation officer was bound by law to make an application under *Section 33* of the *Evidence Act* so that the defence would get a chance either to rebut or agree with the issue. The failure to do so prejudiced the appellant as the same was not certified in line with the provisions of *Sections 65(6)* and *78A* of the *Evidence Act.*

17. Finally, the appellant submitted that his defence was not properly analysed since the trial court failed to re-evaluate the prosecution evidence and weigh it against the appellant's defence. It was submitted that the appellant's defence raised a possibility of a fabrication in the face of the prosecution evidence and given that the police who arrested him asked for money to make the appellant a prosecution witness. The appellant thus relied on the case of ***Ouma vs Republic [1986] eKLR*** and submitted that the burden of proof lied with the prosecution and not the defence and requested court to re-evaluate the evidence and find that the conviction and sentence was based on unfounded evidence and bad law and thus should be reviewed and the appellant acquitted.

Respondent's Submissions

18. The respondent submitted orally on the 6th of May 2021 that it opposes the appeal on conviction and sentence.

19. As regards the defective charge sheet, Ms Muhonja for the respondent submitted that not all defects are relevant on appeal and that the test is whether the appellant understood the charge and available defence and as such the alleged irregularity is not fatal. In this regard, the respondent relied on the case of William Slaney vs State of Madhya Pradesh where the Indian Supreme Court held that an irregularity is not fatal unless it occasions prejudice to the appellant.

20. Secondly, as regard the mandatory sentence, the respondent submitted that the Muruatetu's case does not withdraw judicial discretion in sentencing.

21. Finally, the respondent submitted that all the ingredients of robbery with violence were established with the weapons being produced as exhibits at trial and as such the sentence of death was lawful and appropriate given the circumstances. The appeal is therefore unmerited and ought to be dismissed.

Issues for determination

22. Considering that the appeal has been brought against both the conviction and sentence and taking into account the grounds of appeal by the appellant, I find that there are three (3) issues for determination namely:

i. Whether the charge sheet is defective

ii. Whether the prosecution case was proved to the required standard.

iii. Whether the death sentence is proper.

Analysis and Determination

23. Taking into account that this is a first appeal, it is trite law that the court ought to examine and re-evaluate the evidence on record, assess it and make its conclusion. This position was taken in ***Selle & Another -vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123*** and reiterated by the Court of Appeal for East Africa in ***Peters -vs- Sunday Post Limited [1958] EA 424.***

24. Consequently, as the first appellate court, this court has an obligation to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that unlike the trial court, this court did not have the opportunity of seeing and hearing the witnesses first hand.

i. Whether the charge sheet is defective

25. The appellant submitted that the charge sheet is defective due to duplicity. In particular, the appellant submitted that he was supposed to be charged only under *Section 296(2)* of the *Penal Code* and that the inclusion of *Section 295* of the said *Act* made the charge to be defective and of which has infringed his rights to fair trial under the Constitution. The appellant fronted the same submissions as regards count two submitting that he ought to have been charged either under *Section 256* or *259* of the *Penal Code* but not both Sections of the Penal Code.

26. It is trite law that a charge should not suffer from duplicity. That is, ***'no one count of the indictment should charge the prisoner with having committed two or more separate offences.***' See ***Archold JF, Pleadings, Evidence and Practice in Criminal Cases, 5th Edition,***

Sweet & Maxwell, 1962 at 53.

27. *Section 134* of the *Criminal Procedure Code* spelts out what constitutes a good charge. In particular, Section 134 provides as follows:

> ***"Every charge of information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

28. The above provision was expounded in ***Sigilani vs Republic [2004] 2KLR 480*** where the court held that:

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."***

29. In ***Laban Koti vs Republic [1962] E.A 439***, the court held that in deciding whether there is duplicity in a charge, the test is whether a failure of justice has occurred or the accused has been prejudiced. This position finds further support in ***R vs Thompson [1914] 2 KB 99*** where the court held that the indictment was bad in that it carried more than one offence in each count but that as the prisoner had not in fact been prejudiced in his defence by the presentation of the indictment in that form, there had been no miscarriage of justice and the appeal was dismissed.

30. Professor PLO Lumumba in his book titled ***A handbook on Criminal Procedure in Kenya, Law Africa, 2005 at 60*** observes that where a charge is duplex but the said duplicity does not occasion a failure of justice, the conviction therefrom must stand.

31. In the instant case, I do not see any prejudice that was occasioned to the appellant in the manner the charge sheet was framed. The trial courts proceedings indicate that the charge was read over to the appellant on the 27/9/2016 in Kiswahili which was the language he understood. Moreover, the elements outlined in the particulars of the offence and which were read to the appellant constituted those of the offence of robbery with violence. Looking at the particulars of the offence it is clear that the same were not ambiguous in any way and the appellant duly pleaded to them in Kiswahili pleading not guilty.

32. Furthermore, the trial court record indicates that the appellant fully cross-examined the witnesses and did not raise any complaint throughout the trial and went on to tender his defence. In this regard, I am satisfied that there was no issue of confusion in the mind of the appellant as to the charges he was facing and the evidence presented against him. I have also no doubt in my mind that the appellant faced a charge of robbery with violence under *Section 296(2)* of the *Penal Code* as the evidence tendered pointed to the said charge and not *Section 295* of the said *Act.* As such, I do not find any prejudice that he suffered as a result and incase of any defect the same is curable under *Section 382* of the *Criminal Procedure Code* which provides that: -

> ***"Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge proclamation, order, judgement or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice; provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

33. I am further persuaded by the decision of the Court of Appeal in the case of ***Paul Katana Njuguna vs Republic [2016] eKLR*** as cited by the court in ***Ezekiah Omurende Munyenya v Republic [2020] eKLR*** to the effect that as an offence of robbery with violence includes the elements of the offence of robbery, if the particulars of the charge sheet show the elements of the offence of robbery which are proved, then this is a defect that is not fatal and can be cured by the court under section 382 of the Criminal Procedure Code.

34. In the foregoing, it is my finding that the charge sheet is not fatally defective as alleged.

ii. Whether the prosecution case has been proved to the required standard in law.

35. The appellant submitted that the prosecution failed to discharge the burden of proof in criminal cases as the offence of robbery with violence was not proved. In addition, the appellant submitted that the second count of kidnapping was also not proved by the prosecution.

36. As regards the offence of robbery with violence, the appellant submitted that the facts of the case show that at the time of the alleged robbery, there were two knives of military type but it is not clear whether or not the appellant was in possession of the lethal knives. In this regard, the appellant submitted that PW12 told court that the knives were in a black bag while PW5 informed court that the bag had been given to the counter attendant known as Joan. It was thus submitted that the said Joan should have been called to testify as a witness and without her evidence, it is difficult to know who kept the bag there. Secondly, the appellant submitted that the there was inconsistent/uncorroborated evidence as regards whether the appellant was in the company of the 1st and 3rd accused as PW12 testified that he only arrested the appellant alone. Further, the appellant submitted that there is a discrepancy between the testimony of PW12 and the O.B Report which showed that the appellant was arrested on the 20th of September 2016 while PW12 testified that he arrested the appellant on the 21st of September 2016. Furthermore, the appellant submitted that the description given by PW2 in reference to the appellant is a description that can fit any short brown person. It was further submitted that no first report and no parade was ever conducted to allow PW2 to legally identify his assailants.

37. For an offence of robbery with violence to be proved, certain critical ingredients must be present. These ingredients are reflected in the

provisions creating the offence. It is thus instructive to reproduce the said provisions hereunder.

38. *Section 295* of the *Penal Code* provides as follows: -

> ***"Any person who steals anything, and, or 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."***

39. On the other hand, *Section 296 (2)* of the *Penal Code* further provides that: -

> ***"If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately before 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."***

40. Therefore, to prove an offence of robbery with violence under *Section 296(2)* of the *Penal Code*, all that the Prosecution was required to show was that the following ingredients were present at the time of commission of the offence: -

> ***a. That the offender was armed with any dangerous or offensive weapon or instrument, or***
>
> ***b. That he was in the company with one or more other person or persons, or***
>
> ***c. That at or immediately before or immediately after the time of the robbery, he wounded, beat, struck or used any other violence to any person.***

41. Appraising the evidence tendered in the trial court, PW1, Gilbert Kiptoo Kimaiyo testified on the 30th of May 2017 that on the 20th of September 2016 at about 9.00P.M, he was at Eden Square where he saw the appellant at the bar and that the appellant bought him a soda and after sometime, proceeded to the car outside together with the appellant so that the appellant could get a charger from the car. When the appellant opened the car, PW1 testified that the appellant removed a black bag and opened a zip wherein PW1 saw a tablet. Further, PW1 testified that the appellant opened a second zip wherein PW1 saw a big phone and a third zip where PW1 saw 2 knives falling therefrom. It is at this point that PW1 testified that he ran into the club and alerted the bar attendants and customers and took a boda boda and reported the matter to police. He testified that the police booked his report and proceeded with him back to Eden hotel where he identified the appellant who was arrested then by the police. PW1 also testified that the police ordered the appellant to take them to the room he had booked but did not have the key to one of the rooms which the police ultimately broke in and found the complainant/PW2 who informed them he had been kidnapped. PW1 thereafter identified the items stolen including the black bag, and the knives that he saw on the night of 20th September 2016. On cross-examination by the appellant, PW1 reiterated that he saw the appellant who was holding the camera and confirmed that the appellant was arrested after 11.00P.M and that he accompanied the appellant to the police station.

42. PW2 Dr. Godfrey Barasa Wasike, the victim of the offence, testified on the 20th of June 2017 that on the 20th of September 2016, he met one Samson Kiplet (1st accused person) and together they drove to Kuinet upon which they branched into a feeder road. After moving 10 meters, he saw two gentlemen walking towards the road and positively identified them as the appellant herein and the 3rd accused person. He picked the 2 gentlemen after being informed by the 1st accused to do so. When he stopped, the 1st accused alighted and sat on the back of the car whereas the 3rd accused sat on the co-driver seat and the 2nd accused who is the appellant herein sat directly behind PW2. After some drive, they got to a blind corner and he was informed that the vehicle cannot make it to the home of the 1st accused's uncle.

43. PW2 further testified that just as he was about to switch off the vehicle, he felt a hand coming from behind where the appellant was sitting pinning him on the seat with a knife placed on his neck and another hand covering his eyes. PW2 was thereafter warned that he shouldn't make any noise lest they kill him and further that he was pushed to the back seat where he was trampled on the floor of that seat and 2 knives were pointed at him; one on the neck and the other on the chest. PW2 identified the knives as military type.

44. Further, PW2 testified that the appellant and his co-accused ransacked his pockets and took his two wallets that contained three ATM Cards, cash amounting to Kshs.3000/=. All this time, he testified that the 1st accused was pointing a knife at him while the appellant ransacked the wallet asking how much was in the account with respect to each ATM Card. PW2 further testified that the appellant informed him that although they had been paid well to kill him, they were willing to listen to him before executing their mission within 2 hours and demanded Kshs 1.5 Million not to, but he only managed to write a cheque of Kshs,900,000 in favour of the 3rd accused after he borrowed the funds from his colleague, a Dr. Dan Ndiwa.

45. PW2 further identified the appellant as the one who drove from the scene to the main road while PW2 was being guarded by the 1st accused. PW2 further testified that the appellant asked him for Ksh.50,000 but only gave 20,000 of which he borrowed from yet another colleague of his, Dr. Njiru. PW2 then testified that the appellant drove the car to Eden Square hotel where he was taken and locked in a room until the police arrived and rescued him.

46. On cross-examination by the appellant, PW2 once again confirmed that he saw the appellant at the scene and identified him as one of his assailants. In fact PW2 testified that it was the appellant who told him to alight from the car and walk into the room where he was held until the police arrived.

47. PW4, a Mr. Kennedy Kiplagat, a former caretaker for Eden Square Bar restaurant, also testified that on 23/5/2018 he saw the appellant at Eden Square Hotel where the appellant and the 3rd accused went and requested for a room. PW4 testified that he gave the key room to the

appellant and also identified the appellant when he was taken back to the hotel by the police.

48. PW5, Ms. Lucy Koech, a barmaid at Eden Square testified that the appellant bought a drink at the bar and wanted to take the drink in the car and she accompanied the appellant to the car where she saw the 3rd accused and was paid Kshs.700/=. Afterwards, PW5 testified that the appellant had meat and when he finished eating the police went and arrested him. He directed them to the room where PW2 had been kept. On cross-examination PW5 once again confirmed that the appellant was the one who paid for the rooms.

49. PW6, Peter Kimutai, a watchman at Eden Square testified that he was on duty on the 20th of September 2016 and identified the appellant as one of the persons who was taking beer with friends and that it was the appellant who paid the bill for the drinks that they had taken. After sometime, the police went and arrested the appellant together with PW6 and the ladies who were serving drinks at the bar and were taken to Iten Police Station. On cross-examination, PW6 reiterated that he saw the appellant at the bar and that it was his first time to see him there. On re-examination, he confirmed that he saw PW2 being removed from the room but did not see him enter the room.

50. PW7, Praxedes Simiyu, a banker with National Bank of Kenya, Eldoret Branch, confirmed that indeed on the 20th of September 2016, there was an ATM withdrawal for the sum of Ksh.30,000. On cross-examination by the appellant he revealed that he did not know who exactly withdrew the money unless ATM CCTV cameras are referred to. On re-examination, he said that if an owner of an account holder surrenders his ATM card and pin, then it is possible for another person to withdraw money.

51. PW8, Cleophas Keere, a banker at KCB Eldoret, testified that on the 20th of September 2016, ONE Dan Ndiwa transferred Kshs 990,000 from his account to PW2's account, as an account to account transfer. On cross-examination by the appellant, he testified that the purpose of the transaction was for purchase of motor vehicle.

52. PW9, Dan Ndiwa, a Doctor at Moi Teaching and Referral Hospital and assistant lecturer of Human Anatomy at Moi University, testified on the 11/9/2018 that on the 20/9/2016 PW2 called him and asked him to transfer Kshs 1.35 Million but due to legal restrictions he was only able to transfer 990,000/= of which he did. On the same day, PW9 testified that PW2 called him requesting for more money via MPESA but could not send the same as he was far and only came to learn later that PW2 had been kidnapped. He reiterated the same information on cross-examination by the appellant and further admitted that he did not know the appellant.

53. PW10, Geoffrey Mulando, a customer care clerk at KCB Eldoret testified that on the 20/9/2016, there is an entry for Kshs 990,000 and ATM withdrawal of Kshs.40,000. PW10 testified that there was another cheque drawn in favour of Moses Kibitok, the 3rd accused, which cheque was unpaid. On cross-examination by the appellant, PW10 testified that he has never seen the appellant at the bank carrying out a transaction in the account.

54. PW11, Monica Kurgor, the County registrar of persons Elgeyo Marakwet testified that she received a letter dated the 9/7/2018 from the DCIO Keiyo North requesting information on particulars of a number of ID Cards and wrote to the National Registration Bureau requesting information on the same. She further testified that she received another letter from the same DCIO requesting information on two other ID numbers 20682725 and 3044440 whose print out established that the former number belonged to the appellant and the latter belonged to one Kennedy Odhiambo. The print out, she testified, was accompanied with photographs and finger prints. On cross-examination by the appellant, she stated that she was not aware when the appellant was arrested.

55. PW12, Sgt. Reuben Kipkorir Korir, testified that on the 21/9/2016 he noticed that there was a report in the Occurrence Book about people at Eden Bar who were armed with knives, and he proceeded there and found a car registration Number KBQ 296F and arrested the driver of the car and proceeded to the rooms where they broke into one of the rooms and found PW2 who identified the appellant. PW12 further confirmed that an attendant at the bar confirmed to him that it was the appellant who had given her the black bag that contained items stolen from PW2 alongside the 2 knives. Further, PW12 testified that the appellant was found with Kshs 19,200 and a mobile phone. On cross-examination by the appellant, PW12 testified that he arrested the appellant on the 21/9/2016 and that he had reported to duty on the 20/9/2016, the same date that the report had been lodged. On re-examination, PW12 noted that he arrested the appellant past midnight and prepared the inventory at 02.50 Hours.

56. PW13 testified that he was a CID officer and his work was only to photograph 2 motor vehicles that were being investigated in connection with a case of robbery with violence.

57. Finally, PW14, a CID officer, testified that he interrogated the appellant who stated that they were 4 in number when they kidnapped PW2 and even gave the names of his co-accused. PW14 further testified that the appellant informed him that their plan was to extort money from PW2 and that it would be prudent to keep him in the police station as he can lead them to his co-accused which he did and the police arrested 2 others. After sobering up, PW14 testified that the 3rd accused took them to Eldoret but did not find the 4th accused but finally managed to arrest him on the 25/9/2016 after locating and tracking his phone.

58. PW14 further testified that on interrogation of the 4th accused, the said accused person informed them that he together with the 1st and 3rd accused approached the appellant and set in motion the events of 20/9/2016. PW14 testified that on the said date, the 1st accused and the appellant drew their knives and it was the appellant who pointed a knife at PW2 neck and further pulled PW2 into the rear seats and pinned him to the floor where they took everything from him. PW14 testified that he analysed Safaricom data and found constant communication between the appellant and the 4th accused. On cross-examination by the appellant, PW14 stated that when the appellant was arrested, he was in possession of two mobile phones and that he found the appellant in the cell on the morning of 21/9/2016. Further, PW14 stated that the MPESA Statement shows that the money was withdrawn by PW2 but that the said PW2 was under the confinement of the appellant and that at the time money was withdrawn, the appellant had called within a minute of the said withdrawal. PW14 further reiterated the evidence of the barmaid that it was the appellant who booked the rooms. On re-examination, PW14 testified that the complainant's phone was the one used to withdraw the money and further that through tracking, he was able to link the 4th accused with co-accused.

59. The appellant testified on the 11th of June 2019 that on the 20th of September 2016 at about 7.30 a.m, he received a call from a customer called Samson informing him that he had some work for him. The appellant testified that at about 9.30 in the morning on the same day, he went to his place of work situated at Tukadero and at 2.30 p.m a new number called him of which he received and the caller was Samson. At 6.00 in the evening, the same Samson called and told him that he was at Iten and that the appellant should meet him there. The appellant also testified that Samson informed him that the car he had was a wing road. He further stated that at this point he closed his business and proceeded to his Chama where he was given 17,000 and had an additional 300 totaling to Kshs, 17,300. At 6. 30P.M, the appellant proceeded to the stage and boarded a Matatu at around 7PM where he paid fare of Kshs.100 and alighted at Eden Square Restaurant where he found the said Samson with a motor vehicle registration Number KBQ 269F make Wing Road. Inside the vehicle, the appellant stated that there was a man who was in a suit and was drinking water. He further testified that he looked at the car lights and found that both were not lighting and that he fixed them and was paid Kshs.1000 and went to the club to have a drink as he was waiting for his friends. The appellant also stated that Samson had walked out with the man in the suit and returned alone. At 10.30PM, the appellant testified that Samson told him that his friends had arrived and that after some 3 minutes, Samson returned with his 3 friends and paid the bill; gave the appellant Kshs.1000 and left promising to return after 2 hours. At 11.00PM, the appellant testified that he was arrested together with everyone at the club and that the security guard had informed the police that the appellant was the one with the car. He testified that the police searched the car and found nothing and that when the police search him, they found Kshs 19,200.

60. Appellant further testified that they proceeded to search rooms where they found the complainant whom he stated he saw in the vehicle. At this point they were all taken to Iten police station and booked and the following day they were taken to court. Later, he testified that at about 10.00PM, he was picked for interrogation and asked the whereabouts of his colleagues. The appellant stated that during interrogation he asked for his phone and found that Samson had tried to call him multiple times and the said Samson informed him that he was coming to Eden Hotel. A trap was laid by the police and they were able to arrest the said Samson and another person upon which on the 22/9/2016 all of them were arraigned in court but charges were not read. At the police station, the appellant testified that he was not interviewed until 25/9/2016 and was told he would be treated as state witness and also not be charged with robbery with violence on condition that he parted with Kshs.30,000. He was then charged on the 27/9/2016 and testified that he denied all the charges.

61. On cross-examination, the appellant testified that he was a mechanic and had known Samson for 1 year. He testified that he did carry his tools to Iten but did not identify the items to the police as his. Further, the appellant testified that his chama had 17 people and they contributed 200 per day. He further stated that the man Samson was with was the 4th accused. The appellant finally testified that he was not with the complainant from Eldoret to Iten and that he has never met him and that he did not threaten the complainant with the knife nor did he pull him from the driver's seat to the back seat.

62. From the aforesaid evidence, it is clear that the prosecution was able to place the appellant at the scene of the crime as he was positively identified by PW2. In addition, I take cognizance of the fact that the crime took place during daytime and as such PW2 was able to clearly see and identify the appellant. It is also clear from the evidence that PW2 and the appellant spoke during the ordeal more than once. As such, there is no doubt in my mind that the appellant was at the scene of the crime. In this regard, I am guided by the decision in ***Mwaura vs Republic [1987] KLR 645*** where the court held as follows:

> ***"In cases of visual identification by one or more witnesses, a reference to the circumstances usually require a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light."***

63. Further in ***Republic vs Turnball & Others [1976] 3 ALLER 549*** the court highlighted the questions to be asked when it comes to the identification of a perpetrator by the victim. In this regard, the court noted that the following questions are critical:

> ***a) How long did the witness have the accused under observations?***
>
> ***b) What was the sufficiency of lighting?***
>
> ***c) Was the observation impeded in any way as for example by passing traffic of group of people?***
>
> ***d) Had the witness seen the accused before and if so, how often?***
>
> ***e) Were there any special features about the accused?***
>
> ***f) How much time elapsed between the original observation and the subsequent identification to the police by the complainant when first seen and the actual appearance?***

64. Considering that the incidence occurred during daytime and also taking into account the period between the time the appellant and his co-assailants attacked PW2 and the time the appellant was arrested and PW2 rescued, I find that there was more than sufficient time for PW2 to recognize and identify the appellant. In fact, PW2 vividly recalled where the appellant sat in his motor vehicle and that he drove the car to the hotel and took him to the room where he was kept until he was rescued. The defence by the appellant that he took a matatu to Eden Square and that he had not been in the company of anyone else is therefore a lie that is unsupported by any other evidence. Whereas the appellant claimed that he carried tools to Iten, the same were not recovered and produced before court. If the appellant had indeed carried the same to Iten, they should have been found within the Hotel premises or in the car.

65. It is also clear that the appellant was indeed armed with a knife which constitutes a dangerous or offensive weapon. This is confirmed by PW2 who testified that the appellant and his co-assailants drew knives and pointed them at him, one to the chest and the other on the neck.

66. There is also no doubt that the appellant was in the company of his co-assailants. This was confirmed by PW2 who saw the appellant

with the 1st and 3rd accused in his car. Further PW4, PW5 and PW6 who all worked at Eden Square Restaurant at the time of the incident confirmed that they all saw the appellant in the company of 2 others. For example, PW5 testified that he saw the 3rd accused in the car when the appellant took a drink to the car and paid her Kshs 700. PW6 also testified that he saw the appellant having drinks with his friends at the bar. PW14 testified that on interrogation, the appellant stated that he was with his co-accused and in fact stated what their mission was. Taken altogether, there is no doubt in that the appellant was in the company of the other co-accused persons.

67. There is indication from the evidence on record that the appellant and his co-accused threatened to kill PW2 and dump his body in wheat plantation if he made noises. This is confirmed by PW2 himself who testified to the same and also by PW14.

68. Finally, there is no doubt that all the evidence points to the fact that the appellant was arrested on the 20/9/2016 or 21/9/2016 at midnight. Whereas PW14 testified that the appellant was arrested on the 14th of September 2016, all other evidence suggests that the appellant was arrested on the 20/9/2016 or midnight of 21/9/2016. This has been confirmed by PW2, PW4, PW5 and PW6 who were all arrested at the same time on the same day with the appellant. Furthermore, the appellant himself admits that he was arrested on the 20/9/2016. The OB record also shows that the report was made on the 20/9/2016. PW14 also testified that he found the appellant in the cell on the morning of 21/9/21. The above evidence in my view, is conclusive evidence that the incident not only occurred on the 20/9/2016 but that the appellant was also arrested on the said night.

69. As regards the submissions by the appellant that Joan should have been called to testify and that without her evidence the court will never know who kept the bag at the counter, I take guidance from Section *143* of the *Evidence Act* which is clear in its stipulation that:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact."***

70. What is of essence is whether the evidence is complete and sufficient to establish the offence.

71. In the instant case, the evidence indicates that the appellant participated directly in robbing the victim (PW2) off his property violently. This was confirmed by PW2 and also PW14. This Court is thus satisfied on the evaluation of the entire evidence that the appellant was found in possession of recently robbed items that belonged to PW2 which items were robbed from the Complainant on the 20/9/2016 by the Appellant and his co-accused.

72. As regards the second count of kidnapping, the offence of abduction is spelt out under *Section 256* and *259* of the *Penal Code* as follows:

73. *Section 259;-*

> ***"Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years".***

74. *Section 256;-*

> ***"A person will be guilty of abduction if he forcefully compels, or by any deceitful means induces any person to go from any place".***

75. The ingredients of the offence include kidnapping or abducting a person with intent to cause that person to be secretly and wrongfully confined. However, my reading of Section 256 indicates in my opinion, that the key ingredient in kidnapping and abduction is the forceful compelling of an individual or using of deceitful means to induce a person to go from any place. See, ***Phidesio Nthiga Kithumbu v Republic [2014] eKLR.***

76. In the instant case the facts as presented to the trial court indeed meet the critical ingredients of "forcefully compelling". It is clear from the evidence of PW2 that on the material date of the offence, he was in his office but left with the 1st accused upon being informed that he was going to be refunded money he had used to purchase land from one Jane. Thereafter, PW2 testified that when he reached Kuinet, the appellant and the 3rd accused got into his car, he was violently robbed of his items and forcefully put in the back of the car and taken to Iten and finally Eden Square where he was rescued from. All this time, he was under the confinement of the convicted persons including the appellant herein. In fact, PW2 testified that it was the appellant who took him to the room at Eden Square restaurant.

77. Further, PW5 confirmed that it was the appellant who booked the rooms including where they kept the complainant. PW14 also confirmed that it was the appellant who directed them to the room where the complainant had been kept. Taken altogether, it is clear that the complainant was confined by the appellant and the other assailants without his will or permission and that he was forcefully compelled to go to Eden Square. In fact, PW2 confirmed that the appellant informed him that they would not let him go until the cheque PW2 had drawn in favour of the 4th accused, had been cashed.

78. In the foregoing and based on the evidence on record, I find that the prosecution discharged their burden of proof by proving all the elements of the offence of robbery with violence and the offence of kidnapping and thus finds that the conviction by the learned magistrate was proper.

iii. Whether the sentence is okay

79. The appellant's contention is that the learned magistrate did not take into account the mitigation by the appellant and the circumstances of the case when handing down the sentence. It was the appellant's submission that although he is a first offender and has no criminal records, the court did not take into account his mitigation. The appellant thus relied on the case of ***Francis Karioko Muruatetu & another vs Republic [2017] eKLR*** submitting that it was a misdirection for the learned magistrate to award a death sentence without first listening to the mitigation of the appellant and without weighing the circumstances of the whole case.

80. The appellant further submitted that the mandatory nature of the death penalty deprives the court the discretion to take into account the mitigating circumstances of a case including some personal history and circumstances of the offender. The appellant pointed out that the decision in Muruatetu has been extended by the Court of Appeal to cases of robbery with violence and relied on the case of ***William Okungu Kittiny vs Republic [2018] eKLR***.

81. The Supreme Court in the Muruatetu decision while dealing with the mandatory nature of the death penalty in Murder cases under *Section 204* of the *Penal Code* held that the mandatory nature of the death penalty was unconstitutional. The Court clarified in the said judgement that the death penalty itself remains lawful and constitutional.

82. The reasoning in ***Muruatetu Case*** respecting *Section 204* of the *Penal Code* (the penalty section for murder), had been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases and probably all other similar mandatory death sentences in ***William Okungu Kittiny v R [2018] eKLR*** well cited by the appellant.

83. Similarly, the reasoning had also been extended to sentences imposed by the Sexual Offences Act – and possibly all other statutes prescribing minimum sentences by the Court of appeal in a recent decision in ***Dismas Wafula Kilwake v R [2018] eKLR***.

84. However, on the 6th of July 2021, the Supreme Court in ***Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR*** issued directions to the effect that Muruatetu as it stands now is inapplicable to other offences that carry mandatory sentences other than under *Section 204* of the *Penal Code*, for the offence of Murder.

85. In particular, the Supreme Court held as follows: -

> ***"[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.***
>
> ***[15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."***

86. The court finally gave directions as follows: -

> ***"[18] Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:***
>
> ***i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code;***
>
> ***ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu;***
>
> ***iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.***
>
> ***iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.***
>
> ***v. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under Section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence.***
>
> ***vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.***
>
> ***vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;***
>
> ***(a) Age of the offender;***

(b) Being a first offender;

(c) Whether the offender pleaded guilty;

(d) Character and record of the offender;

(e) Commission of the offence in response to gender-based violence;

(f)The manner in which the offence was committed on the victim;

(g) The physical and psychological effect of the offence on the victim's family;

(h) Remorsefulness of the offender;

(i) The possibility of reform and social re-adaptation of the offender;

(j) Any other factor that the Court considers relevant.

viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu.

[19] Orders accordingly."

87. From the foregoing and based on the doctrine of hierarchy of courts, this court has no option but to hold that the learned magistrate did not err in meting out the death sentence as stipulated under *Section 296(2)* of the *Penal Code.*

88. However, nothing in this judgement stops the appellant from instituting a Constitutional challenge on the constitutional validity of the mandatory death penalty in robbery with violence cases in the appropriate court.

89. Consequently, I reach the conclusion that the appellant's appeal is unmerited and is therefore dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED VIRTUALLY** at **ELDORET** this **29th day** of **July,** 2021.

In the presence of:-

Appellant present in person

Mrs Limo for state

Ms Gladys - Court assistant