REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NOS.18,19 & 20 OF 2019

(CONSOLIDATED)

ABDI ADAN ISSACK SAMOW.....1st APPELLANT

MOHAMED IBRAHIM

MAALIM HASSAN.....2nd APPELLANT

ALIOW ADAN HUSSEIN.....3rd APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and Sentence of Hon. E.K. TOO Principal Magistrate Moyale in Cr. Case No.131 of 2019 delivered on 9.10.2019)

J U D G M E N T

The appellants were charged with the offence of robbery with violence contrary to Section 295 as read with section 296(2) of the Penal Code. The particulars of the offence are that the appellants on the nights of 4th/5th April, 2019 at Tesoramo Trading Centre in Mandera West sub county within Mandera County in the Republic of Kenya jointly while armed with a dangerous weapon namely a knife robbed Dunia Abdow Madnur a female adult of cash Ksh.410,000 and 150,000 Ethiopian Birr and at the time of the said robbery fatally wounded the said Dunia Abdow Madnur.

The trial Court convicted all the appellants and sentenced them to suffer death. Each of the appellants filed a separate appeal but the three appeals were later consolidated. In appeal No.18 and 19 there are ten grounds of appeal which are more or less the same. In appeal No.20 there are 11 grounds of appeal. For purposes of clarity, the grounds of appeal in each appeal are hereby reproduced.

The first appellant's grounds of appeal are as follows:-

1. That the learned trial Magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.

2. That the learned trial magistrate erred in law and fact by failing to note that the identification of the appellant was not free from possibility of error.

3. That the learned trial magistrate erred in law and fact by failing to note that the cloth said to be found with the appellant, which was said blood stained was not found in the possession of the appellant.

4. That the trial Magistrate erred in matters of law and fact by sentencing the appellant to suffer death which is unconstitutional.

5. That the learned trial magistrate flouted in matters of fact and law by convicting the appellant on evidence that lacked requisite standard of beyond reasonable doubt.

6. That the trial Court flouted in matters of fact and law by failing to note that the light used at the scene of crime to identify the appellant was not analyzed by the court.

7. That the trial Magistrate erred in matters of law and fact by failing to note that vital witnesses were not called to prove the allegations adduced before court.

8. That the trial Magistrate erred in matters of law and fact by failing to note that the appellant was not represented by a lawyer, since he was facing a capital offence which is contrary to Article 50(h) of the constitution of Kenya.

9. That the learned trial magistrate erred in both law and fact by rejecting the appellant's defence without giving cogent reasons.

The second appellant's grounds of appeal are as follows:

1. That the learned trial Magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.

2. That the learned trial Magistrate erred in law and fact by failing to note that the identification of the appellant was not free from possibility of error.

3. That the learned trial Magistrate erred in law and fact by failing to note that the appellant was not found in anything belonging to the complainant.

4. That the learned trial magistrate erred in law by convicting the appellant on evidence that lacked requisite standard of beyond reasonable doubt.

5. That the learned trial magistrate erred in law and fact by failing to note that the light used at the scene of crime to identify the appellant was not analyzed by the court.

6. That the learned trial magistrate erred in law and fact by failing to note that vital witnesses were not called to prove the allegations.

7. That the learned trial magistrate erred in law and fact by rejecting the appellant's defence without giving cogent reasons.

The 3rd Appellant's grounds of appeal are:-

1. That the learned trial Magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.

2.That the learned trial magistrate erred in law and fact by failing to note that the identification of the appellant was not free from possibility of error.

3.That the learned trial magistrate erred in law and fact by failing to note that the exhibit adduced before Court was not found in possession of the appellant.

4. That the trial Magistrate erred in matters of law and fact by failing to note that the appellant was not represented by a lawyer, since he was facing a capital offence which is contrary to Article 50(h) of the constitution of Kenya.

5. That the learned trial magistrate erred in law and fact by sentencing the appellant to suffer death which is unconstitutional.

6. That the learned trial magistrate flouted in matters of fact and law by convicting the appellant on evidence that lacked requisite standard of beyond reasonable doubt.

7. That the trial Court flouted in matters of fact and law by failing to note that the light used at the scene of crime to identify the appellant was not analyzed by the court.

8. That the trial magistrate erred in matters of law and fact by failing to note that vital witnesses were not called to prove the allegation of the complainant.

Mr. Owade appeared for all the appellants. Counsel made both oral and written submissions. Counsel submitted that the prosecution failed to prove its case beyond reasonable doubt. The prosecution witnesses gave inconsistent, contradictory and conflicting testimonies. PW1 who claimed to have witnessed the crime testified that there were seven (7) children in the house. The incident occurred at about 2.00am in the morning. It is not clear at what point in time PW2 woke up during the incident. It is also not clear at what point she saw the 2nd appellant when he called the deceased. It is equally not clear whether PW1 went to the door or whether someone else woke up that time. PW1 informed the court that there were three people outside the house and it is not clear how she arrived to that conclusion. The only source of light was from a single flash light. PW1 also went under the bed and it is not clear at what point in time she came out of the bed. PW2 did not witness the incident. PW2 saw the deceased's mother wash the murder weapon and therefore the scene was tampered with. PW7 produced the DNA report as opposed to an expert from a Government Laboratory. The DNA report itself is not conclusive as it indicates that there is a one in three chance. The DNA that was collected at the scene was not conclusive enough. If the report was produced by an analyst it would have been properly explained to the court. Counsel relies on the case of **RICHARD MUNENE V- REPUBLIC (2018)**

eKLR where the court of appeal stated as follows:

> ***We begin with the submissions that the prosecution evidence was contradictory. In a criminal trial, the accused person enjoys a presumption of innocence because the burden of proving the charges is on the prosecution, and to do so beyond any reasonable doubt. Secondly in an adversarial system the purpose of evidentiary rules is to assist the court in establishing the truth and in the process provide protection to the accused in a respect to a fair trial. As they say, the prosecution must present a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction. Contradictions, discrepancies and inconsistences in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistences are proved, they must be resolved in favour of the accused.***
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> ***It is settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily create some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.***

It is further submitted that the identification of the appellants was not free from the possibility of error. The only source of light was a single flash light. It is possible that PW1 could not clearly see the assailants. There was mention of footsteps moving away from the crime scene yet there is no mention as to where those footsteps led to. Counsel relies on the case of **Wamunga V Republic (1989) eKLR** where the Court of Appeal held:

> ***"What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.***
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> ***Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alledges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.***
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> ***…it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

Mr. Owade further contends that the evidence does not prove that the exhibits, namely a knife and a metal box which contained money, were found in possession of the appellants. PW2 testified that the knife was infact washed before it was secured by the Police. Had the police secured the scene before the knife was washed they could have lifted the finger prints on the knife for testing. PW1 was not cross examined on the distance between the shop where the deceased was found and the house where she was hiding under the bed. The appellants were not represented by counsel yet they were facing a capital offence. It is true that the appellants were facing an offence of robbery with violence and not murder. However, both offences carry the death sentence under the Penal Code. Since a robbery with violence suspect attract the same sentence as murder, such a suspect ought to be accorded a counsel. Had that been done such a counsel would have ably defended the appellants. The appellants are lay men with no knowledge in law that could have enabled them to cross examine the witnesses. The utterances made by the 1st and 3rd appellants in court were misguided and not specifically made because the same was true. It is very surprising that no one else apart from PW1 heard the deceased's screams. The prosecution is relying on the utterance of the appellants that were made out of fear. The appellants were willing to admit the charge. If the court was to rely on the utterance of the 1st and 3rd appellants it is clear that they had no intention or knowledge that the offence was going to occur. At least they would have been found guilty of being in possession of stolen goods and sentenced to a period of less than 5 years each. Counsel urgent the court to review their conviction and if possible find them guilty of the offence of being in possession of stolen goods but this is only when the court relies on their statements in court.

On the issue of sentence, it is submitted that the sentence is excessive given the circumstance of the case. Counsel relies on the Supreme Court case of **FRANCIS KARIOKO MURUATETU & ANOTHER V REPUBLIC PETITION NO.15 OF 2015** where the Supreme Court held:

> ***"Consequently, we find that section 203 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory deaths sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."***

Counsel also relies on the case of **WYCLIFFE WANGUSI MAFURA V REPUBLIC (2018) eKLR** where the court of appeal stated as follows:-

> ***We also said in Willam Okungu Kittony's case (supra) that the decision of the Supreme Court in Muruatetu case has immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence rehearing in any matter pending before those courts. Accordingly, since this appeal had not been finalized, this court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial Magistrate's court could have lawfully passed."***

Mr. Owade submitted that the appellants are young men who can be rehabilitated. Should the court admit the evidence of the 1st and 3rd appellants they could be sentenced to 5 years imprisonment and the 2nd appellant can be sentenced to a period of between 20 to 30 years in the event that the appeal is found to be unmerited.

Mr. Ochieng, Prosecution counsel, opposed the appeal and relied on his written and oral submissions. It is submitted that the evidence of

the seven (7) prosecution witnesses proved the case beyond reasonable doubt. The evidence is cogent and was not shaken upon cross examination. PW1's evidence is even corroborated by the defence evidence of the first and third appellants. She could see the appellant from her hiding place. PW1 mentioned some of the stolen items that were later recovered. The exhibits produced corroborated the whole testimony. Money was recovered from the 1st appellant as well as from a box that was recovered through the guidance of the appellants. Blood samples were taken and the blood of the 1st appellant's clothes matched that of the deceased. The post mortem report produced by PW5 confirmed the grisly manner in which the deceased was fatally assaulted using a knife. The knife was produced in court. There were three assailants. The 1st and 3rd appellants confirmed that they escorted the 1st appellant to the deceased's house and stood guard as the 2nd appellant committed the atrocity. They further helped in carrying the boxes which had been taken from the deceased's house.

Mr. Ochieng reiterate that it is worth noting that the 1st and 3rd appellants began confessing at the point of arrest and insisted with the same statement until the end of the trial. The persistence in confession even in time of adversity in remand increased its credibility and the trial court was right to accept this statement. The 2nd appellant's defense was a mere denial and the defenses of the 1st and 3rd appellants placed him at the middle of the incident. It is also submitted that section 77 of the Evidence Act allowed the investigating officer to produce the DNA report. There was no objection to the production. Further, the conviction is not based on the DNA report only. The trial court correctly warned itself on the danger of relying on only one eye witness. However, the evidence of PW1 was corroborated by that of the 1st and 3rd appellants who admitted the offence in their statements.

This is a first appeal and the court has to assess and evaluate the evidence afresh before drawing its own conclusion. The prosecution summoned seven witnesses in support of its case. **PW1 HA** was a minor whose age was given as 13 years. The deceased was her aunt but used to refer to her as her mum as they were living together. The deceased used to run a shop. On the 5.4.2019 they were asleep. The 2nd appellant went there at around 2.00a.m and woke up the deceased. The deceased asked PW1 for the keys to the shop. She gave the deceased the keys and the deceased went to the shop. She saw the 2nd appellant who was standing in front of the house. The deceased had a torch and it is the torch light which enabled her to see all the appellants. She knew them before the date of the incident. The appellants wanted the deceased to open the shop. She then heard the deceased screaming saying "**Abdisamo you are killing me"**. She was scared and went under the bed. The appellants took a box which had some money. There was also another small box which they also took. PW1 thereafter informed the neighbors about the incident. Neighbours went to the shop and found the deceased had been killed. She knew all the three appellants as they used to load some goods at the shop when they were brought by vehicles. There was a knife at the scene where the deceased was killed.

PW2 Abdi Ugar Issack lives in Tesoramo. On the 5.4.2019 at about 2.00am PW1 went to his house and informed him that the deceased's house had been attacked by thugs. He went to the scene and found PW4 was already there together with other neighbours. They entered the deceased's house and saw her body. The deceased had already passed on and there was blood. PW1 told them she had seen the appellants. The same night they went to the appellants' home and woke them up. They decided not to scare them until the Police went to the scene. In the morning at about 8.30a.m the Police went to the scene and arrested all the appellants. The 1st appellant was found with Ksh.59,700 and 1810 Ethiopian Birr. The 1st appellant on being questioned by the Police told them that it was the 2nd and 3rd appellants who had killed the deceased. There was a knife at the scene of crime. Thereafter, a metal box was recovered which contained the deceased's documents. The deceased was later buried.

PW3 Ibrahim Dubo is the deceased's husband. On the material day he had gone to Budurasa to attend a funeral. He was called and informed that his wife had been killed. He went home on a motorbike and found that the Police were already at the scene. **PW4 Ibrahim Hassanow** also live in Tesoramo and is a herder. On 5.4.2019 he was in his house when he heard PW4's children crying. He told his wife to go and check and she returned with the children. He was informed that the deceased had gone to the shop but had not gone back. He went to the shop and saw the deceased's body. There was a lot of blood and her intestines were outside. There was also a knife at the scene. The neighbours screamed and people went to the scene. The villagers decided that nobody was to leave the village until the Police from Takaba went to the scene. The three appellants were arrested. It was the 1st appellant who was arrested first followed by the 2nd and 3rd appellants. The 1st appellant was searched and some money was recovered. Later a box which had clothes was recovered. He knew all the appellants.
PW5 Dr. Mohammed Noor is a medical officer who was based at the Takaba referral hospital. The deceased's body was taken by the Police to the hospital on 5.4.2019. He conducted a postmortem. The deceased was 31 years old. She had multiple stab wound's on the upper arm, thorax and abdomen. There was also stab wound on the back of the chest. One of the stab wounds was extremely deep and went into the lungs. The intestines were visible. He formed the opinion that the cause of death was hypovolemic shock(anaemia) secondary to hemorrhage that resulted from the multiple stab wounds. He signed the postmortem report.

PW6 PC Bacus Mkaya was based at the Mandera West Police station. They got information about the incident at Tesoramo which is about 75 km from Takaba. Together with other Police officers they left for the scene and arrived there at about 8.00am. They found the chief and members of public at the scene. They entered the shop and recovered the body. They also recovered a blood stained knife. They were also shown the deceased's bedroom where she was sleeping. PW1 told them the that deceased was called out to go and sell medicine. Members of the public showed them the 1st appellant who was heading to his home and they arrested him. PC Wachira searched the 1st appellant and recovered Ksh.59,700 and 1810 Ethiopian Birr. The 1st appellant had a yellow shirt which had blood stains. Upon interrogating them the 1st appellant admitted that he got the money from the deceased and he mentioned the other two appellants. The 2nd and 3rd appellants were arrested and they led them to the bush where they recovered a metal box. They opened the box and recovered Ksh.68,000 and 8380 Ethiopian Birr. They also recovered the deceased's identity card, birth certificate and other items. They took the body to Takaba for postmortem. The 1st appellant's clothes were taken to the Government analyst for DNA testing and they were blood stained.

PW7 PC Francis Wachira was based at the Mandera West Police station and investigated the case. They were informed about the incident on the 5.4.2019 and together with other Police officers under the command of Sergeant Oraro went to Tesoramo. They found the deceased's body inside the shop. There was a blood stained knife beside the body. They talked to PW1 who told them that she heard the deceased shouting "**Abdisomo don't kill me, fear God**." They went to the 1st appellant's house where they found his wife who told them that he had gone to graze his cattle. Shortly the 1st appellant arrived and they arrested him. The 1st appellant was wearing two trousers and upon searching him he recovered Ksh.59,700/= and 1110 Ethiopian Birr. The first appellant informed them that they were three of them during the incident. They managed to arrest the 2nd and 3rd appellants. Upon interrogation they were taken to where a metal box was. They recovered

from the box Ksh.68,000 and 8380 Ethiopian Birr. They also recovered the deceased's identity card and other items inside the box. They took the body for post mortem that was done by PW5. Blood samples from the deceased were taken. They took also other samples including nail cuttings and hair scrub of the deceased plus her blood stained clothes. He prepared an exhibit memo and it was confirmed that the blood on the 1st appellant's clothes matched the deceased's blood. It is his evidence that it is the 1st appellant who led them to the 2nd and 3rd appellants and it is the 2nd appellant who led them to where the metal box was.

All the appellants were placed on their defence. The 1st appellant Abdi Adan Isack Samow tendered sworn evidence. He testified that he lives in Tesoramo and transport goods from Moyale to Mandera using a motor cycle. He knew the deceased. On the 5.4.2019 he was with the 3rd appellant chewing miraa upto about 10.00pm. The 2nd appellant also joined them and they continued upto midnight. The 2nd appellant left at midnight and returned at about 1.00am. He told them that his small daughter had been bitten by a scorpion and was crying. He wanted to get some medicine. They went to the deceased's shop and he sat outside the shop where there was a tree together with the 3rd appellant. The second appellant went to wake up the deceased. The deceased got out of her house and asked him "**Abdisomo you are still chewing miraa upto now**." He told the deceased that the 2nd appellant had told them that his child had been bitten by a scorpion and that is why they had taken him to her shop. They stayed infront of the shop. The deceased was checking the medicine and had a torch tied to her neck. He was still seated outside the shop and heard the deceased saying "**Abdisomo this one is killing me."** He ran to the shop and held the 2nd appellant. The deceased fell on his knees while facing him. The 2nd appellant was holding a knife. The deceased was still holding him and was not yet dead. The 2nd appellant hit him on the chest and he moved back. The deceased then fell down. The 2nd appellant held him by the shirt colour and told him that he will go the same route as the deceased should he say anything. He kept quiet and he was shocked. The 3rd appellant was standing outside crying. He told the 3rd appellant that the deceased had been killed and that he had also been threatened with death. He went to his house with the 2nd appellant. They just stayed there without talking. The 2nd appellant went to them running and warned them that should they speak they will go the same route as the deceased. The 2nd appellant then opened his trouser and put some money. He did not count the money. He told them to share the money. The 2nd appellant then left.

It is his further evidence that he had known the deceased since childhood and she was his cousin. PW2 then went to his place and told them that somebody had been killed. In the morning he took his cattle for grazing and returned at 9.00am. Police officers came to the scene and he was arrested. He told the police how the deceased was killed and the Police searched his pockets and recovered the money. He told the police that they were three of them and the other two appellants were arrested. The 2nd appellant led the Police to where the metal box was recovered. The 2nd appellant was the one who used to carry goods at the deceased's shop. He admitted that the blood stained clothes that were produced in court were his. He saw the blood stains on the clothes in the morning and he wanted it to be part of the evidence. When they took the plea he told the court what had transpired. The 2nd appellant threated to kill him and the 3rd appellant while in remand and they were separated in prison. The 1st appellant further testified that while they were chewing miraa they were not planning to do something. They were just listening to music and they were not planning to kill anybody. It was the 2nd appellant's idea to go to the deceased's shop. It was the 2nd appellant who stabbed the deceased until her intestines came out. He did not tell the villagers about the incident because he was scared about their reaction.

The 2nd appellant **Mohamed Ibrahim** tendered unsworn evidence. He lives in Takaba and he is a pastoralist. On 5.4.2019 he was doing his business and was arrested. He knew nothing about the case. He was framed. He was not arrested with anything. He was given all the witness statements and his name is not mentioned in the statement. According to him it was the 1st appellant who was adversely mentioned.

The 3rd appellant **Alio Adan Hussein** tendered sworn defence. He lives in Tesoramo and operates a boda boda. On 5.4.2019 they were chewing miraa. Later the 2nd appellant told them that his child had suffered a scorpion bite. They went to the deceased's shop to get medicine. The deceased had a torch on her neck and was cutting the medicine. The 2nd appellant stabbed her and the deceased called the 1st appellant's name saying she was being killed. He saw the 2nd appellant with a knife. He was extremely scared and went home. He panicked and started vomiting. The 2nd appellant followed them. In the morning he heard that the deceased had died. Police officers went to the scene and he was arrested. When they were charged in court, himself and 1st appellant informed the court that it was the 2nd appellant who killed the deceased. The 2nd appellant threatened to kill them while in the cells and he was transferred to another cell. They were forced to carry the metal box from the deceased's house and it is the 2nd appellant who put money in the 1st appellant's pockets. The 2nd appellant is his relative. When the deceased started screaming the 1st appellant ran to the shop.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The prosecution evidence does establish that indeed a robbery with violence took place on the night of 4th and 5th April, 2019 at Tesoramo trading centre in Mandera West sub County. The violence visited on the robbery victim led to her death. It is the prosecution's contention that it is the three appellants who committed the robbery.

One of the issues in contention is the identification of the appellants. Counsel for the appellants submitted that the evidence of PW1 is not reliable. The source of light was a flash light. PW1 went under the bed and its not clear how she identified the appellants. Further, the distance from the shop to where PW1 was hiding is not given.

The evidence of PW1 is that she was sleeping in the same house with the deceased. The deceased was woken up and wanted to go to the shop. The deceased had to wake up PW1 as she was the one keeping the keys to the shop. PW1 testified that she gave out the keys to the deceased and saw the 2nd appellant standing outside the house. The deceased had a torch and she saw the other appellants. Shortly, PW1 heard the deceased screaming. I do find that PW1's evidence is not contradictory. Her evidence is quite relevant in the sense that it explains what transpired that night. She was sleeping with the deceased in the same house. Even if it can be held that the identification of the appellants by PW1 is not clear, her evidence does confirm the robbery incident, the time the incident occurred and what happened to the deceased. PW1 also testified that a box which had money was taken by the robbers. Another small box was equally taken. It is PW1 who went to inform the neighbours including PW4. She gave the appellants' names to he villagers. She knew the appellants and saw them at the scene. I am satisfied that PW1 properly identified the appellants. PW1's evidence is sufficiently corroborated by the other prosecution evidence.

The other relevant evidence relates to the recovery of the stolen items. Money that was kept in the box as per the evidence of PW1 was stolen. Part of the money was recovered. According to PW6 and PW7 Ksh.59,700 and 1810 Ethiopian Birr was recovered from the 1st appellant's trouser. Ksh.68,000 and 8380 was recovered from the stolen metal box. The prosecution evidence does establish that indeed the deceased was carrying on business at Tesoramo and that the appellants were living at that trading centre. According to PW1 the appellants at times used to carry goods delivered at the shop.

The 1st appellant's sworn defence is that it is the 2nd appellant who committed the offence. He chewed miraa that night together with the 3rd appellant before the 2nd appellant joined them. According to the 1st appellant, the 2nd appellant alleged that his child had been bitten by a scorpion and required medication. That is how they ended at the deceased's shop. Counsel for the appellants contend that if the Court was to accept that defense then the only conclusion it can make is that the 1st and 3rd appellants had no intention of committing the offence. The most they can be found guilty of is the offence of being in possession of stolen property. Mr. Ochieng, learned state Counsel, maintain that the 1st and 3rd appellants consistently reiterated that they were at the scene of crime but alleged that it was the 2nd appellant who killed the deceased. While testifying in Court on 28.9.2019, the 1st appellant confirmed that no one was forcing him to state what he was telling the Court. He was forced to go and take the box. According to the 1st appellant, he heard the deceased screaming saying she was being killed and he went to assist her. The deceased had already been stabbed by the 2nd appellant who continued stabbing her.

The 3rd appellant's defence is similar to that of the 1st appellant. He testified that the 1st appellant asked HIM to speak the truth while in remand. The 3rd appellant informed the trial Court that they were threatened with death by the 2nd appellant. Prison authorities placed them in different cells.

The 2nd appellant's unsworn defense is that he did not commit the offence. None of the witnesses mentioned his name. Blood samples of the deceased were found on the 1st appellant's clothes and not his.

PW6 and PW7 testified that it is the 1st appellant who mentioned the other two appellants. At no time did the 1st and 3rd appellants state that they were tortured by the Police. All along the two maintained that it is the 2nd appellant who committed the offence. The trial Court was therefore correct by treating what the two appellants stated in their defence as their own voluntarily tendered defence. Their defence goes on to confirm what PW1 testified. PW1 saw the two at the scene of crime and that testimony is confirmed by the defence evidence of the 1st and 3rd appellants.

Can it then be concluded that the 1st and 3rd appellants were passive bystanders as the second appellant committed the offence? The trial Court considered this issue and had this to say in its judgement.

> **For accused 1 and 3 to feign ignorance of what was transpiring is an abuse of our general intellect. If at all it was true that they had been caught off-guard by the accused No.2's action they would have called for help and or reported the incidence the said night. After the robbery they shared the loot and they all went home. No report of the robbery was done by the Duo.**

I entirely do agree with the sentiments of the trial Court. The offence was committed at night. The murder weapon was left at the scene. Even if the 2nd appellant was threatening them at the scene, how did they force them to carry the box containing money. How did the 2nd appellant force them not to even tell their families about what had happened. The two appellants testified that after the incident they sat outside a house just pondering what had happened. How comes they did not scream or silently knock on the doors of one of the villagers and wake him up. The 2nd appellant left the two after the incident as per their evidence. The 1st appellant slept in his house that night. PW2 testified that villagers went to the appellants home and woke them up. The 1st appellant had money in his pocket. He did not refuse to take it and his contention that the money was put into his pocket by the 2nd appellant is just but an excuse. Why didn't he notify the neighbours about the crime early in the morning before he went to graze his cattle. The contention that he feared the reaction of the villagers cannot be true.

The evidence of the 2nd appellant is displaced by the prosecution evidence. PW1 placed him at the crime scene. Even if I was to ignore the testimony of the 1st and 2nd appellants in relation to what they said about the 2nd appellant, still there is sufficient prosecution evidence to connect the 2nd appellant with the crime. According to PW6, it is the 2nd and 3rd appellants who led the Police to recover the stolen metal box which had money. The same evidence was tendered by PW7, the investigation officer. The 2nd appellant's contention that none of the witnesses mentioned his name is misplaced. PW1 saw him at the scene and gave his name to the villagers. The evidence of recovery places him at the scene. Although no recovery inventory was prepared, the recovered exhibits were produced in and this does confirm that the stolen money was recovered and it is the 2nd and 3rd appellants who led to the recovery.

The 1st and 3rd appellants cannot be found guilty of possessing stolen property as per Mr. Owade's contention. Even if I was to agree with Mr. Owade that they were found with stolen property only, the doctrine of recent possession would implicate them. The robbery occurred at night and the following morning the appellants were found in possession of the stolen items. The logical conclusion is that they were part of the robbery and their explanation on how they came into possession of the stolen items is not convincing.

On the issue of the murder weapon. I do find that Mr. Owade's contention that finger prints ought to have been lifted from the knife cannot absolve the appellants. There is evidence that the knife was cleaned. Someone handled the knife before the police went to the scene. That in itself does not exonerate the appellants. The 1st appellant accepted that his clothes had the deceased's blood as she fell on him. The DNA report did confirm that the deceased's blood was found on the 1st appellant's clothes. This is not a disputed issue. The manner in which the DNA report was produced cannot be a good ground to allow the appeal.

On the issue of Article 50(h) relating to legal representation, there is Article 50(g) which allows an accused to chose his own advocate. The

appellants could have exercised that right. The mere fact that one is sentenced to suffer death does not amount to substantial injustice. The death sentence is provided under the Law and is recognized under Article 26 of the Constitution.

The upshot is that the prosecution did prove its case beyond reasonable doubt. It is the three appellants who committed the offence. The appellants are guilty of robbery with violence as charged. I am more than satisfied that it is the three appellants who committed the offence. The appeal on conviction fails.

The next issue relates to the sentence meted out on the appellants. They were condemned to suffer death. Counsel for the appellant contend that in view of the decision of the Supreme Court in the **Muruatetu Case (Supra**), the appellants should not be condemned to death. Counsel urged the court to consider a prison sentence.

On 23.7.2020 the Court was informed that parties were trying to reconcile. Mr. Koima learned state Counsel, informed the court that the appellants' family wanted to approach the victim's family for reconciliation.

Affidavits were filed indicating that the family of the deceased and those of the appellants met in the presence of elders and reconciled. Those involved in the reconciliation appeared in Court on 23.9.2020, were sworn and testified on the reconciliation process. Apart from the deceased's husband, all the elders present confirmed that reconciliation meetings were conducted.

Abdow Madnur Mohamed is the deceased's uncle, brother to the deceased's father. He informed the Court that he brought up the deceased and is the one who got her married to Ibrahim. His brother, the deceased's father is in Ethiopia and is aware of the reconciliation**. Abdiwahab Hassan Aliye,** a Borana elder, informed the Court that the families of the deceased and those of the appellants met and reconciled. Ibrahim, the deceased's husband was present. The same information was given by **Issack Madey Edin, Abdirahman Edin Issack and Shaban Emed Mithow. Issack Madey Edin** is an uncle to Ibrahim, the deceased's husband. The picture given to the court is that the families of the accused and that of the deceased met in the presence of elders and reconciled. It is further indicated that despite his opposition, Ibrahim participated in the discussions.

Ibrahim Dubow Madey, the deceased's husband, informed the Court that there was no reconciliation. He categorically stated that he did not swear the affidavit filed in court before a Commissioner for oaths. His uncle, Issack Madey Edin informed the court that he is the one who brought up Ibrahim and that Ibrahim was one of the participants during the discussion. Hajj Abdirahman Sheikh and Haj Abduikahab are Ibrahim's grandfathers and were present during the discussions.

The bottom line is that the appellants were charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. They were convicted by the trial court and their appeals on conviction have been disallowed. The law provides for the death sentence. The Supreme Court outlawed the mandatory nature of the death sentence as it gives no room for mitigation and also gives a blanket sentence despite the different circumstances of each case. Although the **Muruatetu case** involved a murder case, it has been applied across the board in relation to all capital offences as well as in relation to statutory provision which provide for mandatory sentences.

Article 159 (2) of the Constitution allows the courts to be guided by alternative forms of dispute resolution which include reconciliation, mediation and arbitration. The appellants committed the offence and in the process the victim lost her life. Despite the reconciliation efforts by the elders, I am satisfied that the appellants do not deserve a non-custodial sentence. The deceased suffered a brutal death.

Taking the circumstances of the case, I do find that the 1st and 3rd appellants were honest enough to explain what transpired on the material night when the robbery was committed. Although the affidavits filed by the elders only make reference to the families of the 1st and 3rd appellants, their oral testimony is that all the three families were present during the reconciliation meetings. Be that as it may, I am of the considered view that the 2nd appellant does not deserve a sentence similar to that meted out on the 1st and 3rd appellants. This view does not make the 1st and 3rd appellants lesser offenders, but their honesty assisted the trial court to reach the verdict it did. Their line of defence clearly corroborates the evidence of PW1. The reconciliation between the families serves as a mitigation factor and will spare the appellants from the death penalty.

I do hereby set aside the death sentence imposed by the trial court and replace it with the following: -

1. **The 1st appellant is sentenced to serve twelve (12) years imprisonment.**

2. **The 2nd appellant is sentenced to serve twenty (20) years imprisonment.**

3. **The 3rd appellant is sentenced to serve ten (10) years imprisonment.**

The sentences shall run from 8th April, 2019 when the appellants were placed in custody after taking plea in line with the provisions of Section 333 (2) of the Criminal Procedure Code.

The upshot is that the appeals on conviction are hereby disallowed. The death sentence meted out on the appellants is hereby set aside and replaced with prison sentences as herein imposed.

Dated and Signed at Migori this … day of October, 2020

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Meru this 15th day of October, 2020

A. MABEYA

JUDGE