REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 163 OF 2016

KURERA CHILO KUTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of Hon. C.M. Maundu CM in Criminal Case No. 569 of 2013 delivered on 6th December 2016 in the Chief Magistrate's Court at Kwale)

JUDGMENT

The Appeals

1. The Appellant was jointly charged with another accused person with the offence of robbery with violence contrary to section 295 as read with 296(2) of the Penal Code. The particulars were that on 16th May 2013 at Shimba Hills market in Kubo Division of Kwale County within Coast region, jointly with others not before the Court, and while armed with dangerous weapons namely knives and rungus, they robbed Kyalo Peter Sila of a motor cycle Reg. No. KMCY 336B, make Haojin and black in colour, valued at Kshs 83,000/=, and immediately after the time of such robbery killed the said Kyalo Peter Sila .

2. The Appellant pleaded not guilty to the charge on 28th May 2013, and after trial, he was convicted of the count of robbery with violence and sentenced to death. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal are in his Petition of Appeal filed in Court on 15th December 2016, as further amended by Amended Grounds of Appeal filed in Court on 30th October 2018. He also availed written submissions on the said date, as well as further written submissions that he filed on 10th December 2018.

3. The Appellant's grounds of appeal are as follows:

> **1. THAT the learned trial magistrate erred in law and fact by not observing its duty under section 200 of the CPC as a court of law and justice, and therefore contravened Article 25(c) and 27(1), (2) of the Constitution and convicted the Appellant to serve the death sentence.**
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> **2. THAT the learned trial magistrate erred in law and fact and reached a wrong decision in convicting the Appellant to serve the death sentence, and in finding that the prosecution proved their case beyond reasonable doubt on the recovery of the motorcycle, earphone, blood stains and helmet.**
>
> **3. THAT the learned trial magistrate erred in law and fact in convicting the Appellant on the ground that he led to the recovery of the deceased, and that the recovery of the deceased was not proved beyond reasonable doubt.**
>
> **4. THAT the learned trial magistrate failed before convicting the Appellant to examine and evaluate the evidence of the prosecution side, which failed to prove what caused the death of the deceased.**
>
> **5. THAT the prosecution failed to prove that any of the exhibits were recovered in the possession of the Appellant, and therefore the trial magistrate erred in fact and in law to convict the Appellant to death without caution of the danger and that it was not safe to do so.**
>
> **6. THAT the identification of the Appellant was not safe to link him to the offence he was charged with, and therefore the defence of the Appellant was not given reasonable weight.**

4. The Appellant in summary submitted in this regard that the case was partly heard when Hon. Maundu CM took over the hearing, and

upon complying with section 200 of the Criminal Procedure Code, the Appellant wanted the case to be heard *de novo*, and to re-examine the witnesses. However, that his co-accused wished it to proceed from where it had reached, which was the position upheld by the trial magistrate. Therefore, that he was not accorded the right to call witnesses for re-examination, which was a breach of his right to fair trial under Article 25(c) of the Constitution.

5. Furthermore, that there was no evidence linking the recovery of the motorcycle and of the knife with bloodstains to the Appellant, neither was there any witness to his confession as to where the deceased's body was located. He urged that cince these items were not found in his possession, the Court could not draw and inference of possession of recently stolen property. It was also the Appellant's case that the DNA results on the blood found on the knife and motorcycle did not identify which blood group it belonged to, and whether it was his blood group.

6. In addition, that there were no eyewitnesses who saw the Appellant committing the offence, and the only evidence linking him to the crime was that the Appellant had been seen with the deceased earlier on before the offence was committed. Furthermore, that the cause of death of the deceased was not proved beyond reasonable doubt. The Appellant lastly submitted that the death sentence imposed upon him was illegal in the circumstances.

7. Mr. Masila, the learned prosecution counsel, opposed the appeal and relied on written submissions filed in on 19th November 2018 Court by Berryl Marindah, a Prosecution Counsel. It was the Prosecution's case that section 200(3) of the Criminal Procedure Code can only be invoked where a succeeding magistrate starts a case *de novo*, and in the case at hand the proceedings show that the directions given were that the case was to proceed from where it left off. Therefore, that the Appellant was not denied his right to a fair hearing.

8. On the recovery of the motorcycle and of the deceased's body, the Prosecution submitted that the guilt of an accused person can be proved by either direct or circumstantial evidence, and that the evidence of PW4 who was the Appellant's brother, which was corroborated by that of PW5, who was the Appellants father, showed that the Appellant came home with the motorcycle, and also led them to the body of the deceased. Furthermore, that the blood found on the motorcycle was analysed and matched that of the Appellant. Therefore, that from this evidence the circumstances from which the inference of the Appellant's guilt was sought to be drawn were cogent and firmly established, and met the tests set out in **Ahamad Abolfathi Mohammed & Another vs Republic (2018) e KLR**.

9. Having heard the Appellant and the Prosecution, my duty as the first appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v Republic (2003) 1 KLR 756.**

The Evidence

10. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called ten witnesses. Of these witnesses, Samuel Njoki (PW1), saw the Appellant with Kyalo Peter (the deceased) on 16th May 2013, after the Appellant hired the deceased's motorcycle to take him to Shimoni. He testified that he did not see the deceased again that day, and that he heard on the next day that the deceased was missing. PW1 testified that he then went to the Shimoni Police station to report what he had seen, and led the police to the Appellant's home. That on arrival, the Appellant ran away, and PW1 testified that he also saw the deceased's motorcycle Registration Number KMCY 336B at the Appellant's home. PW1 further testified that both the deceased and Appellant were well known to him.

11. Grace Kasivi Matheka (PW2), and Peter Sila Kilonzo (PW3) were the deceased's wife and father respectively, and they both testified that the deceased went missing on 16th May 2013. PW2 also produced receipts of the deceased's motorcycle Registration Number KMCY 336B. Mwende Chulo (PW4), and Chilo Kuto Mwero (PW5) were the Appellants brother and father respectively. They testified that the Appellant came home on 18th May 2013 with a motorcycle Registration Number KMCY 336B, and had injuries. That they took him to hospital to be treated, and that on the next day the police came and arrested them, and later released them after they arrested the Appellant.

12. PW4 also testified that the Appellant told him where the body of the deceased was, and he led the police to the scene where the body was recovered. Further, that the Appellant gave him black earphones on the day they took him to hospital, and that a blood stained knife was recovered from the Appellant's house.

13. Mkalla Nduna Nzele (PW6) was the vice chairman of Pongwe Kidimu village, and he testified that he received information on 19th May 2013 that the Appellant had been seen at his home, and he went with neighbours and tied up the Appellant. He then called the police who came and arrested the Appellant

14. The remaining witnesses being Snr Sgt Francis Wambua (PW7), Cpl Charles Wachira (PW8), Sgt Tom Mageto(PW9), and Cpl Emmanuel Kondo (PW10) were all police officers who testified as to receiving the report that the deceased and his motorcycle were missing, the recovery of the deceased's motorcycle and his body, and the arrest of the Appellant. PW7 and PW10 also produced photographs and a certificate thereof of the motorcycle Registration Number KMCY 336B that they recovered from the Appellant's home.

15. PW8 on his part also produced exhibit memos and a report from the Government Chemist showing that the blood samples they recovered from the said motorcycle matched the Appellant's blood. He also produced as exhibits an artificial tooth and helmet that were found at the scene of the deceased's body, and the earphones found with PW4, which were identified by the deceased's wife as belonging to the deceased. Lastly, PW8 also produced a logbook for motorcycle Registration Number KMCY 336B as an exhibit, which showed it belonged to the deceased, and a post mortem report on the deceased.

16. The trial court found that the Appellant had a case to answer, and put him on his defence. The Appellant gave sworn testimony, and did not call any witnesses. He stated that he was arrested at his home on 19th May 2013 by a group of people who beat him up, and the police then came and took him to the Shimoni police station. He stated that he found his brother (PW4) at the police station, who was then released. He denied committing the offence.

The Determination

17. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I find that there are three issues for determination in this appeal. The first is whether there was compliance with section 200 of the Criminal Procedure Code; second, whether the Appellant was convicted for the offence of robbery with violence on the basis of sufficient and credible evidence, and third, whether the sentence meted on the Appellant is legal.

On section 200 of the Criminal Procedure Code

18. On the first issue, the relevant parts of section 200 of the Criminal Procedure Act provide as follows:

> **"200. (1) Subject to sub-section (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—**
>
> **(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or**
>
> **(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.**
>
> **(2) …..**
>
> **(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right…"**

19. The Appellant submitted that he asked to re-summon witnesses and was denied the opportunity when a new magistrate took over the hearing of the trial. A perusal of the trial court record shows that on 12th October 2015, Hon. C.M. Maundu commenced his hearing of the trial which was already partly heard, and the proceedings were as follows:

> **"12/10/2015**
>
> **Before Hon. C. M. Maundu SPM**
>
> **Mungai for state**
>
> **Court Assistant – Wasamu**
>
> **Accused 1 and 2 – present**
>
> **Interpretation English/Kiswahili**
>
> **Court Prosecutor:**
>
> **This case is partly heard.**
>
> **Court:**
>
> ***Section 200 Criminal Procedure Code* having been duly complied with, the accused person's replies:-**
>
> **Accused 1:**
>
> **I would like the case to be heard denovo. I did not cross examine witnesses properly on the issue of exhibits.**
>
> **Accused 2:**
>
> **I have suffered for long and I am innocent. I would like the case to proceed from where it was left off. I want the case to be concluded as soon as possible.**
>
> **Court Prosecutor:**
>
> **The application for the case to be heard denovo is opposed. However before I respond I would like the investigation officer to be summoned to come and confirm the availability of witnesses.**
>
> **Court:**

Mention 16th October 2015. Summons to issue for the investigating officer.

C.M MAUNDU

SENIOR PRINCIPAL MAGISTRATE

12/10/2015

16/10/2015

Before Hon. C.M Maundu SPM

Mungai for state

Court Assistant – Wasamu

Accused 1 and 2 – present

Interpretation English/Kiswahili

Court Prosecutor:

I have the investigating officer. He has filed an affidavit opposing the application to have the matter heard denovo.

INVESTIGATION OFFICER DULY SWORN STATES IN KISWAHILI:

I am No. 64336 Corpl. Gilbert Sang. I am based at DCI Diani. I am the current investigation officer. I have filed an affidavit opposing the application to have the matter heard denovo. The witnesses were threatened by the accused accomplices and cannot come to testify again. The wife of the deceased who was PW2 cannot be traced.

C.M. MAUNDU

SENIOR PRINCIPAL MAGISTRATE

16/10/2015

Cross Examined by accused 1

Nil

C.M. MAUNDU

SENIOR PRINCIPAL MAGISTRATE

Cross Examined by accused 2

Nil

C.M. MAUNDU

SENIOR PRINCIPAL MAGISTRATE

16/10/2015

Re: Examination by Prosecutor

One of the witnesses is accused 1's father. After giving evidence accused 1 refused to cross examine him.

Court Prosecutor

I wish to rely on the authority of Joseph Kamau Ngichuki –vs- Republic

One of the key considerations under *Section 200 Criminal Procedure Code* is availability of witnesses. We have demonstrate that it would be impossible to procure the attendance of the witnesses who have already testified.

Accused 1:

It can proceed from where it stopped.

Accused 2:

The case should proceed from where it stopped

Court:

The case to proceed from where it was left off. The proceedings to be typed.

Mention on 30th October 2015

C. M. MAUNDU

SENIOR PRINCIPAL MAGISTRATE

16/10/2015"

20. This Court finds as follows on the issue of compliance with section 200 of the Criminal Procedure Code arising from the said proceedings. Firstly, it is evident that the trial Magistrate did extensively comply with section 200 of the Criminal Procedure Code, and that the Appellant, who was the 1st Accused person in the trial, did concede that the case could proceed from where it stopped.

21. Secondly, the Court of Appeal did explain the purpose of section 200 in **Abdi Adan Mohamed v Republic [2017] eKLR** as follows:

> **"Section 200 envisages two situations in a trial that is incomplete at the time the trial magistrate ceases to exercise jurisdiction. The trial magistrate will have either recorded the whole or part of the evidence. Where judgment has been written and signed by the former magistrate, the succeeding magistrate is only required to deliver it. Where all the witnesses have been heard and the trial magistrate is transferred, no issue arises. The succeeding magistrate may act on the recorded evidence. But the succeeding magistrate may also recommence the trial and resummon witnesses.The transition of criminal cases from a magistrate or judge who has ceased to have jurisdiction to the one succeeding him or her remains a matter of concern.**
>
> **Problems are normally encountered in the last scenario where the succeeding magistrate decides to adopt the evidence recorded by the predecessor or altogether recommence the trial. In that case the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right. As we have said earlier where only a handful of witnesses have testified or where the evidence so far recorded is not contested or is only formal in nature, the hearing need not start *de novo.***
>
> **The re-summoning of a witness or witnesses and re-hearing of the case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demeanour and credibility of the particular witness or witnesses and to weigh their evidence accordingly."**

22. The Court of Appeal proceeded to find as follows:

> **"Where, in the language of Section 200(3) the accused demands that any witness be"re-summoned and re-heard," the demand must be subject to availability of the witnesses sought to be re-summoned. It, of course, will be impractical where it is demonstrated that the witness sought to be re- summoned is deceased, to insist on calling such a witness. Similarly if a witness cannot be traced and it is demonstrated to the satisfaction of the court that efforts to trace him have failed, the magistrate or judge may adopt and rely on the evidence on record previously recorded by the outgoing magistrate or judge. That is why in demanding the re-summoning of any witness, the accused person must do so in good faith."**

23. This was the position in the present appeal, and the succeeding magistrate who was Hon. C.M. Maundu, did interrogate the issue of whether the witnesses could be availed and found that they were not available. There was thus no error made on the trial magistrate's part in ruling that the hearing proceeds from where it had stopped.

24. Lastly, section 34 of the Evidence Act does permit a succeeding magistrate to rely on evidence that was adduced in prior criminal proceedings as follows:

> **"34. (1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—**
>
> > **(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding—**

(b) the proceeding is between the same parties or their representatives in interest; and

(c) the adverse party in the first proceeding had the right and opportunityto cross-examine; and

(d) the questions in issue were substantially the same in the first as in the second proceeding.

(2)For the purposes of this section—

(a) the expression "judicial proceeding" shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and

(b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused".

On the Sufficiency of the Evidence

25. On the issue of whether there was sufficient and credible evidence to convict the Appellant for the offence of robbery with violence, section 296 (2) of the Penal Code provides as follows:

> **"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."**

26. The prosecution must prove theft as **a central element of the offence of robbery with violence, as the offence is basically an aggravated form of theft. The** other elements of the offence of robbery with violence were elaborated by the Court of Appeal in ***Ganzi & 2 Others v Republic*** **[2005] 1 KLR and** in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** as follows:

1. If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in the 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.

27. I am alive in this regard to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**.

28. In the present appeal, PW1 witnessed the Appellant taking a ride on the deceased's motorcycle, which was the last time he saw the Deceased. He also identified both the Appellant and Deceased who were known to him. The said motor cycle was later recovered at the Appellant's home by PW1, PW7, PW8 and PW9. PW4 and PW5 testified that it is the Appellant who brought the motorcycle to the home. In addition, PW2, PW3 and PW8 testified and brought evidence to show that the motorcycle belonged to the Deceased, who was missing from the day PW1 saw him give the Appellant a ride on the said motorcycle. The deceased was later found dead, and PW4 testified that it was the Appellant who told him where the deceased's body was.

29. The Appellant argued that this was not sufficient evidence to convict him for the offence of robbery with violence, as the motorcycle was not found in his possession, and the doctrine of recent possession was erroneously applied to him. The doctrine of recent possession is stated in the case of **Malingi vs Republic (1989) KLR 227** as follows:

> **"The doctrine is one of fact. It is a presumption of fact arising under section 119 of the Evidence Act, Cap 80 Laws of Kenya which provides:**
>
> **"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."**
>
> **So as applies to the offence of theft or handling, recent possession raises a presumption of fact that the one in possession is either the thief or guilty receiver (R – v – Hassan s/o Mohamed (1948) 25 EACA 121). The trial court has the duty to decide whether from the facts and circumstances of the particular case under consideration the accused person either stole the item or was a guilty or innocent receiver. By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."**

30. PW4 and PW5 testified that the Appellant brought the motorcycle to the home on 18th May 2013, two days after the Deceased was last

seen with the said motorcycle and the Appellant on 16th May 2013. There was thus evidence adduced to show that the said motorcycle was in the Appellant's possession, and it is my finding that the application of the doctrine of recent possession correctly applied to the Appellant.

31. The evidence linking the Appellant to the robbery was largely circumstantial evidence. In summary. The evidence was that the Appellant was seen in the company of the Deceased, before the Deceased and the Deceased's motorcycle went missing, and that that the said motorcycle was later found in the Appellant's possession and body of the Deceased was also found upon the Appellant's direction.

32. I am in this regard guided by the principles that apply before a court can rely on circumstantial evidence as stated by the Court of Appeal in **Erick Odhiambo Okumu vs Republic (2015) eKLR (Mombasa Criminal Appeal No. 84 of 2012)** as follows:

> **"It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in MUSILI TULO V. REPUBLIC (supra),:**
>
> **'Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.'**
>
> **But for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In ABANGA ALIAS ONYANGO V. REPUBLIC, CR. APP. NO 32 OF 1990 this Court tabulated the conditions as follows:**
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> **'It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.'**
>
> ***(See also SAWE V. REPUBLIC [2003] KLR 364 and GMI V. REPUBLIC, CR. APP. NO. 308 OF 2011 (NYERI)).***
>
> **Before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt. (See TEPER V. R. [1952] All ER 480 and MUSOKE V. R [1958] EA 715). In DHALAY SINGH V. REPUBLIC, CR. APP. NO. 10 of 1997 this Court reiterated this principle as follows:**
>
> **"For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal."**

33. Applying these principles, I note that in the instant appeal PW1, PW4 and PW5 gave a consistent and collaborative account of what transpired from the time the Appellant met the Deceased until the time the Deceased's motorcycle was found in the Appellant's possession and the Deceased's body was found. PW1 also placed the Appellant at the scene when the Deceased was last in possession of the motorcycle, and before he was found dead. There was evidence adduced by PW 8 as to the ownership of the motorcycle and the injuries suffered by Deceased, evidence by PW4 and PW5 identifying and linking the Deceased and motorcycle to the Appellant; as well as the evidence by PW7, PW8 and PW9 as to the recovery of the motorcycle from the Appellant.

34. The only inference that can be drawn in the circumstances is that the Appellant the ones who robbed, killed and disposed of the Deceased's body.I therefore find that the essential elements of the offence of robbery with violence were proved beyond reasonable doubt.

On Legality of the Sentence

35. As regards the sentence of death imposed on the Appellant, at the time the Appellant was convicted and sentenced, the only sentence prescribed for the offence of robbery with violence was the death penalty. On 14th December 2017, the Supreme Court declared that a mandatory death sentence is unconstitutional in **Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR**. The Supreme Court thereupon gave the following guidance in respect of matters such as the present appeal where the death sentence had been meted as the only applicable sentence:

> **"Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing. It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners…. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case."**

36. As this is an appeal from a lower Court's decision, this Court has two options in line with the aforementioned decision by the Supreme

Court of Kenya. These are to either remit the matter back to the trial court to sentence the Appellant afresh, or to alter sentence in line with the powers given to this Court upon hearing an appeal, under section 354 of the Criminal Procedure Code. It is in my view that it would be more appropriate for this Court to impose the new sentence on the Appellant, so as to avoid parallel appeal proceedings in the High Court in the event the new sentence is imposed by the subordinate court, and at the same time in the Court of Appeal from the decision of this Court in this appeal.

37. Consequently, , I uphold the conviction of the Appellant on the chargeof robbery with violence contrary to section 295 as read with 296(2) of the Penal Code, but set aside the sentence of death imposed on the Appellant. The Appellant will accordingly make his plea in mitigation before I consider the appropriate sentence to impose, pursuant to the provisions of section 354 of the Criminal Procedure Code.

38. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 21st DAY OF FEBRUARY 2019.

P. NYAMWEYA

JUDGE

RULING ON SENTENCE

After hearing and considering the Appellant's mitigation, and taking into account the time the Appellant has spent in custody, , I sentence the Appellant to serve 10 years imprisonment for the conviction for robbery with violence, which term of imprisonment shall run from the date of this Court's judgment.

Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 21st DAY OF FEBRUARY 2019.

P. NYAMWEYA

JUDGE