REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 8 OF 2018

CORAM: HON. R.E. ABURILI J

GEORGE OGILO OTIENDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence delivered on in Siaya PM's Court

Criminal Case No. 159 of 2017 by Hon.T.M.OLANDO, SRM)

JUDGMENT

1. The Appellant herein **GEORGE OGILO OTIENDE** was charged before the Principal Magistrate's Court at Siaya in Criminal Case 159 of 2017 with three counts of the offence of Robbery with violence contrary to section 296 (2) as read with section 296 (1) of the Penal Code. He pleaded not guilty and the matter proceeded to trial where the prosecution called seven witnesses and the appellant also gave a sworn statement of defence denying the charge.

2. The trial magistrate, Hon. T. M. Olando after finding that the appellant's defence was a mere denial proceeded to find the appellant guilty of the offence of Robbery with violence contrary to section 269 (2) as read with Section 296 (1) of the Penal Code on all the three counts and sentenced the appellant to death.

3. Aggrieved by the said conviction and sentence, the appellant filed his petition of appeal based on the following grounds:

1. **That he pleaded not guilty to the charge:**

2. **That he was denied first report by the trial court.**

3. **That PW1 claimed that he was assaulted during the incident but no medical report was presented before the court during trial.**

4. **That the sentence awarded was improper, unwarranted and unconstitutional.**

5. **That he was convicted and sentenced under robbery with Violence Contrary Section 296(1) of Penal Code indicated in the committal warrant.**

6. **That PW2 also claimed that he was assaulted but failed to produce before court (sic).**

7. **That he cannot recall all that was adduced before the court and pray for copies of the proceedings to adduce more grounds.**

4. The appellant subsequently filed amended grounds of appeal as listed below:

1. **That no diligent analysis of the evidence of the first report to the authority in relation to identification of the appellant was made, hence arriving on (sic) a wrong decision.**

2. **The evidence of stolen shoes was not backed by the law, hence erroneously used to sustain the conviction of the appellant. The shoes were not among the items, report to have been stolen in the particulars of the charges.**

3. **The trial court failed to quash the conviction on the evidence of duplex offence contrary to section 296(2) and 296(1).**

4. **That the appellant was found guilty under Section 269(2) as read with 286 (sic) of the Penal Code and in the Committal Warrant 296(1) (sic) but sentenced to "Death" against the penalty in the precise section.**

5. **That the appellant was convicted on inclusive extraneous and far-fetched evidence Act.**

6. **That the trial court convicted the appellant relying on a confession that did not meet the legal standards of admission in the court of law pursuant to Section 27, 25A (1)(2), 28 and 29 Evidence Act.**

7. **That the trial court meted out on the appellant a manifestly excessive "Death" sentence" that is outlawed, cruel, degrading and unconstitutional, notwithstanding Article 24(1)e, Article 50(2) (p), Section 279 Penal Code and the Supreme Court's decision on 14th December 2017.**

8. **Unsworn interpreter.(sic)**

Appellant's Submissions

5. The appeal was canvassed by way of written submissions. The appellant submitted that the prosecution witnesses did not identify the offender at the scene of crime (***Locus in quo***) despite their assertion that there was light and that they had a clear recognition of the offender. The appellant relied on the case of the case of **Simiyu & Another v Republic (2005) KLR 1921** where the Court of Appeal emphasized the need for the complainant who purports to previously knowing the assailants to name them in his/her first report. The appellant also relied on the case of **Robert Gitau Wanjiju v Republic CA 63 of (1996) CAN** where it was held *interalia* that the evidence of first report should be taken with greatest care especially when its known that the condition favoring identification were difficult to enable positive identification.

6. According to the appellant, the learned trial magistrate erred in law and in fact in convicting the appellant based on the evidence of stolen shoes, notwithstanding the fact that the shoes were not among the items reported by the complainants to have been stolen in the charge sheet and its particulars. Reliance was placed on the case of **Arum v Republic (2006) KLR at 233** where the court held that before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal trial, there must be positive proof that the property was found with the suspect and that the property positively identified belonged to the complainant.

7. The appellant further submitted that the trial court failed to make a finding that the appellant was accused with a duplex offence, a fundamental mistake not curable under Section 382 of the Criminal Procedure Code and as that as such it was not clear to the appellant the exact charge that he was confronting, and as a result he was not able to prepare a proper defense, hence a prejudice that resulted to a failure of justice. He relied on the case of **Republic v Mongella (1934) EACA 152** and Section 134 of the Criminal Procedure Code.

8. It was submitted that the learned trial Magistrate erred in law and in fact in finding the appellant guilty under section 269(2) as read with section 286 of the Penal Code and in the committal warrant, section 296 (1) and proceeding to sentence him to death contrary to the penalty in the prescribed sections.

9. The appellant submitted that the learned trial Magistrate erred in law in convicting the appellant based on inconclusive, extraneous and far-fetched evidence. He further submitted that the trial Magistrate erred in law in convicting the appellant based on a confession that did not meet the legal standards of admission in the court of law, pursuant to section 27, 28, 25 A(1) (2) and 29 Evidence Act Cap 80 Laws of Kenya.

10. The appellant finally submitted that the trial magistrate erred in law and in fact in meting out on the appellant a manifestly excessive "Death" sentence that is inhuman, cruel, degrading and against the nature of the constitution of Kenya 2020 and further that the trial magistrate failed to appreciate the recent developments arising out of the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** that declared death sentence unconstitutional. He further submitted that the trial magistrate failed to consider Article 24(1) (e), and Article 50(2) (p) of the Constitution as well as Section 279 of the Penal Code.

Analysis and Determination

11. This is a first appellate court. As expected, I have to analyse and evaluate afresh all the evidence adduced before the lower court and draw my own conclusions bearing in mind that I neither saw nor heard any of the witnesses as they testified. See **Okeno v Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."***

12. In **Kiilu & Another v Republic [2005]1 KLR 174,** the Court of Appeal stated:

"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 Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. 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; 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."

13. The prosecution evidence as laid out in the trial Court was as follows: PW1 Kevin Onyango testified that on 28/3/2017 he was sleeping in the house when at around 1.30 a.m. Joshua Ogola came with a group and began to knock the door. Upon PW1 inquiring, they said they were police and when he opened the door, they told him to give them money. He stated that the appellant used a spear and hit PW1 on the leg and that they got hold of him, tied him and took him to his mother's house where they began to assault him. He stated that he used a torch and he was able to see the robbers and further that there was light at his mother's house and he was able to see the appellant. He also stated that his mother Angeline Atieno ran away to call other people and that they subsequently went and reported to the police. PW1 testified that his assailants stole from him shoes, solar radio and a bag with clothes.

14. He testified that the appellant went to sell shoes to another shopkeeper who PW1 to see whether he could recognize the shoes.

15. In cross-examination, PW1 reiterated his evidence in chief and stated that though he knew the appellant who was his customer, he knew him by the name George only and that on the night of the incident, he did not record his statement as he was in pain. PW1 reiterated that he was able to see the appellant as there was light and further, that the appellant was dressed in a mavin and jacket. PW1 further stated that the appellant threatened him with death if he did not give him Kshs. 50,000.

16. PW2 Simon Mbai stated that on 28/3/2017 he was sleeping at about 1 a.m. when he heard a knock at his door by people who said they were police claiming that he had taken part in a robbery. He stated that he was able to see 8 people, one who called himself Corporal. He stated that 'Corporal' took him to his bed and told his accomplices to tie his hands and put him down which they did with a solar wire.

17. PW2 was able to identify the appellant as the one who called himself 'Corporal.' He stated that the people assaulted him and began to search his house and that he was injured on the waist and the ribs. He further stated that people took the solar lamp and solar panel as well as his phone and that of his wife, maize seeds and fertilizer as well as Kshs. 600 which his wife had.

18. PW2 stated that the assailants then took them to the home of Kevin Onyango and told Kevin to open the door and Kevin opened the door after which they then took them to the house of Angeline where they put them on the floor. He noted that there was solar light. He further stated that the people tied their hands in the store but Angeline ran and called people and they went to the police and reported. PW2 stated that later on 29th he got a call and was told that someone was selling a shoe at Nyathii and they went and the chief arrested the appellant. He stated that he knew the appellant even before the incident as they hailed from the same sub-location.

19. In cross-examination, PW2 reiterated that he reported the incident to the police and told them that he knew one of the people who robbed him. He reiterated that he was able to see the appellant during the incident and that it was confirmed when the appellant went to sell a shoe at the shop. He further stated that the appellant was arrested on 29th at 7 p.m. and the things stolen from Angeline were recovered. PW2 stated that no search was done in the appellant's home and as such no item was recovered from there.

20. PW3 Angeline Adhiambo testified that on 28/3/2017 at 1.30 a.m. Robbers went to her home. She stated that she heard the people hit her son Kevin Onyango and when she went to open the door, she found that it was locked from outside. She stated that the people asked her to open the door and they took her to the bedroom and locked her in but that she jumped out through the window and she later called people. She stated that she was later called by the owner of the shop where the appellant had gone to sell a shoe and she was able to identify the shoes as belonging to her husband.

21. In cross-examination, PW3 stated she knew the appellant prior to the incident and that she reported to the police that the appellant was one of those who robbed her. She stated that she was able to see the appellant as there was light from mkopa lamp [solar].

22. PW4 Damaris Kandi Mbai testified that on 28/3/2017 at about 1 a.m. she heard people calling outside and she called her husband and told him to go and see who it was and they went and the people said they were police.

23. She stated that her husband had light and that they also had solar light and when he opened the door, one person got in and went to the bedroom. She stated that other people entered the house and they got into the kitchen and cut the solar light which they used the wire to tie her husband's hands. She further stated that the assailants also tied her hands and took them to the sitting room and began to conduct a search in the bed room. She stated that the assailants hit them with pangas.

24. PW4 stated that the assailants took the two phones, solar, DAP 10 kgs, three packets of maize, 2 tins of beans and panga and other items from the house and then asked them to tell them where the professor lived. She stated that the assailants told them to take them to the house of Nyaserembe.

25. She stated that they went to the house of Kevin and were put to sit down outside the house. She also stated that the assailants got into the house of Kevin and assaulted him and then they took them to the house of Kevin's mother.

26. She stated that Mama Kevin refused to open the door but when they threatened to kill her son, she opened the door and they entered the house. She stated that Nyaserembe entered a room and locked the door from behind whilst they were put in a room and left there and that they screamed and children came and opened for them the door.

27. PW4 stated that she knew the appellant before court as he was one of those who went to her home. She stated that she was able to see him well on that day as he was the 1st person who entered her house when the lights were still on. She stated that she had seen him before that day.

28. In cross-examination, she reiterated that she was able to identify the appellant as there was light when he entered the house.

29. PW5 Stephen Adika stated that on 29/3/17, the appellant went to him and told him that he had not eaten for some time but he had some shoes which he wanted PW5 to take so that he could give him posho [unga] and cooking oil. He stated that he gave him the items and he told him he would come back for the shoes when he had gotten the money.

30. PW5 called the Assistant Chief and the complainant who had told him that their home had been broken into, who arrived and identified the shoes and began to look for the appellant who when he was found, admitted that he had taken the shoes to PW5.

31. In cross-examination, PW5 stated that he normally sold his goods for cash and further that he had never done business with the appellant and that he normally got a receipts when he bought items. He stated that he had a book where he entered the appellant's name and that the appellant did not sign on the book. He further stated that he knew the appellant so he did not demand a receipt from him.

32. PW6 James Aggrey Ouma testified that he got the information on 29/3/2017 that one of his villagers had been invaded and people robbed and they also got information from Omayi that he had recovered a pair of shoes which had been identified as belonging to one of those who were robbed. He stated that he went to the home of the appellant and arrested him and that he knew the appellant even before that day.

33. In cross-examination, PW6 stated that the appellant was arrested at his home where he was found with nothing as the shoes were recovered from the shop where the appellant had bartered for posho and oil. He further stated that the shopkeeper, PW5, did not have any written agreement with the appellant over the shoes.

34. PW7 Sergeant David Kamau of Yala Police Station testified that on 30/3/2017 he received the appellant who was taken to the station by the Assistant Chief of Got Regea sub location and the complainant who reported that a group of people had invaded the village and stolen several items. He stated that one of the complainants had visible injuries and he was treated at the Health Centre. He produced the recovered shoes and treatment notes as exhibits.

35. In cross-examination, PW7 stated that the appellant was mentioned in the report made by the complainant and that there was no need for identification parade as the appellant was brought in by the complainant and the Assistant Chief. He further stated that the person who had the shoes was the one who reported that the appellant had taken to him the shoes. He confirmed that there was no written agreement between the appellant and the person with the shoes and further that the shopkeeper was not charged. He stated that he did not issue the complainants with P3 forms.

36. Placed on his defence, at the close of the prosecution's case, the appellant gave a sworn statement of defence and stated testified that he did not know about the offence as he was in the house when the Chief went and arrested him and searched his house but got nothing. He stated that he was taken to the AP Camp and the following day to Yala Police Station where he stayed for 4 days before being brought to Court.

37. The appellant testified that PW1, 2, 3 and 4 said they were robbed by someone they knew but did not give the name of the people who robbed them nor did they produce the P3 forms. He also stated that he had never transacted any business with PW5 and as such, the charges against him were not true.

38. In cross-examination the appellant reiterated that he did not take any shoes to Stephen, PW5, and as such could not ascertain why PW5 made such allegations against the appellant.

Determination

39. Having carefully considered the appellant's grounds of appeal, the evidence adduced before the trial court and submissions for and against this appeal supported by statutory, constitutional provisions and case law, I proceed to ascertain the main issue of whether the prosecution proved its case against the appellant beyond reasonable doubt. There are other questions which I will resolve as follows:

1) Whether the appellant was charged and convicted on a duplex charge

40. The Appellant's submissions on the defective charge was that the charge sheet was a duplex charge. He cited **Republic v Mongella (1934) EACA 152** for the position that the charge sheet was thereby defective. The charges brought against the appellant were as follows:

"COUNT 1: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) AS READ WITH SECTION 296 [1] OF THE OF THE PENAL CODE.

COUNT 2: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

COUNT 3: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 [1] OF THE PENAL CODE"

41. Section 296 of the Penal Code provides:

"(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

> **(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

42. Thus, Section 296 of the Penal Code has two provisions. This is subsection (1) that is a penal provision providing the sentence for the felony of 'simple 'robbery; and subsection (2) that creates the offence of aggravated robbery and provides a stiffer penalty of capital punishment. Neither Section 295 nor Section 296 refers to an offence of "robbery with violence". Indeed, the felony termed robbery as described under Section 295 of the Penal Code may involve use of actual violence or threat to use violence, while the aggravated offence of robbery as described under Section 296 (2) of the Penal Code may be complete with use of violence or no use of violence as long as there has been a theft and the offenders are either armed with offensive weapons or offenders are more than one. **(See Oluoch v Republic [1985] KLR 549).**

43. The Court of Appeal in **Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR (Criminal Appeal No 5 of 2008)** explained and laid to rest the reasons why charging an accused person with the offence of robbery with violence under sections 295 and 296(2) of the Penal Code would amount to a duplex charge. The said Court, while following its earlier decisions in **Simon Materu Munialu v Republic [2007] eKLR (Criminal Appeal 302 of 2005)** and **Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal Appeal No 353 of 2008)**, stated:

> ***"Indeed, as pointed out in Joseph Onyango Owuor & Cliff Ochieng Oduor v R (Supra) the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.***
>
> ***The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that 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 to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge."***

44. I am also persuaded by the explanation by the Court of Appeal in **Paul Katana Njuguna v Republic (2016) eKLR** that as the offence of robbery with violence includes the elements of the offence of robbery, if the particulars of the charge sheet show the elements of the offence of robbery with violence which are proved, then this is a defect that is not fatal and can be cured by this Court under section 382 of the Criminal Procedure Code.

45. The Court of Appeal in the above case appreciated the defect in charging an accused under both sections, but went further to discuss the effect of that defect. It held that what courts need to have in mind is whether or not a failure of justice occurs with that defect; that the confusion that would arise due to the duplicity did not occur since the accused in that case fully cross examined the witnesses and raised no complaint both before the trial court and the High Court. So that, while it would be undesirable to charge an accused person under both sections, it would not be prejudicial to that accused person if there is no risk of confusion in the mind of an accused as to the charge framed and evidence presented, in which case, a charge which may be duplex will not be found to be fatally defective.

46. In the instant case, the charges brought against the appellant are all brought under section 296 (1) as read with section 296 (2) of the Penal Code. I find that the appellant was not prejudiced by the charges in anyway as he was able to fully cross-examine the prosecution witness.

47. The converse position is that if the evidence adduced pursuant to such a charge does not disclose the offence of robbery with violence, then this is a defect that is not curable under section 382 of the Criminal Procedure Code, for reasons that there will be two offences disclosed by the charge namely simple robbery and robbery with violence, which offences attract different penalties under the law, and prejudice would be caused to an accused person in this regard as it would not be clear what offence or sentence is applicable to him and to which he should raise a defence.

48. In the premise, I must also interrogate the other issues raised of the identification of the Appellant, and whether there was sufficient evidence to convict the Appellant for the offence of robbery with violence, to be able to make a determination as to whether the duplicity in the charge sheet was fatal or not.

2) Was there Positive Identification of the appellant as one of the robbers?

49. The appellant has argued that prosecution witnesses did not identify the offender at the scene of crime. He cited the decisions in **Simiyu & Another (supra)** and that of **Robert Gitau Wanjiju (supra)**.

50. On the issue of identification, I remind myself of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, ***inter alia:***

> ***"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light."***

51. In addition, in **Anjononi and Others v Republic, (1976-1980) KLR 1566** the Court of Appeal observed that ***when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.***

52. The evidence of identification at night must also be tested with the greatest care using the guidelines in **Republic v Turnbull, (1976) 3 All ER 549** and must be absolutely watertight to justify a conviction as was held in **Nzaro v Republic, (1991) KAR 212** and **Kiarie v Republic, (1984) KLR 739**. In **Maitanyi v Republic (1986) eKLR**, the Court of Appeal stated that ***in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect***.

53. In the present appeal, PW1 testified that he used a torch and clearly saw the appellant and his co-assailants. PW2 testified that she was able to see the appellant as there was a solar light in the house which the appellant and his team later disconnected and used the wire to tie his hands. PW4, a wife to PW2 corroborated his statement. PW3 testified that she knew the appellant prior to the incident and further that there was a 'mkopa' light which enabled her to see the appellant.

54. After a careful analysis of the evidence on record it is my considered opinion that the Appellant was properly and positively identified by the prosecution witnesses who came into contact with the robbers on the material night. The appellant was even described as the person who called himself 'Corporal.' Furthermore, the appellant who known to PW1, PW2, PW4 before the incident and after the incident, he went and left shoes with PW5 the witness in exchange for posho and cooking oil. The witness PW5 called the Assistant chief and that is how the appellant got to be arrested. The complainants also reported to the police of the robbery and gave the name of the appellant as one of the robbers. Accordingly, iam satisfied that the appellant was positively identified through recognition using sufficient lighting and therefore an identification parade would have been unnecessary.

3) Was the Evidence adduced by the prosecution witnesses Sufficient against the appellant?

55. The appellant submitted that the learned trial Magistrate erred in law in convicting him based on inconclusive, extraneous and far-fetched evidence.

56. Section 296 (2) of the Penal Code provides as follows with regard to the offence of robbery with violence:

> ***"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 before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

57. The prosecution must therefore prove theft as a central element of the offence of robbery with violence, as the offence is basically an aggravated form of theft.

58. The other elements of the offence of robbery with violence were elaborated by the Court of Appeal in **Ganzi & 2 Others v Republic [2005] 1 KLR** and in **Johanna Ndungu v Republic, Cr. App No. 116 of 2005 (unreported)** as follows:

> ***"1. If the offender is armed with any dangerous or offensive weapon or instrument, or***
>
> ***2. If he is in the company with one or more other person or persons, or***
>
> ***3. If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."***

59. I am alive in this regard to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296 (2) of the Penal Code as was held in **Oluoch v Republic, (1985) KLR 549**.

60. In this case, the evidence as adduced by PW1,2, and 4 indicates that they were wounded by the appellant and his team during the incident. PW1 testified that the appellant used a spear and hit him on the leg. PW2 testified that he was injured on the waist and the ribs resulting from the appellant's attack whereas his wife, PW4 testified that the assailants hit them with pangas. PW5 testified that the accused approached him for a barter with shoes for posho and cooking oil on the basis that he was hungry but did not have money and only had a shoe to trade. PW5 later contacted PW3, the complainant and owner of shoes that the appellant was trading for food.

61. Applying these principles, I note that in the instant appeal, PW1,2,3 and PW4 gave a consistent and corroborative accounts of what transpired from the time they were attacked by the appellant and his gang until the time the robbers left. All these witnesses placed the Appellant at the scene of crime. PW5 placed the appellant as the last in possession of the shoes that belonged to PW3's husband prior to them being stolen, and before PW1,2 and PW4 suffered injury. The only inference that can be drawn in the circumstances is that the Appellant and the persons he was with were the ones who jointly robbed, injured and disposed of PW3's husband's shoes. Albeit the appellant claimed that the recovered shoes were not named in the charge sheet, the complainants clearly identified them to belong to them and PW5 was clear that the appellant is the one who went and gave him the shoes to hold in exchange for posho and oil.

62. Lastly, the appellant submitted as one of his grounds of appeal that the trial court relied on his alleged confession which was illegally obtained and in contravention of the section 25 of the Evidence Act. Section 25 of the Evidence Act defines a confession as follows:

> ***"A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in***

conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence."

63. Section 25 of the Evidence Act was amended by Act No. 5 of 2003 and Act No. 7 of 2007 by inserting into the Act Section 25A which reads as shown below:

> ***"25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.***
>
> ***(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court."***

64. The rules envisaged under Rule (2) above are known as the Evidence (out of Court Confessions) Rules, 2009 hereinafter the Confessions Rules. Under these Rules, specifically under Rule 4, the rights of an accused are specified. This Rule requires the recording officer to ensure that the accused person chooses his preferred language of communication; is provided with an interpreter free of charge where he does not speak Kiswahili or English; is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment; is informed of his right to have legal representation of his own choice among others.

65. Rule 4 (2) requires the recording officer to ensure that the accused has not been subjected to any form of torture and Rule 4 (3) requires the recording officer to ask the accused person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded.

66. In addition, the Confession Rules require the accused to be informed of the option to record his own statement in his preferred language or to have it recorded for him (Rule 7); the option to clarify or add anything in the statement after the same has been recorded (Rule 8) and the requirement to administer a caution before recording the statement (Rule 5). In addition to the legal provisions on this issue, there are numerous pronouncements by judges on the subject of extra-judicial confessions.

67. I have reviewed the lower court judgement and at no place does the trial magistrate state that he is basing his judgement and conviction of the appellant on the confession as alleged by the appellant. There is even no confession on record to be considered by the trial court or by this court. Accordingly, the issue of a confession as raised by the appellant is devoid of merit. It is hereby dismissed.

68. I find that all the essential elements of the offence of robbery with violence were proved beyond reasonable doubt, and in particular, the theft of the PW3's husband's shoes; the evidence by PW1,2 and PW4 as to the injuries suffered; as well as the evidence by PW1,2,3 and PW4 that the Appellant was in the company of other persons at the time and threatened to kill Kevin if his mother failed to open the door for the robbers. They also tied the victims with solar cables before vanishing with stolen items.

69. In light of the positive identification of the Appellant and the overwhelming evidence proving robbery with violence against the appellant, I find that the duplicity in the charge did not materialise in this case as alleged by the appellant.

70. The allegation that the interpreter was not sworn is devoid of any merit as the interpreter was a court assistant judicial staff who is authorised to interpret court proceedings.

4) Whether the sentence meted out was harsh

71. As regards the death sentence imposed on the Appellant, at the time the Appellant was convicted and sentenced, the only sentence prescribed upon conviction for the offence of robbery with violence was the death penalty. It is for that reason that I find the sentence as imposed then was lawful and therefore the trial magistrate cannot be faulted. However, on 14th December 2017, the Supreme Court in **Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR** declared that mandatory death sentence is unconstitutional. The Supreme Court thereupon gave the following guidance in respect of matters such as the present appeal:

> ***"Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing. It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners…. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case."***

72. This Court therefore has two options- to remit the matter back to the trial court to sentence the Appellant afresh or alter sentence in line with section 354 of the Criminal Procedure Code.

73. Nonetheless, in order to avoid parallel appeal proceedings in the High Court against the new sentence that may be imposed by the subordinate court, and at the same time in the Court of Appeal from the decision of this Court in this appeal should the appellant be aggrieved by the decision of this court, I find it more appropriate that this Court imposes the appropriate sentence on the Appellant [re sentences the appellant] after considering his fresh mitigation.

74. For all the above reasons, the appeal by the appellant against conviction on all the three counts of robbery with violence is dismissed. The mandatory death sentence imposed on the appellant in each of the three counts is hereby set aside. The appellant to mitigate before being re-sentenced.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 6th Day of October, 2020

R.E. ABURILI

JUDGE

Ruling on resentencing

Upon considering the offence committed and circumstances thereof and having accorded the appellant an opportunity to mitigate, as per the appeal record herein, I hereby resentence the appellant to serve forty years imprisonment on each of the 4 counts convicted. The sentences to run concurrently and to be calculated from 30th March, 2017.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 6th Day of October, 2020

R.E.ABURILI

JUDGE