REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO. E002 OF 2020

(CONSOLIDATED WITH CRIMINAL APPEALS NO. E003/2020, 36/2019, 35/2019)

(Being an appeal against the Conviction and Sentence from the judgement dated 15/10/2019

*by **Hon. J. Wanjala (CM) in Nyahururu Chief Magistrate's Court** in*

***Criminal Case No. 2197 of 2016**)*

TERRA MUGUNA KARIUKI...1ST APPELLANT

PAUL THUMBI NGINYO...2ND APPELLANT

JOHNSON NJENGA NGATIA...3RD APPELLANT

JAMES KAMAU NJERI...4TH APPELLANT

-VS-

REPUBLIC...RESPONDENT

JUDGEMENT

Introduction

1. The four Appellants were jointly charged and tried of Robbery with Violence contrary to Section 296(2) of the Penal Code. The particulars stated that Johnson Njenga Ngatia, Terra Muguna Kariuki, Paul Thumbi Nginyo and James Kamau Njeri on the 5th day of July 2016 at Mairo-Inya Township within Nyandarua County jointly being armed with dangerous weapons namely metal bars and an axe robbed Rosemary Wanjiru Simon of two mobile phones make Samsung Galaxy GTSxxx and Huawei Ideos Uxxx both valued at Kshs.29,000/- and immediately before such robbery murdered the said Rosemary Wanjiru Simon.

2. The 4th accused person in the original case James Kamau Njeri (the 4th Appellant herein), was also charged with an alternative charge of Handling Stolen Goods contrary to Section 322(2) of the Penal Code. Particulars stated that on 20th day of September 2016 at Nyahururu Township within Laikipia County otherwise than in the course of stealing dishonestly retained one mobile phone make Huawei Ideos Uxxxx knowing or having reasons to believe to be stolen goods.

3. They pleaded not guilty, were tried, convicted of the charge against them and sentenced to death on the count of robbery with violence. Being dissatisfied with the said conviction and sentence each of the Appellants filed individual appeals which appeals were consolidated for purposes of trial and determination having each raised the following grounds of appeal:-

4. **Terra Muguna Kariuki: 1st Appellant's Grounds of Appeal (Amended Grounds of Appeal filed on 25th January 2021)**

> ***i. That the learned trial magistrate erred in law and facts in finding that the circumstantial evidence on record was sufficient to prove the case against the accused person in the absence of any other corroborative evidence.***
>
> ***ii. That he learned trial magistrate erred in law and facts by convicting the Appellant on evidence of a recovered phone Samsung Galaxy phone from PW1 and erred by evidence that Accused 1's evidence together with PW1 could be considered conclusive***

evidence when there was no corroborating evidence to prove that the Appellant handled the phone in issue. It was an error to convict the Appellant in reliance of co-accused persons.

iii. That the learned trial magistrate erred in both law and facts in misconstruing the circumstances of the arrest of the Appellant in connecting him with the purported robbery committed on 5th July 2016 to one Rosemary Wanjiru Simon.

iv. That the learned trial magistrate erred in law by convicting the Appellant without properly analyzing his alibi defence.

v. That the learned trial magistrate erred in law and facts by convicting the Appellant on a fatally defective charge sheet.

5. **Paul Thumbi Nginyu: 2nd Appellant's Grounds of Appeal** (**Amended Grounds of Appeal filed on 25th January 2021)**

i. That the learned trial magistrate erred in law and facts in finding that the circumstantial evidence on record was sufficient to prove the case against the accused person in the absence of any other corroborative evidence.

ii. That the learned trial magistrate erred in law and facts by convicting the Appellant on evidence of a recovered jacket or jumper found in the house of the deceased at the scene. It was a misdirection for the court to mete a conviction basing its evidence on PW2 and PW3 who were family members and their relationship was strained

iii. That the learned trial magistrate erred in law by convicting the Appellant without properly analyzing his alibi defence.

iv. That the learned trial magistrate erred in law and facts by convicting the Appellant on a fatally defective charge sheet.

6. **Johnson Njenga Ngatia: 3rd Appellant Grounds of Appeal (as per the Petition of Appeal dated 27th October 2019)**

i. That the learned trial magistrate erred in law and fact in finding that the evidence presented during trial against the Appellant was sufficient to prove of the offence of murder contrary to Section 203 of the Penal Code.

ii. That the learned trial magistrate erred in law and in fact in failing to apply her mind to the testimony tendered by the prosecution and defence witnesses which would have inevitably have led to a different conclusion with particular regard to the matters listed in the Petition of Appeal dated 27th October 2019. (Refer to page 205-208 of the Appellant's Record of Appeal)

iii. That the learned trial magistrate erred in law and in fact by applying the circumstantial evidence as the best evidence in the circumstance of the present case yet did not ascertain the application of other first tier tests such as DNA sampling of the scene which contained ample DNA foot-print of the perpetrator's and the doctrine of recent possession. All in all, the learned trial magistrate adopted the circumstantial evidence test to justify her decision to convict the Appellant.

iv. That the learned trial magistrate erred in law an in fact in finding as she did the prosecution had discharged its burden and that there was sufficient evidence to support the charged levelled against the Appellant in view of the hiatuses in the prosecution case as listed in the Petition of Appeal dated 27th October 2019. (Refer to page 205-208 of the Appellant's Record of Appeal).

v. That the learned trial magistrate erred in law and in fact in finding as she did that the prosecution had established its case beyond reasonable doubt in view of the fundamental misapprehension of the facts as the law.

vi. That the learned trial magistrate erred in law and fact in failing to appreciate the fact that the police failed and/or neglected to investigate the circumstances surrounding the prosecution of the case against the Appellant leading to a witch hunt of the Appellant and gravely curtailing his right to freedom of movement, liberty and fair administrative process.

vii. That the learned trial magistrate erred in law and fact in dealing with matters before her arbitrarily, casually and on whims rather than on analysis of evidence and the law.

viii. That the conviction is dangerous, shambolic and against the weight of the evidence tendered by the defence ought to be overturned in earnest.

7. **James Kamau Njeri: 4th Appellant Grounds of Appeal (as per the Petition of Appeal dated 18th October 2019)**

i. That the learned trial magistrate erred in law and fact in finding that the Appellant was in possession of the Huawei Ideos phone knowing or having reasons to believe it was stolen.

ii. That the learned trial magistrate erred in law and in fact in finding that the Appellant did not give a satisfactory explanation on how he came in possession off the Huawei Ideos phone and dismissing his defence.

iii. That the learned trial magistrate erred in law and in fact in finding that the evidence on record connected the Appellant to the offence of robbery with violence as charged.

iv. That the learned trial magistrate erred in law and in fact in finding that there was overwhelming circumstantial evidence on

record against the Appellant connecting him to the offence of robbery with violence.

v. That the learned trial magistrate erred in law and in fact in shifting the burden of proof to the Appellant while dismissing his defence.

vi. That the learned trial magistrate erred in law and in fact in finding that the Appellant did on 5/7/2016 with the accused no. 1-3 while armed with a metal bar and an axe rob Rosemary Wanjiru Simon of 2 mobile phones and murdered her.

vii. That the earned trial magistrate erred in law and in fact in failing to find that the prosecution evidence was weak and full of glaring contradictions and inconsistences and for relying on it to convict the Appellant.

viii. That the learned trial magistrate erred in law and fact in sentencing the Appellant to death which is unconstitutional and for disregarding the Appellant's mitigation.

Background to the Appeal

8. There were eleven prosecution witnesses who testified in the trial as follows: -

9. **Philip Maina Mwangi (PW1)** stated that he is from Nyahururu Township. Initially PW1 had been charged with the same offence of Robbery with Violence but later on the charge was withdrawn against him and he was treated as a prosecution witness.

10. On 20/07/2016 he was at his place of work at 4NTE office in Nyahururu Township when he was approached by the 1st and 2nd accused persons in this case who are **Johnson Ngatia and Terra Muguna Kariuki.** The two accused persons sought to sell to him a mobile phone. They told him that Terra Muguna (Accused 2) wanted to go on a journey to Nakuru and then Eldoret but he did not have fare and he had a phone he wanted to sell to get fare.

11. He stated that they offered to sell him a Samsung Galaxy at Kshs.4, 000/-. He stated that 1st accused person told him that the phone belonged to the 2nd accused person who was his friend who wanted to get fare to go to Eldoret.

12. PW1 stated that he was reluctant as he did not want to buy but later on he accepted to buy the phone at a reduced price of Kshs.3,000/- but he was given a receipt reading a price of Kshs.6,500/-. The phone was Samsung Galaxy. Later on he was arrested with the phone when he was using it. He was taken to the DCI office Nyahururu where he was shown the box for the phone and was told that the owner of the phone was killed. The said phone was produced as Exhibit 2 in this case.

13. PW1 then mentioned the people who sold him the phone one of them being Johnson Njuguna whom the police officers managed to arrest the same day. The second accused was already in prison custody having been arrested for another offence. PW1 pointed at accused 1 and accused in this case as the ones who sold him the stolen phone.

14. **PW2 Elizabeth Nginyo** is the mother of the 3rd accused person, Paul Thumbi Nginyo. Her evidence was that on 06/07/2016 her daughter Jane Nyambura (PW3) informed her that her neighbor at Mairo – Inya by the name Rosemary Wanjiru had been killed by unknown people but there was a jumper or jacket that belonged to her son Paul Thumbi (accused 3) that had been found in the house of the murdered woman. When she heard that she went to the CID office Nyahururu and was shown a jumper (exhibit 4) which she immediately recognized to belong to the 3rd accused person herein who is her son. She calls it a pullover which she identified before this court and was later produced (Exhibit 3).

15. When cross – examined by Accused 3 Paul Thumbi Nginyo she told him that the exhibit jumper belonged to him. She said that she calls it a pullover or cardigan, but it is also referred to as a jumper. While PW2 was testifying she referred to her son (Accused 3) as a person who is known to steal. He had been imprisoned before.

16. **PW3 Jane Nyambura Nginyo** a sister to Accused 3 and daughter to PW2 stated that she stays near Mairo – Inya. She stated that on 05/07/2016 she was going home from a market at around 6.30pm. She saw people standing near her neighbor's home. The neighbor was Rosemary (now deceased). She went to find out and she learned that the neighbor had been killed inside her house. The body was in the house. Police officers arrived when she was still at the home. The police officers entered in the house and the body was taken away. The following day CID officers returned to the home. On 05/07/2016 the police did not allow people to enter in the house but the following day when they returned she went to the home again. That was on 06/07/2016.

17. When she entered in the house she saw a jumper (cloth) on the floor which she recognized to belong to her brother Paul Thumbi Nginyo (Accused 3 herein) and it was blood stained. It's a brown jumper with pockets. She stated that she had seen the accused person wearing the jumper. After that she informed her mother (PW2) about the jumper belonging to her brother being found in the house of the deceased person. She was shown the said jumper in court and she identified it and told the court that it belonged to accused 3 Paul Thumbi Nginyo who is her brother.

18. **PW4 Simon Kariuki –** the father of the deceased – he visited the scene after the body had already been taken away. What he saw was that everything in the house was scattered and it appeared the attackers had passed through the roof.

19. **PW5 Esther Nyokabi** – a sister to the deceased was called by her neighbor on 05/07/2016 to proceed to her sister's home (i.e. deceased person's house) because there appeared to be a problem. She visited her sister's home when she learned that her sister had been murdered. She stated that; "I saw my sister lying dead. She had been murdered. We found a sword near her body and a metal bar near the body also."

20. She added that the phones of the deceased had been taken. A sim card was found on a table. She stated that she knew that her sister used to have three phones being a Samsung Galaxy (white), a black Huawei Ideos and a Techno. All three phones were missing. She saw three sim cards in the house which belonged to the deceased. Later she was shown two phones being Samsung Galaxy and Huawei Ideos by CID Officers which she identified to belong to her late sister.

21. The Samsung Galaxy is the one that had been recovered from PW1. She also identified the Huawei Ideos black in color (Exhibit 4). The Samsung Galaxy bears serial number 35xxxx/xx/xxxxxx/x. She also identified a box (container) for the Samsung Galaxy phone bearing the same serial number (Exhibit 5).

22. The serial number for Huawei Ideos is 355xxxxxxxxxxxx which also appears on the box (exhibit 6). The boxes for the two phones were taken from the deceased house. She also identified in court a sword (exhibit 7) and a metal bar (exhibit 8) that were found in the deceased's house and they were blood stained.

23. She stated further that accused 2 – is her brother and accused 1 and accused 3 were his friends. She stated that she knew accused 1 and accused 3 as they come from Mairo – Inya where they also stay. She stated that she did not know the 4th accused person James Kamau.

24. When cross examined by accused 1 she stated that; "I know you as a friend of Terra (accused 2). I used to see you with my brother (accused 2).

25. **PW6 Ann Wanjiku Njenga** – the Principal of Ol Joro-Orok Agricultural Training Institute testified and stated that she used to worship together with the deceased Rosemary Kariuki. On 05/07/2016 she went to the deceased's home around 5.30pm. On arrival she found the gate closed. She opened the gate and walked towards the house. She was expecting to find the deceased person in the house together with other worshippers. She just pushed the door expecting to find people in the house. She saw a T-shirt and a bible. She saw the deceased lying on the seat. She tried to call the deceased but there was no response. She left the house and called neighbors. She went back with some neighbors. They realized that she was dead.

26. Where the deceased was lying there was a metal bar. They screamed and people came. The matter was reported to the police. When Police Officers arrived she went back to the house. They found a sharp edged sword in the house which had some dry blood. She stated that she saw blood clot on the deceased's blouse at the neck. It was evident that she had been killed.

27. **PW7 Salome Wanja** – a sister to the deceased stated that when she looked at the deceased's body she had been stabbed with a knife on the neck that penetrated to the chest. She also saw burn marks on the chest and another stab wound on the neck. She attended the postmortem together with her brother. She stated that she did not know who killed her sister.

28. **PW8 Dr. Boniface Kagure Miring'u** carried out the postmortem at Nyahururu on 11/07/2016. He stated that on general examination of the body he saw burned marks resembling iron box burns on the right anterior (front on the chest) and also on the backside of the chest wall. Also on the right buttock there were burns.

29. He stated that they were second degree burns meaning that the skin and the layer beneath had been burned. The body also had stab wounds on the left upper side of the thorax chest wall. There were three more stab wounds on the right side (the back of the chest wall). The body had been decapitated half way – that is the neck had been cut half (that is like slaughtering). At the level of C4, C5 and were also fractured.

30. There was also transection of the spinal column at the level of C4, C5 (meaning that the spinal code had been cut). On the respiratory the left lung had been perforated and it had collapsed. The cardiovascular system was normal. Also the digestive system and the genitalia were normal.

31. On the head there was despoliation at C4, C5 and the spinal code column had fractures. As a result, he formed opinion that the cause of death was despoliation of the spinal code – meaning that what caused the death was the cutting of the neck. The probable weapon used was sharp like a panga or axe. He stated that the cutting of the neck was a clear smooth cut like a very heavy and sharp object was used. The perforation of the knife that was used.

32. **PW9 John Kibe Ngugi** testified and stated that in June 2016 he was on leave. When on leave he would do business. He used to go to buy oranges from Tanzania or from Ukambani and bring to sell in Nyahururu. He requested his fried to locate for him a Matatu he could hire and he was introduced to Accused 4 James Kamau Njeri who had a Matatu Reg. No. KCB 247X Nissan Vanette. On 06/06/2016 he woke up to start the journey. He paid Kshs.10, 000/- to Samuel Kamau as a deposit. They started the journey but along the way the vehicle broke down.

33. He continued this journey using a Matatu. He went to Machakos and bought his goods and he returned. He asked the driver of the vehicle that broke down to refund his money. That the driver (accused 4) gave him 1,500/- and told him that for the balance he would give a phone as a collateral. That accused 4 produced a phone from his pocket which was Huawei Ideos. The phone was without a sim card.

34. Later on he was called by CID officers and was told that he was having a phone that belonged to somebody else. He was told to record a statement because the phone he was given belonged to a lady that had been killed. By that time the person who had given him the phone namely Samuel Kamau was at the police station. He had been arrested. He identified the suspect and the phone (exhibit 4). He stated that the accused person (accused 4) gave him the phone as collateral.

35. **PW10 No. 93937 Police Constable Edward Esanya** produced photographs. He stated that he is not the one who visited the scene and took photographs, but he came to produce the photographs on behalf of his colleague Sergeant Joel Koske who had been transferred. He came to produce six photographs taken at the scene of murder;

a. 1st photograph shows the general view of the door of the house of the deceased – Exhibit 10 (a).

b. 2nd photograph shows the general view of items including a brown handbag and scattered items on the floor.

c. 3rd photograph shows a general and closer view of the deceased lying on the sofa set facing down in the sitting room – Exhibit 10 (c).

d. 4th photograph shows a closer view of the deceased lying on the sofa set – Exhibit 10 (d).

e. 5th photograph shows a closer view of the face with injury on the left side of the neck – Exhibit 10 (e).

f. 6th photograph shows a metal bar lying next to the deceased on the floor – Exhibit 10 (f)

36. The photographs were produced together with the report (Exhibit 11 memo form).

37. **PW11 No. 76773 Corporal Odhiambo Boniface** who was the investigating officer testified and stated that on 05/07/2016 he received a report through Mairo – Inya Police Station where it had been reported that a person by the name Rosemarry Wanjiru had been robbed and murdered at her home. He visited the scene with the scene of crime officer on the same date 05/07/2016.

38. He stated that on arrival at the scene, at the backyard of the house they found a ladder attached to the ground and the roof and one iron sheet had been removed. That is where the entry was gained. At the bedroom the ceiling board had been damaged and the same was used as an entry point. The ceiling board had fallen down partly. In the sitting room they found the deceased lying on a sofa set in a pool of blood with a cut on the back of the head. Photographs were taken at the scene and the body was removed. He stated that on the deceased there was a deep cut wound on the back of the head and there were burns. The body had some smell indicating that it had stayed for a while. The body was removed to the mortuary.

39. He stated that he collected a sword and a metal bar both stained with blood from the scene which were found lying next to the body. That the metal bar was on the sofa next to the deceased, but the sword was on the floor. He produced the sword and the iron bar as exhibits. He further stated that he collected two box for phones that were reported to be missing from the deceased. He produced the two boxes and two receipts for Samsung Galaxy IMEI No. 353xxxxxxxxxxx and a box for Huawei Ideos Serial No. 355xxxxxxxxxxx. These numbers assisted him to trace the people who were using the said phones.

40. He traced Philip Maina (PW1) with the Samsung Galaxy and recovered the phone. Then the said Philip mentioned Johnson Njenga (accused 1) and Terra Muguna (accused 2) to have sold him the phone at Kshs.3, 000/- who issued him a receipt showing Kshs.6, 500/- (Exhibit 14).

41. As a result, he traced accused 1 and accused 2 and they were charged with this offence.

42. He stated that Johnson Njenga Accused 1 told him that the phone was brought to him by Accused 2 Terra Muguna with instructions to look for a market to sell the phone. He confirmed that the said Terra Muguna was a brother to the deceased and he was already in prison remand charged with another offence.

43. As regards the second phone Huawei Ideos he traced it through Accused 4. He recovered the phone from an agricultural officer (PW9) who had been given the phone to hold as collateral by accused 4. He stated that accused 4 James Kamau confirmed that he had given the phone to the Agricultural Officer to hold as credit for a debt to be paid. Accused 4 was also arrested because of the phone.

44. The 3rd accused person was connected to this case through a brown jumper that was found in the deceased's house and was identified by family members of accused 3 to belong to accused 3. The jumper was produced. He stated that accused 3 denied the jumper to be his, but PW11 relied on the evidence of the mother and sister (PW3) of accused 3 who identified the jumper to belong to the accused person.

45. On the defence side all accused persons denied the offence.

46. **Accused 1 Johnson Njenga Ngatia** stated that he works with TKM Sacco. He stated that in July 2016 (on 20th July, 2016) he was approached by Accused 2 Terra Muguna who told him that he wanted to travel to Eldoret but he did not have fare, but he had a phone that he wanted to exchange with money so that he could travel. He took accused 2 to PW1 at 4NTE booking office. PW1 accepted to buy the phone. Then on 15/09/2016 he was arrested by CID officers and was taken to Nyahururu Police Station where he found Maina (PW1) the buyer in the cell. He was charged jointly with Philip Maina (PW1) and were brought to court.

47. **Accused 2 Terra Muguna Kariuki** denied the charge. He stated that on 05/07/2016 he was at his place of work at Shauri repairing some road when he was informed about the death of his sister. He went home and found several members of the family gathered. That is when he learned his elder sister had been murdered.

48. He was arrested later on 31st July on alleged offence of stealing and was arraigned in court on 01/08/2016. Later on in October he was again charged with this case because Johnson Njenga (accused 1) had lied that he had sold a phone to Philip Maina. After he was charged Philip Maina was released.

49. **Accused 3 Paul Thumbi** denied to have committed the offence and he denied the jumper that was produced to belong to him. He stated

that he was arrested for alleged offence of stealing. He stayed in custody up to October 2016 when he was also charged with this case of Robbery with Violence. He was then joined with Accused 1 and Accused 2. Later accused 4 was also charged jointly with him.

50. He states that his mother (PW2) and his sister (PW3) who testified and identified the jumper to belong to him did so out of a grudge they hold against him when he objected to sale of family plots by the mother (PW2).

51. **Accused 4 James Kamau Njeri** also denied to have committed the offence. He stated that he was a Matatu operator and that the phone make Huawei was left in the Matatu by a passenger in September 2016. He implicated accused 1 to be the passenger that left the phone in his Matatu. He stated that after he was charged and was remanded in prison he met the passenger or the person who left the phone in his vehicle was also in prison custody. He identified the person to be the 1st accused person in this case.

52. His conductor did not testify yet he is the one who was allegedly left with the phone. He stated that he later briefly used the phone by inserting his card in the phone when his phone went low on power. Accused 4 produced exhibits such as his driving license and a photograph showing his image next to a vehicle and was in matatu driver's uniform. He stated that he owned a Matatu Reg. No. KCB 247X which he was operating on Nyahururu – Nakuru and Mairo – Inya road. He stated that in September 2016 he carried some passengers from Nyahururu to Mairo – Inya and one of the passengers was drunk. That the conductor tried to prevent the passenger from entering the vehicle but he advised the conductor to let the passenger in. The time was 11.00pm. Later on the driver told him that the passenger who was drunk had refused to pay fare and instead gave him a phone. The phone was Huawei Ideos. That as the owner of the Matatu he advised the conductor to give him the phone to keep until the passenger collected it since the passenger had promised to collect it.

53. But the passenger never returned to collect the phone. Later on he used the phone to call his brother to be assisted when his vehicle broke down while on his way to Nakuru. He got assisted and he proceeded to Nakuru. Later on he was hired by Mr. Kibe (PW9) to take him to Ukambani to buy oranges and other fruits. He stated that Mr. Kibe paid him Kshs.3, 000/- for fuel. On the way the vehicle's engine knocked and he had to be pulled back to Nyahururu. He managed to refund PW9 Kshs.1, 500/-. He was not able to refund the rest of the money because he used the money he had to buy a new engine.

54. Later on PW9 met him at the bus stage and took the phone from his vehicle. By the time he was arrested he did not have the phone. He stated that the investigating officer later approached him when he was with Mr. Kibe (PW9). He is the one who had told the investigating officer the person who had the phone. He explained how Mr. Kibe got the phone and that Mr. Kibe had promised to return the phone as soon as his money was paid in full. He tried to explain to the investigating officer how he got the phone but he did not know the name of the passenger who left the phone. He was then arrested and charged. When he was remanded in prison custody he met the alleged passenger, but the conductor who had given him the phone wrote that he was given a Nokia Phone and the conductor also wrote a different vehicle as KBC 938V to be the vehicle in which he was given a phone. He was therefore unable to use the conductor as his witness. Neither was the conductor called by the prosecution to testify.

55. Accused No. 4 called a witness **Boniface Njoroge DW5** who only stated that he knew accused 4 as a Matatu operator and that the accused used to drive motor vehicle Reg. No. KCB 247X which used to operate on Nyahururu – Nyeri Road. That it was operating as town service. About the phone he had no knowledge about it.

56. Accused No. 4 also called one **Alex Wanjiku** who stated that he knew accused 4 as a Matatu driver but this case he knew nothing. He stated that he did not know what the accused person was charged with.

Appellants' Submissions

Terra Muguna Kariuki: 1st Appellant's submissions filed on 25th May 2021:

57. The 1st Appellant averred that the learned trial magistrate misdirected herself when she convicted him based on circumstantial evidence without any corroborating evidence on record. That the trial magistrate did not consider the law on recovery of stolen items by police. He asserted that without any corroborative evidence, PW11's evidence that he bought the phone from accused 1 and 2 remain only as allegations n given by the officer and that an inventory would have gone a long way to corroborate the evidence.

58. It was the 1st Appellant's submission that PW1 and Johnson Njenga, accused 1, planned to pin down the Appellant since they found him in prison with another matter. Reliance was placed on **Joseph Odhiambo vs. Republic cr: ppel No 4 of 1980 (COA).** Further, the court did it record the credibility of the two and failed to warn itself accordingly before convicting him based on their evidence. Reliance was placed on the case of **Ndara S/o Kariuki and 6 Others vs Republic (1945) 12 EACA 84**.

59. In addition, the 1st Appellant averred that there was no nexus between his arrest and the robbery in question. That the trial magistrate convicted him based on accomplice evidence which was very weak. That the case was poorly investigated and there were too many gaps left by the prosecution to determine that the case was proved beyond reasonable doubt. He quoted the case of **Woolmington vs DPP (1935) AC 462.**

60. The 1st Appellant submitted that the trial magistrate did not consider his alibi defence. That the prosecution did not rebut his defence of alibi when it was given under oath.

61. In conclusion, he asserted that charge sheet was fatally defective and could not support a conviction or sentence. He alleged that it was clear that the robbery did not take place on 5/7/206 as indicated on the charge sheet. Reliance was placed on **Section 134, 214 And 382 of the Criminal Procedure Code.**

Paul Thumbi Nginyo: 2nd Appellant's Submissions dated 12th February 2021:

62. The 2ndAppellant submitted that his arrest and conviction was based on evidence of recovery of a jumper purported to have been recovered for the scene of crime which was identified by his mother, PW2 and his sister, PW3. However, that evidence was not corroborated by any other witness apart from the two family members who were trying to fix him as there existed a grudge between them over a piece of land.

63. It was the 2ndAppellant submission that PW2's evidence was based on hearsay which is inadmissible in court and that her evidence was suspicious as it was clear that she was fixing the Appellant to settle family issues. He submitted that on cross examination PW3 agreed that there was no way that she could prove that the jumper belonged to the Appellant since there was no evidence of photograph or any independent witness who could prove that the jumper belonged to him.

64. It was his submission that there was no concrete evidence to prove that the jumper belonged to him and he denied that it belonged to him. Reliance was placed on ***Ndegwa Vs R (1985) KLR 535***. Further he asserted that there was no evidence on how the jumper was recovered and relied on the case of ***Joseph Murimi & Another vs. Republic (2020) eKLR*** and ***Stephen Owino Opera vs Republic (2016) Eklr.***

65. Additionally, the 2ndAppellant asserted that the prosecution did not connect him to the recovered jumper and that nothing connected him to the scene or robbery in question.

66. Similarly, to the 1st Appellant, the 2nd Appellant submitted that the charge sheet framing of charges and evidence are in variance thus the charge sheet is defective under the meaning of ***Section 214 of the Criminal Procedure Code***. That the charge sheet was fatally defective and could not support a conviction or sentence. He alleged that it was clear that the robbery did not take place on 5/7/206 as indicated on the charge sheet. Reliance was placed on ***Section 134, 214 And 382 of the Criminal Procedure Code.***

67. Finally, the Appellant submitted that the prosecution did not prove this case as against him to the required standard of proof beyond reasonable doubt and therefore his conviction and sentence was not safe.

Johnson Njenga Ngatia: 3rd Appellant's Submissions

68. The 3rd Appellant submitted that no singular piece of evidence was ever recovered from the Appellant and that he was believed to have been the deceased's neighbor and a friend to Terra Muguna and was therefore linked to the commission of the offence by association but not by any hard evidence.

69. It was his submission that the trial magistrate simply attributed the death of the deceased to him by imagining without any evidence to confirm that the Appellant was a neighbor of the deceased and must have known that the deceased had been killed when the Appellant assisted the 1st Appellant to sell a mobile phone which was said to have housed a sim card belonging to the deceased at one point. That it was not established whether the phone belonged to the deceased and no authentication was done.

70. Further, the 3rd Appellant asserted that he was first arraigned to court after a period of 1 month and 3 weeks from the offence was alleged to have been committed and therefore it cannot be concluded that that period of time is proximate enough even to invoke the doctrine if recent possession which in any case would not affect him since the evidence di not point to him as the person who handled wither exhibit 1 and/or 2.

71. The 3rd Appellant alluded to the fact that the author of exhibit 2 should have been identified by forensic handwriting examination so at to point to the role played by the Appellant in the sale. Additionally, he asserted that no shred of evidence was adduced to place the Appellant as the scene of the crime yet that was easy to procure by way of DNA sampling of the scene of crime to ascertain the bearers of the weapons recovered thereat.

72. On the standard of proof required; reliance was placed on ***Article 50 (2) (a) Of the Constitution of Kenya, 2010***, ***Section 107-109 Evidence Act***, ***David Wahome Wanjohi (supra).***

73. In conclusion, the 3rd Appellant asserted that he was convicted based on assumptions and conjecture but not on concrete facts. That for a conviction to result from circumstantial evidence, the evidence must explicably point to the defendant and must be so watertight as to exclude any doubt or other hypothesis. However, this was not such a case as there was room to establish inculpatory material such as DNA sampling of the scene of crime and a background check of the origin of exhibit 1 for identification as well as forensic handwriting examination of exhibit 2.

James Kamau Njeri: 4th Appellant's Submissions

74. The 4th Appellant submitted that none of the prosecution witnesses confirmed seeing him at the deceased's homestead on 5/7/2016 where the robbery with violence was said to have taken place. If anything from the evidence, the date of 5/7/2016 was when the body of the deceased was discovered and the robbery was alleged to have been committed on 2nd or 3rd July 2016. That the only witnesses who mentioned him in connection with the offence were PW9 and PW11 the investigation officer and this was in relation to the black Ideos phone which belonged to the deceased. This in his opinion did not prove beyond reasonable doubt that he participated in the robbery and murder of the deceased.

75. It was his evidence that the learned trial magistrate dismissed his defence yet he gave an explanation on how he came in possession of the Ideos phone. He went on to give an account of the same. Reliance was placed on the cases of ***James Githinji Ndungu Vs R Court of Appeal, Criminal Appeal No. 392 of 2006*** and ***Mwangi & Another vs Republic 2 KLR 32.***

76. The Appellants counsel asserted that the Appellant did not deny knowledge of the Ideos phone the very first time he was arrested on 20/9/2016 and he even voluntarily informed the police that the phone was with PW9 who was holding it as a collateral. That his conduct just like the Appellant in the aforementioned ***James Githinji's* Case supra** was not of a guilty person. Further reliance was placed in the case of ***Rasto Muyela v R (2013) eKLR***.

77. It was the Appellant's submission that the doctrine of recent possession is not applicable in the instant case noting that the Ideos mobile phone was found in possession of the Appellant on 20/9/2016 which is a period of 75days from the date of the robbery. That the recovery of the phone was not within the proximate time of the robbery given that the phone is an item that changes hand within a short period of time. Reliance was placed on the case of ***Stephen Mwende v R (2015) eKLR.***

78. The Appellant urged the court to find that the mere fact that the Appellant used his sim card on the Ideos phone although no data from Safaricom was produced to prove that was not sufficient ground for convicting him. That his explanation was plausible given his conduct from the time of his arrest which should be taken into consideration. Finally, the Appellant urged the court to set aside the mandatory death sentence meted by the trial magistrate should the appeal on conviction fail as guided by the supreme court decision of ***Francis Karioko Muruatetu & Anor v R (2017) eKLR.***

Respondent's Submissions:

79. On their part, the prosecution conceded the appeal in relation to James Kamau Njeri for the reason that other than the Huawei Ideos phone that was found on him, there is no other evidence to suggest that he was at the scene of crime at the time of commission of the offence.

80. It was their submission that the 4th Appellant was convicted because of the doctrine of recent possession which was wrong as the Appellant gave an explanation that he was a driver and that he got the phone in the course of his duties which in their opinion might be reasonably true as to how he came about the possession.

81. The prosecution however opposed the other Appellants appeal. They submitted that Joseph and Terra were rightly convicted due to the doctrine of recent possession. That the Samsung phone was in their possession before they sold it to PW1 and even made a fake receipt to show that they owned the phone. That they were unable to give a reasonable explanation of how they came about the possession of the Samsung phone.

82. The Respondent contended that PW1 bought the Samsung phone for Kshs.3000/ after being shown a receipt for the phone and the same was corroborated by the evidence of PW11 the investigating officer. Further, PW1 identified Joseph Njenga Ngatia by recognition and he also identified Terra Muguna since he spent quite some time with him negotiating for the phone although it was the first time he was seeing him.

83. Moreover, the Respondent averred that PW2 and PW3 identified a brown jumper picked at the scene of the rime as belonging to Paul Thumbi Nginyo. That PW3 stated that she first saw the cardigan at the scene and was able to recognize it. That PW2 stated that she was able to identify the cardigan because of the pockets and she would often see Paul Thumbi Nginyo wearing it and the same was corroborated by PW3.

84. The Respondent submitted that it also came out in evidence that Joseph Njenga Ngatia, Paul Thumbi Nginyo and Terra Muguna all resided in Mairo Inya where the offence was committed and PW5 confirmed that all there were friends.

85. In conclusion, the prosecution submitted that it proved its case to the required standards and therefore the appeal should be dismissed in its entirety.

Analysis and Determination:

86. First and foremost, the duty of this court as the first Appellate court is set out in the case of ***Okeno Vs Republic [1972] EA 32*** where it was stated as follows: -

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"***

87. Similarly, in ***David Njuguna Wairimu vs. Republic [2010] eKLR*** where the Court of Appeal stated that:-

> ***'The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first Appellants court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.'***

88. Fundamentally, this court is expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis, while bearing in mind the fact that it never had the opportunity to hear the witnesses and observe their demeanor.

89. Inevitably, this court in determining this appeal ought to satisfy itself that the ingredients of the offence of robbery with violence were proved and as so required in law; beyond any reasonable doubt.

90. The offence of robbery with violence is contained in ***Sections 295 and 296(2) of the Penal Code*** as follows:-

> ***"295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***
>
> ***296(2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

91. Further, In ***Jeremiah Oloo Odira v Republic [2018] eKLR*** the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows: -

> ***"Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.***
>
> ***On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -***
>
> > ***(a) The offender is armed with any dangerous or offensive weapon or instrument, or***
> >
> > ***(b) The offender is in the company of one or more other person or persons, or***
> >
> > ***(c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person."***

92. In the present case, I wholly agree with the learned trial magistrate that the elements of the offence of robbery with violence were established. The evidence follows that:-

> ***"Entry into the house was gained through a roof. An iron bar and a sword were produced because they were found in the house next to the body of the deceased. Photographs produced by the scene visiting officer clearly proves that the weapons were found near the deceased's body. The body had been cut and burned with something like an iron. Photographs produced show injuries on the body of the deceased. The doctor's evidence indicates that very serious injuries were inflicted on the deceased that caused her death. She had been stabbed, the neck was cut in a manner to slaughter the deceased."***

93. Accordingly, I believe and concur with the trial magistrate that the two phones were stolen under circumstances that qualify to be robbery with violence since the victim was fatally injured.

94. After considering the grounds of appeal, submissions thereon and evidence adduced in the trial court, the Appellants herein raised separate grounds of appeal which I have considered and I find that the key issues raised by the Appellants and that cut across their appeals are: whether the charge sheet was defective; secondly whether the learned trial magistrate erred in law and in fact by applying the circumstantial evidence as the best evidence in the present case and lastly, whether the Appellants were convicted for the offence of robbery with violence on the basis of consistent, reliable and sufficient evidence.

Was the charge defective?

95. Both the 1st Appellant, the 2nd Appellant submitted that the framing of charges in the charge sheet and the evidence presented in court are in variance thus the charge sheet is defective under the meaning of ***Section 214 of the Criminal Procedure Code***. That the charge sheet was fatally defective and could not support a conviction or sentence. They alleged that it was clear that the robbery did not take place on 5/7/2016 as indicated on the charge sheet. Reliance was placed on ***Section 134, 214 And 382 of the Criminal Procedure Code.***

96. ***Section 134 of the Criminal Procedure Code*** provides that a charge sheet should be drafted in such a way that; -

> ***It discloses an offence known in law;***
>
> ***(ii) offence is disclosed and stated in a clear and unambiguous manner such that the accused person pleads to a specific charge which is easily under stable so as to also enable the accused person prepare the defence; and***
>
> ***(iii) The charge should contain all the essential ingredients of the offence.***

97. Indisputably, the body of deceased was found on 5th July 2016 however following the evidence adduced in court the robbery with violence and consequent murder did not occur on that same date, it must have occurred some days before; perhaps on the 2nd or 3rd of July

2016. The accused persons did not at any point raise this objection and they even went on to give their defence thus in my view this irregularity did not occasion a failure of justice thus the proviso in ***Section 382 of the Criminal Procedure Code*** applies herein.

98. ***Section 382 of the Criminal Procedure Code*** provides that:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

99. Further, I associate myself with the reasoning of the Learned Judge in the case of ***B N D v Republic [2017] eKLR*** that:-

> ***"The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective. In this case, the Appellant was charged under section 8(1) (3) of the Sexual Offences Act. No such section exists in the Act. The question is: did this prejudice the Appellant and occasion a miscarriage of justice? I do not think so. There is no question in my mind that the Accused Person clearly understood the charges facing him well enough to understand the ingredients of the crime charged so that he could fashion his defence. In this case, he understood it well enough to offer an explanation when the facts were read out to him. Hence, as our case law has established, the test for a defective charge sheet is a substantive one, not a formalistic one and when it is used here it establishes that the charges gave fair notice to the Accused Person to the charges he was facing, and the trial was fair in a substantive sense. No miscarriage of justice was occasioned by the typographical error in the charge sheet."***

100. Accordingly, in determining whether the variance between the date indicated in the charge sheet and the actual date the offence was committed rendered the charge sheet defective; I hold that it did not. More so, this variance did not prejudice the Appellants or occasion a miscarriage of justice. The same cannot be considered to be a fatal defect as contended by the 1st and 2nd Appellant and in any case the defect therein was curable by **Section 382 of the Criminal Procedure Code**. Therefore, I find that this ground of appeal lacks merit. That being the case I will proceed to determine the other issues raised in the Appellants' grounds of appeal.

Whether the learned trial magistrate erred in law and in fact by applying the circumstantial evidence as the best evidence in the present case

101. In determining the appeal in relation to the issue at hand, it is important for this court to evaluate the conduct of each of the Appellants and draw conclusions as to the role; if any played by each of the Appellant towards the commission of the crime.

102. According to PW1 the Samsung Galaxy phone was sold to him by the 1st and 3rd Appellant. PW1 testified that he knew the 3rd Appellant as they has worked together at one point for 4NTE. That the latter was the one leading the negotiations but on behalf of his friend, the 1st Appellant. It was PW1'S testimony that the initial story as given by the 3rd Appellant was that the 1st Appellant wanted to travel but he had no fare. PW1 was adamant that he had no way of helping the two and that is when according to his testimony the 1st Appellant gave out a phone and asked if he could buy it. When PW1 asked if they had a receipt for the phone, they responded that it was where they had kept their bags and left saying that they were going to get the receipt. Upon their return 30 minutes later, they come back to complete the transaction and left pw1 with the phone and receipt and went away. A receipt that was obviously fictitious according to the evidence adduced in court PW1 was later arrested in relation to the phone and he told the police that the 1st and 3rd Appellant sold him the phone tying it to the case.

103. From the foregoing narration, it is clear that the 1st and 3rd Appellant were working in cahoots; the 3rd Appellant was in charge of finding a customer which he did and it was someone known to him and the 1st Appellant was in possession of the phone and served as the actual seller. PW1 even referred to the latter as the owner of the phone. He only bought the phone because he knew the 3rd Appellant. It is obvious that the 1st Appellant knowingly misrepresented himself as the owner of the phone and jointly with the 3rd Appellant went to great lengths to dispose of the phone and even come up with a false receipt.

104. I agree with the trial magistrate in her assertion that the phone connects Accused 1 and Accused 2 to the offence of robbery with violence because it belonged to the deceased person who had been murdered in cold blood in her house. Notably, when placed on their defence, the 1st and 3rd Appellant did not tender any explanation as to how they came in possession of a mobile phone that was stolen from PW1 from the deceased.

105. It is my considered view that the phone established an undeniable nexus between these two Appellants and the offence. It is also important to note that the 1st Appellant was said to the deceased's brother. PW1 positively identified the two as the persons involved in selling him the phone.

106. The 2nd Appellant was linked to this case and arrested because of a jumper that was found in the deceased house otherwise known as the scene of crime. Pw2 and PW3, who are his family members i.e. his mother and sister identified the jumper and asserted that it belonged to him. PW3 even identified the jumper by its brown color and its pockets. The both testified that they were used to seeing the 2nd Appellant wearing the jumper as they lived together. I agree with the learned trial magistrate's opinion that,

"One wonders why the family members would have used such a grave matter to settle their alleged grudge with their kin. I do not believe that accused 3 was speaking the truth. I am satisfied that the jumper was properly identified by his mother and his sister (PW2 and PW3 respectively) who used to see him wearing it. They stayed in the same home with the accused person."

107. PW3 testified in court that the 2nd Appellant was a person who was known to steal; that aside how did the 2nd Appellant's blood stained jumper find its way in the deceased's house? The The 4th Appellant was tied to the crime because of the Huawei phone he had given to PW9. He admitted that he handled the phone and he gave it to PW9 as payment of a debt he owed him. However, in his testimony that 4th Appellant said he came about the phone through a passenger who had left the phone in his vehicle however he could not pinpoint the said passenger as he was driving when the phone was left.

108. Having enumerated on how the evidence on record connects the Appellants to the offence of robbery violence, it is clear that there was no direct evidence to the commission of the offence because there are no witnesses saw what actually happened but there is overwhelming circumstantial evidence.

109. The court in ***Republic v Jumaa Kaviha Kalama Ndolo [2020] eKLR*** quoting the case of ***DPP Kiborne 1973 AC 729***, where the court made the following pertinent observation on circumstantial evidence:

"Circumstantial evidence is particularly powerful when it proves a variety of different facts all of which point to the same conclusion. It works by cumulatively, in geometrical progression, against other possibilities and has been likened to a rope composed of several cords: One strand of the cord might be insufficient to sustain the weight but three stranded together may be quite of sufficient strength. There may be a combination of circumstances no one of which would raise a reasonable suspicion but the three taken together may create a strong conclusion of guilty with as much certainty as human affairs can require or admits of."

110. Also as relied upon by the trial magistrate, the case of ***Kepkering Arap Koske vs Republic (1949) 16 EACA*** set the threshold of the court's acceptance and acting on circumstantial evidence, which has been followed in many other cases which state that before drawing the inference of the accused's guilt from circumstantial evidence the court should ensure that there are no other co-existing circumstances which would weaken or destroy the inference.

111. Similarly, the court in the case of ***Erick Odhiambo Okumu vs Republic (2015) eKLR*** set out three principles for relying on circumstantial evidence as follows;

· ***The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.***

· ***Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.***

· ***The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.***

112. Moreover, in ***Joseph Mutie Mutua v Republic [2019] eKLR,*** it was stated that:-

"For a finding of fact to be made based on circumstantial evidence, the court must be satisfied that there are no other co-existing circumstances which would weaken or destroy the inference of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

113. Having considered all the Appellant's grounds of appeal, and also having carefully reviewed the evidence on record, I find nothing to suggest that the learned magistrate was in error in convicting the 1st, 2nd and 3rd Appellant on the evidence available. I have carefully gone through the circumstantial evidence tendered in court and linked the chain of circumstances undoubtedly to the 1st, 2nd and 3rd Appellants as the persons who violently robbed the deceased and caused her death. I find that there is no escape for the aforementioned Appellants and the prosecution discharged their mandate beyond reasonable doubt to prove that the 1st, 2nd and 3rd Appellants were culpable in the commission of the offence.

114. I agree with the trial court that the circumstances of the offence point to the 1st, 2nd and 3rd Appellants as having committed the offences because the 1st and 3rd Appellants handled a phone which they jointly disposed of and the 2nd Appellant was connected to the offence through a jumper that was found at the scene and was identified by his mother and sister to belong to him. There was no plausible explanation given by the latter as to why a cloth identified to be his was found at the scene. Their defenses were a mere denials and the same were rightfully rejected.

115. Nevertheless, the prosecution conceded the appeal in relation to James Kamau Njeri, the 4th Appellant for the reason that other than the Huawei Ideos phone that was found on him, there is no other evidence to suggest that he was at the scene of crime at the time of commission of the offence. He explained how he came about the phone and It was the Respondent's submission that the 4th Appellant was only convicted because of the doctrine of recent possession which was wrong as the Appellant gave an explanation that he was a driver and that he got the phone in the course of his duties which in their opinion might be reasonably true as to how he came about the possession. These explanations therefore work to his benefit

116. From the evidence, the 4th Appellant's counsel asserted that the Appellant did not deny knowledge of the Ideos phone the very first time he was arrested on 20/9/2016 and he even voluntarily informed the police that the phone was with PW9 who was holding it as a collateral. Having gone through the evidence on record it seems to me that the 4th Appellant was arrested merely based on suspicion which can never form the basis of conviction. Consequently, the evidence on record against the 4th Appellant does not irresistibly assure the court that the 4th Appellant was indeed a part of the gang that committed the crime at hand. In the circumstances, I think that it is unsafe to allow the conviction against the 4th Appellant to stand. It is my considered view that the 1st, 2ndand 3rd Appellants were convicted for the offence of robbery with violence on the basis of consistent, reliable and sufficient evidence.

117. On the issue of sentencing, the Sentencing Policy Guidelines requires the court to take into account the gravity of the offence. From the holding of the trial court herein it is clear that the same had this in mind while passing death sentence against the Appellants and sentence being a discretion of the court, I am unable to find fault in her ruling thereon as this offence was committed with exceptional depravity leading to a loss life.

118. In conclusion,

> ***i. The 1st, 2nd and 3rd Appellants' appeal from conviction and sentence is without merit and is hereby dismissed***
>
> ***ii. The 4th's Appellant appeal is hereby allowed, conviction quashed and the sentence set aside. The 4th Appellant shall be set at liberty forthwith unless otherwise lawfully held.***

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 23RD DAY OF SEPTEMBER, 2021.

....

CHARLES KARIUKI

JUDGE