REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO 68 OF 2016

JULIA WANGECHI GITHUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(**An appeal against the original conviction and sentence of Hon. P.O. Ooko (PM) arising from a judgment delivered in Mavoko Principal Magistrate's Court Criminal Case No. 658 of 2012 on 26th January, 2015)**

JUDGMENT

The Appeal

The Appellant was charged in the trial court with two counts of robbery with violence contrary to section 295 as read with 296 (2) of the Penal Code. The particulars of the first count were that the Appellant on 28th August, 2012 at Daystar junction in Athi River District in Machakos County, jointly with others not before court, robbed Paul Mbugua Gichaga of motor vehicle KBE 972E make Fuso fighter valued at KShs. 2.5 Million; a mobile phone make Nokia 1121 valued at KShs. 6,500/=; an ID card, Equity Bank ATM card, Driving Licence and Cash KShs. 7,800/= all valued at KShs. 2,514,000/=; and at the time of such robbery used actual violence to the said Paul Mbugua Gichaga.

The second count was that the Appellant on 28th August, 2012 at Daystar junction in Athi River District in Machakos County jointly with others not before court robbed George Njuguna Mbugua of mobile phone make Nokia 8280 valued at KShs. 8,000/=, a driving licence, ID card, Barclays Bank ATM card and cash KShs. 10,000/= all valued at KShs. 21,700/=; and at the time of such robbery used actual violence to the said George Njuguna Mbugua.

The Appellant was convicted of both counts and sentenced to suffer death for the first count. The sentence for the second count was however put in abeyance. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal by way of an Amended Memorandum of Appeal she filed in this Court dated 13th June 2017.

Her grounds of appeal are as follows:

a) That the learned magistrate erred in law and facts in convicting the Appellant while relying on identification evidence by PW1 and PW2, whereas the same had not been supported by any description in an initial report to police prior to the identification parade.

b) That the learned trial magistrate erred in law and facts in failing to appreciate that the charge was bad on its face/duplex charge. Thus, the charges were incurable defective.

c) That the learned trial magistrate erred in law and facts in failing to appreciate that the Prosecution had failed to prove its case to the standard required in law that is, prove beyond reasonable doubt.

d) That the learned trial magistrate misapprehended the facts, applied wrong legal principles, and drew erroneous conclusion to the prejudice of the Appellant.

e) That the learned trial magistrate erred in law and facts in admitting the evidence of PW7 whereas the evidence was inadmissible in law.

f) That the learned trial magistrate misdirected himself in law in that, he shifted the onus of proof from the prosecution to the Appellant contrary to the law.

g) That the learned trial magistrate erred in law and facts in convicting the Appellant whereas the Appellant's constitutional right to a

fair hearing had not been afforded.

h) That the learned trial magistrate erred in law and facts in failing to take into account, and or failed to consider, and or failed give reason why he disregarded the Appellant's alibi defence.

The Appellant also availed written submissions wherein she addressed the grounds she raised on her identification, the burden of proof, the duplex charge, violation of her constitutional rights and her alibi defence. Her arguments are detailed out in the section on this Court's determination hereinbelow.

Ms Mogoi Lilian, the learned Prosecution counsel opposed the Appellant's appeal, in submissions she filed in Court dated 19h September 2017 in which she responded to the issues raised by the Appellant, and urged this Court to uphold the conviction of the trial Court and confirm the sentence.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The Evidence

The Prosecution in this regard called seven witnesses to testify in the trial court. The facts on the record were that Paul Mbugua Gichanga (PW1) who was a driver of motor vehicle registration number KBE 792E was in Mai Mahiu with his co-driver George Maina (PW2) on 27th August 2012 at 4pm, when the Appellant requested them to transport her sister's household items at Athi River for a consideration of KShs. 12,000/=. PW1 testified that the Appellant made a down payment of KShs. 4,500/= and they then left for Athi River. While approaching Athi River, the Appellant informed them that they had reached their destination and that her sister had instructed her to wait for them. She then ordered for meat to be cooked for PW1 at a Mariakani hotel, and later at around 9:00 pm on the same day, the Appellant's sister came in company of another lady.

The Appellant then went into the kitchen and served PW1 and the co-driver the food and three cups of soup, and at around 9:30 pm, the Appellant's sister informed PW1 that her brother had finished parking her items. At 10:00 pm, PW1 boarded the vehicle with the Appellant, her sister, two brothers and four loaders and drove the vehicle under directions of the Appellant. He later realized that he was in a forest with his hands and legs tied, and that everything of his had been stolen including the vehicle. After he regained consciousness, he heard his colleague panting in a nearby bush. He crawled to where his colleague was and found his hands and legs tied. His colleague untied himself then untied PW1. PW1 realized that he had been beaten during the incident and was bleeding on the forehead.

They walked to Daystar University sign post where they were assisted by two people. The two men assisted them to Athi River Hospital but because there was a Doctors' strike, they went to Shalom Medical Centre. They then reported the matter to Athi River Police Station where they issued with a P3 form. PW1 was summoned a month later by Police at Athi River for identification parade, where he positively identified the Appellant.

On cross examination, he stated that he saw the Appellant for the first time on when she had hired the vehicle. That the identification parade was conducted a month from the incident and had approximately ten women. Further, that he easily identified the Appellant because she hired the vehicle during the day and even spent time with her till at night. That he saw her faced as they talked during the journey.

Alfred George Njuguna Mbugua (PW2) who was PW1's co-driver, recounted that the Appellant introduced herself to them as Esther. He basically reiterated PW1's account of the ordeal and stated that after leaving the hotel for the Appellant's sister's place, while PW1 was driving, he became unconscious and later found himself in the forest with both hands and legs tied. When he regained consciousness, he called out PW1 whose hands and legs were also tied. He untied himself and then untied PW1. PW2 claimed that his Kshs. 10,000/=, cell phone make, Nokia valued at KShs. 8,000/=, driving licence, Barclays Bank ATM and National Identity Card were stolen during the incident. Using a good Samaritan's phone they informed the owner of the vehicle of the ordeal, and that the good Samaritans also informed the police of the incident.

PW2 testified that he found that he had been beaten and as a result lost two teeth and sustained a cut on his left knee. Further, that they recorded their statements and were later called for identification parade. PW2 stated that he identified the Appellant since he sat together with her on the material day. On cross examination, he reiterated his sentiments in examination in chief that the appellant had hired the vehicle in pretext that her sister needed to relocate to Athi River.

John Ndungu Mbugua (PW3) was the owner of motor vehicle registration number KBE 972E, and he testified that he received a telephone call from PW1 informing him that the vehicle had been stolen. He went to Athi River where he learnt that PW1 and PW2 had been taken to Shalom Hospital for treatment. He visited them there and saw them both with injuries. He with the help of police officers tried to trace the vehicle to no avail. He stated that his vehicle was valued at KShs. 2.5 Million and he produced the log book as an exhibit. On cross examination, PW3 stated that he saw the Appellant for the first time in court and that he was not present during the robbery.

On 25th October 2012, Sergeant Charles Mwori Muoni Mureithi (PW4) who was attached at Loitoktok Police Station received a call at around 9:00 am that there was a vehicle passing through '*panya* (illegal) route' in an area called El Gatungela. He and PC Omar Kassan rushed to the scene and managed to get a motor vehicle registration number KBQ 609G Land Cruiser destined for Tanzania, together with its driver and two passengers, one of whom was a lady.

After their interrogation upon arrival to the police station, PW4 realized that the lady had once been arrested for a different offence but had escaped while in police custody. She was therefore charged with the offence of escaping from lawful custody in Loitoktok mobile court. She

was thereafter handed over to the DCIO Athi River Police Station and later charged with the offence of preparation to commit an offence when it was learnt that she was ferrying the vehicle to Tanzania. On cross examination, PW4 stated that he only investigated the Appellant with regard to motor vehicle KBQ 609G.

Inspector Joseph Wagairo (PW5) of Athi River Police Station testified that he was requested by Corporal David Sakwa to conduct an identification parade in respect of the Appellant, who indicated before the said parade that she was willing to participate in the parade. He then organized eight people of the same age and complexion to the Appellant. Further, that before the parade, PW1 and PW2 were accommodated inside the CID offices which is approximately 20 meters away from the police station, and did not meet after the identification.

PW5's testimony was that PW1 failed to identify the Appellant, but that PW2 did identify the Appellant. Further, that he inquired from the Appellant if she was satisfied with the manner in which the parade was conducted, and she answered in the affirmative and appended her signature in the report. PW5 signed the report on 29th September, 2012 which he produced as P. Exhibit 3. He on cross examination clarified that he did not conduct any investigation but only did the identification parade.

Corporal David Sakwa (PW 6) was on patrol on 28th August, 2012 when he received a report at 3.40 am of a robbery incident which had occurred at Daystar area. He went to the scene where he found PW1 and PW2 seated by the road side. The two had bodily injuries. He went with them to Athi River police station but since they had serious injuries; profuse bleeding and visible injuries, they were taken to Shalom Hospital for treatment. He interviewed the two who told him that they had been robbed of a canter lorry by a lady who had hired it from Mai Mahiu to Athi River, in the pretext that they were going to transport some household items from her sister.

PW6 then commenced investigations and was later informed that a lady had been arrested. He then organized for an identification parade to be conducted and she was positively identified by PW1 and PW2. He produced a photograph of the vehicle and logbook as P. Exhibit 6 and 7 respectively. He stated that the vehicle has never been recovered. On cross examination, he stated that the Appellant's photos were taken after the identification parade and denied that he was aware of the Appellant's photos in print media.

Pauline Ndunge Kimeu (PW7), a Clinical Officer at Athi River Medical Services, produced treatment notes and P3 forms for PW1 and PW2 filled by her colleague Maureen Maitha who was on maternity leave. The treatment notes and P3 forms were produced as Exhibits 4 and 5.

The trial magistrate found that the prosecution had established a *prima facie* case and put the Appellant on her defence. The Appellant gave a sworn statement that she was in her hotel on 29th September, 2012 at 8:00 pm when two police officers who were known to her requested her to accompany them to the police station at Loitoktok. That a nearby butchery had by then been broken into and properties stolen. She assumed she had been arrested in relation to the said robbery. That upon arrival to the police station, she was locked up in the cell. The next day she was informed that she was suspected to have committed an offence, and was taken to Kajiado police station where she was locked up for a day. That she was expectant and her labour started and was taken to hospital and delivered.

Upon being discharged, she was taken back to the police station where she got media people who took her photographs. She was then arraigned in Kajiado Law Courts where she was charged with stealing a motor vehicle. That on 29th September, 2012, she was subjected to an identification parade at Athi River Police Station where she was not identified by PW1 and PW2 and was thereafter arraigned in court.

The Determination

After considering the grounds of appeal, submissions thereon and evidence adduced in the trial Court, I find that the main issues raised by the Appellant in her appeal are firstly, whether the charge sheet was defective; secondly whether her identification was proper; and lastly, whether she was convicted for the offences of robbery with violence on the basis of consistent, reliable and sufficient evidence.

Was the Charge Sheet Defective?

The Appellant's submissions on the defective charge was that the charge sheet was a duplex charge, and she cited **Joseph Njuguna Mwaura & others vs Republic (2013) eKLR** for the position that the charge sheet was thereby defective.

Ms. Mogoi on the other hand cited the decision in **Paul Katana Njuguna v. Republic (2016) e KLR** in support of her submission that the defect in the charge was not fatal, since the Appellant understood the charge she was facing from the time of plea which was properly taken in Kiswahili language, and that the court warned her of the seriousness of the offence she was facing. It was further contended that the Appellant has not demonstrated any confusion or prejudice suffered, thereby the defect did not prejudice her.

I am guided by the decision of a five-judge bench of the Court of Appeal in **Joseph Njuguna Mwaura & 2 Others v Republic [2013] e KLR *(Criminal Appeal No 5 of 2008)*** that explained and laid to rest the reasons why charging an accused person with the offence of robbery with violence under sections 295 and 296(2) of the Penal Code would amount to a duplex charge. The said Court, while following its earlier decisions in ***Simon Materu Munialu vs Republic [2007] eKLR (Criminal Appeal 302 of 2005)*** and ***Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal Appeal No 353 of 2008),*** stated as follows:

> **"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.**
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> **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."

I am also persuaded by the explanation by the Court of Appeal in **Paul Katana Njuguna vs Republic (2016) eKLR** that as the offence of robbery with violence includes the elements of the offence of robbery, if the particulars of the charge sheet show the elements of the offence of robbery with violence which are proved, then this is a defect that is not fatal and can be cured by this Court under section 382 of the Criminal Procedure Code.

The Court of Appeal in the case appreciated the defect in charging an accused under both sections, but went further to discuss the effect of that defect. It was held that what courts needs to have in mind is whether or not a failure of justice occurs with that defect. That the confusion that would arise due to the duplicity did not occur since the accused in that case fully cross examined the witnesses and raised no complaint both before the trial court and the High Court. So that while it would be undesirable to charge an accused person under both sections, it would not be prejudicial to that accused person if there is no risk of confusion in the mind of an accused as to the charge framed and evidence presented, in which case a charge which may be duplex will not be found to be fatally defective.

The converse position therefore is that if the evidence adduced pursuant to such a charge does not disclose the offence of robbery with violence, then this is a defect that is not curable under section 382 of the Criminal Procedure Code, for reasons that there will be two offences disclosed by the charge namely simple robbery and robbery with violence, which offences attract different penalties under the law, and prejudice would be caused to an accused person in this regard as it would not be clear what offence or sentence is applicable to him and to which he should raise a defence.

This Court will therefore have to also interrogate the other issues raised of the identification of the Appellant, and whether there was sufficient evidence to convict the Appellant for the offence of robbery with violence, to be able to make a determination as to whether the duplicity in the charge sheet was fatal or not.

Was there Positive Identification?

It is argued on this issue by the Appellant that that the trial magistrate erred in convicting her on the basis of unbelievable and insufficient identification evidence. She contended that PW1 and PW2's evidence on her dressing were contradictory, and that it was not interrogated whether the period between 4.00 pm and 10.00 pm was sufficient for identification. It was submitted that complainants should always describe the complexion, special features and marks for the evidence to be watertight. In this regard, the Appellant cited the decisions in **Victor Mwendwa Mulinge vs Republic (2014) eKLR** and **Turnbull vs Republic (1976) 3 ALL ER** among others.

The Appellant took issue with the fact that it was stated that the identification parade was conducted on 29th September, 2012 yet she was arrested on 25th October, 2012. She contended that the identification parade rules were flouted when no members of the parade wore the alleged yellow trouser of skirt and blue tops. She further submitted that rule (d) of the Police Forces Standing Order Cap 46 was violated, and that the parade was not conducted in accordance with the principles laid down in **Gabriel Kamau Njoroge v. Republic (1987) KLR**.

The Prosecution submitted that the Appellant was positively identified as being the one who hired PW1 and PW2 for transport services, and that she was among others not before the Court who violently robbed PW1 and PW2 on the night of the 28th August 2012.

On the issue of identification, I have reminded myself of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, *inter alia*, that:

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

In addition it has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

The evidence of identification at night must also be tested with the greatest care using the guidelines in **Republic - v- Turnbull, (1976) 3 All ER 549** and must be absolutely watertight to justify conviction as held in **Nzaro -v- Republic, (1991) KAR 212** and **Kiarie - v- Republic, (1984) KLR 739**. In the case of **Maitanyi -v- Republic, (supra),** the Court of Appeal stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect.

In the present appeal, PW1 and PW2 testified that they saw the Appellant during daylight at 4pm when she sought to hire their motor vehicle to transport her sister's belongings in Athi River. In addition, they testified that they were with the Appellant from 4pm on the way from Mai Mahiu to Athi River and until 10pm when they lost consciousness. The Appellant in addition served them food and soup. There were thus no difficult circumstances existing to interfere with their observation of the Appellant, and they spent a considerable amount of time with the Appellant within which to make that observation. The witnesses were called to the police station after a month of the robbery and PW2 was able to identify the Appellant from the identification parade.

As regards whether the identification parade was properly conducted in accordance with the law, identification parade procedures are regulated by Police Force Standing Orders now under the National Police Service Act 2011, and previously under the Police Act. (Cap 46) which has since been repealed. The procedure for identification parades were also laid out in the cases of **R V. Mwango s/o Manaa (1936) 3**

EACA 29 and **Ssentale v Uganda (1968) E.A.L.R 365**. The rules include the following:

- The accused has the right to have an advocate or friend present at the parade;
- The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;
- Witnesses should be shown the parade separately and should not discuss the parade among themselves;
- The number of suspects in the parade should be eight (or 10 in the case of two suspects);
- All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;
- Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and
- As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

In the present appeal, PW5 was the police officer who conducted the identification parade, and from the evidence adduced, the Appellant consented to the identification parade and signed the identification parade to signify her consent and affirmation of the results. The identification parade was conducted by an officer other than the Investigation Officer of the case and the witnesses did not see the Appellant before the parade. In addition, the two identifying witnesses did not communicate with each other once PW1 had been to the parade and before PW2 attended it. After a careful analysis of the evidence on record I am satisfied that PW5 acted with fairness in the parade arrangement and that the identification parade was properly conducted.

I therefore find that the Appellant were properly and positively identified as having been with PW1 and PW2 on the material date.

Was the Evidence adduced Sufficient?

The Appellant contended that PW1 and PW2 did not lead the police to her, and did not produce receipts showing she paid for fuel. She further argued that there was no mention of any weapon in evidence, yet it was claimed that PW1 and PW2 were injured. She further contended that no evidence was tendered as to why the attendance of the maker of the treatment documents could not be secured. Further, that PW1 and PW2's blood samples were not taken to ascertain intoxication, and that they never mentioned that they saw their attackers yet violence was upheld.

The Appellant also stated that her rights under section 77 (2) of the Constitution was violated since she was not allowed to address the court orally. She further submitted that her defence was ignored for no cogent reason occasioning miscarriage of justice.

The Prosecution, after summarizing the evidence adduced in the trial Court, submitted that the same was consistent, and there was no doubt created that the Appellant committed the offence of robbery with violence or as to his identification. It was further stated that the Appellant's evidence was a mere denial and did not shake the prosecution's case.

Section 296 (2) of the Penal Code provides as follows with respect to the offence of robbery with violence:

> **"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."**

The prosecution must therefore 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.**

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**.

In this regard the evidence stated in the foregoing given by PW1 and PW2 does indicate that after regaining consciousness, they found that all the property in their possession were stolen and they were injured. The last person to have been with them and the said property was the Appellant and her accomplices. The evidence linking the Appellant to the robbery was circumstantial evidence, namely that PW1 and PW2 were in the company of the Appellant before the said robbery and injury. We are in this regard guided by the principles that apply before a court can rely on circumstantial evidence as was 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),:***
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> ***'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.'***
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> ***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.'***
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> ***(See also SAWE V. REPUBLIC [2003] KLR 364 and GMI V. REPUBLIC, CR. APP. NO. 308 OF 2011 (NYERI)).***
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> ***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:***
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> ***"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."***

Applying these principles, we note that in the instant appeal PW1 and PW2 gave a consistent and collaborative account of what transpired from the time they met the Appellant until the time they regained their consciousness after having been robbed and injured. They both placed the Appellant at the scene when they were last in possession of the property that was stolen, and before they suffered injury. The only inference that can be drawn in the circumstances is that the Appellant and the persons she was with were the ones who robbed, injured and disposed of PW1 and PW2 after rendering them unconscious.

Lastly, the intervening period between the alleged time of the offence on 27th August 2012 and the time the Appellant was arrested does not weaken the inference of guilt, on the contrary it strengthens that inference as PW2 was able to positively identify the Appellant in an identification parade after one month on 29th September, 2012.

I therefore find that the essential elements of the offence of robbery with violence were proved beyond reasonable doubt, and in particular the theft of the PW1's PW2's and PW3's properties; the evidence by PW7 as to the injuries suffered by PW1 and PW2 during the robbery upon medical examination; as well as the evidence by PW1 and PW2 that the Appellant was in the company of other persons at the time.

In light of the positive identification of the Appellant and the evidence on robbery with violence adduced in the trial Court, I also find that the duplicity in the charge sheet was not fatal as the Appellant was not prejudiced by the defect. In addition, this is a defect that can thus be cured by this Court on appeal.

As regards the sentence of death imposed on the Appellant, at the time the Appellant was convicted and sentenced, the only sentence prescribed upon conviction 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 Muruateru & 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:

> **"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."**

This Court therefore has two options; to remit the matter back to the trial court to sentence the Appellant afresh or alter sentence in line with section 354 of the Criminal Procedure Code. In order to avoid parallel appeal proceedings in the High Court against the new sentence that may be imposed by the subordinate court, and at the same time in the Court of Appeal from the decision of this Court in this appeal, it is in my view more appropriate that this Court imposes the new sentence on the Appellant.

Consequently, , I uphold the conviction of the Appellant on the two counts of robbery with violence contrary to section 296(2) of the Penal Code, but set aside the sentence of death imposed on the Appellant. The Appellant will accordingly make her plea in mitigation before I consider the appropriate sentence.

DATED AND SIGNED AT MACHAKOS THIS 21st DAY OF MARCH 2018.

P. NYAMWEYA

JUDGE

RULING ON SENTENCE

After considering the appellant mitigation and considering that the Appellant has previous convictions, I sentence the Appellant to serve 10 years imprisonment for the conviction for count 1 of robbery with violence, and 10 years imprisonment for the conviction for count II of robbery with violence, which terms of imprisonment shall run concurrently. These terms of imprisonment have taken into account the time the Appellant has spent in custody.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 21st DAY OF MARCH 2018.

P. NYAMWEYA

JUDGE