REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.86 & 87 ALL OF 2009

TERRY GORETI WASIKE……..1ST APPELLANT

FRANCIS SIMIYU Alias ALIM YUSUF ……2ND APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(Appeal from judgment & conviction of Webuye Senior Resident Magistrate Court Webuye in criminal case No.799 of 2009 sentenced on 29/6/2009).

J U D G M E N T

1. The two(2) Appellants, Terry Goreti Wasike, (hereinafter the 1st Appellant) and Francis Simiyu alias Alim Yusuf (hereinafter the 2nd Appellant) were jointly charged with Wilson Maina of two counts of Robbery with Violence contrary to Section 296 (2) of the Penal Code. A fourth person, Murumba Mwinami Kirui (hereinafter Murumba), faced the charge of Handling Stolen property contrary to Section 322(2) of the Penal Code. After trial, the Appellants were convicted and sentenced to death. The other two were acquitted. This appeal challenges both conviction and sentence.
2. It had been alleged that, on the 18th of June 2008, the three (3) at Mabanga Area at Bungoma East district jointly with others not before Court and while armed with a dangerous weapon, namely a wire, had robbed Peter Wambua Mulei of an unregistered Motor vehicle with foreign number CC 1330 YR 1994 Toyota Tarcel, Cash of 2000/= one Mobile phone make Motorolla c50 and a rucksack containing a black trouser all valued at Kshs.755,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Peter Wambua Mulei. It had also been alleged that at the same time they robbed Charles Mutula Kilonzo of cash kshs.1,500/=, driving licence C of C 032029, a National identity card and voters card and at or immediately before or immediately after the time of such robbery used actual violence to the said Charles Mutua Kilonzo.
3. Peter Mulei Wambua (PW 1) earns his living by driving vehicles which are on transit from the Port of Mombasa to Kampala. On the 18th of June 2008, and in the company of Charles Mutua Kilonzo (PW2), PW2was driving one such vehicle. It was a Toyota Tarcel. Just as they passed Webuye Township they were waved down by a young lady and a young man who asked them for a lift. They obliged. The lady and the young man were joined by two other young men who entered the vehicle. This would have been at about 9.30p.m. The young men asked for a lift to Matisi. P.W.1 explains that he quickly agreed as two of them wore school uniform and one had a Physical Exercise (P.E.) T-shirt. He assumed that they were school children.

4. On nearing Matisi school, PW1 was surprised to see that his colleague PW2 had a wire tied around his neck and one of the boys whom they had given a lift was pulling it from behind. He was soon to find himself in the same situation when a wire was looped over his head and around his neck. Things then happened quickly, PW2 was hauled to the back seat and the driver's door flung open. PW1 was also pushed to the back. It is alleged that the 2nd Appellant tied the legs and hands of PW1. He then got into the vehicle and started to drive at high speed towards Webuye town. The vehicle was driven off the main road into a feeder road and into a sugar plantation. When they reached near Nzoia river, the four (4) passengers violently damped both PW1 and PW2. PW1 was in fact thrown into the river but he managed to hold on to the embankment. After a struggle he freed himself and rescued his colleague. The young men who had sought a "lift" had made away with the motor vehicle, one mobile phone, Kshs.3,500/=, a Racksack, a Driving licence, a National Identity card and a Voters card.
5. As they did not know where they were, PW1 and PW2 spent some time getting the bearing and eventually got into the main road at a place called Flyover. A good Samaritan led them to Webuye police station where they reported their ordeal. It was now the morning of 19th June 2008. As sometimes would happen, the police at first thought that they had feigned the robbery and locked them in the cells.
6. Later on the same day, the police made some headway in investigating the incident. The police had recovered a cell phone which PW1 recognized to be his. On the morning of 20th June 2008, some suspects were arrested. Two separate identification parades that were conducted. PW1 and PW2 were able to pick out the Appellants from those parades.
7. It had fallen to Corporal Amos Gichuki (PW6) to investigate the complaint. And this is how he arrested the Appellants. Acting on information from an undisclosed informer, PW6 visited the residence of a person popularly known as "Pastor". "Pastor" is Murumba. The information PW6 had received was that a stolen vehicle had been hidden at the home of Murumba. On conducting a search within the compound, PW6 found a motor vehicle make Toyota Tarcel and bearing Registration KBC 704K. Something interesting happened while they were still at that home. Two persons emerged from a nearby maize plantation. One was carrying a yellow plastic container which later turned out to be petrol. He promptly arrested the two persons and started to question them. Not long after, two other people also made their way into the compound. One was arrested while the other escaped. The two persons who had emerged from the plantation were Appellants. On carrying out a search on them, a Motorolla cell phone was found on the person of the 2nd Appellant. PW1 identified the cell phone to be his.
8. PW6 requested Inspector Edward Mutemi (PW4) to arrange and conduct an identification parade in respect to the suspects who had been arrested. He recalls organizing two parades on the 20th of June 2008 in respect to the Appellants. It was his testimony that the two were positively identified by PW1 and PW2 in separate parades.
9. Both Appellants gave sworn statements in their defence. The 2nd Appellant alleges that on the 19th of June 2008 while going home after a football game that he met his girlfriend. As they were talking the father of the girl appeared unexpectedly and so they had to hide. Thereafter he parted ways with his girlfriend. As he was walking back way home, he met two people who arrested and handcuffed him. He was later taken to Webuye police station where he says the police attempted to extort the sum of kshs.20,000/= from him in return for his freedom. He remembers being subjected to an identification parade but denies any involvement in the offence. It was his testimony that on the date when the robbery is said to have taken place, that is on 18th of June 2008, he was asleep at his aunty's home.
10. On 19th June 2008 the 1st Appellant was at a place known as Bakisa. She had been directed there in her search for the home of a traditional doctor. As she made her way to that home, she decided to rest under a big tree owing to fatigue. It was then that she was arrested by two police officers and taken to Webuye police station. She was then subjected to an identification parade. She denies that she robbed the two complainants and says she was asleep at her parents home on the night of 18th June 2008.
11. They are some aspects of the evidence of Murumba (who was the fourth accused) and his witness which touch on this appeal. Murumba stated that on the 19th of June 2008, some police officers visited his home in search of a stolen motor vehicle. While the police were at his home,

three young people came towards his home. One of the young men was carrying a container. The three were arrested by police. These included the Appellants. The evidence of the Murumba's wife, Bridgit Murumba (DW5), supported this account. But she had an additional line. In the early hours of the 19th of June 2008, at around 3.00a.m, she was woken up in her sleep by the knock on her door. She answered to the call and opened her front door.She found a lady who told her that she was unwell and required the assistance of her husband. As Murumba was away, the lady chose to stay in the vehicle that had brought her. At day-break PW5 saw the lady in the company of three other young men. They were pushing a vehicle towards a nearby bore-hole. DW5 later saw them wash the vehicle. As DW5 testified in Court she was able to identify the Appellants as two of the four young persons she had seen on that morning.

12. That is the abridged version of the relevant evidence which this Court shall revisit in detail as it determines this appeal. The Appellants who were represented by Mr. Makali raised the following grounds in this appeal:

a. THAT the learned trial magistrate erred in law and in fact in convicting the appellants of the offences charged by holding that the wire was a dangerous and/or offensive weapon in the circumstances of the case which finding is unsupportable in law and in fact.
b. THAT the learned trial magistrate erred in law and in fact in convicting and sentencing the appellants to death on both counts without satisfying himself as to the age of the appellant and hence his judgment runs counter to the letter and spirit of the Children Act 2011.
c. THAT the learned trial magistrate erred in law and in fact in convicting the appellants on both counts and thereafter sentencing them to death on both counts.
d. THAT the learned trial magistrate erred in law and in fact in convicting the appellants on both counts on the evidence of the respective complainants only which evidence stood uncorroborated in material particulars.
e. THAT the learned trial magistrate erred in law and in fact in convicting the appellants without fully satisfying himself that the circumstances then obtaining favoured a positive identification and there was no possibility of error or mistake.
f. THAT the learned trial magistrate erred in law and in fact in not permitting the appellants test the veracity and accuracy of the adverse evidence tendered against them by the co-accused and his witnesses, specifically DW4 and DW5.
g. THAT the learned trial magistrate erred in law and in fact in holding that defence testimony could in law corroborate the prosecution case, and/or that evidence of a co-accused which is not tested by cross-examination could shalter (sic) another accuseds defence.
h. THAT the judgement of the learned trial magistrate was against the weight of the evidence.

13. The appeal raises issues of law and fact and as a first Appellate Court it falls on us to re-consider the evidence, evaluate it and draw our own conclusions. In doing so, we will make allowance for the fact that unlike the trial Court, we did not have the advantage of hearing and seeing the witnesses testify (**Okeno –vs- Republic [1972] E.A. 32**).

14. We think it appropriate to dispose of an issue of law raised in respect the age of the Appellants. After this appeal had been admitted to hearing, the Appellants applied for the taking of additional evidence under the Provisions of Section 358 of the Criminal procedure Code. That application was allowed by Court on 30th of May 2011 following which the Appellants were subjected to an age assessment at Bungoma District Hospital. In reports dated the 31st of May 2011 the 2nd Appellants age was assessed at approximately 22 years while that of the 1st Appellant at 19 years. Given that the offence is said to have taken place on 18th June 2008, it would seem that the 1st Appellant was a child at that time. As for the 2nd Appellant, he would have attained the age of majority. It was argued by Mr. Makali with some force that as child offenders, the two Appellants should have been tried before a Children Court, and secondly that they should have been availed legal assistance. In addition, Section 190 of the Children Act barred the sentencing of a child to death. As we have already noted, a simple computation of the 2nd Appellant's age immediately removes him from the definition of a child now or at the time the offence was committed. The arguments made by Mr. Makali could, therefore, possibly apply to the 1st Appellant alone.

15. The 1stAppellant was charged with three other persons. All her co-accused were persons of above

the age of 18 years . In that respect, Section 184 of the Children Act would guide the Court on the trial of the 1st Appellant. It provides as follows:-

> **"184(1) Notwithstanding the provisions of Parts ll and VII of the Criminal Procedure Code, a Childrens' Court may try a child for any offence except for-**

a. **The offence of murder; or**
b. **<u>An offence with which the child is charged together with a person or persons of or above the age of eighteen years."</u>**

Quite clearly, the 1st Appellant was before a Court of proper jurisdiction.

16.In respect to the need for legal assistance, Section 186 of the Children Act provides as follows:

> **"186. Every child accused of having infringed any law shall-**

a. **……**
b. **if he is unable to obtain legal assistance be provided by the Government with assistance in the preparation and presentation of his defence;"**

It is our view that a child can only benefit from the assistance contemplated by this section if it is demonstrated to the satisfaction of the Court that the child is unable to either afford or access legal assistance. But for this right to be more than notional, the trial Court has a duty to promptly inform the child of this guarantee and to invite the child to indicate whether or not he/she is able to obtain legal assistance.

17) When and what is the extent of the assistance to be provided? The Children Act has been hailed as one of Kenya's most progressive pieces of legislation. It codifies many of the world's best practices in respect to the Rights and welfare of the child. Indeed its preamble proudly and explicitly declares that one of its objects is to give effect to the principles of the Convention on the Rights of the Child and the African Charter to the Rights and Welfare of the child.

18) So as to place the provisions of Section 186 of The Children Act in perspective we need to understand the provisions of these two international instruments with regard to legal assistance to a child. Article 40(2) (b) of The Convention of The Rights of The Child (1989) provides:-

> **"i) Every child alleged as or accused of having infringed the Penal law has at least the following guarantees ……**
>
> **ii) to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and <u>to have legal or other appropriate assistance in the preparation and presentation of his or her defence</u>."** (Emphasis ours)

Compare this with Article 17(2) (c) of the African Charter on the Rights and Welfare of the Child which obligates State parties to the Charter to:-

> **Ensure that every child accused of infringing the Penal law …….**
>
> **iii)<u>shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence</u>.**(Emphasis ours)

The African Charter imposes a greater obligation on the state parties as it expressly requires the State parties to ensure that the child is not only afforded legal but other appropriate assistance in the preparation and presentation of his/her Defence.

19) The text of our statute is somewhat unclear as to the exact nature of the assistance to be provided by the State. To illustrate this we again reproduce that section:-

"186. Every child accused of having infringed any law shall-

c. **……**
d. **if he is unable to obtain legal assistance be provided by the Government <u>with assistance</u> in the preparation and presentation of his defence;"** (my emphasis)

Given that a stated intention of the statute is to give effect to the two International Instruments we propose that an appropriate way of interpreting this obligation is by aligning it as much as possible to the provisions in those instruments that expand the guarantees available to the child. In taking this course, we are aware of the provisions of Article 2(6) of the Constitution, and also Article 53(2) of the Constitution that demands of the courts to be guided by the principle that: *A child's best interests are of paramount importance in every matter concerning the child.* It makes sense to read in, the provisions of the International Instruments. Accordingly, we do hold that the assistance referred to in the latter part of Section 186 (b), and which the Government is obliged to provide, is legal assistance in the preparation and presentation of the Child's Defence. The need to afford such assistance to a child would be informed, partly, by the inherent vulnerabilities of a child that, left on his/or her own, a child is unlikely to mount any or an effective Defence. A child's mind is likely to be naïve, unsophisticated, lacking in legal knowledge and experience. The atmosphere in a Court room can also be confusing, perplexing and distressing to a child.

20) Although we never had the benefit of any argument on this point by counsels, we know that there is ever present a constraint in the resources of the State and it can be argued that it may not be possible for the State to provide free legal assistance to every child facing trial. Nevertheless, our view is that the need for legal assistance is acute where, like here; a child is involved and is accused of a serious infringement of the law with a possibility of substantial prejudice occurring. In that event, the State would be obliged to provide legal assistance. We venture to suggest that it is in circumstances like these where the provisions of Article 50(2) (b) of the Constitution apply. That Article requires that every accused person has a right,

> **"to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of the right promptly."**

The 1st Appellant was not informed of the guarantee that exists under Section 186 of the Children Act and we would, on this ground alone declare her trial a mistrial. This is notwithstanding that she appeared to have robustly participated in the proceedings by way of cross-examination and laying out her defence. But as will become apparent shortly even the prosecution case as presented was inadequate to sustain a finding of guilty against her.

21) We now turn to appraise the evidence presented before the trial Court. We start with the evidence on identification by PW1 and PW2. It was just after 9.30p.m. when PW1 stopped to give a lift to some "school children". Undoubtedly darkness had long set in. We are not told that there was moonlight. The four passengers sat at the back seat of the vehicle. PW1 and PW2 say that they were able to positively identify the Appellants because the interior light of the vehicle was on. PW1 said,

> **"The interior vehicle light was on and one could see well inside the vehicle."**

While PW2 stated,

> **"I identified the 1st accused and the 2nd accused person. We were robbed at night but**

I managed to identify them as I had stayed with them for some time and the interior vehicles light had been switched on."

22. The Learned Magistrate held as follows on the above evidence.

"According to PW1 and PW2 when being cross-examined by the 1st and 2nd accused persons, they were able to pick the two suspects from identification parade because the suspects had been with them for some time and even talked to them during the unfortunate incident."

23. On our part we think that the period from when the passengers entered the vehicle up to the moment they turned violent was a calm period which might have been conducive for identification. But it must be remembered that it was at night. What the Court was told is that the single most important factor that aided positive identification was that the interior lights of the vehicle were on. What is of concern to us however is that this was not subjected to sufficient scrutiny? We would have expected evidence to be led on the exact moment the interior lights were switched on. And for how long they were on? Certain other questions needed to be asked and answered: What was the intensity of the light? What was the position of the light vis-à-vis the Appellants? The only evidence that attempted to address but one of these questions is the following statement of PW2;

"I was held and a rope on a wire put on my neck and lightened. I saw you with the aid of the interior vehicle's lamp which I managed to switch on."

From this evidence the lights were switched on after the attack on PW1 and PW2. Then on would be distressful moments.

24. We accept the proposition by Counsel for the Appellants that where the only evidence against an accused is that of identification the trial Court is enjoined to examine such evidence carefully and to be satisfied that circumstances of identification were favourable and free from the possibility of error before it can return a conviction (see generally **Maitanyi –vs- Republic [1986] KLR 198** and **Wamunga –vs- Republic [1989] KLR 424.** We think that the evidence of identification was not sufficiently interrogated. And taken alone, would not be a basis for a safe conviction. So, was there other evidence that incriminated the Appellants?
25. Before we answer this question, we need to say something on the identification parades conducted on the Appellants. Their Counsel thought them to be so flawed as to be worthless. There is an admission by the Appellants that an identification parade was conducted. This is what the 1st Appellant said in her Defence,

"The next morning a police officer called me from the cells and all the women from the cells were paraded outside. I was told to take a position in the line and then picked or identified by two men. I did not know I was given a form to sign. I signed the same."

On his part the 2nd Appellant said,

"An identification parade was done on 20.6.08. I signed the parade forms. The parade had several people. I was told to pick a place in the parade of my own choice."

26. The Court has examined the evidence on the conduct of the parades and the forms which were signed by the Appellants. Both participated freely and were satisfied with their arrangement and conduct. Although it was the contention of the Appellants that the witnesses had seen them in the cells before the parade, this was vigorously discounted by PW4 and PW6. PW4 said;

"I had seen the suspect when I conducted the parade. They were held in a secluded place before being brought out to identify you."

While PW6;

> **"When I arrested you, you were booked in the cells. During the identification parade, the witness had no chance to see you. They were locked in the C.I.D. office."**

This Court believes both PW4 and PW6, more so because the Appellants did not take this up in their cross examination of PW1 and PW2.

27. Something curious seems to have happened in respect to the 1st Appellant. In her parade form the names of all members of the parade are masculine. And one name appears erased. In addition, six of them were persons who were members of the parade in respect to the 2nd Appellant. Counsel's argument was simply this; members of the male gender could not be properly used to identify the 1st Appellant- a woman. That we agree. But it is clear to us that there was an error in the entry of the names in the form. We say so because the 1st Appellant herself said that members of her parade were female (see her evidence quoted in paragraph 25 above). And the officer who arranged and conducted the parade confirmed that the members of the parade were of almost the 1st Appellant's age, physique and appearance. Nothing should turn on the clerical error in the form. It neither nullifies nor diminishes the evidential value of the identification parade.
28. The prosecution case got support from an unlikely place. When invited to make his defence, MURUMBA (DW4) who was one of the Appellant's co-accused, and also his wife BRIDGIT MURUMBA (DW5) gave sworn testimonies that incriminated the Appellants. MURUMBA corroborated the account of PW6 on how PW3 had arrested the Appellants.

This is what he said;

> **"After a while (sic) I saw near my gate three people, two young men and a lady. They were coming towards my home. One of the young men was carrying a container. When they neared the police arrested them and made them sit down."**

His wife BRIDGIT (DW5) told a story of how on 19/06/2008 she saw a lady and 3 young men push a vehicle to a borehole and washed it. The young lady was the 1st Appellant and one of the three men was the 2nd Appellant. The vehicle was the complainant's stolen vehicle.

29) How was the Court to receive and treat the evidence of DW4 and DW5? This Court was recently confronted with a similar question. Justice Tuiyott had this to say in **Busia Criminal Appeal No.105 of 2012** ***Aloicy Nyongesa vs. Republic;***

> **"……..once an accused gives sworn evidence that incriminates one of his co-accused then on that evidence he is for all purposes a witness for the prosecution. For that reason the trial Court must give the co-accused an opportunity to test that evidence by way of cross-examination. This is in fact a fundamental right of an accused person, the right to challenge evidence (Article 50(2) (b) of The Constitution 2010). That the co-accused has been afforded this right must be duly on record."**

30) The Appellants were not afforded the opportunity to cross-examine DW4 and DW5 and we would readily agree with Counsel that, the portion of their evidence that incriminated the Appellants would be worthless. The following passage in the decision of the Court of Appeal in ***Mattaka & others–vs-Republic*** **[1971] E.A. 495 p. 503** illustrates this;

> **"we agree, but we would add that we think that the failure of a trial Court to allow cross-examination of the accused by another will ordinarily result in the quashing of a conviction when the trial Court has relied on the evidence on which it was sought to cross-examine, unless without that evidence there is an overwhelming story case against the accused."**

The trial Court should have completely disregarded that evidence. Instead it repeatedly relied on it to demonstrate the strength of the prosecution case.

31) Having said that, there is still other evidence that incriminates the 2nd Appellant. Whilst PW6 was still at the home of DW4, the Appellants emerged from a nearby maize plantation. And the 2nd Appellant was carrying a yellow plastic container which contained a liquid that was later confirmed to be petrol. That alone may not have meant much. But on being arrested, he was found in possession of a cell phone Motorolla c.50 belonging to PW1. It had been stolen at the time of the Robbery.

32) We had found that the evidence of identification was not sufficiently assuring and required to be propped up by some other evidence. In respect to the 2nd Appellant, other evidence was provided when he was found red-handed with the stolen cell phone barely 24 hours after the robbery. It did not help his case that he was also found close to a place where the stolen car had been recovered and he was carrying petrol. As for the 1st Appellant not much can be made of her presence with the 2nd Appellant: what remains is the evidence of identification on which we do not think a safe conviction can be returned.

33) We still think it necessary to comment on the argument by the Appellants' Counsel that the Trial Magistrate did not consider their Defence. Both had put forward *Alibi* defences. This was raised for the first time when the Appellants were giving their unsworn statements in Defence. In such circumstances, the police or prosecution do not have a fair opportunity of checking and testing the *alibi*. What the trial Court must then do is to weigh the prosecution evidence against that of the *alibi* evidence. The *alibi* evidence of the 2nd Appellant is what he said in his testimony: that at the time of the incident he was asleep at his aunt's home in the company of Joel Simiyu and John Mwangale. That was all. No further evidence was called to back this. In our assessment the evidence of identification, possession of recently stolen item and possession of petrol at a place close to where the stolen vehicle had been recovered, put together, far outweighs the Alibi evidence of the 2nd Appellant.

Reading of section 296(2) of CPC

35) A simple reading of Section 296(2) reveals the elements of the offence of Robbery with Violence. An offence under this Section is committed when the offender robs and is either:-

a. **Armed with a dangerous or offensive weapon or instrument or,**
b. **In the company of one or more persons or,**
c. **If, at or immediately before or immediately after the time of the robbery he/she wounds, beats, strikes or uses any other personal violence to any person.**

36) In both counts, the Appellants had been charged with committingthe offence jointly with others not before Court while armed with a dangerous weapon "namely wire" and then used actual violence on the victims. Counsel for the Appellants argued that a wire is not a weapon. The word weapon is not defined in the Penal Code. That word must be assigned its ordinary meaning. The Concise Oxford Dictionary (Ninth Edition) defines a weapon to mean, inter alia,

> **"a thing designed or used or <u>usable</u> for inflicting bodily harm (e.g. a gun or cosh)."[Emphasis ours]**

There is evidence that wires were used to strangle the complainants. The wires were being used to inflict bodily harm on the complainants. Ordinarily a wire would not be a weapon but it becomes one when used, like in this instance, to cause bodily harm.

37) But even if we were wrong the other elements of the offence of robbery with violence were present. The 2nd Appellant robbed in the company of three other persons and during and after the robbery strangled the complainants, violently ejected them out of the car and threw one of them into a river. These were overt acts of violence.

38) The result is that, on our own appraisal of the evidence, the 1st Appellant's conviction was unsafe. On the other hand the evidence against the 2nd Appellant was overwhelming and we must, as we now do, uphold the conviction.

39) There is one aspect of the sentence imposed, that calls for our intervention. The following is part of Courts order on sentence,

> **"Each of the 1st and 2nd accused persons having been convicted in counts 1 and II, are sentenced to suffer death as provided by the law."**

It is not clear whether the Magistrate imposed a death sentence on each count. A sentence order must be unequivocal. As a matter of good practice, where an offender has been convicted of more than one count of a capital charge then the Court shall impose a sentence on one count and leave the sentences on the other charges in abeyance (***Ganzi & other –vs- Republic*** **[2005], KLR 52).** We shall follow this practice.

40) The trial Court imposed a death sentence. We see no reason to interfere with it. The robbers threw one of the complainants into River Nzoia and had it not been of the complainant's gallant efforts he would have drowned. The robbers were ruthless and heartless. So we uphold the sentence imposed save that we now clarify that it is in respect to count one. Sentence on count two is held in abeyance. Accordingly, the 2nd Appellant will suffer death for count one as by law provided.

41) In respect to the 1st Appellant we quash her conviction and set aside the sentence. She is now set at liberty unless otherwise detained for some lawful reason.

DATED AT BUNGOMA THIS 23rd DAY OF MAY 2013.

IN THE PRESENCE OF:

…….COURT CLERK

……FOR APPELLANTS

……FOR THE STATE

F. TUIYOTT

JUDGE

F. GIKONYO

J U D GE