REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 27 OF 2019

ESTHER MATAYO..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(*An appeal against conviction and sentence (Hon. Okuche, SRM), dated 26th February 2019 in Criminal Case No. 238 of 2018, at Loitokitok)*

JUDGMENT

1. The appellant was charged with the offence of robbery with violence contrary to Section296 (2) of the Penal Code. Particulars were that on the 9th May, 2018 at Illasit Trading Centre in Loitokitok sub-county with another not before court, while armed with a pistol, robbed Maurice Kyalo Matolo cash 130,000/- and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Maurice Kyalo Matolo.

2. The appellant denied the offence and after a trial in which the prosecution called 7 witnesses, het was found guilty, convicted and sentenced to death. He was aggrieved by both conviction and sentence and lodged a petition of appeal dated 8th July, 2019 and raised the following 7 grounds of appeal namely:

> 1 ***The learned trial Magistrate erred in law and fact in convicting and sentencing the appellant when the charges were not proved beyond the standard set out in law.***
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> ***2 That the learned trial Magistrate erred in law and fact in convicting and sentencing the appellant when the ingredient of the offence were not proved.***
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> ***3 That the learned trial Magistrate erred in law and fact in convicting and sentencing the appellant in failing to appreciate the fact that the appellant boarded the motor vehicle merely as a passenger and further that she boarded the said motor vehicle at a different place and time from that of the other perpetrator that managed to escape, who also robed the appellant***
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> ***4 That the learned trial Magistrate erred in law and fact in convicting and sentencing the appellant when the evidence on record was substantially contradictory, inconsistent, did not support and was incapable to sustaining the charges facing the appellant.***
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> ***5 That the learned trial Magistrate erred in law and fact in convicting and sentencing the appellant by finding that the appellant and the perpetrator who escaped acted in concert when no evidence of being in communication was ever adduced either by way of communication report or otherwise.***
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> ***6 That the learned trial Magistrate erred in law and fact in convicting and sentencing the appellant in connecting the appellant with the ballistics report and the spent cartridges when no traces of gun powder or otherwise were found on the appellant.***
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> ***7 That the learned trial Magistrate erred in law and fact in convicting and sentencing the appellant in failing to inquire as to how the exhibits were obtained, particularly PMFI 6, 7 and 11 that were the clothes the appellant had on together with a pink bag***

3. During the hearing of the appeal, Mr. Mutinda, leaned counsel for the appellant, submitted that the trial court did not evaluate the evidence on record properly; that there was no corroboration of the prosecution's evidence; that the trial court did not consider the credibility of prosecution witnesses particularly PW2 and PW3 and that the trial court did not consider the appellant's defence.

4. Mr. Mutinda further submitted that the prosecution did not prove its case beyond reasonable doubt. He argued for instance, that the

appellant was not properly identified; that there was no identification parade for purposes of identifying the appellant and that the appellant was a passenger in the motor vehicle and the other person who was not in court was not known to her and that they did not board the vehicle at the same place and the trial court was therefore in error in disregarding all this fact.

5. Mr. Mutinda argued that the offence was committed in a public place at about 6.30 pm which meant the prosecution could easily have got an independent witness to corroborate its case. This he argued therefore, that the offence was not proved as required by law.

6. Regarding sentence, counsel faulted the trial court for failing to appreciate the Supreme Court decision in ***Francis Karioko Muruatetu & Others*** Supreme Court Petition No. 15 of 2015,[2017] eKLR on mandatory death penalty. He urged the court to allow the appeal, quash the conviction and set aside the sentence.

7. Mr. Meroka, Learned Principal Prosecution Counsel, opposed the appeal, supported conviction but not sentence. He submitted that the prosecution proved its case against the appellant beyond reasonable doubt. According to counsel, the ingredients of the offence under Section 296(2) that the appellant was in the company of more than one person; that they were armed and that they threatened to use violence were proved. He submitted that the appellant and her accomplice were armed with pistol and used violence on PW2 and PW3.

8. Mr. Meroka contended that the evidence of PW2 and PW3 confirmed that there was an attack; that bullet heads were recovered from the vehicle and that PW5 was shot and wounded when he went to the aid of PW2 and PW3 which was evidence of violence. He also submitted that Kshs 130,00/- was stolen from PW3.

9. On the identification of the attacker, he submitted that PW2 and PW3 testified that they did not have any passenger in their vehicle as alleged by the defence thus placing the appellant at the scene. He argued that soon after the attack, the appellant was arrested in a Maize farm during the day and was identified through her dress.

10. Regarding sentence, learned counsel argued that although death sentence is still lawful, he did not support it in line with the Supreme Court decision in the Muratetu case. He urged the court to dismiss the appeal on conviction but left the issue of sentence at the court's discretion.

11. I have considered this appeal, submissions made on behalf of the parties and the authorities relied on. This being a first appeal, it is the duty of this court, as the first appellate court, to reanalyze, reassess and reconsider the evidence and make its own conclusions. This court must however bear in mind that it did not see the witnesses testify and give due allowance for that.

12. In ***Kiilu& Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

13. PW1 No. 231845 A/SP Florence Karimi a police officer attached at the CID Headquarters, Ballistic Section as a firearm examiner, told the court that on 4th June, 2019, she received two spent cartridge cases accompanied by an exhibit memo from Sgt. Stephen Kipyalon, Marked Z1 and Z2. She was required to ascertain the caliber of Z1 and Z2 and the probable weapon used to fire them. She conducted examination and concluded that Z1 and Z2 were fired cartridges and were part of ammunition caliber 9x19 M. The witness told the court that she did a microscopic examination which revealed that Z1 and Z2 were fired with one firearm and that the firearm used had also been used in another shooting incident and the exhibit had been submitted by DCI Loitokitok. According to the witness, there were marching firing pin markings which formed the basis of her opinion that Z1 and Z2 were fired from a gloak pistol. She produced exhibit memo as PEX 1 (a) report PEX 1(b), two spent cartridges PEX 2(a) ,(b).

14. PW2, Maurice Kyalo Matolo, testified that on 9th May, 2018 he was at Illasit with his driver to collect money for supplying shop accessories and was paid Kshs, 133,000/- and used Kshs to fueled the vehicle and remained with a balance of Kshs, 130,000/-. They then stopped for him to answer a call of nature but before he was done, he was hit by the car's door. He was confronted by two people a man and a lady. The man had a gun which he pointed at his shoulder. They entered the vehicle and the man holding the gun ordered the driver to drive towards Loitokitok. The lady started beating him and took the money, Kshs.130,000/- from his pocket. After robbing them, the man ordered the driver to slow down. He tried to shoot the driver but missed. The driver stopped when he saw two other vehicles approaching from the opposite direction. They got out and raised an alarm. The attackers got out and walked towards Loitokitok. The driver sought assistance from members of the public but the man again shot at the driver missing a second time.

15. He told the court that a police officer arrived at the scene, cocked his gun and then there was a shootout forcing the robbers to run away. After a while, the lady was brought to where they had packed the vehicle. He testified that he had seen the lady when they were shooting at the driver; that she had a blue dress and a black jacket. He identified the jacket MFI 6 and the blue dress MFI 7. He told the court that he confirmed to the police who came to the scene that the lady was one of the robbers and that the robbers had shot at the dashboard and the driver's seal. The man had a khaki jacket and a white cap, which he identified in court and that they reported the matter at the Illasit police station. He identified the lady in the dock. In cross-examination, the witness told the court that he could not tell how they got into the vehicle.

16. PW3 – Meshack Mwanza, the driver of motor vehicle KCC 509X who was with PW2, told the court that on 9th May, 2018, he drove the vehicle to Kimana and Loitokitok to collect payment for goods earlier supplied to traders in the area. As they were driving to Illasit, PW2 requested him to stop so that he could relieve himself. When PW2 came back, the witness noticed two people at the back of their vehicle, a

man and a lady, the man was holding a gun. Thee man ordered him to drive towards Loitokitok which he did. The lady ordered PW2 to give them money which PW2 obliged. They were given money from the dashboard and that which PW2 had in his pocket. They then ordered him to slow down. PW3 opened the door and jumped out. He heard a gunshot from behind. PW2 also jumped out. PW2 raised an alarm while he pelted the robbers with stones. They shot at him but again missed. The robbers ran into a Maize farm. Three men came and shot in the air and asked him where the robbers had gone. They went for the robbers, one man followed the man while he together with two others followed the lady and arrested her. They took the lady to where the vehicle was packed and found a police vehicle had arrived. She was taken to Illasit police station.

17. The witness testified that the lady was wearing a blue dress and a black jacket while the man was wearing a white cap and a khaki jacket. Police searched the vehicle and recovered a spent cartridge on the driver's seat. In cross-examination, the witness told the court that the lady was not a passenger in their vehicle; that she was with the man who escaped and that she pleaded with them not to kill her saying she was a Tanzanian.

18. PW4 – Susan Wanjiku Mwaura testified that on 9th May, 2018 at about 12 noon, she was at home when she heard gunshots on the road. She then saw people coming towards her house. She started running away. One of them got into her house. She met a brown man with a pistol following those people. He asked her not to run away and introduced himself as a police officer. Members of the public joined the police officer and surrounded the house. The man inside the house started shooting at them and shot and injured the police officer. People scampered away and the man took his chance and ran away. The man had a white cap and a black bag.

19. PW5, No. 234496 IP Enock Macharia a police officer attached to DCI Kajiado South Sub County, testified that on 9th May, 2018 he was on duty at Illasit. Some people had come for certificates of good conduct and he took them to Loitokitok for the exercise. When he finished with them he boarded a vehicle to Illasit and on reaching Nkama, he found two probox vehicles parked in the middle of the road while people outside were shouting thief, thief, thief. He inquired what the problem was and he was informed of the robbery incident. He followed the robbers into the maize farm and saw two people running ahead of him, a man and a woman who were being pursued by members of the public. The lady went into the maize farm but he followed the man who was on a footpath.

20. According to the witness, the man entered into a house. He saw a lady ran away but asked her not to run away and introduced himself to her as a police officer. He asked her to go and close the door to the house which she did. He called for reinforcements and also asked the lady to get men who could assist which she also did. Men came and surrounded the house and one of them broke the door. He ordered the person inside the house to surrender but he did not respond. He suddenly heard gunshots and he was shot on the leg. He fired back and the men who were assisting ran away in fear. The man took advantage and escaped. He was taken to hospital for treatment. He told the court that the man was wearing a white cap and a jacket while the lady was wearing a blue dress and a black jacket.

21. PW6 No. 231840 Mwangi Njiru a gazetted scenes of crime officer and photograph processor, testified that on 16th July, 2018 he received an exhibit memo form dated 10th July, 2018 accompanied with a CD from PC Julius Langat which he was requested to process. He processed it and issued a certificate dated 30th July, 2018. From the CD he processed 7 photographs which he also signed and dated. The photographs showed Motor vehicle KCC 909X and a bullet hole in the vehicle. He produced the photographs as PEX 8; the certificate as PEX 12 and exhibit memo as PEX 13.

22. PW7 No. 64273 Sgt. Julius Langat of DCI, Illasit, testified that on 10th May, 2018 he was instructed by IP Marwa to investigate the case; that he recorded statements which showed that PW2 and PW3 had come to collect money from business people for goods supplied when they were attacked by a man armed with a pistol and a woman. They ran away but the woman was arrested by members of the public. The man who was armed ran into a home and later shot a police officer, (PW5) and escaped. The lady was taken to the police station together with the vehicle. A search in the vehicle yielded a spent cartridge. On 10th May, 2018 another spent cartridge, 41 invoices, 3 cheque leaves for KBC and one for Equity Bank were recovered in the home of PW4.

23. The witness told the court that the cartridges were taken for ballistic examination and a report showed that the cartridges, D2, Z1 and Z2 were fired from the same gun. He produced the black jacket as PEX 6, Blue dress PEX 7, invoices and cheque leaves were in the bag which he produced as PEX 11. The cartridges were also produced as exhibit. He told the court that the lady was charged and that they recovered nothing from her.

24. The appellant gave a sworn testimony and told the court that she a Tanzanian business lady who had on that material day come to the market; that after buying clothes for her children she decided to visit a friend at Loitokitok and boarded a probox; that the vehicle stopped at a stage and a person boarded. On reaching Nkama the person pointed a pistol at her and ordered her to keep quiet. He took her bag; pointed the pistol at the driver and started picking items from the handbag. The driver started swerving the vehicle and the man shot at him forcing the driver to stop. The man alighted and ran towards a maize farm. She also alighted and the driver took a stone and hit her. Members of the public came and started chasing the man. They said she was with the man which she denied. They arrested her and took her to a nearby town and threatened to bury her alive. She was beaten and later found herself in hospital. She was later charged in court. She denied committing the offence.

25. After considering the above evidence, the trial court was satisfied that the prosecution had proved its case against the appellant beyond reasonable doubt, convicted her and sentenced her to death, prompting this appeal.

26. I have reviewed the evidence led by the prosecution in this matter. This was a charge of robbery with violence. The prosecution was required to prove beyond reasonable doubt that, first; the attackers were more than one; that they were armed or that they used violence or threatened to use violence during the robbery.

27. In this appeal, there is a doubt from the prosecution evidence, that two people attacked PW2 and PW3; that they were armed; that they robbed their victims of money and that they used or threatened to use violence against their victims during the robbery in order to actualize their mission.

28. According to the uncontroverted prosecution evidence, the two were a man and woman and that the man was armed with a pistol and actually pointed the pistol at PW2 and PW3, fired but missed. While the man pointed a gun at the victims, the lady took money from PW2. They then ordered the driver to slow down, alighted and ran away towards a maize farm. The evidence of the prosecution no doubt proved the ingredients of the offence of robbery with violence under Section 29(2) of the Penal Code. I therefore agree with the trial court that the prosecution proved the ingredients of the offence as required by law.

29. The only question that remains to be answered is whether, the prosecution proved beyond reasonable doubt that the appellant was one of the attackers. The appellant's counsel has raised questions of doubt about proof of the case beyond reasonable doubt and that there was no corroboration. In their view, there was no proof that the appellant took part in the commission of the crime she was charged with. He argued that being a market day, the prosecution could have got an independent witness to corroborate the evidence of PW2 and PW3 that indeed the appellant was one of the robbers. He submitted, therefore, that there was no proof that the appellant was one of the robbers.

30. In answering the question whether the appellant took part in the commission of the offence, the trial court stated:-

> ***"PW2 and PW3 states (sic) that when they stopped next to Oilybya to allow PW2 to answer to a call of nature, two persons entered their vehicle to the rear. This was a man and a lady. These two persons robbed them. They stopped and the robbers ran into the field. The incident occurred at around 6.30 PM. It is the evidence of PW2 that he saw the lady very well, when she was in the vehicle and as she was leaving the vehicle and running into the farm.***
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> ***He identified her by the cloths she was putting on. This was a blue dress and black jacket. He also saw her when they were shooting at the driver. It is the evidence of PW3 that together with two other persons, they chased the accused persons and arrested her. She asked them not to kill her as she was a Tanzanian…. They took the lady to the roadside where she was later assaulted by members of the public"***

31. The court then went on to analyze the evidence of PW5 who arrived at the scene moments after the robbery and how a chase ensued as well as the appellant's defence which the court rejected and concluded.

> "***The accused person is well placed at the scene of the incident. There is overwhelming evidence that she did commit this offence. Her defence does not raise any doubt into the prosecution's case and I will dismiss it."***

32. I have myself reviewed the evidence of the prosecution and that of the defence. The incident took place about 6.30 PM. PW2 and PW3 were in a private mission using a private vehicle. They were collecting money for goods earlier supplied to business people in the area. There is no evidence that their vehicle was a public service vehicle that would ordinarily carry passengers. They also told the court that the reason why their vehicle stopped at that place was to allow PW2 answer to a call of nature, and that was when the robbers gained entry into their vehicle and robbed them.

33. After the robbery, the robbers ran away into a maize farm. Members of public, including PW5, a police officer, gave chase leading to the arrest of the appellant. They were clear on her mode of dress. PW5 saw these people running away and was also clear that the lady wore a blue dress and a black jacket.

34. From the place where the incident took place to the moment the appellant was arrested, the defence did not allege that there were factors that broke the chain of events, including the chase, that would have inhibited the view of those pursuing the appellant and her accomplice. The was arrested immediately after the robbery and taken back to the vehicle and handed over to the police.

35. The appellant's defence was that she was visiting a friend at Loitokitok and that was why she boarded the vehicle. She stated that she was also a victim of the robbery and that she was robbed of her handbag. She did not deny that the cloths produced as exhibits were her cloths or that she wore such cloths on the material day. Her story that she boarded the vehicle to visit a friend was not believable, given that this was a private vehicle as opposed to a public service vehicle. PW2 and PW3 were also clear in their testimonies that they did not carry any passengers and that the appellant was one of the robbers

36. From the evidence on record, I do not find merit in the appellant's argument that the prosecution did not prove its case beyond reasonable doubt. Having reevaluated the evidence on this point, I am satisfied that the prosecution proved that the appellant was indeed one of the robbers and the trial properly evaluated the evidence in this regard and arrived at the right conclusion. I agree with his finding and see no reason to interfere with that finding.

37. Lastly, there is the issue of sentence. The appellant argued that the sentence imposed against her was manifestly harsh and excessive. The respondent's counsel submitted that although the sentence meted out was lawful, he did not support it given the Supreme Court decision in the **Muruatetu case**.

38. Section 296(2) of the Penal Code under which the appellant was charged provides for death sentence, thus;

> "***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 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."***

39. However, the Supreme Court has held that the death sentence violates fundamental rights and freedoms and that maximum sentences violate the court's discretion to met out appropriate sentences depending on the circumstances of each case. The Supreme Court stated;

“[45]To our minds, what Section 204 the Penal Code is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless”

40. The Supreme Court went on to state that section 204 violates the right to fair trial thus;

“[47] Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.”

41. The Court also held that the mandatory death sentence deprives courts the discretion to impose appropriate sentences where the sentences are mandatory, stating:

[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right”

42. The Supreme Court re affirmed the earlier holding by the Court of Appeal in ***Godfrey Ngotho Mutiso v R,*** Criminal .Appeal . No. 17 of 2008, stating:

“We are in agreement and affirm the court of Appeal decision in Mutiso that whilst the constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High court’s statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offenders’ version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death penalty. If mitigation reveals an untold degree of brutality and callousness…”

‘If a judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused criminal culpability. Further imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of ‘over punishing’ the convict…”

43. The decision in the the ***Muruatetu case,*** affirms the position that death sentence is no longer mandatory and courts are not bound to impose the death penalty or maximum sentences. That means courts have discretion to impose a appropriate sentences depending on the circumstances of each case.

44. In the present appeal, the appellant has challenged the death sentence imposed against her. She has argued that the sentence was harsh and excessive and failed to take into account the legal position post the Muruatetu decision. On this, I agree with the appellant that by imposing the death penalty the trial court violated the appellant’s fundamental rights and freedoms.

45. I have gone through the trial court’s record and noted that the appellant offered mitigation that she was the sole bread winner for her family, which the trial court considered before it sentenced her to death. The mitigation played no role in influencing the sentence the trial court eventually imposed against her. In other words, the mitigation did not mean anything, and that is precisely what the Supreme Court called unfair trial, given that with or without mitigation, the courts would still impose the death penalty.

46. Having considered the circumstances of the offence and the mitigation recorded by the trial court, and taking into account the fact that death penalty is a violation of human rights and fundamental freedoms of an individual, I am satisfied that there is reason for this court to interfere with the death sentence imposed against the appellant.

47. In ***victor Owich Mbogo v Republic***, (supra), the court of Appeal stated, with regard to sentence, that the Supreme Court decision in Francis Karioko Muruatetu & Another v Republic,(supra) had found that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code to be unconstitutional. For that reason the court set aside the death sentence imposed by the High Court and substitute it with a custodial sentence of imprisonment for a term to be determined by the High Court given that the appellant in that case had not been given an opportunity to mitigate.

48. In the present appeal, I am satisfied that the death sentence imposed against the appellant ought to be set aside and replaced with an imprisonment of a term. As to the number of years, this court has to bear in mind that the sentence to impose should be an appropriate one depending on the circumstances of the case as well as sentences in similar offences.

49. In ***Republic v Ruth Wanjiku Kamande*** [2018] eKLR. Lesiit J, was of the view any other sentence other than death should be imposed only in deserving cases. And in ***Misheck Ireri Njagi v Republic*** [2019] eKLR, Muchemi, J reduced a death sentence to 15 years imprisonment.

50. Applying the above decisions to the present appeal, I am of the considered view that given the circumstances under which the offence herein was committed, a sentence of imprisonment for fifteen years will be appropriate.

51. Section 333 of the Criminal Procedure Code requires the court to consider the period an accused spent in remand or custody when passing sentence. The section provides;

> ***"(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.***
>
> ***(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***
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> ***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."*** (Emphasis).
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> ***52.*** The Court of Appeal emphasized on the requirements in that section in ***Ahmad Aboifathi Mohammed & another v Republic*** (Criminal Appeal No. 135 of 2016 [2018] eKLR, thus:
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>> ***"By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person."***

19. According to the record that the appellant was arrested 9th May 2018 and was sentenced 26th February 2019. She was therefore in remand between the time she was arrested and when she was sentenced. That period should, as a matter of law, be taken into account when considering sentence. Taking into consideration, the circumstances under which the offence was committed and the seriousness of the offence, including the violence used or threat to use violence against the victims, the appellant deserves a deterrent sentence.

20. For the reasons given in this judgment, the appeal against conviction is dismissed and conviction upheld. Appeal against sentence succeeds to the extent that the death sentence imposed against the appellant is hereby set aside. In place therefor, the death sentence is hereby replaced with a sentence of imprisonment for a term of fifteen years. The sentence will run from 9th May 2018.

Dated, signed and delivered at Kajiado this 21st day of February, 2020.

E.C. MWITA

JUDGE