REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 51 OF 2014

CHARLES AMBOKO ANEMBA ……..……APPELLANT

VERSUS

REPUBLIC ……... RESPONDENT

-consolidated with-

CRIMINAL APPEAL NO. 52 OF 2014

ELISHA MAIYA OMULAMA..…….…… APPELLANT

VERSUS

REPUBLIC ……...…… RESPONDENT

(Being appeals from original conviction and sentence of G.A. Mmasi – Ag. P.M. in Criminal Case No. 544 of 2013 delivered on 11th April, 2014 at Vihiga)

JUDGMENT

Introduction:

1. When **ISAAC KISIERA** was visited by two unfamiliar visitors in the early morning of 10/03/2013 at his residence in Rotego village in Vihiga County, he was robbed of several of his items in the midst of threats to violence. As a result of that incident ELISHA MAIYA OMULAMA and CHARLES AMBOKO ANEMBA were eventually arrested and arraigned before the Senior Principal Magistrate's Court at Vihiga. The following charge was preferred.

   "ROBBERY WITH VIOLENCE CONTRARY TO SECTION 295 AS READ WITH SECTION 295 (2) OF THE PENAL CODE.

1. ***ELISHA MAIYA OMULAMA (2) CHARLES AMBOKO ANEMBA:- On the 10th day of March, 2013, at Kidundu sub-location in Vihiga County within Western province, jointly, while armed with dangerous weapons namely pangas robbed ISAAC KISIERA of cash Kshs. 1,800, 2 mobile phones make Samsung and Nokia, 4 kg of sugar, 4kg of rice, 5 litres of cooking oil, video deck make Sony, 5 packets of milk and one pineapple all valued at Kshs. 25,130/= and immediately before such robbery threatened to use actual violence to the said ISAAC***

KISIERA."

2. Upon conclusion of the trial, the said ELISHA MAIYA OMULAMA and CHARLES AMBOKO ANEMBA were found guilty, convicted and sentenced to suffer death. They subsequently preferred appeals against the conviction and sentence before this Court.

The trial:

3. The trial took place from 24/07/2013 to 10/02/2014 and judgment was delivered on 11/04/2014. The prosecution availed seven witnesses in support of the charge whereas ELISHA MAIYA MULAMA opted to give unsworn evidence as CHARLES AMBOKO AWEMBA gave sworn evidence in their defences.

4. **PW1** was **CHARLES KISIERA** who was the complainant. He testified on how he was attacked by two people in his house on 10/03/2010 who were armed with pangas and rungus. The attackers also threatened to shoot him short of his compliance. On demand he gave out his mobile phone, make Samsung number 0722430322, and the mobile phone's Personal Identification Number (PIN). The attackers transferred the money which was in the mobile phone before further transactions were disabled by the service provider, Safaricom. The attackers also demanded for the pair of trousers which PW1 had worn the previous day and took some Kshs. 1,500/= therefrom as well as Kshs. 500/= from PW1's wife's handbag. They ransacked the house, carried away several items of PW1 and eventually locked him and his wife inside their bedroom. They were rescued by a neighbour and managed to report the incident to Safaricom who immediately intervened and stopped any further transactions in respect of PW1's mobile phone number.

5. PW1 stated that the attackers were not hooded and they freely talked to him for long in the full glare of the electric lights in the house before they accomplished their ordeal and left. In the course of the incident, PW1 managed to identify the two assailants whom he so confirmed during identification parades. He further identified the two in Court.

6. **PW2** was PW1's wife one **SELAH OSIDA KISIERA**. She confirmed PW1's evidence and pointed out that the attackers were in their house for about 30 minutes under the electric lighting. Although she clearly saw the attackers, she only identified them in Court as when the identification parades were conducted she was in Nairobi undertaking some examinations.

7. **PHILIP BUTALA** testified as **PW3**. He was the neighbour who rescued PW1 and PW2 and used his mobile phone to report the incident to Safaricom where further transactions on PW1's mobile phone were blocked. He later on accompanied PW1 to lodge a complaint at the police station as well as at Safaricom Customer Care. **PW4** was **No. 232493 Insp. MUMO SHAMALLA** who was attached to Safaricom Law Enforcement Liaison office in Nairobi. His duties included production of MPESA transactions and fraud records in judicial proceedings. He recalled how the police had requested for records in respect to several mobile phone numbers including PW1's. He produced documents on various transactions in respect to PW1's mobile phone as well as one which had been registered in the names of ELISHA OMULAMA which was number 0714330213 which confirmed that on 10/03/2013 Kshs. 3,000/= was transferred from PW1's mobile phone number to the other number.

8. The OCS Vihiga Police Station one **No. 233216 CIP JUDITH NYONGESA** conducted two identification parades. She was **PW5.** In the course of the parades the two Appellants herein were identified by touching by PW1. The Investigating officer was one **No. 79934 PC JONATHAN LANGAT** who testified as **PW6.** He undertook investigations which resulted in the the arraignment of the Appellants before the trial Court. The last prosecution witness was **No. 599321 SSP. BOSCO KISAA** who testified as **PW7**. He was the arresting officer.

9. When the Appellants herein were placed on their defences, ELISHA MAIYA OMULAMA stated that he was arrested in respect to another case and charged. He could not understand why he had

been charged in seven cases including the one which was then before Court. CHARLES ANEMBA testified on how he was arrested at Luanda Police Station where he had taken one girl to make a report after she received Kshs. 3,000/= in her mobile phone from one ISAAC KISIERA. He denied any involvement in the alleged robbery.

10. It is on the foregone *inter alia* evidence that the trial Court found the Appellants herein guilty and accordingly convicted and sentenced them to death.

The Appeals:

11. On 09/05/2014 both Appellants herein lodged their said appeals. CHARLES AMBOKO ANEMBA filed Appeal No. 51 of 2014 whereas ELISHA MAIYA OMULAMA filed Appeal No. 52 of 2014. The two appeals were consolidated by an Order of this Court with Appeal No. 52 of 2014 being the lead appeal. ELISHA MAIYA OMULAMA then became the first Appellant and CHARLES AMBOKO ANEMBA the second Appellant respectively.

12. Under Appeal No. 51 of 2014, CHARLES AMBOKO ANEMBA preferred the following grounds of appeal:-

1. ***THAT, the learned trial magistrate erred in law and facts in convicting the appellant to serve an unconstitutional sentence.***
2. ***THAT she erred in law and facts in not finding that the mode of identification and the conditions at the locus in quo were not conducted to a proper identification of a suspect.***
3. ***THAT she erred in law and facts in not finding that there was no prompt report to the authorities offers the alleged incidence hence the delay of effecting my arrest.***
4. ***THAT she erred in law and facts disregarding my defence in contravention of section 169 (1) CPC.***
5. ***THAT I pray to be served with a copy of certified proceedings, charge sheet and judgments to erect further grounds.***

On the other hand, ELISHA MAIYA OMULAMA preferred the following grounds of appeal:-

1. ***THAT the sentence imposed on me is manifestly harsh and excessive as to amount to misdirection.***
2. ***THAT the learned trial magistrate erred in law and facts by observing that the prosecution did establish their case on the strength of the identification evidence notwithstanding the fact that conditions coupled with circumstances prevailing at the time of the act were not conclusive to permit positive identification.***
3. ***THAT the learned trial magistrate erred in law and facts in placing reliance to convict on the purported identification parade but failed to note that the parade was worthless as it contravened the parade rules stipulated by the vice (sic).***
4. ***THAT the learned trial magistrate erred in law and facts by failing to address as to why there were looming contradictions between the initial statement given to the police and the evidence in chief of all the prosecution witnesses.***
5. ***THAT the learned trial magistrate erred in law and facts by failing to comply with the provisions of section 324 as read with section 329 of the CPC.***
6. ***THAT the trial court failed to observe the fact that investigation done in this matter was shoddy to sustain the conviction in the capital offence.***
7. ***THAT the learned trial magistrate erred in law and facts in totally misunderstanding and failing to appreciate the appellants' unsworn defence statement there coming to a wrong conclusion.***
8. ***THAT as I cannot recall all that was adduced in the trial, I beg leave this honourable court of law to furnish me with certified true copy of the lower court records to enable me elect more reasonable grounds of appeal and I also wish to be present at the hearing of this appeal.***

13. At the hearing of the appeals, the Appellants relied on their written submissions in urging this

Court to allow the appeals. Learned State Counsel Mr. Ng'etich opposed the appeals and called for their dismissal. We however wish to state that on careful perusal of the written submissions it appeared that the same related to Criminal Case No. 503 of 2013 at Vihiga Senior Principal Magistrate's Court involving the two Appellants herein which related to sexual offences. That notwithstanding we have taken into account and duly considered all their grounds of appeal before us.

Analysis and Determination:

14. This being a first appeal, our duty is clearly settled in law. It was held in the case of **Okeno vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

15. In dealing with these appeals, we will separately consider the following issues which appear very cardinal, being:-

a. ***The issue of identification of the Appellants as the assailants;***
b. ***Whether the Appellants' defences were considered;***
c. ***The constitutionality of the death sentence;***

(a) On identification of the Appellants as the assailants:

16. The evidence on record is in respect of **visual identification at night** by PW1 and PW2. PW1 stated that he was awoken when someone attempted to open one of the windows to the bedroom of his house. He switched on the electricity light and waited only to hear the attempt again. On peeping outside he found nothing and switched off the light but remained up. He again switched on the light and as he approached the door to his bedroom, the door was knocked open and two people armed with pangas and rungus entered. He was ordered to sit on the bed. He obliged. He was threatened with shooting upon showing any form of resistance. The attackers then engaged PW1 and PW2 in some discussion including where they came from and what they were doing. They warned PW2 not to scream. In the course of the encounter, the attackers asked for PW1's mobile phone and he gave them. They also asked for the PIN and likewise PW1 gave them. As the ordeal went on, PW1's phone rang and one of the attackers asked PW1 if he had alerted the neighbours but he denied. He was ordered to tell the caller that all was well. He also obliged. PW1 recalls seeing the thugs making some transactions in his mobile phone. They also asked PW1 to give them the trouser he wore the previous day and took money therefrom. They also took money from PW2's handbag. After collecting several household items, the thugs locked PW1 and PW2 in the bedroom and left. PW1 described how the thugs looked like and what each of them exactly did. There was one who was slim, short and stout with a scar on the left side of the head. He was the one who mostly questioned PW1 whereas the other one searched the house. The other one was also short and stout and had scars on the hands. He identified those assailants as the Appellants herein.

17. PW2's testimony mainly corroborated that of PW1. PW2 further clarified that when one of the attackers noticed that she was intensely looking at them, he told her not to bother as even if she so looks at them she will not know them. She also identified the Appellants in court.
18. The ordeal took about 30 minutes under the electricity light in the bedroom. The attackers were not hooded and they freely talked to PW1 and PW2.

19. Before any further analysis of the evidence, we wish to have a look at two issues which tend to corroborate the foregone. They are the **identification parades** and **the mobile phone money transactions**.

20. On the **identification parades**, it is to be noted that it was only PW1 who attended as PW2 was away in Nairobi where she was taking her examinations. The parades were conducted by PW5 who was a Chief Inspector of Police and the OCS Vihiga Police Station. PW5 detailed how she conducted the parades and in complying with all the rules thereto. She clarified that the witness who was PW1 had been kept at the CID offices which are outside the Police station as the parade was being organized within the Police station. In the first parade, eight people were arranged and the suspect, the first Appellant, chose to stand between members 7 and 8. He was identified by touching and on being asked if he was satisfied with the parade, he so agreed and voluntarily signed the Parade Form which was produced in Court.

21. PW5 also conducted the second parade for the second Appellant herein. She also arraigned eight members. These were different from those she used for the first parade. PW1 managed to identify the second Appellant also by touching. On not having any objection, the second appellant voluntarily signed the Parade Form which was also produced in Court.

22. PW5 clarified that in both parades she arranged members who were of similar appearances, complexion and heights as the Appellants.

23. We have intently looked at the parade forms which confirm that the Appellants herein signed to the effect that they consented to the parades, did not wish to have any of their friends or solicitors present during the parades and that they had no complaints on how the parades were conducted. We have equally looked at the Appellants cross-examinations on PW1, PW2 and PW5 and did not see any meaningful objections to how the parades were conducted. We therefore uphold the outcomes of the two identification parades.

24. On the issue of the **mobile phone transactions**, the evidence of PW1, PW2, PW3, PW4, PW6 and PW7 remain very relevant. PW1 was the registered subscriber to the mobile phone number 0722430322 whereas the first appellant was the registered subscriber to mobile phone number 0714330213. The record confirms that on 10/03/2013 at 02.43 a.m. Kshs. 3,000/= was transferred from number 0722430322 under receipt number DF79AB582 to number 0714330213 which money was so received under the same receipt number and at the same time and date. We have closely scrutinized Exhibits 1 and 2 which are the accounts for the two mobile phone numbers detailing the transactions and we are satisfied that the sum of Kshs. 3,000/= was transferred from PW1's mobile phone to that of the first Appellant during the night of the robbery. Further the first Appellant did not object to the fact that he was the registered subscriber in respect to the mobile phone number 0714330213 which received Kshs. 3,000/= from PW1's mobile phone in the said transaction. We equally did not come across any evidence to the effect that the first appellant had made a report to the Police that his mobile phone number 0714330213 had either been misplaced, stolen or lost.

25. PW7 further testified that he arrested the first appellant on tracking him through the mobile phone number 0714330123 and from the information he received from the second appellant on the first appellant's whereabouts.

26. From the Exhibit 1 which is the record of PW1's mobile phone account, we have also noted that on 10/03/2013 at 02.55 a.m., the sum of Kshs. 3,650/= was transferred from PW1's mobile phone to mobile phone number 0719460753 which was registered in the name of the second appellant. Though that transaction was completed the same was reversed about an hour later through receipt numbers DF79LA312. This reversal however was not initiated by the second appellant but confirms the evidence of PW1 and PW3 on how they contacted Safaricom immediately after the robbery and also managed to undertake the reversal. A subsequent reversal attempt however failed in respect of the sum of Kshs. 3,000/= which had been transferred from PW1's mobile phone to that of the first appellant.

27. Of equal importance is the fact that the second appellant did not deny being the registered subscriber of mobile phone number 0719460753 which was so confirmed by PW4. Further, the

second appellant did not at any point make a report to the Police to the effect that he had either lost his said mobile phone or the same had been stolen or misplaced for this Court to consider the possibility of someone else using his mobile phone to undertake the said transaction. As we make this observation, we are clear that the same is and should not be construed, as shifting of the burden of proof to the Appellants.

28. The foregone is therefore the factual analysis of the circumstances surrounding the issue of the identification of the Appellants herein. We will now have a look at the case law on this issue. The Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** stated as under;-

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

29. In **R –vs- Turnbull & Others (1976) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

30. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

> ***"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-***
>
> > *"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."*
>
> ***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."***

31. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night:-

> ***"We have re-examined the evidence upon which that conclusion was made, and we find***

that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

32. The issue of the conduct of the identification parades has also been a subject of deliberation before the Court of Appeal and is now quite settled. In finding that the parades were conducted properly, the Court of Appeal in the cases of **John Mwangi Kamau vs. Republic (2014) eKL**R and **Douglas Kinyua Njeru vs. Republic (2015)eKLR** clearly restated the parameters in conducting parades.

In the case of **John Mwangi Kamau** (supra) the Court expressed itself as follows:-

"15. Identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68& 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003; the assailants' were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, this Court observed:-

> *"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."*

16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure? In Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008 this Court faced with a similar situation expressed itself as follows:-

> *"As to the compliant in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.*

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

17. Based on the foregoing, we are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the said identification evidence. On the issue of whether the identification parade was properly conducted we can do no better than to reproduce this Court's observations inDavid Mwita Wanja & 2 others –vs- Republic- Criminal Appeal No. 117 of 2005:-

"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -

"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

"6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -

……

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

……

(n) The parade must be conducted with scrupulous fairness, otherwise the value

of the identification as evidence will be lessened or nullified;"

18. PW5 (IP Francis) gave evidence of how the identification parade was conducted. He testified that the appellant was placed amongst eight members; the witnesses were in a different room while the parade was being prepared; none of the witnesses met the appellant before the parade; each witness was called alone to identify the assailants from the parade; after identification each witness was taken to a different place in order not to influence the others who had not gone through the parade. IP Francis testified that the appellant changed his position in the parade when each of the witnesses identified him. The appellant never objected to the manner in which the parade was conducted. Based on the foregoing evidence and the identification parade form on record we concur with the two lower courts that the identification parade was properly conducted. We also note that each witness identified the appellant as the assailant who was armed with the pistol. Therefore, there was corroboration of the identification evidence. We are of the considered view that the identification evidence was positive and free from error"

33. This Court is therefore under a legal duty to weigh the above evidence on visual identification, identification parades and the money transactions as a whole and with great care so as to determine the extent of reliance on such. This is based on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested.

34. With the foregone in mind and having carefully scrutinized the said evidence, we thereby find that the identification of the Appellants herein was positive and free from any error. PW1 and PW2 had ample time with the Appellants under the electricity light in their bedroom. PW1 also identified both of them during the identification parades and there is also the evidence of the money transactions which squarely connects both the Appellants to the commission of the offence.

(b) The Appellants' defences:

35. The Appellants herein tendered their respective defences on 10/02/2014. The first Appellant reiterated how he was arrested on 09/04/2013 and ended up in Court being charged with several charges on robbery with violence. The second Appellant recalled how he was arrested at Luanda Police Station on 04/06/2013 when he had escorted a lady to make a report about Kshs. 3,000/= which had been transferred to her mobile phone by one Elisha Mulama whom the second Appellant knew quite well. He was later on paraded and eventually charged in Court with the capital charges.

36. PW7 who was the arresting officer stated clearly how he tracked and eventually managed to arrest the Appellants herein whom he had sought for sometime in connection with several other incidences of robbery with violence within Vihiga County. The trial Court equally revisited the Appellants' defences in its judgment which upon weighing the same as against the prosecution evidence was satisfied that the Appellants were properly and safely identified as the robbers. We have also addressed ourselves on the defences and do equally agree with the trial Court that upon consideration of the defences, we are satisfied that they did not create any reasonable shadow of doubt upon the prosecution's evidence in the case. We so find.

(c) <u>On the constitutionality of the death sentence:</u>

37. This subject on the constitutionality of the death sentence has been taken up in various fora in view of the world's general position on the same. Kenyans have also tested the same in various judicial fora and for a time there were conflicting decisions on the same. This uncertain position led to the Article 26 in our Constitution which states as follows:-

"26. (1) Every person has the right to life

(2) .....

(3) A person shall not be deprived of life intentionally, except to the extent authorized by the Constitution or other written law.

(4) ....."

It is to be noted that Kenyans, being aware of the position the world had taken on the issue of death penalty, saw it befitting and in 2010 gave unto themselves the above Article 26 among others.

38. Be that as it may, our Courts have now come up and settled the uncertainty which was created by conflicting judicial decisions and today, Kenyans can happily hold that the issue of the constitutionality of death sentence is so settled. The Court of Appeal consisting of a bench of five Honourable Judges in the case of **JOSEPH NJUGUNA MWAURA & 2 OTHERS versus REPUBLIC, Criminal Appeal No. 5 of 2008,** which decision was made on 18/10/2013, firmly settled this issue.

39. It must be made clear that the said uncertainty on this issue in our Courts was largely due to the different interpretations of the law taken by different Judges. However and as earlier on said, that uncertainty has now been buried in the annals of history unless and until it is resurrected by the promulgation of other written law to the contrary.

40. The Court of Appeal in the **Joseph Njuguna Mwaura case (supra)** clearly expressed itself as follows: -

> ***" We hold that the decision in Godfrey Mutiso -vs- Republic to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences. Our reading of the law shows that the offences of Murder contrary to section 203 as read with 204 of the Penal code, Treason contrary to section 40 of the Penal code, Administering of oaths to commit capital offence contrary to section 60 of the Penal Code, Robbery with violence contrary to section 296(2) of the Penal code and Attempted Robbery with Violence contrary to section 297(2) of the Penal Code carry the mandatory sentence of death."***

The Court went on to say thus:-

> ***"The impact of this decision is that mitigation is now required to determine the appropriate sentence in cases where there had been convictions for capital offences. In effect, the holding in this case introduced sentencing discretion to judicial officers in Murder cases. Decisions by this Court are generally binding but we do have the power to depart from those decisions where we consider that in the circumstances, it is correct to do so. This Court will also not follow a case that it considers per incuriam. See Dodhia -vs- National Gurdlays Bank Ltd (1970) EA 195.***
>
> ***"A look at all the provisions of the law that impose the death sentence shows that these are couched in mandatory terms, using the word "shall". It is not for the Judiciary to ursup the mandate of Parliament and outlaw a sentence that has been put in place by Kenyans, or purport to impose another sentence that has not been provided in law. It has no jurisdiction to do so...***
>
> ***"Since the Constitution, both in the former epoch and the current clearly envisage that the right to life is not absolute, the State can limit it in accordance with any written law."***

41. On the issue of the International covenants and instruments abolishing death penalty which Kenya

is a signatory to, the Court of Appeal in the **Joseph Njuguna Mwaura Case (supra)** stated as follows: -

> ***"Indeed some of the International instruments envisage a situation where the right to life may be curtailed in furtherance of a sentence imposed by a Court of law. Article 6 of the International Covenant on Civil and Political Rights provides that:***

1. ***Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.***
2. ***In countries which have not abolished the death penalty, sentence of death may be imposed only for the more serious cases in accordance with the law in force at the time of the commission of the crime.... This penalty can only be carried out pursuant to a final judgment rendered by a competent court.***

> ***"Kenya has been party to this convention since May 1972. This country however is not a party to the Second Optional Protocol to the International Covenant in Civil and Political Rights which aims at the abolition of the death penalty. This is instructive because it points out that under our law as it stands, the death sentence continues to be a valid sentence that can be passed by a Court of law."***

42. The Court of Appeal further held that by passing the present Constitution by way of a referendum in 2010, the people of Kenya had demonstrated that they wished to retain the limitation on the right to life contained in Article 26(3). The Court of Appeal cited with approval the words of the Court in ***Mutiso –vs- Republic (supra)*** as follows:-

> ***"The appellant has not challenged Kenya to abolish the death penalty in preference to unqualified right to life and we have no information that this Country has any intention of joining the countries of the world which have heeded the United Nations call to abolish capital punishment. Suffice to say that an opportunity had arisen in the debate raging for the last two decades relating to a new constitution which is due for a referendum on 4th August 2010. The abolition of the death sentence is not one of the provisions in the proposed Constitution and it is not a contentious issue. As the draft was arrived at through a consultative and public process, it could be safely concluded that the people of Kenya, owing to their own philosophy and circumstances, have resolved to qualify the right to life and to retain the death penalty in the statute books."***

43. On whether the mandatory death sentence violates Article 26 of the Constitution of Kenya, the Court of Appeal again expressed itself fully in the case of **Joseph Njuguna Mwaura(supra)** and stated as follows: -

> ***"We must now consider whether the death sentence as envisaged under our law amounts to cruel and inhuman or unusual punishment which is prohibited by the Constitution.***
>
> ***Blacks Law Dictionary (9th Edition) defines "torture" as "the infliction of pain to the body or mind to punish, to extract a confession or information or to obtain sadistic pleasure" and "cruel and unusual punishment" as punishment that is tortuous, degrading, inhuman, grossly disproportionate to the crime in question or otherwise shocking to the moral sense of the community". Inhuman treatment is defined as "physical or mental cruelty that is so severe that it endangers life and health."***

44. On a careful analysis, the Court of Appeal settled for the following holdings:-

> ***"Based on these definitions cruel, inhuman and degrading punishment is that which is done for sadistic pleasure, in order to cause extreme physical or mental pain, and that is disproportionate to the crime, so that in causes moral outrage within the community.***

"We do not think that the death sentence falls within the definitions. The death sentence is not done for the sadistic pleasure of others. It cannot also be said to be shocking to the moral sense of the community due to the fact, as we have stated, that it has now been endorsed by the people of Kenya through the referendum, and by the fact that it continues to exist in our statute books with constitutional underpinning.

"We also do not consider that the deprivation of life as a consequence of unlawful behaviour is grossly disproportionate punishment for the offence committed, which in many cases result in the loss of life, and the loss of dignity for the victims".

45. This decision of the Court of Appeal is binding on this Court.

The above analysis therefore brings us to the inevitable conclusion that death penalty in Kenya is permitted by the Constitution and statute (Penal Code) and it is not in contravention of the Kenya's obligations under the International law. Death sentence in Kenya is therefore not unconstitutional.

DISPOSITION:

46. As we come to the end of this judgment, we have equally satisfied ourselves that the charge of robbery of violence as laid against the Appellants herein was sufficiently proved in law. The Appellants were properly placed as the assailants who were armed with dangerous weapons namely pangas and rungus. They so threatened PW1 and PW2 with actual violence in the event they would not have co-operated. PW1 and PW2 had no option but to surrender to the assailants' will. Eventually, the robbers stole mobile phones and several other household items including money. With proof of all these ingredients, we so reiterate that the charge was adequately proved.

47. The upshot is therefore that the Appellants' appeals lack in merit and are hereby dismissed in their entirety.

Orders accordingly.

DELIVERED, DATED and SIGNED in open court at Kakamega this 21st day of July, 2015

RUTH N. SITATI **A. C. MRIMA**

JUDGE **JUDGE**

In the presence of

Present in person ..... For 1st Appellant.

Present in person.....For 2nd Appellant.

Mr. Omwenga (present)..... For Respondent.

Mr. Lagat ..... Court Assistant.