REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 21 OF 2012

VINCENT KASUTI WAFULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the original conviction and sentence in criminal case number 2201 of 2010 in the Chief Magistrate's Court at Bungoma – Hon. F. Kyambia (SRM)*)

JUDGMENT

1. The Appellant herein was charged together with two others for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars were that on an unknown date and time between 10th and 16th November, 2008 at Chepkube village, Chepkube location in Mt. Elgon District within western province, jointly with others not before court, while armed with offensive weapons namely pangas and knives robbed JOB WAKHOLI SITATI one numberless motorcycle make STAR TVS, Blue in colour valued at Kshs. 90,000/= the property of his employer JACOB BWAYO, and at, or immediately before or immediately after the time of such robbery killed the said JOB WAKHOLI SITATI.

2. In sum, the prosecution case was that the deceased who is the victim of the offence was a motorcycle rider employed by one Jacob Bwayo who testified as PW1. The deceased would pick the motorcycle up from PW1 at 6.00 a.m. for his daily operation and return it at 6.00 p.m. On the material date, the deceased did not return the motorcycle as had been custom. He had, according to his wife PW2 Vivian Nagila Wakoli left home at around 5.00 p.m. after receiving a phone call. At about 9.00 p.m., PW1 called the deceased to inquire of his whereabouts to which the deceased informed him that he was at a place known as 'Mayanja' and would be coming home to bring the motorbike. He would however never return. When he had last been seen, he had been in the company of the 1st and 3rd Accused persons. It was not until 16th November, 2018 that divers recovered the deceased's body in a river at a place known as Lwakhakha. The deceased's body had a cut wound on the head, the eyes were gouged out and his tongue had been removed. The motorbike was traced to Uganda and was later recovered. The prosecution called a total of 16 witnesses to establish its case.

3. At the end of the trial, the 1st and 3rd Accused persons were found guilty of the offence of robbery with violence and accordingly convicted under **section 215** of the **Penal Code** while the 2nd Accused person was acquitted on the charges. The 1st and 3rd Accused were consequently sentenced to suffer death by hanging.

4. Being dissatisfied with the decision of the trial court, the Appellant preferred the instant appeal on both conviction and sentence. He filed nine (9) grounds of appeal, in which he alleged that the charge sheet was defective; the proceedings were in violation of his constitutional rights; the evidence relied upon was full of contradictions and did not support the charge; the decision of the trial court was against the weight of evidence on record and the sentence was too harsh in the circumstances. On this basis, he urged the court to quash the conviction and set aside the sentence.

5. On 22nd June, 2021 the Appellant filed amended grounds of appeal, in which he propounds the grounds in the petition of appeal and further faults the proceedings before the trial court stating that:

a. *He was arrested without a warrant and detained in police cells for over 24 hours contrary to section 77 of the Constitution*.

b. *He was not informed of his right to representation neither was he accorded an Advocate contrary to Article 49 as read with Article 50(2) of the Constitution*.

c. *He was denied bond and bail contrary to Article 49 of the Constitution*.

d. *The prosecution witnesses were not credible and gave contradictory and inconsistence evidence contrary to section 165 CAP 80*.

e. *The case against him was not proved to the required standard and lacked probative value to sustain a conviction and sentence.*

f. *He was accorded an unfair trial and hearing whereby the case was delayed and took excessively long contrary to Article 50(e).*

g. *The prosecution evidence was full of discrepancies which render the whole evidence scanty and unworthy to sustain a conviction and sentence against the appellant.*

h. *The prosecution failed to summon all witnesses necessary to establish the truth in the present case due to the apprehension that they will testify to the detriment of their own case.*

i. *Identification was not positive and the circumstantial evidence was not proved against the appellant as there were other co-existing circumstances that weakened or destroyed the inference of guilt.*

j. *The prosecution failed to rebut the appellant's defense contrary to section 212 of the C.P.C yet the trial magistrate did not consider the same.*

k. *The trial magistrate failed to consider the appellant's mitigating factors contrary to section 216, 329, 333(2) of the C.P.C as read with section 38 CAP 63.*

l. *The appellant was tried, convicted and sentenced over an incurably defective charge sheet that was not amended contrary to section 214 of the C.P.C.*

m. *The mandatory death sentence meted upon the appellant is unconstitutional, excessive, inhuman, degrading, arbitrary, torturous and amounts to unfair trial.*

6. The Appellant in person contemporaneously filed undated written submissions in support of his case. He contended that he was arrested without a warrant on reasonable suspicion of committing the offence of robbery with violence when the offence is in fact punishable by death. Further that he was not brought before court within twenty-four hours of his arrest or within fourteen days of his arrest. He noted that according to the charge sheet, he was arrested on 10th March, 2009 but first taken to court for plea taking on 24th November, 2010. That according to PW15 CPL Philip Amala, the police were entitled to keep him in their custody for fourteen days before bringing him before the court. He asserted that he was never informed of the reason for the extraordinary delay or given any explanation whatsoever. He cited the decisions in **Ndede vs. Republic [1991] eKLR** and **Albanus Mwasia Mutua vs. Republic [2006] eKLR**. He urged that there was no cure for the delay other than to nullify the proceedings for violating his rights under **Article 49** of the **Constitution**.

7. On the right to a fair hearing under **Article 50** of the **Constitution**, the Appellant submitted first, that he was never informed of his right of representation by an advocate nor did the trial magistrate make efforts to assign him an advocate which acts amounted to an unfair trial. He asserted that not every man has the ability to defend himself urging that one may not bring out the points in his favour of the weakness in the prosecution case, or may be tongue tied, nervous, confused or wanting in intelligence or could not examine or cross-examine witnesses. He urged that it is the duty of the court to enforce the provisions of the Constitution failure to which there would be no basis for the constitutional provisions.

8. Second, that an arrested person has a right to be released on bail or bond pending trial until proven guilty of the offence. He contended that throughout the trial, from the year 2009 until his conviction on 10th February, 2012, he was never informed of this right nor was the right explained to him. That by being deprived of his right to liberty for three whole years without bail or bond he did not receive a fair trial. To this end, he cited **section 356** of the **Criminal Procedure Code**, and **Articles 27** and **49(1)(h)** of the **Constitution**. He urged that the jurisprudence from case law is that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of the evidence adduced in support of the charge.

9. Third, that the trial took excessively long without a cogent reason contrary to **Article 50(4)**. Further that he was not provided with an interpreter when the Constitution is clear that every person who is charged with a criminal offence shall be informed as soon as reasonably practicable in a language that he understands and in detail, of the nature of the offence with which he is charged. Additionally, that despite the order of 20th January, 2011, he was not supplied with copies of witness statements nor did the court confirm that he ever received them. He urged that the prosecution duty at common law is to disclose to the defense all witness statements or to allow them to inspect statements and make copies of all the relevant scientific material whether or not the defense made a specific request for disclosure.

10. It was the Appellant's further submission that the prosecution witnesses gave contradictory, inconsistent and uncorroborated evidence contrary to **section 165** of the **Evidence Act**. That the section states that the consistency or otherwise of a witness can be proved by former statements made by such witness relating to the same fact. Therefore, that the witness upon whose evidence is relied on should not create an impression in the mind of the court that he is not a straight forward person or raise suspicion about his trust worthiness or do or say something which indicates that he is a person of doubtful integrity and therefore an unreliable witness.

11. He pointed out that despite PW1, PW8 and PW12 referring to him as "Castor", he had no such alias. That in any case, the charge also identified him as "Vincent Kasuti Wafula". In respect of the deceased, he pointed out that the charge sheet referred to the deceased as "Job Wakholi Sitati", while the postmortem form referred to the deceased as "Job Wakoli". Further that the charge sheet indicated that the offence occurred on diverse dates between 10th and 16th November, 2008 which was inconsistent with the evidence of PW1, PW2 and PW8 that the deceased was last seen on 10th November, 2008. On this basis, he urged that the charge was defective stating that the evidence in chief did not accord with the charge.

12. The Appellant further urged that despite PW1 testifying to having organized with his fellow teachers to pretend to be in the market for a

motorcycle to lure the offenders, no document was ever produced to confirm that there were any such business dealings. He asserted that the **Sale of Goods Act (CAP. 31)** provides that business transactions involving sale of goods shall always be proved by a receipt, sale agreement or contract letter.

13. The Appellant further urged that the case against him was not proved to the required standard and lacked probative value to sustain the conviction and sentence against him. Particularly that there was no eye witness who saw him attack and steal from the deceased, nor was he found to be in possession of the robbed motorbike. Further that the police failed in its duty to prove identification by arranging for and conducting a fair identification parade. He contended that there were other co-existing circumstances that weakened and destroyed the inference of guilt. Therefore, that there was no chain formed such that there was no escape from the conclusion that within human possibility, the crime was committed by the accused and none else.

14. The Appellant drew attention to the testimony of PW15 CPL Philip Amala who stated that the appellant was first charged for the offence of murder contrary to **section 203** as read with **section 204** of the **Criminal Procedure Code** and later with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. He took issue with the rank of PW15 noting that he was below the rank of Inspector and could therefore not have taken an inquiry statement or even charge or caution statement from the appellant. Therefore, that the case was fabricated, coached and framed. Further that the evidence so extracted was inadmissible and should not have been relied upon in convicting him.

15. Additionally, the Appellant argued that the prosecution failed to call essential witnesses to testify, and attributed this to their apprehension that they would testify to the detriment of their own case. That this omission is fatal to the conviction as the prosecution is bound to call all witnesses necessary to establish the truth in a case.

16. In respect of sentencing, the Appellant contended that the trial court failed to consider his mitigation on account that the court's hands were tied thereby depriving him of the right to protection and full benefit of the law. He asserted that the Constitution and the law grants the court discretion to consider mitigating factors before sentencing, urging that **sections 216**, **329** and **333(2)** of the **Criminal Procedure Code** and **section 38** of the **Penal Code** provide that sentences meted out without considering mitigating factors are null and void. He urged that these sections are progressive provisions of the law which guarantee enjoyment of human rights as they are intended to have the elements of a fair trial manifested in all criminal trials. He urged the court to find that the failure to take these provisions into account before sentencing is a violation of **Article 27** of the **Constitution, 2010** and **section 70** of the repealed Constitution.

17. Further that the sentence imposed against him was torturous, cruel, degrading, inhuman, grossly misappropriate and unusual. That the trial court failed to consider that **section 296(2)** of the **Penal Code** is inconsistent with the Constitution as it deprives the court of use of judicial discretion in a matter of life and death. To this end, he cited the Supreme Court decision in **Petition 15 & 16 of 2015 (Consolidated); Francis Karioko Muruateu & another vs. Republic [2017] eKLR**.

18. The state opposed the appeal through learned State Counsel Ms. Nyakibia and relied on its written submissions dated 15th July, 2021 in which it asked the court to dismiss the appeal in its entirety for want of merit.

19. On the allegation that the proceedings violated the Appellant's constitutional rights, it was submitted that the Applicant had not pointed out any particular right and stated with precision how such a right had been violated. It was asserted that the record demonstrates that the trial magistrate was very considerate to the extent that even after the charge sheet was amended to include the frame number of the motorbike, he directed that the seven (7) witnesses who had testified be recalled to testify afresh but that the Appellant declined the offer, and insisted that the trial continue with the remaining witnesses. It was urged that the trial was conducted fairly and the right of the accused persons to cross-examine witnesses and defend themselves was upheld.

20. The State denied that the trial court had failed to take into consideration the evidence in defence. Reference was drawn to the judgment of the trial court at page 70 of the Record of Appeal. In particular, the second paragraoh in which the trial court noted that "*the first accused only gave account of how he was arrested. This did not break the chain of circumstantial evidence linking him to the offence"*. It was further urged that the Appellant also failed to tell the court where he was on the date of the incident despite having been placed on the trail of the scene of crime in Kenya, yet he was a foreigner. That the Appellant also failed to explain what he was doing with a stolen motorbike in Uganda, where he got it from, and why he was selling it. The State urged that his defence was simply not plausible.

21. According to the State, the judgment rendered against the Appellant analyzed the evidence and reached a finding based on the evidence. That far from the tendered evidence, there was no superfluous material considered as alleged. Further that the Appellant had not pointed at any particular material which he considered extraneous, such that it would have led to his acquittal if it had been regarded by the trial court. Therefore, that there was no merit on this ground of appeal.

22. On the weight of evidence upon which the Appellant was convicted, the learned State Counsel submitted that the key ingredients of the charge of robbery with violence were properly met. That PW1 testified that his motorbike was robbed from the deceased rider and transported across the border to Uganda. That he used PW9 to lure the Appellant to sell it to him so that he could return it to Kenya. That PW8 saw the Appellant and another hire the said motorbike before the rider was later discovered dead. That PW12 testified to seeing the motorbike ferrying two passengers one of whom was the Appellant and further to hearing the noise of a man saying "*musiniue*"; and that PW11 testified to recovering the body of the deceased.

23. The learned State Counsel urged that the evidence was overwhelming and showed that the Appellant played a central role in the robbery and death of the rider. To this end, the State asked the court to disregard the notion that the conviction was not based on tangible evidence, urging that the conviction was based on tangible, corroborative and relevant circumstantial evidence that placed the Appellant at the center of the crime. That no other hypothetical conclusion could be inferred from the facts other than that the men whom the rider was ferrying at 7.30 p.m. on the 10th November, 2008 were the ones who robbed him of the motorbike and killed him soon thereafter.

24. On the ground that the charge sheet was defective, it was submitted that the statement of offence and particulars thereof as indicated on

the charge sheet did not reveal any defect which offends **section 134** of the **Criminal Procedure Code**. That the Appellant knew the nature of the offence he was facing and was properly cautioned on the plea date as per the record.

25. On sentence, it was the submission of the State that in the circumstances of this case, the death sentence was the only appropriate sentence. It was asserted that a life was lost as a result of the acts of the Appellant. That his greed led to the killing of a young rider who was working hard to earn himself a living, for his young family which was dependent on him. Therefore, that the sentence meted out should stand. That in any event, **section 296(2)** of the **Penal Code** provides for a mandatory death sentence. The state however noted that the trial court erred to the point that it sentenced the Appellant "*to hang*" when hanging is not contemplated under the said section. Therefore, that the Appellant ought to have been sentenced strictly to death as provided by law. It was however noted that the error was negligible.

26. In determining this appeal, I will categorize the issues propounded by the Appellant under four (4) headings:

a. Rights of Accused persons under Article 49 of the Constitution.

b. The right to fair hearing under Article 50.

c. Burden and Standard of proof.

d. Mitigation and Sentence.

I will now proceed to analyze these issues based on the evidence on record and guided by the arguments raised in the conduct of this appeal.

27. This being the first appeal, I am cognizant of my duty as the first appellate court, as outlined in **Nzivo vs. Republic Criminal Appeal No. 81 of 2003 [2005] 1 KLR PG 700**, where the learned Judges of Appeal, Tunoi, O'kubasu and Waki JJA, held *inter alia* that:

> **"1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts' own decision on the evidence.**
>
> **2. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 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."**

a. <u>Rights of Accused Persons Under Article 49 of the Constitution</u>.

28. On this ambit, I will deal with the issues of arrest, arraignment and bail and bond. I will first deal with the issue of arraignment of the Appellant outside the period stipulated under **Article 49(1)(f)** of the **Constitution** and **section 72** of the **repealed Constitution**. An examination of the Charge Sheet reveals that the Appellant was arrested on 10th March, 2009 and was not brought before a court until 24th November, 2010. The State Counsel conceded that the Appellant had not been brought to court in a timely manner but stated that this did not entitle him to a nullification of the proceedings as he has recourse for the violation of his rights upon application. Indeed, this is the position in law.

29. In the case of **Julius Kamau Mbugua vs. Republic Criminal Appeal No. 50 of 2008** it was observed that there are remedies available to accused persons who are taken to court later than the period provided for. While deliberating on **section 72(6)** of the former constitution which is **Article 49** in the **2010 Constitution** in the foregoing case, the Court of Appeal rendered itself thus:

> **"Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in section 72(6). That is the appropriate remedy which the appellant should have sought in a different form."**

30. This position was reaffirmed by the Court of Appeal in its decision in **Evans Wamalwa Simiyu vs. Republic Criminal Appeal 118 of 2013 [2016] eKLR,** where the appellate court cited the case of **Julius Kamau Mbugua vs. Republic [2010] eKLR** and stated *inter alia* that, where an Appellant is not produced in court within twenty-four hours, it would not automatically result in his acquittal. Instead, the Appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights. In the premise therefore, there is no basis for me to find that this issue was fatal to the prosecution's case.

31. On the right to be released on bail and bond pending a charge or trial, the pertinent law is **Article 49(1)(h)** which provides that *an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released*. The import of this provision is that whereas the right to bond or bail is now constitutionally enumerated, it is not an absolute right. Bail or bond can therefore be denied where there are "compelling reasons". In the instant case however, there is nothing on record to show that the Appellant made an application for bail and/or bond which application was denied. The record however shows that prior to taking plea, the trial court had informed the Appellant and his co-accused persons that the "*the offence they are facing is not bailable*" without more. Notably, the plea taking was done barely three (3) months after the promulgation of the **Constitution 2010** which enumerated the right to bail and bond in the Bill of Rights.

b. <u>Right to a Fair Trial Under Article 50 of the Constitution</u>

32. On this ambit, I will deliberate on a myriad of issues albeit collectively. These are in respect of the Appellant's right to representation; to be informed of the charge with sufficient detail; to have trial conclude without unnecessary delay; to be supplied with witness statements and to adduce and challenge evidence.

33. On representation, **Article 50(2)(g)** provides that every accused person has the right to a fair trial which includes the right to *choose, and be represented by an advocate, and to be informed of this right promptly* and further, as stated under **Article 50(2)(h)**, to have an advocate assigned to the accused person by the State and at the State's expense, if substantial injury would otherwise result, and to be informed of this right promptly.

34. Whereas this court is alive to the fact that the court has a duty to inform unrepresented accused persons of their legal rights, including the right to legal representation, promptly, it is also alive to the fact that the right to legal representation at the state's expense, though a fundamental human right essential to the realization of a fair trial, is not absolute as held by the Court of Appeal (Koome, Azangalala & J.Mohammed, JJ.A.) in **Thomas Alugha Ndegwa vs. Republic [2016] eKLR**.

35. The above cited authorities are to the effect that it is in the interest of justice that an accused person has the benefit of the assistance of a lawyer at each stage of the case. This does not however mean that in circumstances where no such legal representation is provided the accused person is automatically entitled to a retrial or better yet to be released. This is so because the right only becomes available "*if substantial justice would otherwise result*". In **Republic vs. Karisa Kyengo & 2 others [2017] eKLR**, the Supreme Court of Kenya affirmed this position and further observed that:

> **"We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available "*if substantial injustice would otherwise result*"…**
>
> **It is thus clear from the above guideline that free legal assistance may be accorded to a person who "*does not have sufficient means to pay for it*" and that representation should also be given "where interests of justice so require". In recognizing the discretion exercisable by any court in making the determination as to whether the accused person is entitled to legal aid, the Supreme Court of India held as follows:**
>
> > **"*The Court may Judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise. That discretion resides in the Court*."**
>
> **In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at the State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings.**

36. The additional factors considered by the court in determining whether or not to grant an accused person legal representation include *inter alia* the seriousness and/or severity of the offence; the ability of the accused person to pay their own legal representation; whether the accused is a minor; the literacy of the accused and the complexity of the charge against the accused. In the instant case, there is nothing on record to the effect that the Appellant was informed of his right to legal representation.

37. Submitting on this, the Appellant stated that he was not afforded an Advocate, a fact he says prejudiced the trial. Whereas there is nothing on record to show that the Appellant was informed of his right to legal representation, the record demonstrates that at the onset of the prosecution case on 22nd March, 2011 when the first prosecution witness testified, the Appellant and his co-accused persons were represented. The coram of the court on the said date indicates *inter alia* "Accused Present. Waswa for Accused present." The proceedings of the said date go on to show that the said Waswa, who was presumptively the Advocate on record, cross-examined PW1 on behalf of the Appellant and his co-accused persons. There is however nothing to show what happened thereafter as the record shows that the trial proceeded with the accused persons acting in person. In light of this however, it is right to conclude that the Appellant was appraised of his right to representation and could also afford to have legal representation.

38. In **Thomas Alugha Ndegwa vs. Republic** (*supra*) the court of appeal cited with approval the decision in **Legal Aid South Africa vs. Van Der Merwe and Others, (A409/2010) [2010] ZAWCHC 525** where the court stated that:

> **"It should not be required by a court to provide legal representation at state expense where this is not necessary, because the person concerned is able to afford such representation to him or herself."**

39. The enquiry as to whether an accused person is able to bear the costs of representation from his or her resources is however made by the court. An accused person nonetheless has as much, if not more, of an obligation as the State to assist the court's enquiry. Failure in those circumstances to assist the court may well be fatal to their quest for legal assistance at State expense. (See – **Legal Aid Board vs. The State, (363/09) [2010] ZASCA 112** - Supreme Court of Appeal of South Africa). This does not however go to state that the Appellant ought not to have been informed of his right to legal representation and promptly so.

40. Bearing in mind that the Appellant previously had legal representation, it is my considered view that the failure to be informed of their right to legal representation did not prejudice their trial in any way. Whether it was for the court to inquire what happened to the Appellant's

Advocate in order to have an Advocate assigned to him is a different issue altogether.

41. The Appellant further contended in his grounds of appeal that he was not informed of the charge in sufficient detail and further that the charge was defective.

42. The rules for framing of charges are provided under **Section 137(a)** of the **Criminal Procedure Code** (CAP 75) as follows:

> **"(a)(i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;**
>
> **(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;**
>
> **(iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:**
>
> **Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;**
>
> **(iv) the forms set out in the Second Schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in other cases forms to the same effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances of each case;**
>
> **(v) where a charge or information contains more than one count, the counts shall be numbered consecutively;"**

43. In sum, a charge must contain a statement of the offence describing the offence. The said description and particulars of the offence should be executed briefly and in ordinary language, devoid of technical terms and it is not even necessary that the charge should disclose all elements of the offence. It should however contain a reference to the section of the enactments creating the offence.

44. The object of **section 137(a)** is that the offence charged should be disclosed in a clear and unambiguous manner, so that the accused person is able to understand it well enough to be able to plead to it, and to prepare a defence thereto. From the record, the charge in the trial that gave rise to this appeal was indicated as "*ROBBERY WITH VIOLENCE C/SEC 296(2) OF THE PENAL CODE"*. The particulars were set out as hereunder:

> *"1. VINCENT KASUTI WAFULA 2. RONALD MURUNGA 3. ANTHONY WERUNGA BUMBO :- On unknown date and time between 10th and 16th November, 2008 at Chepkube village, Chepkube location in Mt. Elgon District within western province jointly with others not before this court, while armed with offensive weapons namely pangas and knives robbed JOB WAKHOLI SITATI one number less motorcycle make STAR TVS, Blue in colour valued at Kshs. 90,000/= the property of his employer JACOB BWAYO, and at, or immediately before or immediately after the time of such robbery killed the said JOB WAKHOLI SITATI."*

45. It therefore appears that the offence was sufficiently disclosed to the Appellant in the charge. He was fully aware that he was facing a charge of robbery with violence from the statement of the offence as well as the particulars, so much so that he was able to cross-examine the witnesses and mount his defence. The charge was therefore not defective. Additionally, the record shows that at the date of plea taking on 24th November, 2010, the Appellant and his co-accused were cautioned of the substance of the charge.

46. Having pleaded to the charge, which contained a clear statement of a specific offence, I am satisfied that the Appellant was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet gave further details as to the description of the property stolen, the date, place and the manner of the alleged offence.

47. The Appellant further contended that he did not understand the language of the court and ought therefore to have been afforded the services of an interpreter. From the record, it appears that on the date of plea taking the language used in court was noted as "*Kiswahili/English*". The record goes on to reveal that the Appellant fully participated in the proceedings and did not, at any given time, raise an issue to the effect that the language being employed was a hindrance to his following of the proceedings. The record shows that the Appellant was able to cross-examine the prosecution witnesses, and at the end offer mitigation. Therefore, since the Appellant participated in the proceedings after plea was taken I am not persuaded that there was any prejudice suffered. (See – **John Kamau Githuku & anor. vs. R, Criminal Appeal No. 229 of 2008** (*unreported*)). To my mind therefore, the Appellant understood the language used by the court and that used by the witnesses.

48. On the allegation that the trial took unnecessarily long to conclude, I note that the Appellant and his co-accused persons were first brought to court on 24th November, 2010 and it was not until 14th February, 2012 that the trial would conclude. Therefore, the trial took about 15 months to conclude.

49. I am alive to the fact that **Article 50(2)(e)** provides for an accused person's right to have the trial begin and conclude without unnecessary delay. It is imperative to state that **Article 50(2)(e)** is anchored on the maxim *justice delayed is justice denied*. There is, however, a flip side to this maxim. In the case of **Joseph Ndungu Kagiri vs. Republic Criminal Appeal 69 of 2012 [2016] eKLR**, Mativo, J termed this "The Two Sided Speedy Trial Problem" and further observed thus:

> **"The two sided problem caused by speedy trials was ably discussed by Shon Hopwood who while invoking the maxim *"justice delayed is justice denied"* considered the fuller picture of criminal justice. He postulates what he calls the flip side of the said maxim and argues that it poses an equal danger. This danger was ably brought out by *Martin Luther King, Jr.'s Letter from Birmingham Jail* where he wrote:- '*justice too long delayed is justice denied. Not because delays contrary to justice should be tolerated for any time. Rather, because the flip side of justice delayed can be an equal danger: a rushed, unconsidered justice*'.**
>
> **In my considered opinion, the speedy trial provided for in our constitution is not "*a rushed and unconsidered justice.*" No. it cannot be nor can it be so construed under any circumstances. In my considered view, our constitution provides for a speedy trial but it anticipates a trial with two sides, which must of necessity exhibit the best antidote to both sides. It must demonstrate a criminal justice system that is not too fast, and not too slow, but just right.[11] To me that is the proper meaning of the phrase '*to have the trial begin and conclude without unreasonable delay*'."**

50. Whereas the Appellant attributed the period taken to conclude the matter to adjournments which in his view derailed the trial, I note that while there are in fact adjournments that were granted during the conduct of the trial, there is nothing to the effect that the adjournments were not justified. Further that the trial court took it upon itself to ensure that the adjournments did not prejudice the trial. The record clearly demonstrates this.

51. To this end, I make reference to the proceedings of 26th October, 2011, 25th November, 2011, 14th December, 2011 and 10th January, 2012. The adjournments on these respective dates were to allow the prosecution to avail one Dr. Vilembwa, of Webuye Sub-district hospital. Despite being served with summons, the Doctor refused to come to court, a fact which led the trial court to issue a warrant of his arrest on 10th January, 2012. On 23rd January, 2012 the Doctor was consequently brought to court under warrant of arrest. On the said date, the trial court noted that the Doctor had been issued with summons since 26th October, 2011, but had failed and neglected to honour the summons. The trial court found the explanation given by the Doctor for this failure to be unconvincing and thereby detained him at Bungoma Police Station pending his attendance to testify at the hearing the next day, being 24th January, 2012.

52. From the foregoing, I find that there was no unreasonable delay occasioned to the Appellant to the effect that his right under **Article 50(2)(e)** was violated. In any event, hurried trials are not necessarily efficient since they may prevent accused persons from properly exercising their constitutional rights in presenting their case. The record clearly demonstrates that prior to 25th November, 2011 which was barely three (3) months before the trial was concluded, the matter proceeded without a fuss. Therefore, it is likely that even in the absence of the adjournments the trial would have been concluded in no less than one year. In view of the fact that the prosecution presented 16 witnesses, I find that this was reasonable time.

53. On the right to adduce and challenge evidence under **Article 50(2)(k)**, the Appellant contended that he was never supplied with witness statements and further that the trial court failed to consider his defence. The record shows the contrary. It is evident that after plea taking on 24th November, 2010, the trial court directed that "*each of the accused be supplied with copies of statements at their own expense*". It appears that this may not have been done which led the court to issue the same order at the mention date of 20th January, 2011. There is nothing on record to demonstrate that the Appellant was never supplied with the witness statements as directed. Additionally, the record shows that the Appellant had the opportunity to cross-examine the prosecution witnesses which he did, save for in select instances where he elected not to.

c. <u>Burden and Standard of proof.</u>

54. The standard of proof in criminal cases is beyond reasonable doubt and the onus of proving this rests with the prosecution. I am alive to the fact that the prosecution has a duty to call all witnesses necessary to establish the truth of a matter even if their evidence may be inconsistent as elaborated in the case of **Bukenya and Others vs. Uganda [1972] EA 549**. I am also cognizant of the provisions of **section 143** of the **Evidence Act** that no particular number of witnesses are required to prove a fact. All that the prosecution is required to do is to call such number of witnesses as sufficient to prove its case. **Section 143** provides thus:

> **"No particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact."**

55. The record shows that the prosecution called a total of 16 witnesses in support of its case, all of whom they considered sufficient to prove their case. To my mind therefore the argument that the prosecution failed to summon crucial witness must fail especially since there is no provision of the law stipulating that the prosecution should call a particular number of witnesses. Additionally, there is nothing on the record to indicate that the credibility of the prosecution witnesses was ever called to question during the trial, and there is nothing to show that the trial court which had the benefit of seeing and hearing the witnesses first hand, found them to be unbelievable so as to disregard their testimony. If anything, the trial court found their evidence overwhelming and credible enough to sustain a conviction.

56. In respect of the allegation that some of the witnesses had to be forced to testify, the record shows that it was only PW16, the Doctor who conducted the postmortem on the deceased's body, who had to be issued with several summons and a warrant of arrest to come to court. He attributed his failure to honour the summons to having been away on leave and upon resuming work to being required to appear in several courts. While the trial court did not find his explanation convincing, it appears that his failure to attend court in time did not taint his credibility in the eyes of the trial court. In any event, his was to produce the post-mortem report and to testify to the victim's cause of death.

57. The Appellant also alleged that there were discrepancies in the evidence adduced by the prosecution witnesses. Specifically, that the owner of the motorbike had stated that the value of the motorbike was Kshs. 94,000/= when the cash sale receipt indicated the value as 95,000/=. There is however nothing in the testimony of PW1, who was identified as the owner of the motorbike, in respect of the value of the motorbike.

58. It was further contended by the Appellant that the prosecution failed to prove its case: that none of the witnesses identified him nor was an identification parade ever conducted to identify him. It however appears from the record that the Appellant was convicted on the basis of circumstantial evidence. There was no direct evidence in respect of the circumstances leading to the victim's death. The Victim had however been last seen in the company of the Appellant and another, who were his pillion passengers. Indeed, the trial court in its judgments recognized that the evidence was circumstantial and proceeded to demonstrate that the chain of circumstances was not broken and further that it linked the Appellant to the offence.

59. I am convinced that the trial court demonstrated that the guilt of the Appellant was the only rational inferrence that could be drawn in the circumstances. I find refuge in the decision in **PON vs. Republic [2019] eKLR**, in which the Court of Appeal (Ouko,(P),Gatembu & Murgor, JJ.A.) observed thus:

> **"This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are Rex V Kipkerring Arap Koske & 2 Others [1949] EACA 135 and Simon Musoke V R [1958] EA 71. In Rex V Kipkerring (supra) the court explained that;**
>
> **"In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving the facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."**
>
> **Simon Musoke V R (supra) introduced an additional factor to the foregoing, to the effect that before drawing the inference of the accused's gilt from circumstantial evidence the court must be sure that there are no co-existing circumstances of factors which would weaken or destroy that inference. Over the years these strictures have been developed further by way of explanation. For example, in the case of Omar Mzungu Chimera V. R Criminal Appeal No. 56 of 1998, the Court stated that;**
>
> **It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**
>
> > **(i) the circumstances from which an inference of guilt is to be drawn, must be cogently and firmly established;**
> >
> > **(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
> >
> > **(iii) 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."**

The trial court also demonstrated in detail that the prosecution had established all the essential ingredients of the offence of robbery with violence. To my mind therefore, the offence was proved against the Appellant to the required standard.

60. The record further shows that the trial court considered the unsworn testimony given by the Appellant in his defence and found it unconvincing. Notably, the Appellant had elected not to call any witnesses. Whereas the Appellant contended that the Prosecution failed to rebut his defence contrary to **section 212** of the **Criminal Procedure Code**, a reading of the section reveals that such rebuttal is necessary only if the accused introduces a new matter in his defence. From the record it is evident that the Appellant did not introduce any new evidence in his defence which would have required the Prosecution to adduce evidence in reply to rebut the matter. If anything, all he did was give an account of how he was arrested. Therefore, the argument that a rebuttal was required cannot stand.

e. Mitigation and Sentence

61. Whereas the Appellant alleged that the trial court did not consider his mitigation prior to sentencing, the record reveals otherwise. That upon conviction, the Appellant was allowed to make his plea in mitigation which he did. The relevant part of record states: "*I have considered the accused person mitigation and the facts that they are first offenders. However, the sentence provided for the offence under S. 296(2) of the Penal Code is death sentence. My hands are tied and I have no option but to sentence both the 1st and 3rd accused to hang.*"

62. In advancing arguments against the sentence, the Appellant sought to rely on the decision in **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR** (Muruatetu Case). It is imperative to state that the said decision did not however outlaw the death penalty. The decision only stated that the death penalty was inconsistent with the Constitution to the extent that it was mandatory, but that it was still applicable as a discretionary maximum punishment. Notably, the Supreme Court in its recent decision in **Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR**, observed that the Muruatetu Case did not invalidate mandatory sentences in the Penal Code, or any other statute and that the judgment was only in respect of **section 204** of the **Penal Code** which provides for the offence of murder.

63. Therefore, where an accused person has been convicted of the offence of robbery with violence as in this case, the death penalty is still applicable. I do however agree with the Prosecution that the trial court ought to have sentenced the Appellant to suffer death without more. It was uncalled for, for the trial court to state that the Appellant should hang.

64. Based on the foregoing, I can do no more than to agree with the finding of the trial magistrate on both sentence and conviction. I commend the Learned Trial Magistrate for doing a thorough job in evaluating the evidence. I must also commend the Appellant for putting forth a strong case in his appeal, especially since he was acting in person. In the end, I find that the appeal is lacking in merit and consequently dismiss it in its entirety.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 13TH DAY OF OCTOBER, 2021.

.....

L. A. ACHODE

HIGH COURT JUDGE

In the presence of ……Appellant in Person.

In the presence of……..State Counsel.