REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL CASE NO. 82 OF 2015

DAVID GATHANGU NYAGUTHIO.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Appeal from the judgment conviction and sentence

in Othaya PM Cr. Case. No.35/2014, Hon. Ekhubi R.M.)

J U D G M E N T

David Gathangu Nyaguthio (the appellant) was charged with the offence of Robbery with violence c/s 296(2) of the Penal Code.

It was alleged that on the 4/1/2014 at Thunguri Township in Nyeri South District within Nyeri County jointly with others not before the court, being armed with dangerous weapons namely blunt object robbed Antony Wahome Karuga of cash 5000/= and a mobile phone make Forme all valued at ksh.6500/= and immediately before, and immediately after the time of such robbery used personal violence to the said **Antony Wahome Karuga**.

The case for the prosecution was that on 4/1/2014 at about 10:14p.m. the complainant Antony Wahome Karuga was walking home from Thunguri shopping centre. As he was nearing his gate, a person came running past, and ran past him, soon thereafter someone called him from behind, approximately 10m telling him to stop. He recognized the voice as that of David Gathangu, the appellant, a fellow villager. with whom they had interacted severally. Although it was Hence, augh it was dark, and he could not see clearly he recognized the voice.

He was fearful but he stopped. He noticed that the person who had called him was with three other people who attacked him, felling him to the ground. He was hit with a blunt object on the left side of the face and the left elbow. while down they stole his Ksh.5000/= from his pocket and mobile phone valued at Ksh.1500/=.

He raised alarm. A motor vehicle emerged with its lights on, and the attackers ran away. The driver of the said motor vehicle stopped and assisted him and took him Othaya Police Station where made his report, was issued with a referral note and was treated at Othaya District Hospital.

On 9/1/14 he was issued with a P3 – which was completed on 27/1/14. He later pointed the accused at Thunguri shopping centre where the police arrested him. Nothing of his was recovered from the accused person.

In cross examination he told the trial court that the person who ran past him was the one Ayub, a fellow villager, who told him to run for his safety. However, he did not see Ayub after the attack. Upon raising alarm, the 1st person to arrive at the scene was his wife, but she was not a witness. Neither was the driver one Kabucho who had escorted him to hospital.

He further told the court that the time before the alleged offence the appellant was walking with the aid of walking stick. That it is possible for people to speak in similar voices, that he was capable of recognizing most of the villagers' voices, that there were other people from the neighbourhood who responded to his alarm.

P.W.2 Ayub Kimita Muthoni told the court that on 4/1/2014 from 7.30pm. he was at Thunguri shopping centre at Kaguchi's bar. As he was leaving about 10:30p.m. he met the appellant who requested him to buy him liquor which he did. As he was leaving the appellant and 2 others, one of whom he identified as John who was armed with a beer bottle began to follow him. These persons attempted to hold him, and frisk his pockets but he managed to get away. As he ran away he passed the complainant not very far from the shopping centre, and warned him to run for his safety. He reached home safely. The following day he learnt that the complainant had been taken to hospital.

In cross examination he told the court that on the material date the complainant had left the bar earlier than both he and the appellant. That the appellant had recovered from a limp he had, and when he P.W.2 ran away, the appellant chased after him.

On cross examination by the court he said he heard screams but he thought the complainant was screaming due to drunkenness, and hence he never went back to assist him.

On further examination by the prosecutor he told the court after warning the complainant to run for his safety, he heard screams later on but did not recognize the voice of the person screaming. He did not suspect it was Antony because he thought had escaped from what he P.W.2 was running away from.

P.W.3 the clinical officer Ngumo Waitere from Othaya District Hospital filled the complainant's P3 on 27/1/2014. He had a history of assault by known persons. He complained of a headache, had a cut wound on the right side of the face, swollen left lower jaw and scalp, swollen and painful left shoulder joint swollen left elbow joint. He was first seen at the hospital two hours after the incident. The probable weapon was a blunt object. The degree of injury was ascertained as harm. The P3 was produced as Pexh.1.

On cross examination he told the court that at the time of examination the complaint was not intoxicated and his complaint was assault.

P.W. 4 No. 65268 Abdul Hussein of Kaguthu Police Post testified that at the material time he was attached to Othaya Police Station, Crime Branch. On 4/1/2014 he was the duty officer at the report office when at 10:30p.m. the complainant was brought by good Samaritan in a taxi. He was bleeding, had injuries to the head and hand. He reported that he was walking home from Ruguti where he had been drinking when he was attacked by three people who took his mobile phone and Ksh.5000/= from his rear trouser pockets. The attack took place near his gate and he raised alarm and neighbours including his wife came to his rescue. He recognized one of his attackers' voices as that of David Kathagi with whom they were together in the bar where P.W.2 bought him a drink.

P.W.4 directed the taxi to take the complainant to hospital. He was treated at Othaya District Hospital, was issued with a P3 which was completed. P.W.4 visited the scene. He testified that the complainant did not have a receipt for the phone, He learnt from P.W.2 that he had been chased by the appellant and others but they never caught up with him. Later, he liaised with APC Suleiman who arrested the appellant.

On cross examination he told the court that the complainant is the one who gave out the appellant's name because he recognized his voice on the night he was attacked. He did not witness the arrest, and denied

that the appellant was walking with the help of crutches which the police confiscated upon his arrest. He told the court that the complainant had injuries on the right side of the face according to the P3 but what he had seen was an injury below his left eye.

On 9/6/2015 the prosecution closed its case. By then the 1st trial Magistrate Nyakweba P.M. had been transferred and the matter was taken over by B.M. Ekhubi SRM. On 18/6/ 2015 he determined that the accused had a case to answer and put him on his defence.

In his sworn statement of defence on 24/6/15 the appellant told the court that on 4/1/2014 he had a fracture and was on crutches. That he was arrested on 8/2/14 by an AP from Ruraguti AP camp.

He attempted to produce X-rays films and treatment notes to prove that he had a fracture – but the same was objected to because he did not have a report accompanying the X-rays, which were also not dated. A summons to the medical officer in charge of Provincial General Hospital Nyeri did not bear nay fruits as the medics were on strike then. The court allowed the production of the radiography request forms dated 4/7/2013, 29/8/2013 and 6/5/2015.He closed his case on 8/9/15

In his well-reasoned judgment delivered on 23/10/15, the trial magistrate found that the prosecution had proved its case against the appellant beyond a reasonable doubt, convicted and sentenced him to death.

It is against that conviction that this appeal has been brought.

In the amended petition dated 13/4/2017, the appellant through the firm of Nderi, Kiingati Advocates raised three grounds of appeal; -

> 1) That the trial magistrate erred in fact and law in failing to give effect to article 159(2) of the constitution when it was apparent there had been reconciliation.
>
> 2) The learned trial magistrate erred in fact and in law in convicting the appellant one evidence requiring corroboration
>
> 3) The learned trial magistrate erred in fact and in law in failing to appreciate it was unsafe to convict the appellant on the evidence adduced.

The appeal was opposed and Ms. Jebet appeared for the state.

The 1st ground was based on what appears on the record to have transpired before the Hon. Nyakweba P.M. on 30/4/14. It is the appellant's contention that rendered his whole trial a mistrial.

On that day the record shows that the prosecution indicated to the court that the complainant wanted to withdraw the complaint.

The record then reads;

> <u>The complainant sworn states</u>
>
> "I am Antony Wahome Karuga. I am a farmer. The complaint is my neighbour. He violently robbed me of my mobile phone and cash Ksh.5000/= as I was walking home during the night. Since he is my neighbour, I decided to forgive him. He apologized and compensated me. I informed the investigating officer who consented with this arrangement".
>
> The court in rejecting his request stated.
>
> "The offence the accused person committed is a serious one. It attracts a death penalty. The purpose of the criminal justice system is to guard the citizens by punishing crime. Once a crime is reported, it is the responsibility of the Republic to prosecute the same. In the present case, it

appears that the complainant after reporting this offence went back to negotiate with the suspect. This is not desirable. For any charge to be withdrawn the court must be satisfied that there are sufficient reasons to permit the withdrawal. The grounds laid herein does not appear to me sufficient. Accordingly, I decline to allow the withdrawal. This case will therefor proceed as usual."

The appellant's submission is that the trial magistrate failed to exercise his discretion correctly as required by article 159(2) of the constitution which require courts to encourage/promote reconciliation. That trial magistrate arrived at this opinion without hearing the other parties.

Mr. Nderi's argument was that although the power of discontinuing a prosecution by the DPP is subject to the court's discretion, it was necessary for the court to hear not only the prosecution but also the accused person before making its decision by forestalling the application for withdrawal without hearing the accused person. The Court violated the tenets of fair trial.

Secondly, the complaint having been allowed to give reasons why the complainant wanted to withdraw the complaint, and having those reasons forming part of the record had the effect of overturning the presumption of innocence. This was prejudicial to the appellant. The magistrate ought to have subjected the complainant's application to cross examination, or have the same expunged from the record.

I was referred to the case of **R vs. Faith Wangui [2015] eKLR**

In response to this issue Ms. Jebet argued that the prosecution in that case did not even have the jurisdiction to allow the withdrawal of the complaint by the complainant because such offences can only be withdrawn by way of a *nolle prosequi* signed by an Asst. DPP or above. Further that the proper procedure had not been followed and the trial court was correct.in refusing the application.

She argued further that the case of **R v. Faith** was distinguishable as it relates to a petty offence. That s.204 of the Criminal Procedure Code would not be applicable to a charge of robbery with violence. She also argued that the withdrawal was a violation of the Bill of Rights, and inconsistent with the constitution and the criminal procedure.

In his rejoinder, Mr. Nderi reiterated that there was no unanimity in court regarding withdrawal of complaints by the complainant. He urged court to go through article 50, 159 of the Constitution and the Criminal Procedure Code. He submitted that the court has even allowed a reconciliation in a murder case – the case of Muhammed Abdul; and that the court herein was duty bound to reflect on the charge once there was an intention to withdraw. That it was a breach of the appellant's right under Article 50 of the Constitution to have the complainant take the stand, give evidence on record ascribing guilt on the accused without giving him the opportunity to challenge that evidence, amounted to a mistrial. He urged the court to find that any matter before court can be withdrawn/reconciliated.

Mr. Nderi proceeded to argue the 2nd and 3rd grounds together.

Referring to the trial magistrate's judgment he argued that the trial magistrate found that the evidence by voice recognition was unreliable and not credible in that the trial magistrate had made a finding that it was not clear what language the accused person is alleged to have used, or what name he had called the complainant by. He urged the court to find that the P.W.2 was not a credible witness for the reason that he had not reported the attempted robbery on his person and that if he had actually identified his assailants he would have reported the matter for investigations.

Further that the evidence of identification required corroboration. That the trial court was mistaken in making the assumption that the same persons who had attempted to rob P.W.2 were the same gang that robbed P.W.1 That the prosecution had not established sufficiently any connection between the two incidents and it was unsafe to rely on that evidence by presuming that the one the two were corroborative of each other. I was referred to the case of **Joshua Muriuki Mugathia Vs. R [2014] eKLR**.

Finally, that the failure by the prosecution to call the complainant's wife and the good Samaritan who

took the complainant to hospital and the arresting officer denied the court the advantage of the best evidence. Consequently the court could draw the inference that their evidence would have been be adverse to the case for the prosecution.

In response the prosecution submitted that the wife was not at the scene at the time of the incident hence her evidence was not necessary. The good Samaritan only took the complainant to hospital and the arresting officer would only attest to the number of days it took to arrest the appellant, and that in any case the prosecution, under s.123 of the Evidence Act, could not be directed as to whom they could call as their witness and were at liberty to call whichever witness they pleased.

Further that the evidence of P.W.1 was corroborated by that of P.W.2, that it was soon after P.W.2 passed and warned P.W.1 that he heard him scream so it must have been the same gang that had attempted to rob him that had robed P.W.1 and in any event P.W.2 knew the appellant and did to need to identify him.

This being a first appeal the I have the duty to re evaluate the evidence and arrive at my own findings, always bearing in mind that I never saw or heard the witnesses. **See Kiilu and Another V. R (2005) 1 KLR 174** where the Court of Appeal expressed itself thus;

> *"…an Appellant in a first appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."*
>
> *It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."*

In dealing with first ground the record speaks for itself. The trial magistrate then, Hon. Nyakweba P.M. did take down on oath, testimony by the complainant to the effect that the appellant had admitted to having robbed him, they had reconciled and he had received compensation. It appears from the record that the prosecution was well aware of that position and had no problem with the complainant's application to withdraw his complaint.

In rejecting the application, the trial magistrate stated,

> "The offence the accused person committed is a serious one".

I can see the appellant's concern. It is a genuine one. By making the above statement, the magistrate appeared to have taken the complainant's testimony to mean that the appellant had indeed admitted to committing the offence of robbery with violence against the complainant. It was no longer the offence the accused person was alleged to have committed. It took away the presumption of innocence especially when he proceeded to reject the application without interrogating what exactly the appellant had settled with the complainant, if at all. To that extent, I agree with Mr. Nderi's submissions, that complainant's testimony was prejudicial to the appellant.

Mr. Nderi urged the court to find that any offence can be withdrawn of reconciled.

That appears to be the case but with various restrictions, governed by various provisions of the law. For example, section 40 of the Sexual Offences Act.

Withdrawal of complaints generally is provided for under s.204 of the Criminal Procedure Code in the following terms; -

> "If a complainant, at any time before a final order is passed in a case under this part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may

permit him to withdraw it and it shall thereupon acquit the accused person"

I think it is important from the outset to differentiate withdrawal of a complaint by a complainant and reconciliation between a complainant and the accused person.

Section 176 of the CPC provides for the promotion of reconciliation in the following terms;

> In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.

The issue of withdrawal must of necessity begin with a definition of complainant.

The Criminal Procedure Code carries no definition of the complainant. There are varying views on the who a complainant is depending on the context.

In **Roy Elirema and Another Vs. Republic Cr. Appeal 67/2002** the court of appeal in discussing section 202 of the Criminal Procedure Code which provides for the dismissal of a case for non-appearance of the complainant, stated that;

> *"Complainant in this context has been interpreted to mean the Republic in whose name all criminal prosecutions are brought and not the victim of crime who is merely the chief witness on behalf of the Republic"*

This is in line with the powers of the Republic represented by the DPP under section 82 and 87 of the Criminal Procedure Code.

With the promulgation of the Constitution of Kenya 2010, the bill of rights, the victim has since moved centre stage in criminal proceedings.

At Article 50(1) on the right to a fair hearing;

> Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

At Article 50(9)

> "Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences."

The Victim Prosecution Act no 17 of 2014 was passed as

> AN ACT of Parliament to give effect to Article 50 (9) of the Constitution; to provide for protection of victims of crime and abuse of power, and to provide them with better information and support services to provide for reparation and compensation to victims; to provide special protection for vulnerable victims, and for connected purposes.

Section 9 provides for the rights of the victim during the trial process;

> (1) A victim has a right to —
>
> > (a) be present at their trial either in person or through a representative of their choice;

(b) have the trial begin and conclude without unreasonable delay;

(c) give their views in any plea bargaining;

(d) have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;

(e) be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;

(f) have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and

(g) be informed of the charge which the offender is facing in sufficient details.

(2) Where the personal interests of a victim have been affected, the Court shall—

(a) permit the victim's views and concerns to be presented and

considered at stages of the proceedings determined to be appropriate by the Court; and

(b) ensure that the victim's views and concerns are presented in a manner which is not—

(i) prejudicial to the rights of the accused; or

(ii) inconsistent with a fair and impartial trial.

(3) The victim's views and concerns referred to in subsection (2) may be presented by the legal representative acting on their behalf.

Section 13 of the describes the victim as a complainant who may address the court either in person or through an advocate and it is clear that the victim is no longer 'merely' the chief witness on behalf of the Republic but a central part of the criminal trial.

Compare the position of the CPC with that of the Sexual Offences Act no 3 of 2006.The Sexual Offences Act No3 of 2006 offers what could be the proper definition of a complainant, the Republic, the actual victim, or in special circumstances, a representative of the victim. This appears to me to expand the definition in the **Roy Elirema case**

"complainant means the Republic or the alleged victim of a sexual offence, and in the case of a child or person with mental disabilities, includes a person who lodges a complaint on behalf of the alleged victim where the victim is unable or inhibited from lodging and following up a complaint of sexual abuse"

Reading through various authorities I have found that the position as to who a complainant is in the Criminal Procedure Code is not settled when it comes to the withdrawal of cases. See **DPP v. Nairobi C. M's Court & Anor [2010] eKLR**, **R v. Faith Wangui [2015] eKLR** and others, whose view I share as in **Ketan Somaia & Jason Wellinghton Oluga V. R [2005] eKLR, Mulima V. R [2004] eKLR** who find it hard to accept that the prosecutor can double up as the complainant. Surely there must be two concepts of who complainant is; the actual victim, without whom the state would not be able to proceed with some aspects of the case, whose report to the authorities sets off an investigation, and the eventual prosecution. How many time have we heard police officers state that they have not received any complaint, even in matters within the public domain, for them to commence any investigations? There is that person against whom an offence is committed, against whom the law is broken so to speak, and for whom the state machinery in the criminal justice system gears itself up to deal with the offender.

Is it tenable that this person, once their report or complaint is received at the police station or the prosecution has started, could have no say as to whether the process should continue or stop? I wish to add my humble view to the view that this is person the one for whom section 204 of the Criminal Procedure Code exists, so that this person can approach the court and lay out the reasons for not wanting to proceed any further with the prosecution of the complaint already made to the police, already investigated, already before the court for trial and where **the court is satisfied with the reasons** given it has the discretion to allow the application and set the accused person free.

This in my humble view is not in any way inconsistent with Article 157 (6) of the Constitution which provides; - that the DPP shall exercise state powers of prosecution and may institute and undertake criminal proceedings against any person… in respect of any offence alleged to have been committed. An offence must have been alleged to have been committed someone must make that allegation. The DPP may also take over and continue criminal any proceedings that have been instituted/undertaken by another person and authority which the permission of that person/authority. The DPP also has powers to discontinue proceedings instituted by DPP/taken even by DPP – but even these power to discontinue is limited under Article 157(8). The DPP may not discontinue a prosecution without the permission of the court.

Hence both the power of the victim of the offence to withdraw a complaint, and that of the prosecution to do the same, are distinct. The submission by the state counsel therefore that the prosecution in this case had no jurisdiction to withdraw the complaint is correct to the extent that under s.204 it is the victim's only available room to tell the court directly that they do not wish to proceed with the case. Both are subject to the court's discretion. And each party has a right to be heard on the issue.

Article 50 of the Constitution does not distinguish an accused person and a complainant which it come to equally before the law –

> 1) "Every person has the right to have any dispute that can be resolved by the application of the law allowed in a fair and public hearing before court…"

On the issue of reconciliation, Article 159(2) (c) and (3) provide for Alternative Dispute Resolution and the Judiciary is required to encourage alternative dispute resolution. This gives strength to section 179 of the Criminal Procedure Code. However, reconciliation is limited only as to the type of case, common assault, cases relating to personal and or private matters, and cases that are not felonies. Again the terms of the reconciliation are subject to the approval of the court.

The golden threat through these provisions is the exercise of judicial discretion whether it is a withdrawal by the complainant or the state, whether it is reconciliation on ADR the court must be satisfied and approve of the same. What there is then the court must enquire into the justice of the withdrawal/reconciliation.

Hon.Nyakweba did not do that in this case. He did not enquire into the matter before rejecting the application. Perhaps if he had heard the other party, and the investigation officer, he would have been able to make the distinction of what the parties were seeking before him. He would not have left uncontested prejudicial evidence on record, evidence that on the face of it suggested that the appellant had admitted the offence, yet he was not given any opportunity to challenge it.

I do not find that the trial was a mistrial on this ground as it was cured by the fact that another magistrate conducted the trial to the end.

This matter must rest there.

Coming to the other grounds of appeal; with regard to the evidence the case turned against the appellant on the strength of the alleged recognition by the complainant, and corroboration of that evidence by the evidence of PW2. Hon. Ekhubi in his judgment pointed out the weakness of this evidence himself that the complainant did not state the language the used by the person who called him, or the name by which

he was called. It goes without saying that he needed to interrogate this further. – see **Charles O. Maintanyi vs. R [1985]2KAR 158. Wamunga vs. R [1987] KLR 424.** The magistrate was required to analyse this evidence and satisfy himself that there was no possibility of error in the identification of the appellant by the complainant. He pointed out the vagueness of the complainant's testimony with regard to the person who called out to him that night, noting that that evidence of voice recognition was weak and required corroboration. This became necessary even more because it was dark and the complainant did not see the attackers enough for physical identification.

It is for this that he relied on the testimony of P.W.2, to draw the inference that that the same people who he alleged had tried to rob him must have been the same people who robbed the complainant. This in my view was not supported by the evidence, as the prosecution did not provide any to the two incidents.

In the case of **Joshua Muriuki Mungathia versus Republic [2014 eKLR,** the court said at paragraph 12 –

> *"The evidence of P.W.1 and P.W.2 is not related in that both were testifying of different circumstances and events. P.W.2 was not present at the time and place where P.W.1 was robbed. Each witness was therefore testifying of different events"*

That is the exact thing which happened in this case. P.W.2 did not witness the robbery on P.W.1. P.W.1 did not witness who attempted to rob P.W.2. Each of them had a separate incident. One of an alleged attempted robbery by persons saw, and he knew. The other of a robbery by persons he did not see, he did not know, and one of whom he alleged to have recognized his voice. It is noteworthy that when he heard PW1 scream, PW2 did not think it could have been a robbery. He thought PW1 was screaming out of drunkenness. That says something about the credibility of his story that he was being chased by robbers as he passed by PW1's gate.

Despite the prosecution's contention that the other witnesses were unnecessary, this is where they could have been of help. The wife to the complainant would have told the court whether the complainant mentioned anything about the identity of his attackers. The good Samaritan who allegedly escorted the complainant to hospital, and any of the neighbours who responded to his alarm would have confirmed whether the complainant had mentioned the appellant as the person who had attacked him.

I find that though the judgment was well reasoned, the trial magistrate misdirected himself when he found that the insufficient evidence of recognition of the complainant was buttressed by the evidence of P.W.2. That cannot be because there is no evidence that the two incidents were connected. Each of them was involved in a distinct incident and neither of them was present during the others.

Finally, the prosecution needed to establish the ingredients of the offence of robbery with violence c/s 296 (2). These are basically, stealing from the victim, where 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."

In this case though the prosecution established that the complainant sustained injuries as per the P3 medical report, no effort was made to establish that he had been robbed of any of the items he alleged. The prosecution did not produce any proof or evidence that the complainant owned a mobile phone or that he had the money he alleged he had that night. This coupled with the insufficient evidence that the appellant was involved renders the conviction unsafe.

I find therefor that;

> 1. The complainant, the actual victim of the offence, herein had a right to apply to withdraw his complaint and the court was obligated to hear all the parties before rejecting the application.

2. The trial magistrate by taking the complainant's testimony purporting that the appellant had admitted the offence, and leaving it on record without giving the appellant the opportunity to challenge the same was a violation of his right to a fair trial

3. The prosecution did not provide sufficient proof of the charge against the appellant to warrant a conviction. The trial magistrate misdirected himself in finding so.

4. The conviction was unsafe and is hereby quashed. The sentence of death is set aside. The appellant is to be set at liberty unless otherwise legally held.

Right of appeal 14 days.

Dated, delivered and signed in open court at Nyeri this 31st Day of October 2017

Teresia Matheka

Judge

In the presence of Court Assistant: Harriet

State Counsel: Ms. Jebet

Appellant present

Mr. Kimunya holding brief for Mr. Nderi for appellant.

TERESIA MATHEKA

JUDGE