



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CRIMINAL APPEAL NO. 2 OF 2018**

**LEACKY KIRORI MUTURI.....1<sup>ST</sup> APPELLANT**

**KEVIN ASHIUNDU ALIAS ABABU..... 2<sup>ND</sup> APPELLANT**

**PAUL GACHOHI LUCY ALIAS PAU.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Being consolidated appeals from the original conviction and sentence, in the Criminal Case No.417 of 2015, in the Principal Magistrate court at Kajiado, (Hon. Kasera-PM)*

**JUDGEMENT**

1. The three appellants herein were charged with four counts of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the offences are couched in the charge sheet as follows:
2. In Count I, the particulars are that on the 24th day of February 2015 at Isinya Township in Isinya sub-county within Kajiado county, the accused jointly with others not before court while armed with dangerous weapons namely, pistols robbed Joyce Ndinda Mutisya of motor vehicle registration Number KBD 421T Toyota, cell phones Tecno R7, Tecno p5 and Huawei 330, a gas cylinder 13 KG, cash money 42,000, assorted clothes all valued at Kshs. 609,700 and at the time of such robbery with violence used actual violence to the said Joyce Ndinda Mutisya.
3. In Count II, the prosecution alleged that on the 24th day of February 2015 at Isinya Township in Isinya Sub-county within Kajiado county, the accused jointly with others not before the court while armed with dangerous weapons namely, pistols robbed Phyllis Mutie cash money Kshs.2000, a cell phone make Samsung all valued at Kshs.4000, and at the time of such robbery used actual violence to the said Phyllis Mutie.
4. In Count III; particulars are that on the 24th day of February 2015 at Isinya Township in Isinya sub-county within Kajiado county, the accused jointly with others not before the court while armed with dangerous weapons namely, pistols robbed Francis Nguma of motor vehicle registration number KCB 043K Toyota Hilux, cash money Kshs.258, 000, and Nokia cell phone all valued at Ksh.2, 517,000 and at the time of such robbery with violence used actual violence to the said Francis Nguma.
5. In the last count, the particulars are that on the 24th day of February 2015 at Isinya Township in Isinya sub-county within Kajiado county, the accused jointly with others not before court while armed with dangerous weapons namely, pistols robbed Purity Mwanzia of two cell phones Nokia Lumia 520 and Huawei all valued at Kshs.25, 000, and at the time of such robbery with violence used actual violence to the said Purity Mwanzia.
6. Alternatively, the Appellants were also charged with handling stolen goods contrary to **section 322(1)** of the penal code. It was alleged by the prosecution that on the 24th day and 28th day of February 2015, the accused otherwise than in the course of stealing dishonestly received and retained one cell phone make Nokia 210 Serial No.35513050319121 valued at Kshs. 10,000 knowing it to be stolen or having reasons to be unlawfully obtained.
7. After a full trial had been conducted, the Honourable trial court in its judgement found the Appellants guilty of the offence of robbery after which they were convicted and sentenced to serve seven years' imprisonment. Having been aggrieved and dissatisfied by both the conviction and sentence imposed upon them, the Appellants timeously brought the instant appeal challenging the findings of the trial court.
8. The 2<sup>nd</sup> appellant lodged his amended supplementary grounds of appeal dated 24<sup>th</sup> September 2018. It is indicated therein that the prosecution failed to prove its case against him to the required standard of proof beyond reasonable doubt; the court failed consider his

defence; there is no documentary evidence to prove that he made a confession; that the police officer who conducted the identification parade was not summoned to give evidence in court in violation of **section 150** of the CPC and lastly, Magistrate overlooked the facts of my non-participation to the offences charged and erred in both law and facts by sentencing me to death.

9. The 3<sup>rd</sup> Appellant lodged his supplementary petition of appeal dated 5<sup>th</sup> April 2018 and filed on 6<sup>th</sup> April 2018. He indicated that the trial court relied on hearsay evidence; no direct or circumstantial evidence to link appellant with any counts of robbery with violence; the magistrate failed to analyse the evidence hence did not to assign a reason for finding the appellant guilty; defence not considered; the court relied on hearsay evidence given by the investigating officer to the effect he was implicated by accused 1 and 2; the death sentence was meted without considering the mitigating factors.

### **The Prosecution's Case**

10. The prosecution called a total of nine witnesses in support of its case. PW1 Joyce Ndinda Mutisya testified that on 24<sup>th</sup> February 2015 she was on duty at work where she works as a clerk in Nairobi, and she lives in Isinya. She was driving her motor vehicle registration number KBD 421T. When she reached the gate of her home, she hooted at the gate at 7 pm so that the gate could be opened. As she was waiting for the gate to be opened, that is when she found herself pointed with a gun on her neck.

11. The assailant demanded her cooperation as the gun was now put on her cheek. He was not masked and he had marks on his face. Further that he was not one of the persons before court. He then took her to the master bedroom after which the assailant demanded a million shillings. She did not have such an amount of money and gave them on Kshs. 41,000. He took then took her to the couch where another assailant who had his face covered joined them.

12. The assailants then proceeded to take items to the motor vehicle. One of the assailants threatened to rape her in turn if she declined to give them log books. She told them that the logbooks were at the bank. They took her radio and ring. She pointed out that the 3<sup>rd</sup> Appellant is the one who took her ring as the other one takes her house girl's phone. Purity was with mzee. She heard her raise alarm. She was brought to the house. The assailants also searched mzee but he had no money. They also asked for postcard and pin after which they withdrew money.

13. The assailants then interrogated mzee with regard to how he built the house and he told them that he took a loan. They were then taken to the bedroom where assailants tied them with their hands behind their backs. The assailants then locked bedroom from outside. She then heard her motor vehicle being driven away.

14. She averred that she visited the police station to identify the assailants who had been already been arrested. She told the court that she managed to identify the 3<sup>rd</sup> Appellant and the 1<sup>st</sup> Accused (deceased). Further that the Appellants admitted having committed the robbery. She stated that the 3<sup>rd</sup> Appellant pleaded to the complainants to protect them. Further, nine people were brought for purposes of the identification parade. PW1 told the court that the 3<sup>rd</sup> Appellant corporate with her and told her about the whereabouts of the motor vehicle they stole.

15. She stated that the 3<sup>rd</sup> Appellant told her that he was only given kshs.2000 from the money they stole. It was her testimony that the 1<sup>st</sup> Accused (deceased) hit her with a bolt of a pistol on her right chest and she sustained injuries. She produced a P3 form and the identification parade form as an exhibit. She later found her motor vehicle KBD 421T at Isinya Police Station.

16. Upon cross-examination by 3<sup>rd</sup> Appellant, PW1 reiterated that she identified him at the parade and that his face was not covered with a mask during the robbery. Further that she was with the 3<sup>rd</sup> Appellant for about 3 hours in the house and that she marked his face very well. She recognized was able to recognise the 3<sup>rd</sup> Appellant at the identification parade and that they were four in total during the robbery.

17. The evidence of PW2; Francis Nguma, is that he is a businessman. He testified that on the material date, he went home at 9 p.m. and as he reached the gate, he hooted so that Pw3 could open the gate (small gate). He stated that as he entered the house, he heard her raising alarm. Further, one of the assailants came out and pointed a pistol at him through the windscreen. The assailant then demanded cooperation from him. He told the court that the gate was also opened by one of the assailants (the 1<sup>st</sup> Accused) who then forcibly entered the car and pushed him to the co-driver seat after which he drove it to the parking. He was asked how much money he had.

18. PW2 testified that he told them he had Kshs. 10,000, Kshs. 250000 was in the motor vehicle. They took the phone Nokia 210. He was taken to the house through the kitchen door. He saw his wife lay on the sand and one of the assailants was watching after her. The assailants then demanded 1 million which informed them that he did not have. He then heard them take household goods. He stated that he managed to identify the 1<sup>st</sup> accused well and that his phone was recovered. It was stated that the 3<sup>rd</sup> Appellant told them that he was with 1<sup>st</sup> Appellant during the robbery. Further that the 3<sup>rd</sup> Appellant told him that he was brought on a motorcycle by the 3<sup>rd</sup> Accused.

19. Upon cross-examination by the 3<sup>rd</sup> Appellant, he stated that he was not present at the identification parade. He further stated that he saw the 3<sup>rd</sup> Appellant's face during the robbery and that later found him at the police station. And that he asked PW2 to forgive him. During cross-examination by the 2<sup>nd</sup> Appellant he stated that he did not see him in the house, that he was not present at the identification parade. During cross-examination by the 1<sup>st</sup> Appellant, he stated that he did not see him at the scene of the crime and that it was the 3<sup>rd</sup> Appellant who mentioned him.

20. PW3 - Purity Mwanzia testified that she worked for PW2 during the time of the robbery. She told the court that on the material date, she closed work at 9:30 p.m. She saw 3 people in the compound who demanded her to corporate with them and that they hit her and took her to the sitting room. She found PW1 tied in the sitting room and PW2 was brought to the same room after which the assailants demanded for money.

21. The testimony of PW4; Phyllis Nduku Mutie is such that on 24/2/2015 she was in the house at around 7 p.m. when the PW1 came. She went to open the gate for her. She stated that as PW1 parked her car, she saw one of the assailants entering the compound. He followed her and caught her after which he told her to keep quiet or he could kill her.

22. Further that the assailant placed a gun on my cheek. She was not able to identify the person since it was dark. She saw another assailant pass her, who then stood near the motor vehicle. She was then taken to the house in a room with lights on. He told her not to look at him and she then looked down.

23. It was her testimony that one of them had taken her phone and it had been switched off. She told the court that she lost her Samsung phone and cash to them. My phone was not recovered. She did not identify any of the people. During cross-examination by the accused persons she testified that she was not able to identify any of the appellants.

24. PW7 is Stephen Lemaya; a doctor at Isinya hospital who corroborated Pw1 testimony. He testified that she sustained injuries during the robbery. On 26/2/2015 he filled the P3 form. His findings were that Pw1 was injured on the chest and her hands were bruised, the injuries were 2 days old. The weapon used was a blunt object. Degree of injury was harm. P3 form produced as an exhibit.

25. PW9, Salim Bibi a CID Officer was the investigating officer in this particular matter. He narrated that on 24/2/2015, in the evening the complainants came to the police station at 11 p.m. A report was made that they were attacked by men armed with pistol and rungu. We took inventory of what was stolen they said what they lost; PW2 had lost motor vehicle KCB 043k which was black in colour, money to the tune of Kshs. 258,000, phone Nokia and a copy of the logbook. Record- all lost is Kshs. 2,517,000. Kshs. 5900 went to Martin Oloo by Mpesa, Safaricom data.

26. Further that Pw1 lost motor vehicle Toyota DX KBD 421T, white Tecno R7, Techno P5, Knavery gas cylinder, money Kshs. 42,000, motor vehicle was recovered in Nairobi in possession of the accused, whom we arrested. Pw4, the house girl lost Kshs.2, 000 and Samsung phone valued at Kshs.4, 000. Pw3 lost Nokia Lumia 520 which was recovered, Nokia black was found with George Gakura and Joseph Kungu the 3rd appellant through Carolyn Guchu, pw6. Nokia Lumia was found with Lucas Omondi Onono who told us he got it from Robert Ouko Ngeso, accused 5. Huawei 33 was found with Joan Wangithi, she took us to her sister in law, Jackline Aoko. She took us to Charles were alias kuku. After writing statements the officers engaged Airtel and Safaricom. Lucas Onono had the Nokia Lumia, they arrested him in Kariobangi, and he led them to Robert Ouko Ngesa whom he called on the phone.

27. Sylvester Otieno Jayallo ran away after he knew they were near the bar where he was. Lucas Onono and Robert Ouko were subjected to identification parade but none of them then was identified. The police officers teamed up with police at Kariobangi. Sylvester Otieno was known by police as a member of the gang. They went to Pavis house in Korogocho where we arrested the 3rd appellant. He told them they were in Isinya but he does not know which post.

28. They were known in the area. The 3rd appellant was with other people. They arrested all of them brought them to Isinya. The 3<sup>rd</sup> Accused was with Odhiambo whom they interrogated them. He told the court that the 3rd appellant implicated the 3<sup>rd</sup> accused to have been at the scene of the robbery, they were subjected to an identification parade. During the identification parade, the 1st appellant was identified by the complainant when she said she saw a brown slim man.

29. PW1 identified 3<sup>rd</sup> appellant by touching him. The 1st accused person (deceased) cooperated with the complainants. He told the complainants that he drove Toyota DX and left it around in the workshop and that that the robbers were six in total. Amongst the robbers who were mentioned by the 1<sup>st</sup> accused (deceased) were Sylvester Otieno Jayallo and Biro Biro who were not found. Further that, Biro drove pick up KCB with household items and the 2nd and 3rd accused were taken on a motorbike.

30. PW9 stated that the 1st appellant told him that they came with 3<sup>rd</sup> accused (2<sup>nd</sup> appellant) and Sylvester Otieno. That the 1st accused person admitted that he had a gun but he returned it to the owner. He stated that he retrieved the telephone dates to establish who was using the phones. Panalogis phone was with Ann Wamboi Kimani. Huawei 330 was with Wamboi Ann, she said it was given to her by Jackeline Aoko her sister in law. Toyota DX was recovered.

31. During cross-examination by the 3<sup>rd</sup> appellant, PW9 stated that he was identified by Pw1 and that it was his neighbour who showed the police his house when they visited the plot. He also stated that he did not find the 3<sup>rd</sup> appellant with any stolen items. PW9 reiterated that the complainant described him that is why he brought the 3<sup>rd</sup> Appellant to court. He stated that the 3<sup>rd</sup> appellant cooperated by making a confession that he was involved in the robbery.

32. During cross-examination by the 3<sup>rd</sup> accused, he stated that the police arrested him while driving with the 1st accused (deceased). Further that he was not arrested with an exhibit, that the complainant did not identify him during the identification conducted by OCS Isinya Emojong and that he was mentioned by someone that he rode the motorcycle to the scene of the crime. Upon cross-examination by the 4th accused, PW9 stated that he was mentioned by the 1st accused (deceased) and the 3rd appellant.

33. After having through the above evidence and exhibits produced before it, the learned trial magistrate was satisfied that the prosecution had made out a prima facie case against the Appellants and accordingly placed each of them on their defence under **section 211** of the Criminal Procedure Code Cap 75 Laws of Kenya.

#### **Defence Case**

34. The defence case is premised upon three witnesses. DW1 testified that he was not involved in the theft that occurred on 24th February 2015. He was arrested on 3<sup>rd</sup> June 2015 and taken to Isinya Police Station. The complainant had told the police to look for a tall brown man. He stated that he is not the only tall brown man. That evening complainant picked him at the identification parade. He stated he does not

know the offence. Upon Cross-examination by the counsel for the state; He stated that he does not have a witness in court, that his grandmother was at home when he was arrested and that the officer only talked of a tall brown man.

35. DW2 testified that on 24th February 2015, he was at home in Korogocho. On Saturday morning he went to the parade in NYS. After the parade he went to work at 8 A.M. He later went to a certain bar in Korogocho where he found 2 men therein. He entered the bar and before he settled numerous police officers entered and arrested him. He was then taken to Kariobangi police station.

36. He was asked if knew some lady that was outside the bar. The said lady had said she did not know him. He stated he did not know the lady. Upon reaching the police station he was put through an identification parade where some officers also stood at the parade. He stated that he was not picked in the parade. Upon-cross examination by the counsel for the state; he stated that he heard Biro say he was identified by one of the people in court and that he lost his PL in 2014 of which he reported.

37. DW3 testified that he was arrested of another offence of robbery with violence and that he was out of custody on bond at the time he was arrested with the present offence. He stated that the court, in that case, had told him that he had a case to answer. He told the court that he was jointly charged with this offence together with other people he did not know. Upon cross-examination by the counsel for the state, he stated that he had treatment notes but he gave them to the lawyer for civil case, that the 1st and 3rd appellant said that they did not mention him in their case.

### **1<sup>st</sup> Appellant' Submissions**

38. The appellant presented his written submissions dated 20<sup>th</sup> July 2018 and filed on 23<sup>rd</sup> July 2018 therein he submitted that he was not identified by PW2 and on the testimony of PW2 and PW9 he was implicated by the 3<sup>rd</sup> Appellant who thereafter denied in his cross examination by the 3<sup>rd</sup> Appellant that he was not with him at the time of the commission of the offence.

39. The appellant never admitted being at the scene of Crime and there was no proof of his participation. In addition, the purported confession by 3<sup>rd</sup> appellant should not be relied on as it was contrary to **Section 25(a)** of the Evidence Act. Finally, the statements made by 3rd appellant and 1<sup>st</sup> accused implicating the appellant was exculpatory and extra judicial and evidence of a weak character.

### **2<sup>nd</sup> Appellant's Submissions**

40. It was averred that PW2 and PW9 testified against the appellant and none of other prosecution witness did. PW2 averred that 3<sup>rd</sup> Appellant is the one who mentioned being with the 1<sup>st</sup> and the 2<sup>nd</sup> Appellant at the time of the robbery. Further, that Paul Gachohi (3<sup>rd</sup> Appellant) denied during cross examination that the 2<sup>nd</sup> Appellant brought them to the scene of crime by his motorcycle and that he implicated the 1<sup>st</sup> and 2<sup>nd</sup> appellant. It was contended that the trial magistrate erred in failing to consider the appellant's defence and failed to assign any reasons for rejecting the appellants' defence which was in contravention of Section 169 of criminal procedure code. He cited the case of **Okeno vs R 1972 EA32**.

41. It was argued that the appellant never admitted to being at the scene of crime and no proof of appellant's participation in the crime. Further that the trial magistrate erred in relying on purported confession of the 3<sup>rd</sup> appellant against the appellant contrary to **Section 25(a)** of the Evidence Act. The statement made by 1<sup>st</sup> and 3<sup>rd</sup> appellant implicating the appellant was exculpatory, extra judicial and not a confession. The evidence adduced was of a weak character which could have been offered against the appellant and would not sustain his conviction.

42. It was argued that the evidence of PW2 and PW9 which was to the effect that the 1<sup>st</sup> and 3<sup>rd</sup> appellant had implicated the appellant was not a confession and if it was a confession it was not corroborated hence it cannot be a basis of a conviction of the appellant in a joined trial. Further that the statement made by 1<sup>st</sup> and 3<sup>rd</sup> appellant at trial could only amount to accomplice evidence which must be corroborated in material particulars such corroboration is lacking.

43. The appellant in his written submissions attacked the 4 counts levelled against him by the prosecution. He challenged the evidence regarding his identification at the scene of crime. He submits that on the 4 counts, PW1, PW2, PW3 and PW4 testified that they did not identify him. The appellant reiterated that on the day of the robbery, he was at home in Kanyancho on Saturday morning, went to NYS parade, work where garbage was being collected, and went to the bar at 8A.M. at Korogocho.

44. The appellant contends that he was made to attend the identification parade but nobody identified him as one of the perpetrators of the alleged robbery. In addition, he contended that the court relied on hearsay evidence adduced by Pw1 and that the trial court erred in law and fact by placing relying on such assertions without proof.

### **Respondent's Submissions**

45. Against 1<sup>st</sup> Appellant, written submissions dated 1<sup>st</sup> October 2018 and filed on the same day, the Respondents opposed the appeal and support the conviction. The evidence of Pw1 placed him at the scene of the robbery at her house when the appellant was tasked to guarding her at sitting room while colleagues were ransacking the house. There was sufficient close interaction between him and the witness pw1 thus vitiating any error or mistaken recognition. The said appellant was positively identified at the identification parade properly conducted and produced to court as exhibit 2 page 30 lines 6.

46. There was clear visibility for the complainants to positively identify him. In the appellant's sworn evidence, he confirmed that he was positively picked at by witness number one. This supports the prosecution's case that the accused indeed committed the offence on the night of 24/02/2015. On the issue of recent possession, the appellant led investigations under **Section 3 Evidence Act**, revealed where the witness

vandalized vehicle was to be found and true to investigations, the motor vehicle was found at the place.

47. Against 2<sup>nd</sup> Appellant, the role played by the appellant was an accomplice who introduced and ferried the appellant, Paul Gichuhi, and another via a motorcycle. Whereas he was not picked out by prosecution witness taken in totality, the events of the day irresistibly point to his involvement in ferrying the appellant, Paul Gichuhi and another to the site of the robbery. The respondent submits that the cross-examination on whether 3<sup>rd</sup> appellant mentioned the appellant, which he responded that he mentioned him because he was being harassed, and the Respondent is of the view that 3<sup>rd</sup> appellant response was a mere denial.

48. Against 3<sup>rd</sup> Appellant, the respondent vide their written submissions stated that the prosecution at trial established and proved all three ingredients required to prove the offence of robbery with violence. The evidence presented connected to the offence of robbery with violence, in particular the testimonies of PW1, PW2, PW3 and PW4. The respondent relied on the court of appeal decision of **Stephen Karanja versus Republic criminal case no. 110 of 2008.**

49. The appellant was convicted by evidence of an accomplice 3<sup>rd</sup> appellant (1<sup>st</sup> appellant herein), who informed the investigation that he was with the Appellant and 3<sup>rd</sup> accused (2<sup>nd</sup> appellant herein). It is the prosecution's humble submissions that the evidence to sustain a conviction based on accomplice evidence was not satisfied against the appellant. The only prosecution evidence was that of PW2 and PW9 the investigating officer who stated that he arrested the appellant because he was pointed out by the second accused.

50. PW1, PW2, PW3, PW4, PW5, PW6, PW7, and PW8 did not pick him out nor did Dw1 mention him in his evidence in chief. Properties of PW1, PW2, PW3, and PW4 were recovered, none was said to be recovered from the current appellant. In conclusion the state conceded the appeal against the appellant on both conviction and sentence.

### **Law and Determination**

51. I have gone through the evidence on record, the grounds of appeal and the appellants' submissions, in my view this cases hinges on whether or not the Appellants herein were properly identified as the assailants in this matter.

52. The duty of this court in this appeal is to submit the evidence adduced in the trial to fresh analysis in order to reach its own independent conclusion. In doing so, the court must bear in mind that unlike the trial court, it has not heard the opportunity of seeing and hearing the witnesses testify. **Okeno vs. R (1972) EA 32**

53. On whether the Appellants herein were properly identified as the assailants who robbed the complainants, the court shall interrogate whether the identification was free from error. In **Cleophas Otieno Wamunga vs Republic (1989) KLR 424**, this Court stated as follows: -

***“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”.***

54. The more reliable mode of identification is recognition, the caution made in the **Turnbull case** should be heeded, thus:

***“Recognition may be more reliable than identification of a stranger but even when the witness in purporting to recognize someone which he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.....”.***

55. I'm conscious of the need for careful scrutiny of identification evidence, before basing a conviction on it. It relied on dicta from the case of **Abdullah Bin Wendo vs Rex 20 EACA 166** that:

***“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 favoring 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.”***

56. In the criminal appeal case of **Titus Wambua vs Republic Criminal Appeal 23 Of 2014**, the court observed that we must examine the conditions that existed at the time and place of the robbery and their favourableness or otherwise positive identification or recognition as alleged by the complainant as well as the state of mind of the complainant which would determine whether he or she had capacity to identify the appellant.

57. In the instant case, I now interrogate whether or not the 1<sup>st</sup> and 2<sup>nd</sup> appellant; **Leack Kirori Muturi** and **Kevin Ashaundu Alias Ababu** respectively, were properly identified as some of the assailants that attacked the complainants. I have noted that none of the nine prosecution witnesses who testified during trial identified the 1<sup>st</sup> and 2<sup>nd</sup> Appellants. They were neither found in possession of any of the stolen items. The 1<sup>st</sup> Appellant was made to attend an Identification parade but nobody pointed a finger at him. The evidence of PW1 and PW2 indicates that the 1<sup>st</sup> Appellant was mentioned by the 3<sup>rd</sup> Appellant (Paul) who told them that he was part of the gang that ravaged their home. He further told them that Kevin, the 2<sup>nd</sup> Appellant was the one who ferried him on a motor cycle to the complainants' home.

58. The Learned trial magistrate relied on this evidence as the basis to convict and sentence the 1<sup>st</sup> and 2<sup>nd</sup> Appellants. In my view the evidence relied upon was hearsay due to its very nature that it is evidence asserted by a person other than the witness who testified. This evidence was offered as evidence of the truth of that assertion rather as evidence of the fact that the assertion was made. It is not original evidence. The rule against hearsay states that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of the stated fact. Thus, the learned magistrate relied on the truthfulness of the evidence hence with all due respect; there was a misapprehension of the law.

59. Further, it is clear that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were incriminated by their co-accused. The evidence relied upon by the Learned Magistrate was also not corroborated, which makes it evidence of the weakest kind. Such evidence is incapable of sustaining a conviction on its own or without having been corroborated. The law on the value of statements made against co-accused in a joint trial is well settled. In Anyangu & Others vs. Republic [1968] EA 239, the Court of Appeal for East Africa held as follows at Page 240:

***“A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused, it may, in a joint trial be “taken into consideration” against that co-accused. It is however, not only accomplice evidence but evidence of the ‘weakest kind’ (Anyona s/o Omolo and Another VR (1953) 20 EACA 318). A statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is tried.”***

60. Applying the foregoing decision to the circumstances of this case, the statement that was purportedly made by the 3<sup>rd</sup> Appellant which implicates the 1<sup>st</sup> and 2<sup>nd</sup> Appellants does not amount to a properly called entered confession. It was undoubtedly exculpatory and extra-judicial. In the case of Joseph Odhiambo vs. Republic Cr. Appeal No. 4 of 1980 this Court of Appeal held that:

***“An exculpatory extra judicial statement by one accused cannot be used as evidence against a co-accused’. Even if it could be held to have been a confession, which it was not, the law is that the statement and evidence of a co-accused person is evidence of the weakest kind since an accused person can implicate another, intending to save himself from blame.”***

61. In view of the foregoing, I find that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were not properly identified as some of the assailants who robbed the Appellants. In the premises, the prosecution failed to establish a case of robbery with violence against the 1<sup>st</sup> and 2<sup>nd</sup> Appellants.

62. As regards the identification of the 3<sup>rd</sup> Appellant, **PAUL GACHOHI LUCY ALIAS PAU**, I shall apply the same principles of identification cited above. An application of the principles set out in the case of Republic versus Turnbull 1976 3 All ER 549; the court is required to examine closely the circumstances in which the identification by each witness came to be made, based on the guidelines bellow.

63. The court would look into the period within which the witness has the accused under observation, at what distance and whether the observation was in any manner embedded e.g. by-passing traffic or a press people. Is it a case of identification or recognition? If recognition, how often does the witness see the accused person, was there a special reason of remembering the accused, time that elapsed between the original observation and the subsequent identification to the police and as there any material discrepancy between the description of the accused given to the police by the witnesses when first seen by him and the accused actual appearance?

64. According to the evidence of PW1, she had sufficient opportunity, aided by the fact that lights were on to positively identify the 3<sup>rd</sup> Appellant. She stated that she was with the 3<sup>rd</sup> Appellant for a three period of the ordeal. She told the court that the 3<sup>rd</sup> Appellant was unmasked and that she was able to properly identify him. Upon identification parade, nine people were lined up and she managed to identify him as the man she was with in the house on the night of the robbery.

65. Further, that he cooperated with them at the Police station by telling them where to find the stolen cars. PW2 corroborated PW’s testimony. He testified that the 3<sup>rd</sup> Appellant was present at the scene of the robbery. In my view this account favours a positive identification. Thus, I find that the 3<sup>rd</sup> Appellant was properly identified as one of the assailants that robbed the Appellants.

66. In conclusion, I find that the prosecution proved its case beyond reasonable doubt against the 3<sup>rd</sup> Appellant. It is clear from the evidence on record that he was properly identified by the complainants. He also cooperated in the recovery of some of the items that were stolen from the complainants during the robbery. There is also evidence that violence was visited upon PW1 and the same is corroborated by the evidence of PW7 the clinical officer who treated and examined PW1. Injuries were noted on her body and were described as harmful. Thus, the appeal fails on the part of the 3<sup>rd</sup> Appellant.

67. As regards the 1<sup>st</sup> and 2<sup>nd</sup> Appellant, the prosecution failed to prove its case against them, to the required standard of proof beyond reasonable doubt. The appeal succeeds of the part of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants.

68. Lastly, I would like to address myself as to sentence. The law on mandatory death penalty in Kenya being unconstitutional is now settled following the Supreme court decision in Francis Muruatetu v Republic 2017 ECLR. From the record the appellants are indicated to have no previous criminal records. The learned trial magistrates treated each one of them as first offenders including the appellant. In mitigation the appellant sought for leniency on grounds that he is a family man whom his family solely depend on him for provisions.

69. I have taken into account the period already served by the 3<sup>rd</sup> Appellant which is approximately four years from the date of arrest. I hereby sentence the 3<sup>rd</sup> Appellant to eight years’ imprisonment from the date of this arrest taking also account of section 333 (2) of the Criminal Procedure Code and the period spent in custody.

70. I hereby quash the conviction and sentence imposed upon the 1<sup>st</sup> and 2<sup>nd</sup> Appellants. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants be and are hereby set at liberty unless otherwise lawfully held.

71. Fourteen (14) days right of appeal explained.

**Dated, Delivered and Signed at Kajiado this 8<sup>TH</sup> day of August 2019**

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**Hon. R. Nyakundi**

**Judge of the High Court**