REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 161 OF 2019

SILAS AMADI DHIKAS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the decision of Hon J.A. Owiti SPM delivered on 30th October 2019

In Kapsabet SPM CR C no. 116 of 2016)

JUDGMENT

SILAS AMADI DHIKAS was tried, found guilty and convicted of the offence of Robbery with violence c/s 296(2) of the Penal Code.

On 4th October 2019, the learned trial magistrate meted out the mandatory death sentence.

It is against that conviction and sentence that he brings this appeal on the following grounds:

> *1. That the charge she was fatally defective having been drawn to read 'robbery with violence/s 295 as read with 296(2) of the Penal Code'. That the learned trial magistrate was in error to have proceeded to convict him on a duplex charge.*
>
> *2. That the learned trial magistrate was also in error in failing to find that the identification was not positive*
>
> *3. That the learned trial magistrate was also in error in awarding him the mandatory death sentence contrary to the Supreme Court's decision the **Muruatetu** case without considering the circumstances of the case.*

The appeal was opposed by the state through the Prosecuting Counsel, Mr. Chacha.

Having read through the proceedings in dealing with the appeal I am guided by **Okeno vs Republic (1972) EA 372** where it was stated;

> *"It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."*

It is on this guidance that I read the record of appeal and the submissions by both the appellant and the respondent and found the following issues arising for determination:

> ***1. Whether the charge sheet was defective?***
>
> ***2. Whether the appellant was properly identified?***
>
> ***3. Whether the award of the death sentence was justified in the circumstances.***

On the first issue, the appellant submitted that the charge was duplicitous for citing the two provisions of the law i.e. **Section 295 and 296(2) of the Penal Code.** He relied on **Section 134 of the Criminal Procedure Code** which sets out how charge sheets are to be framed; and on

the cases:

Ibrahim Mathenge vs Republic Cr. Appeal 222 of 2014 on the proposition that a duplex charge goes to the root of the appellant's conviction, as it is a fundamental breach.

Joseph Mwaura Njuguna & 2 Others vs Republic [2013] eKLR and

Joseph Onyango Owuor & Cliff Ochieng Oduor vs Republic [2010] eKLR where the Court of Appeal stated that **Section 295** is merely descriptive and **Sections 296(1) and 296(2)** deal with specific degrees of the offence of robbery.

Peter Ndindi Njoroge vs Republic HCCR APP no. 39 of 2017 (UR) for the proposition that a fatally defective charge sheet cannot support a conviction.

In their response the prosecution were of the view that the ***Joseph Onyango Oduor*** case supported their position, that the inclusion of **Section 295** on the charge sheet did not make it defective as that section was merely descriptive.

The Court of Appeal in **Johana Ndungu v Republic [1996] eKLR** set down the ingredients of robbery with violence and in doing so dealt with the thorny issue of **Section 295 of the Penal Code** as it relates to **Section 296(2).**

The Court stated:

> *"In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:*
>
> *1. If the offender is armed with any dangerous or offensive weapon or instrument, or*
>
> *2. If he is in company with one or more other person or persons, or*
>
> *3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.*

In ***Simon Materu Munialu V Republic [2007] eKLR (Criminal Appeal 302 of 2005)***, the same Court was confronted with the issue whether a charge sheet citing only **Section 296 (2) of the Penal Code** was sufficient. The Court in that appeal considered the submission that **Section 295 of the Penal Code** creates the offence of robbery, but held that:

> *'…the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion.*
>
> *In our considered view, section 137 of the Criminal Procedure Code would be complied with if an accused person is charged, as the appellant was, under section 296(2) because that section 137 requires one to be charged under the section creating the offence and in the case of robbery with violence under section 296(2), that section creates the offence by giving it the ingredients required before one is charged under it and it also spells out the punishment. We reject that ground of appeal."*

Again in ***Joseph Onyango Owuor & Cliff Ochieng Oduor vs R [2010] eKLR (Criminal Appeal No 353 of 2008)*** the Court had to deal with a similar situation. In that appeal, the appellants had submitted, as has the appellant in the present appeal, that **Section 296 (2) of the Penal Code** did not create an offence but merely made provision for the punishment for robbery with violence. The Court stated:

> ***"Mr. Musomba submitted that unless the aforequoted sub-section (section 296) is read with section 295 of the Penal Code, then reliance on section 296(2), above, without more will not disclose the commission of an offence. Section 295 of the Penal Code defines the offence of robbery. Section 296(1) and 292(2) of the Penal Code, have a common marginal note, namely "punishment of robbery". ..***
>
> **'Section 295**, does not deal with the degree of violence being merely a definition section… ***Sections 296 (1) and 296 (2) of the Penal Code deal with the specific degrees of the offence of robbery and have been framed as such.'***

In **Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR** the Court of Appeal stated:

> *"We agree that this is the correct proposition of the law. Indeed, as pointed out in* ***Joseph Onyango Owuor & Cliff Ochieng Oduor***

v R (Supra) *the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence, which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.*

The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides ***that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal****. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge."*

The charge sheet in this appeal states

"*Silas Amadi Dhikas… Robbery with violence contrary to section 295 as read with 296(2) of the Penal Code*."

From the foregoing Court of Appeal decisions post 1995, that charge is duplex. The question is whether that duplicity is fatal. I found the answer in **Paul Katana Njuguna vs Republic [2016] eKLR** where the court observed:

"*In arguing the appeal,* ***Mr. Nyaga*** *submitted that the charge against the appellant was duplex as he was charged under both* ***Sections 295*** *and* ***296 (2)*** *of the* ***Penal Code****. Referring to* ***Simon Materu Munyaru -v- Republic, [2007] eKLR****, quoted in* ***Joseph Njuguna Mwaura & 2 Others -v- Republic, [2013], eKLR****, counsel submitted that it was wrong to charge the appellant with the offence of robbery under* ***Section 295*** *as read with* ***Section 296 (2),*** *as that rendered the charge duplex and created a confusion. … In regard to the alleged defect in the charge,* ***Mr. Omirera*** *submitted that* ***Section 295*** *of the* ***Penal Code*** *was simply a definition section, and although charging an accused under both* ***Sections 295*** *and* ***296 (2)*** *was undesirable, doing so did not amount to a fatal defect in the prosecution's case, as the same could easily be cured by invoking* ***Section 382*** *of the* ***Penal Code****.*

The court went on to note that:

"*Neither* ***Section 295*** *nor* ***Section 296*** *refers to an offence of "robbery with violence". Indeed, the felony termed robbery as described under* ***Section 295*** *of the* ***Penal Code*** *may involve use of actual violence or threat to use violence, while the aggravated offence of robbery as described under* ***Section 296 (2)*** *of the* ***Penal Code*** *may be complete with use of violence or no use of violence as long as there has been a theft and the offenders are either armed with offensive weapons or offenders are more than one. (See* ***Oluoch v Republic*** ***[1985] KLR 549****)…."*

In that appeal, the particulars of the charge were stated in the following terms:

"PAUL KATANA NJUGUNA - on the 28th day of January, 2009 at Kwa-wanzilu area, Ekalakala Location in Yatta District within Eastern Province jointly with others not before court while armed with offensive weapons namely rungus, and man-made pistol robbed from DANSON NZUKI MWASIA of a wallet and immediately before he used personal violence to the said DANSON NZUKI MWASIA".

Having considered those particulars the court stated:

"*The particulars as stated are clear and do support the offence of aggravated robbery. The defect is alleged to be in the statement of the charge in the count in which the appellant was charged with robbery with violence contrary to* ***Section 295*** *as read with* ***Section 296 (2). Is that fatal? We think not.****" (emphasis mine)*

The court explained its thinking as follows:

"*We have considered the law on duplicity in charges as expounded in case law and academic treatises and find an interesting trend which seems to have emerged… The Court cited with approval the case of* ***Cherere s/o Gakuli -v- R. [1955] 622 EACA,*** *where the predecessor of this Court reviewed the cases on the subject of the effect of a charge which is found to be duplex and concluded that* ***"The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity"****… In that case, the court held that the appellant was left in no doubt from the time when the first prosecution witness testified, as to the case which he had to meet and he could not, therefore, be said to have been prejudiced in any way. (Emphasis mine)*

What this appears to me to mean is that not every duplicity is fatal to the case. It will depend on the circumstances of every case.

The particulars of the charge herein were that';

'*On the 20th day of November 2015 at about 0300 HRS at [Particulars Withheld] Village in Kapsabet Township within Nandi County, jointly with others not before court, while armed with offensive weapons namely panga, rungu, and knife, robbed MN of Kshs. 10,000/=, one Techno phone s/no not known valued at Kshs. 4,500/=,one Nokia mobile phone s/no not known valued at Kshs. 2,000/=, one Sony Tech radio valued at Kshs.1,200/=, one D- Light torch valued at Kshs. 900/=, and one kilogram of roofing nails valued at Kshs. 200/=, all valued at Kshs 18,800/= and immediately before or immediately after the time of such robbery, used actual violence to the said MN'*

It is my considered view that the particulars of the charge are clear in terms of the ingredients of the offence of robbery with violence. There was theft, there was violence accompanied by offensive weapons, and there were other offenders who had not been arrested by the time the matter went for trial. The question then would be whether there was failure of justice by the fact that the **Section 295** was cited in the charging section to warrant the charge to be deemed as fatally defective. I would here echo the words of the Court of Appeal and state; I think not.

Why?

The record speaks. The appellant was aware of the charges facing him. He cross-examined the witnesses accordingly. There was no confusion as to the charge he was facing. I would conclude therefore that in the circumstances of this case, the charge was not fatally defective.

On the second issue regarding identification: The case for the prosecution was that the complainant 63 years old. H N was sleeping alone in her single roomed house at *[Particulars Withheld]* Estate on the night of 20th November 2015. At about 3:00am, she heard a bang on her door. She had a spot light which she turned on and saw the accused and another. They were armed. She said the accused was armed with a panga, a rungu and a knife. That the accused uttered the words ***'leta pesa'***. She told him she had no money. His co assailant put his hand into her panty and found nothing. The accused hit her with the rungu on the head, she started to bleed. His co assailants took Kshs. 10,000/= from under her bed, her phones, electronics, hammer and nails and ran away. The accused asked for the MPESA pin she told him she had not registered her phone. He continued to demand for money while putting the rungu on her breasts, she raised a distress call. Her neighbour came to her rescue but accused threatened her with a panga and he fled. He then ordered her to bend. He raped her and ejaculated then left.

Even after they left one Zainabu whom she described as a prostitute came asking her whether there was more money. She managed to sneak out, and ran to the hospital. On the way she met a boda boda person with whom she pleaded to take her to hospital. He did. She later reported to the station.

About a month later, she was called to the station where she identified the appellant as one of the assailants in an identification parade, recognising him as the one who raped her.

On cross-examination she testified that her assailants were the appellant alias *Ninja*, one *Panya* and *Zainabu*. That she saw the three of them on the material date. She also said that when the door to her house was banged she saw two people enter. That she saw the appellant for the very first time that night and later identified him in an identification parade. That when she raised alarm her neighbour M came to her rescue and even identified the appellant and called out his name *Ninja* and his co assailant *Panya.*

On re-examination, she testified that she recognised the appellant as the person who attacked robbed and raped her.

PW4 was the said M whose other name was WS. His testimony was that on 26th November 2015 he was asleep when his neighbour M gave a distress call ***'Kijana wangu kuja unisaidie'***. On his way, he met Ninja who he said was the appellant. They knew each other as he said Ninja called him by his name, *M*. He did not identify Ninja's friend. That Ninja was armed and unleashed a panga. That he M ran for his life up to the police station. He returned home at 5:00am, found Mongina bleeding, and took her to hospital at Kapsabet. She told him that she had been raped. He later recorded his statement.

PW2 was no. 225385 CPL Rogers Maziwa from Kapsasur AP Camp. He testified that on 8th January 2016, at 8:00hrs, they received a report from members of the public that there were robbers at Kapsasur. He and his colleagues rushed there and arrested three of them including the appellant whom he knew as Ninja. They took them to the Camp where on thorough search found Ninja with a panga and a rungu. The OCS then sent a motor vehicle to collect the suspects. He said the other two were released upon investigations.

On cross-examination, he said that he knew the appellant on the day he arrested him as he was not from the area. That he was arrested on suspicion and found with the said items. The officer clarified that he did not search the appellant at the scene.

PW3 no 74411 **PC Julius Koitaba** was the investigating officer. His testimony was that on the 8th January 2016 he collected the suspects from Kapsasur AP Camp, together with the exhibits. He also took the statements of the complainant herein and her witness, took over the P3 that had already been filled. He produced as exhibits ID parade forms, panga and small rungu, and blood stained petticoat.

On cross-examination he testified that an ID parade was conducted by an Inspector of Police, that when he visited the scene the door had been replaced.

PW5 **Patrick Kenei** testified on behalf of Silas Ruto the clinical officer who examined the complainant. He said that she was treated for head injury and rape. He produced the P3 and the treatment notes. He said that it was confirmed that she was raped.

The trial court put the appellant on his defence. He denied the offence and stated that the material time he was in Usenge Bondo along Lake Victoria where he was engaged in fishing. That he came to visit his Aunt and grandmother in Kapsabet in December 2015. That on 22nd December 2015 he went to visit a friend in Kapsasur and it is while he was there that he was arrested and taken to Kapsasur AP Camp. While there, a lady came and said he was the one. He was unable to bribe his way out and after four days was taken to Kapsabet Police Station where the same lady identified him in an ID parade that also consigned juveniles and girls. The appellant submitted that the trial court failed to examine the evidence of identification along the tests that have been set over time by precedent.

First there was the issue of the complainant's and PW4's testimony. The PW4 testified that he immediately recognised the person he met on the way to complainant's house as Ninja, a person known to him. However, it came as a surprise that the report to the police did not mention that the person who attacked the complainant was known as Ninja, yet PW4 went to the police station the same night of the robbery. It is also

noteworthy that the arresting officer PW2 testified that he knew the appellant as Ninja but on cross-examination told the court that he met the appellant for the first time the day he arrested him, and that the appellant was not a local of Kapsasur. The complainant also testified that she learnt the names of her attackers as Ninja and Panya from PW4 M. However M told the court that of the two persons he met, he only identified Ninja, but not the other one, hence contradicting the complainant.

The importance of this first reports was made out in the case **Tekerali Son of Korongozi &Others vs. R [1952] EACA 259**, cited by the appellant in which the Court of Appeal held that: *Evidence of the first report by the complainant to a person in authority are important as it often provides a good test by which the truth and accuracy of the subsequent statements may be gauged and provide a safeguard against later embellishments or the deliberately made-up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.*

If truly the PW4 saw a person he knew as Ninja then his name, physical description would have been given to the police, and the arrest of the appellant would not have depended on the random arrest of suspected robbers. The police would have been out there looking for a specific person. It is also noteworthy that the alleged identification parade forms were produced by the Investigating Officer but the person who conducted the identification parade did not testify as to how he did it. Clearly the complainant's testimony that she identified the appellant as her attacker in an identification parade is not supported by the requisite evidence.

The PW4 testified that there was light in the complainant's house but according to him, he met the Ninja while on his way to the complainant's house, was threatened with a panga and ran for his life.

The complainant herself described the attack. When the door to her house was banged she lit her torch. However, as to what happened with the torch light the moment the robbers entered her house is not known as she did not tell the court and the prosecution did not make any effort to lead evidence as to whether she saw the faces of the attackers, how far the light was, what kind of torch, the amount of light.

The appellant brought this out by citing the cases of **Abdullah bin Wendo vs. Republic (1953) 20 EACA 166, Republic vs. Turnbull & others [1976] 3 ALLER 549**, **Cleopas Otieno Wamunga vs. R. Criminal Appeal No. 20 of 1982 [1989] eKLR** on the need to test the evidence of identification.

In ***Abdulla bin Wendo*** above the court stated;

> *"That evidence of identification should be tested with great care especially when it is known that conditions favouring a correct identification were difficult. The witness who testified that they could identify an appellant in circumstances of shock and fear could easily be mistaken because the duration of observation was short. We are doubtful whether the witnesses could have identified the appellant's face in the manner described by the witness. We are doubtful how the witnesses were able to identify the appellant in the identification parade."*

It would not be unfair to state that from the evidence on record that the manner in which the robbery happened was not favourable for identification. The trial magistrate stated that the robbers were with the appellant for thirty (30) minutes. That they had not covered their faces, hence it was easy for the complainant to identify the accused. However none of that was stated by the complainant. From their entry, the robbers harassed her, ordering her to produce money, putting hands in her pants, hitting her on the head, causing her to bleed.

The court in ***Abdulla bin Wendo*** also emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

> ***"Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."***

I say that the identifying witnesses were single witnesses because the PW4 did not see the robbers at the scene but on his way to the scene. It cannot be said with certainty that the persons PW4 said he met were coming from the home of the Complainant.

In **Michael Nganga Kinyanjui vs Republic [2014] eKLR** the Court of Appeal considered these cases and quoted from **Cleopas Otieno Wamunga vs. R** that:-

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification. The way to approach the evidence was succinctly stated by Lord Widgery, C.J. in the well-known case of Republic vs. Turnbull [1970] 3 ALL E.R. 549…"***
>
> *"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them*

and his actual appearance... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

It is evident from the trial court's judgement that there was no analysis of the evidence of identification as required by these precedents.

It is also noteworthy that the arrest of the appellant did not proceed from the point of description by the complainant or PW4. Neither was it as a result of the investigations of the complainant's report. The evidence as recorded bears a visible disconnect between the complainant's report and the arrest. The offence happened on 20th November 2015 according to the complainant, and 26th November 2015 according to the PW4.

The appellant was arrested on the 8th January 2016 and arraigned in court on 11th January 2016. His testimony that the while in custody complainant saw him at the AP Camp before the identification parade was not controverted by the prosecution who failed to call the identification parade officer.

I find that this ground has merit.

I do not doubt that the complainant was attacked, robbed and raped on the night of 20th November 2015. The burden of proof that it was the person before court who did it remains on the prosecution. On appeal, the court relies on the record. However, the evidence as recorded raises certain questions that poke holes into the case. The complainant told the court that when it happened at 3:00am as she was sleeping. At the same time that she was awake as it was her prayer time. She said she ran to hospital and was assisted by a boda boda person she found on the way, on the same hand PW4 insisted that after being threatened by the Ninja, he ran to the police station, then returned to find the complainant bleeding in the house and that he was the one who took her to hospital. The police record in the P3 says the offence happened about 5:15am, and was reported at the same time. May be an error. But is she reported at 5:15 am, at what time after 5 am did the PW4 take her to hospital? The P3 indicates that a report of **assault by persons well known to her** was made. The part of rape and robbery is not mentioned. The part of the P3 that relates to sexual offences was not completed, and neither was the appellant charged with the said sexual offence. Why? No explanation was given by the prosecution, yet the case was investigated.

In addition, three suspects including the appellant were arrested on suspicion of robbery within Kapsasur. The claim that the other two were released following investigations was not supported by any evidence. There were no complainants for the alleged robbery in Kapsasur. Nothing more is said about these suspects, their names, and what investigations exonerated them and not the appellant.

All I can say at this point is that evidently, the case was truly poorly handled.

The evidence on identification cannot support the conviction.

On the final issue, it is true as per the appellant's submissions that the trial court considered its hands tied by the mandatory nature of the death sentence provided for under **Section 296(2) of the Penal Code**. While the death sentence remains a lawful sentence in our laws, it is no longer the only sentence that trial courts can mete in capital offences. The ***Muruatetu*** case made that possible by declaring that the court maintains the inherent jurisdiction, and discretion to determine the appropriate sentence in any case taking into consideration the circumstances of the offence and the mitigation of the offender.

Before I conclude, I find it necessary before concluding to say something about the Probation Officer's Report filed on 1st October 2019. This is only because upon reading it I was of the opinion that it made prejudicial uncorroborated/unsupported statements which the appellant had no opportunity to challenge.

It stated*:* That the victim';

> *'…considers the accused a threat to her life and fears for the worst in the event of his release.* ***She also added that the accused is an unpopular character known for his deviant behaviour throughout Kapsabet and its environs****….During social inquiry he gave a lot of contradicting evidence about the offence and his place of abode. It was confirmed that he has no fixed place of abode and his lifestyle has been controversial and secretive. Even though the accused is not well known character within [Particulars Withheld] area where he claims to have dwelt before he got arrested* ***he is a notorious and well known person within Kapsabet town due to his rowdy and violent behaviour****.* ***As a matter of fact the residents of Kapsabet are said to have had a sigh of relief since he was arrested…his bad reputation in the community…he is a huge threat to peace and security in the community'***

It is acceptable that the victim would be afraid of the person she believes robbed physically attacked and sexually assaulted her. Be that as it may, the victim in her testimony told the court that she saw the appellant for the first time on the day of the robbery. When did she get to know about his reputation in the whole of Kapsabet, that she did not know during the trial? The appellant's alleged notoriety, violent and deviant behaviour was unknown to the Police as the Investigating Officer said nothing about this. Nor did the prosecution. No records of previous convictions or police records or reports to the police or the local administration of a single act of violence against any member of the public except for this case. About his background, the report shows that he attended a school. The officer could have checked with the school, and the local administration of that area. An aunt was also interviewed; she would have corroborated his statements. These efforts are not visible in the report hence the allegations remained prejudicial.

To my mind, such serious allegations about an accused person that are intended to persuade the court in the sentencing process ought to carry factual information, and opinions that can stand the test of scrutiny should the subject of the report seek to cross examine the maker of the report on its factual contents.

That said, I find that the appeal succeeds.

The conviction is quashed. The sentence of death set aside. The appellant be set at liberty unless otherwise legally held.

Dated and delivered virtually this 30th day of December, 2020.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant Martin

Court Prosecutor Ms. Limo

Appellant Present

Probation Officer Ms. Wanyonyi