REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 7 OF 2015

OBED EDES TESHA

WILBERT PHILIP ELIAS……...……...APPELLANTS

VERSUS

REPUBLIC…….…….…….....RESPONDENT

(An appeal on a conviction and sentence from the original Judgement in Kajiado Principal Magistrate's Court Criminal Case No. 990 of 2012 before Hon. M.A. Ochieng (SRM)

JUDGEMENT

OBED EDES TESHA and **WILBERT PHILIP ELIAS** hereinafter referred as the appellants filed an appeal against the whole judgement and orders issued by Hon. M.A. Ochieng (SRM) in Criminal Case No. 990 of 2012 delivered on 10/12/2013. The appellants were jointly charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code and an alternative count of handling stolen goods contrary to section 322 of the Penal Code.

The brief facts of the charge read that the two appellants on 3/10/2012 Emaui Village, Namanga in Kajiado Central County, within Rift Valley Province, jointly while armed with a knife robbed Saitoti Murumbe Kishinda a motorcycle registration KMCW 217V make Skygo valued at Ksh.75,000 and at or immediately after the time of such robbery used actual violence to the said Saitoti Murumbe Kishinda. The alarm was raised immediately after the robbery where other boda boda operators responded to pursue the robbers. On the same day at Kitilwa Base, in Amboseli National Park the appellants otherwise than in the course of stealing dishonestly received or retained one motorcycle reg. No. KMCW 217V knowing or having reason to believe it to be stolen. Each of the appellants pleaded not guilty to the main charge and alternative count. In the course of the trial, the prosecution called seven (7) witnesses subsequently the appellants were placed on their defence. At the end of the trial the learned trial magistrate convicted each one of them of the offence of robbery with violence contrary to section 296 (2) of the Penal Code with a corresponding death sentence as prescribed under the law.

Being dissatisfied with the judgement they have appealed to this court on the following grounds:

1. That the learned trial magistrate erred in law and facts in failing to give points for determination, the decision thereon and reason for decision made contrary to the clear provision of section 169 of the Criminal Procedure Code.

2. That the learned trial magistrate erred in law and facts in failing to find that enough doubt was created by prosecution to secure the appellants acquittal.

3. That the learned trial magistrate erred in law and facts in convicting the appellants whereas the charge sheet was defective as it did not disclose whether a knife indicated on particulars of the charge was dangerous weapon within the meaning of section 89 of Penal Code.

4. That the learned trial magistrate erred in law and facts in shifting the burden of proof from the prosecution to the appellants contrary to the law.

5. That the learned trial magistrate erred in law and facts in convicting the appellants while relying on inconsistent and contradictory evidence given by prosecution.

6. That the learned trial magistrate erred in law and facts in failing to taken into account and failed to consider and or failed to give reasons why the appellants defence was disregarded.

7. That the learned trial magistrate erred in law and facts in convicting the appellants whereas the appellants' constitutional right to a fair trial was contravened.

The appeal was canvassed before me by way of written submissions. The appellants' submissions were identical in nature where they opted to submit by consolidating the eight (8) grounds of appeal together as a block.

Arguing the appeal in brief the appellants challenged the evidence adduced by PW1, PW2, PW4, PW6 and PW7 as being inconsistent and contradictory capable of establishing the burden of proof in a criminal charge under section 296 (2) of the Penal Code. The appellants further argued that the evidence by the prosecution witnesses was at variance with the particulars of the charge more specifically as it relates to ownership of the motorcycle. It was further their case that the certificate of ownership relied upon by the learned trial magistrate contained no names of the owner. The appellant further impugned the testimony of PW1 and PW2 as to who between Mary and Nelly is the actual owner of the motorcycle. That element of the offence remained unproven at the close of the prosecution case which doubts the learned magistrate should have resolved in their favour. They further argued that the learned trial magistrate relied on the testimony of PW7 which was contrary to section 21 and 106 (b) of the Evidence Act Cap 80 of the Laws of Kenya.

The appellants contended that the judgement of the learned trial magistrate was in contravention of section 169 of the Criminal Procedure Code where the judgement lacked points of determination on both the prosecution and defence case. They relied on the case of **Nyanamba v Republic [1983]**. The appellants submitted and faulted their conviction whereas the learned trial magistrate ignored the fact that the charge was defective. They argued that the prosecution failed to indicate whether the knife was a dangerous weapon within the reading of section 89 of the Penal Code.

The appellants further submitted that the evidence by the prosecution failed to prove the ingredients of armed robbery which is a vital element under section 296 (2) of the Penal Code. In this regard they placed reliance on the following authorities; **Erick Macharia Mugo & Another v Republic [2014] eKLR, Suleiman Juma alias Tom v Republic Cr. Appeal No. 181 of 2002, George Omondi v Republic Cr. Appeal No. 5 of 2005**. It was their argument that the learned trial magistrate relied heavily on unreliable and discredited evidence ignoring a plausible defence placed before the court.

Finally the appellants invoked Article 50 (c) (j) of the Constitution to alleg that their constitutional right was violated on the part of the learned magistrate no to order for disclosure of evidence and witness statements be supplied in advance. The two appellants relied on the case of **Gilbert P. Chodomley v Republic [2008] KLR.** Based on the above the appellants urged this court to allow the appeal and quash both conviction and sentence.

Mr. Akula, senior prosecution counsel for the respondent opposed the appeal and the line of arguments advanced by the appellants. In dealing with the evidence presented at the trial court Mr. Akula contented that it consisted both direct and circumstantial evidence in support of the charge under section 296 (2) of the Penal Code. Mr. Akula, emphasized that the appellants' defence never controverted the testimony of

PW1 – PW7 as to the commission of the offence and arrest of the appellants as the perpetrators. Mr. Akula submitted and adopted the ingredients of the offence as stated under section 296 (2) and referred to the testimony of PW1, PW2, PW3 and PW4 contained in the record read together with the recovery of the motorcycle exhibit 1 no doubt proves the charge of robbery with violence against the appellants.

Mr. Akula drew the attention of the court to the testimony of PW2, PW3 and PW4 which confirmed the robbery took place and soon thereafter the item stolen was found in possession of the appellants. He relied on the case of **Daniel Mariani v Republic [2013] eKLR** where the court held interalia that the prosecution needs to only proof one of three elements under section 296 (2) of the Penal Code for it to sustain a conviction. With regard to the submissions on the doctrine of recent possession he relied on the following authorities: **Elizabeth Gitiri Gachanja & 7 Others v Republic [2011] eKLR, Mkadisho v Republic [2002] eKLR and Ng'ang'a Kahiga alias Peter Nganga Kahiga v Republic Cr. Appeal No. 272 of 2005**. Learned prosecution counsel further contended that the prosecution supplied the appellants with witness statements in advance of the trial. They were informed of the charge and adequate time accorded to them to prepare for the defence. He urged that the facts submitted on by the appellants did not constitute evidence of a violation of Article 50 (2) (c) (j) of the Constitution. As regards the contention by the appellants that the prosecution witnesses contradicted each other, Mr. Akula submitted that a look at the cross examination reveals that there was no iota of defence case that rebutted the case for the prosecution. In conclusion Mr. Akula urged this court to dismiss the appeal and affirm the judgement by the trial court.

The burden of proving the case against the appellants beyond reasonable doubt is always on the prosecution. See (**Woolmington v DPP [1935] AC 462 Miller v Minister of Pensions [1942] ALL ER 372)**. By dint of principles in the case of **Okeno v Republic [1972] EA** this being the first appellate court is duty bound to revisit the evidence adduced before the trial court afresh, analyze it, evaluate it and arrive at an independent conclusions but always bearing in mind that the trial court had the advantage of seeing the demeanor of witnesses and hearing them and thus ought to give allowances for that position.

The appellants appeal to this court is based on eight grounds but on considering the arguments can be condensed into two main grounds:

> ***Whether the prosecution proved the case beyond reasonable doubt to warrant this court affirm conviction and sentence of the trial court?***
>
> ***Whether the question of recent possession of stolen property was found with the appellants***

ON ISSUE NO. 1

On what constitutes an offence under section 296 (2) of the Penal Code, the Court of Appeal considered the question in the case of **Johanna Ndungu v Republic Cr. Appeal No. 116 of 1995**. The court stated:

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

beats, strikes or uses any other violence to any person.

Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact needed time (sic) of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner aforedescribed, then he is guilty of the offence under subsection 2 and it is mandatory for the court to convict him. In the same manner in the second set of circumstances if it shown and accepted by the court that at the time of robbery the offender is in company with one or more person or persons, then the offence under subsection (2) is proved and a conviction there under must follow:

The court is not required to look for the presence of either of the other two set of circumstances. With regard to the third set of circumstances there is no reaction of the offender being armed or being in company with others. The court is not required to look for the presence of either or these two ingredients. In the case of *Joseph Onyango Owuor & Cliff Ochieng Oduor v Republic [2017] eKLR Cr. Appeal 353 of 2008* the Court of Appeal further stated as follows in application of section 296 (2) of the Penal Code:

"Mr Musumba submitted that unless the aforequoted sub-section (section 296) is read with section 295 of the Penal Code, then reliance on section 296 (2) above without more will not disclose the commission of an offence. Section 295 of the Penal Code defined the offence of robbery. Section 296 (1) and 296 (2) of the Penal Code I have a common marginal note, namely punishment of robbery in this country marginal notes as a general rule read together with the section by the ejusden (sic) generis rule, section 296 (1) and section 296 (2) have to be read together. Section 296 (1) above provides that a person who commits robbery is liable to imprisonment for fourteen years, so that when dealing with the offence as referring to the aggravated circumstances of the offence, or the robbery for under section 296 (1) of the Penal Code."

Mr. Akula in reply argued that the prosecution duty is to prove any one of the three set of circumstances exist to place the accused under the provisions of section 296 (2) of the Penal Code. This issue was also discussed in the case of **Simon Materu Mumatu v Republic [2007] eKLR**. The Court of Appeal held interalia that:

"The ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296 (2) of the Penal Code it these ingredients which need to be explained to such accused persons so as to enable him know the offence is facing and prepare his case….."

In this case from the evidence, PW1 testified that he was an employee of PW2 tasked with the responsibility to operate her motorcycle registration KMCW 217V Skygo for hire. PW1 stated that he was on duty on 3/10/2012. He was hired by the 2nd appellant to be ferried at Lunan. On their way they picked the 1st appellant from a stage under the directions of PW1. The appellants in the course the journey changed the itinerary and destination. They agreed to pay a further 400 as hire charges. PW1 further told the trial court that the appellants confronted him at forest area, held his shoulder, the 1st appellant held his legs, the 2nd accused covered his mouth and at the same time removed a knife from his pocket which he aimed at stabbing him. In that confusion the 1st appellant switched on the motorcycle with 2nd appellant jumping on board and they drove away. The complainant was taken to the hospital where he was treated for the injuries and later a p3 filled by PW5. PW5 confirmed that PW2 sustained injuries to the right ear, neck, chest and left wrist.

Analyzing the evidence by the prosecution to the set of circumstances under section 296 (2) it is shown and accepted by this court that robbery with violence took place on the material day. The appellants were in company of another when executing the place of the robbery. The two appellants paused as customers in need of transport hire to ferry them at a particular destination of their choice. To show motive to commit the offence; can be inferred by their conduct of changing the destination in the course of the journey. The complainant before appellants drove away his motorcycle was actually assaulted and suffered harm as evidenced by the testimony of PW5. It is on record from the evidence of the trial court that the robbery took place during the day. The complainant spent some time with the assailants making it possible for a positive identification to take place. The evidence tendered by PW1 as submitted by the senior prosecution counsel shows that the appellants are the same persons who robbed the complainant PW1.

In this appeal the other issue raised by the appellants was in respect of a knife. In their submissions the charge sheet failed to describe the knife as a dangerous weapon. The Court of Appeal in **Johanna Ndungu Case (Supra**) has stated that the act of being armed with a dangerous or offensive weapon as one of the elements of the offence under section 296 (2) of the Penal Code. The court began by recognizing that a knife and a panga which can be used for various purposes like domestic functions etc is also capable of a dangerously applied to cause harm or death. It can therefore be inferred that no item no matter how small or common can be disregarded once used dangerously or an offensive manner has the capacity to injure, wound or cause death with the requisite intent and force. That is why the Court of Appeal has provided guidance regarding framing a charge under section 296 (2) when a device like a knife or rungu or panga can be considered a dangerous weapon. In this case PW1 testified that the 2nd appellant wielded a knife at the time of the robbery. The knife was not recovered by the police during the arrest and investigations.

That issue whether the charge is defective for failure to include the words being armed with dangerous weapons did not prejudice or occasion injustice against the appellants. My conclusion therefore is that the prosecution case was more centered in the other set of circumstances under section 296 (2):

1. That the appellants in company of another at the time of the said robbery robbed the complainant of the motorcycle Skygo KMCW 217V

2. Secondly, that the complainant the victim of the said robbery was actually beaten and wounded by the gang of three of which the appellants were members. There was overwhelming evidence at the trial to show that the appellants were the people duly armed injured and stole the motorcycle from the complainant.

The second ground to determine this appeal is the doctrine of recent possession; the appellants submitted that they hired the complainant with a sole purpose of being taken to a place they wanted to seek employment of charcoal burning. As they were proceeding the motorcycle run out of fuel necessitating the complainant (PW1) to leave it behind with the appellants as he went for fuel. It was further their defence that when PW1 delayed to turn up they decided to push it to a nearby wildlife camp. In a little while they saw a police vehicle where they were arrested of being in possession of stolen motorcycle. Mr. Akula for the respondent contended that the appellants were arrested in possession of the motorcycle taken violently from PW1.

Looking at the evidence, PW1 confirmed that she was the owner of the motorcycle registration KMCW 217V. She further stated to have employed PW2 as a driver. PW2 further stated that on 3/10/2012 at around 3.00 pm when the appellants approached him as customers willing to hire his motorcycle. There is evidence that soon thereafter the motorcycle was forcibly taken from him after an attack and use of violence PW2 raised an alarm. One of the people who heard the screams testified as PW3. PW4 testimony was to the effect that he did intercept the appellants and effected an arrest while they were in possession of a motorcycle. It is the same PW1 and PW2 identified at the police station. There was overwhelming evidence that the appellants were found with possession of the property of the complainant. The robbery took place at 3.00 pm. They were pursued following an alarm raised by PW2. The appellants were arrested on or about one hour later away from the scene of the crime. The prosecution evidence

established ownership of the motorcycle. The motorcycle was initially in custody of PW2. It was stolen from PW1 a few hours before recovery. This was echoed in the case of ***Aram v Republic [2006] 1KLR 233*** where the court held that before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal matter, the possession must be positively proved, there must be positive proof.

Applying these principles the motorcycle was positively proved by PW1 and PW2. The documentary evidence exhibited was not rebutted by the defence. As to what true is near enough to recent possession there is no general rule. See ***Muraguri S/O Muigai & Another v Republic [1953] 26KLR 83*** once the prosecution proves the elements of the doctrine of recent possession the burden of proof shifts to the accused to explain possession. See the case of **Mwachange & 2 Others v Republic [2002] 2KLR 341** the court summarized the principles as follows:

> **"Where an accused is found in recent possession of goods to have been stolen, he is under an obligation to explain how he came into such possession and that such possession is innocent, failure to do that leads to the inescapable conclusion that he is the thief or robber. This principle does not displace the presumption of innocence and the burden of proof expected of the prosecution to establish the guilty of the accused beyond reasonable doubt."**

In this appeal the appellants submitted that the subject motorcycle was left in their possession by PW2. It was further their testimony that they drove the motorcycle and only had to free from the scene on realizing that they were being pursued by members of the public. Their presence at KWS was to seek assistance and for their own safety.

I have carefully considered and weighed the prosecution evidence by PW1, PW2, PW3, PW4, PW6 and PW7 on the issue of recent possession of a motorcycle and the rebuttal evidence by the appellants. It is not in dispute that the doctrine of recent possession of goods is rebuttable by an explanation to be given by the one found in possession. Based on the evidence adduced from the record it is clear that incident of robbery occurred during the day. The appellants having cornered the complainant forcibly took away the motorcycle from him and left him at the scene. There was an alarm raised immediately thereafter. The members of the public who were in hot pursuit of the appellants contributed to their arrest while still in possession of the motorcycle. That burden on the part of the appellants to rebutt the prosecution case was not established as required under the law to create a doubt in the evidence on the doctrine of recent possession. The evidence adduced against them stands unchallenged on how they came to be in possession of the subject motorcycle. That left the prosecution case on this ground on the doctrine of recent possession proved beyond reasonable doubt in compliance with the principles in the case of **Nganga Kahiga alias Peter Nganga Kahiga v Republic Cr. Appeal No. 272 of 2005** where it was held:

> **"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction, in a criminal case, the possession must be positive proof:**
>
> **1. That the property was found with the suspect.**
>
> **2. That the property is positively the property of the complainant.**
>
> **3. That the property was stolen from the complainant.**
>
> **4. That the property was recently stolen from the complainant.**
>
> **The proof as to time as has been stated over and over again, will depend on the easierness with which the stolen property can move from one person to the other".**

If one is found with recently stolen property he is either a thief or a robber. As for the appellants they pass for robbers as charged under section 296 (2) of the Penal Code.

The third issue raised by the appellants was in respect of a violation of a right to a fair trial under Article 50 (2) (c) and (j) of the Constitution. Under Article 50 (2) (c) it provides that:

> **"Every accused person has the right to a fair trial which includes the right to have adequate time and facilities to prepare a defence.**
>
> **(j) A right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence."**

The bone of contention as submitted by the appellants was that they were never served with the vital information before the commencement of the trial. In a rejoinder Mr. Akula the senior prosecution counsel submitted that the record shows that the trial court directed that the witness statements and exhibits be supplied to the appellants. Mr. Akula further contended that during cross examination the record reveals that the appellants made reference to the witness statements. This constitutional duty by the prosecution is well illustrated in the case of ***Gilbert Cholmondeley v Republic [2008] eKLR*** where the court stated thus:

> **"We think it is now established and accepted that to satisfy the requirement of a fair trial guaranteed under our constitution the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial all the relevant copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items…"**

The trial court record has been scrutinized regarding this issue of supplying witness statements. Before the trial commenced an order was made on the 29/11/2013 that the witness statements be supplied before the next hearing date. The subsequent hearings were adjourned to enable the appellants' access and be supplied with the statements. On the 4/4/2013 the appellants stated as follows: "*we wish to have the case heard*." On 22/4/2013 the appellants were ready to proceed save for the application to be supplied with the first report. The hearing started in earliest on 22/4/2013 and the appellants confirmed to the court that they were all ready to proceed.

The presumption I draw from the record is that at this particular moment the issue of witness statement was no longer pending which is the reason it was not brought to the attention of the trial court. The appellants were aware of their rights to a fair trial under Article 50 (2) (c) on being supplied with the bundle of evidence in advance before the trial. As at the time the first witness took the stand I find no tangible evidence that any of the appellants was not supplied with the information on the offence. The record bears me witness that the trial magistrate even adjourned the hearing for sometimes to enable the appellants be supplied with the record on first report by the police. The case was adjourned several times at the request of the defence in order to have the witness statements be supplied and enable them prepare the defence. During the period of adjournment the appellants had time to consult and internalize the evidence the prosecution aligned against them. The confirmation by the appellants of their readiness to have the first witnesses is a clear testimony that there was no impediment for the case to proceed against them. The court discussed this legal proposition under Article 50 (2) (c) in the case of ***Thuita Mwangi & 2 Others and Anti-corruption Commission & 3 Others [2013] Petition 153 of 2013*** consolidated with ***Petition 369 of 2013*** where it was held:

> **"The right to be provided with material the prosecution wishes to rely on is not a one off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigations may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and expultory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect the right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare the defence."**

In view of the foregoing and the reading of the record I do entertain serious doubt that the case proceeded against the appellants without advance supply of witness statements. The allegation on appeal by the appellants is at variance with the record which correctly reflects what transpired throughout the trial. I

therefore agree with the submissions by the senior prosecution counsel that there is absence of evidence from the appellants that a violation of right under Article 50 (2) (c) and (J) of the Constitution occurred. That ground of appeal therefore fails.

The appellants also challenged the learned trial magistrate judgement for failure to give reasons for the decision as provided for under section 169 of the Criminal Procedure Code Cap 75 of the Laws of Kenya. Under section 169 of the Criminal Procedure Code it provides that,

> ***"a judgement written by or under the direction of the presiding officer of the court in the language of the court shall contain the point or points for determination, the decision thereon and the reasons for that decision and shall be dated and signed by the presiding officer in open court at the time of pronouncing it. In the case of conviction the judgement shall specify the offence which, and the section of the penal code or other law under which the accused person is convicted and the punishment to which he is sentenced."***

The duty to give reasons as a function of due process was taken a notch higher by the promulgation of the Constitution 2010 and enactment of The Fair Administrative Act 2015. I am alive to the provisions of Article 47 of the Constitution and section 4 of the Fair Administrative Act. Under section 4 (2) of the Fair Administrative Act:

> **"Every person has the right to be given written reasons for any administrative action that is taken against him."**

A want of reasons on the part of a judge or magistrate not to give reasons can therefore be good ground of appeal to challenge the legality and basis of the decision in favour of one party as against the one who lost the contest in court. In *Black's Law Dictionary 970 10th Edition 2014*,

> ***"a judgement is a decision of a court regarding the rights and liabilities of parties in a legal action or proceedings. Judgements also generally provide the courts explanation of why it has chosen to make a particular court order."***

It is therefore both constitutional and statutory duty to provide reasons for the decision reached after an adjudication of a matter by trial courts or an appellate jurisdiction. The reasons deal with the competing interest of the parties to a dispute and it depicts a sense of public participation, fairness, accountability, responsiveness, precedent setting in relation to performing the judicial function. In an article by **Lawrence Baum** ***Judges and Their Audiences; A Perspective on Judicial Behaviour [2006]*** the author succinctly put it in perspective on judicial reasoning and the audience potentially being addressed by the decision of a judge, he did identify three levels:

> **"(1) For judges' internal audience, that is, for the parties and their counsel, transparent reasons make it much easier to narrow the issues they will need to address if they decide to appeal the decision.**
>
> **(2)For judges' institutional audience, that is colleagues at the court or other professionals, members of the local bar or other legal professionals as well as other branches of government; reasons are needed for guidance and coordination purposes. If legal actors are unaware that a particular judge or court has laid down a specific decision, or if they cannot identify its underlying reasons they can hardly be guided by it or take it into account in solving co-ordination problems.**
>
> **(3)For judges' external audience, that is, for the general public transparent reason – giving is a crucial both for guidance and contestation purposes. Rules that citizens know little about or do not understand are unlikely to provide them with meaningful guidance. Similarly they may not be in a position to contest a judicial decision effectively if they cannot discern its underlying justification."**

In the same breathe commenting on the effects of reason – giving on judicial audiences **Retired Hon. Lord Justice Bingham**, Reason and Reasons for decisions

: ***Differences Between a Court Judgement and An Arbitral Award: 4 Arbitral International 141-143 [1988]:***

"I cannot, I hope, be the only person who has sat down to write a judgement; having formed the view that A must win, only to find in the course of composition that there are no sustainable grounds for that conclusion and that on any rational analysis B must succeed."

In a persuasive authority in the case of *Osmond v Public Service Board of New South Wales [1984] 3 NSWLR 447* Kirby P of the Court of Appeal held:

"There was a general common law duty to give reasons that duly existed irrespective of whether the decision was judicial or administrative in character. *Its emphasized that the duty existed whether or not the legislature had chosen to impose such an obligation is as can be deduced from our own constitution enacted by parliament under Article 47 and the Fair Administrative Act 2015."* *emphasis mine.*

President Kirby explained the benefits of a duty to provide reasons first it enabled the recipient to see whether any appealable or reviewable error had been committed, thereby informing the decision whether to appeal, or let the matter lie.

Secondly, an answered the frequently voiced complaint that good and effective government could not win support or legitimacy unless it was accountable to those whose rights is affected.

Thirdly, the prospect of public scrutiny would provide officials with disincentive to act arbitrarily.

Fourth, the discipline of giving reasons could make decision makers more careful, and rational.

Finally provisions of reasons would provide guidance for future cases."

From the above legal texts and cited authorities there are multiple benefits achieved by judicial officers giving reasons for their decisions. It is both a constitutional and statutory duty to render an account and basis of a decision.

Now the question is whether the learned trial magistrate is guilty under section 169 of the Criminal Procedure Code in so far as the judgement dated and delivered on 10/12/2013 is concerned? The answer is I believe to be found in the impugned judgement of the trial court.

After evaluating the record and reviewing the judgement it is clear that the learned trial magistrate determined the case under the following framed issues:

1. Whether the accused persons jointly robbed the complainant herein of motorcycle registration number KMCW 217V?

2. Whether in the alternative they retained the said motorcycle knowing or having reasons to believe it to be stolen?

3. Whether the accused persons stole?

4. Whether immediately before or after the time of stealing they used or threatened to use actual violence to any person to obtain the thing stolen or overcome resistance to its being

stolen?

5. Whether the accused persons were armed with a dangerous or offensive weapon?

The learned trial magistrate after going through the testimony by the prosecution witnesses and the defence by the appellants, in her evaluation she formed the opinion and gave reasons that the prosecution has proved the charge of robbery with violence against the appellants beyond reasonable doubt. The appellants were subsequently convicted to death.

The only omission I note on the part of the learned trial magistrate is the failure to state section 296 (2) of the Penal Code as the one the appellants have been found guilty and convicted accordingly. I am of the conceded view that the omission not to state the section of the charge and punishment has not occasioned prejudice nor miscarriage of justice on the appellants. That omission is curable under section 382 of the Criminal Procedure Code.

I find no merit on this ground of appeal.

I am therefore satisfied that the appellants conviction for the offence of robbery with violence under section 296 (2) was proper and in accordance with the law. I affirm the conviction of the lower court. The sentence imposed is lawful. I find no exceptional circumstances to interfere with it.

The upshot is that the entire appeal lacks merit on both conviction and sentence and is hereby dismissed accordingly.

Dated, delivered and signed in open court at Kajiado on 19th day of December, 2016.

……..

R. NYAKUNDI

JUDGE

Representation:

Appellants present

Mr. Akula Senior Prosecution Counsel - present

Mr. Mateli Court Assistant - present