REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 68 OF 2018

PETER KIRITU NGOCHI ....APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(Being an appeal against Conviction of Sentence in Nakuru Chief Magistrate's Criminal Case Number 1148 of 2013 by Hon. F. Munyi (Senior Resident Magistrate).

JUDGMENT

1. On 20th May 2013 the appellant was charged with the offence of **Robbery with Violence Contrary to Section 296 (2) of the Penal Code and the alternative charge handling stolen property Contrary to Section 322 (2) of the same code.**

It was alleged that on 18th May 2013 at Nakuru Town Nakuru County within Rift Valley jointly with his co accused and others not before the court while armed with dangerous weapons namely pistol robbed Stephen Gathonjia motor vehicle registration number KBS 043X Mitsubishi FH valued at Kshs. 5.2 million and at or immediately before or immediately after the such robbery threatened to use actual violence to the said Stephen Gathonjia.

In the alternative that on the same date at Lessos area in Eldoret County Rift Valley, jointly, other than in the course of robbery dishonestly retained the same motor vehicle the property of Johnstone Muchai Muthanga knowing or having reason to believe it too be stolen or unlawfully obtained.

On the 3rd August 2018 the trial court found him guilty of Robbery with Violence, convicted him accordingly. On 9th August 2018 he was sentenced to death.

2. Aggrieved, he filed this appeal on the grounds which he later amended viz;

> 1. *THAT the learned trial magistrate erred in points of law and fact by failing to appreciate that the provisions of section 200 of the criminal procedure code were not observed and complied with during trial.*
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> 2. *THAT the learned trial magistrate erred in points of law and fact by failing to appreciate that the appellant's constitutional right to a fair trial under article 50(2) of the constitution were grossly violated.*
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> 3. *THAT the learned trial magistrate erred in points of law and fact by failing to appreciate that the provisions of section 151 of the criminal procedure code was not complied with.*
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> 4. *THAT the learned trial magistrate erred in points of law and fact by both relying on contradicting pieces of evidence on identification and failing to observe that the evidence tendered by the prosecution pointed on the fact that the prevailing circumstances at the locus quo were absolutely difficult, for a witness to make any significant identification.*
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> 5. *THAT the learned trial magistrate erred in points of law and fact by failing to appreciate that the credibility of the identification parade was utterly at stake as it completely faulted the procedures set out in the force standing orders pertaining to an identification parade.*
>
> 6. *THAT the learned trial magistrate erred in points of law and fact in basing the reason for conviction on inconsistent and incredible evidence of possession of an alleged stolen motor vehicle without observing that the recovery was not proven beyond*

reasonable doubt as required in law.

7. THAT the learned trial magistrate erred in points of law and fact by failing to give details of her finding that the appellant herein undertaking in the alleged crime was different from the others whose charges were dropped to handling stolen goods.

8. THAT the learned trial magistrate erred in points of law and fact by failing to consider the appellant's plausible defense without appreciating that the same was not rebutted or rather displaced by the prosecution pursuant to the provisions of section 309 of the criminal procedure code

9. THAT the learned trial magistrate erred in points of law and fact by failing to appreciate that the evidence adduced as a whole by the prosecution did not entirely discharge the prosecution burden of proving its case beyond any reasonable doubt.

He also filed his written submissions.

3. This being a first appeal the appellant is entitled to a re-assessment of the evidence and for this court to draw its own conclusions see **Okeno vs Republic.**

4. **Preliminary**

The prosecution called eight (8) witnesses. The record was not very clear, because part of the typed proceedings were missing when the file was sent to me for writing of judgment.

The original record was also incomplete as some of the handwritten proceedings were missing.

5. **Case for the Prosecution** The matter started before Hon. Mwaniki Principal Magistrate on 7th August 2014 when PW1 Stephen Gathonjia testified, that he was employed by one Johnstone Muchai to driver motor vehicle registration number KBS 043X Mitsubishi Lorry.

6. On 18th May 2013 he was called by one Thuku, a fellow driver about 7.00 a.m. He found Thuku who told him they were to pick some goods from Rongai. They drove to somewhere in the interior of Rongai. Somewhere along the way he found two (2) people on either side of the road. He was told by the persons he was with in the lorry that these two (2) were to assist in transporting the goods. He stopped to pick them and that is when all hell broke loose.

7. He was attacked by a person who was armed with a pistol, dragged to the back of the lorry and given two (2) bottled of some liquid to drink. Before he lost consciousness he could hear the men speaking in Kikuyu asking whether the lorry had a cut out.

8. He found himself rescued by a boda boda who took him to a dispensary. He found that his phone Nokia 2730 and Kshs. 2,300/=, his Driving Licence (DL) and Public Service Vehicle (PSV) licences had all been stolen. The PSV, DL were later recovered together with the motor vehicle. He was treated at St. Mary's Hospital. He reported to police and told them that the people who attacked him were five (5) in number and he saw them clearly.

9. The police called and told him that they had recovered the motor vehicle and arrested the persons found in possession of the same. He attended an identification parade on 22nd May 2013 where he identified three of the assailants who included the appellant. He said during the robbery the appellant was in a grey jacket, which was recovered inside the lorry. He said the 1st accused was in the company of the other who had a pistol.

10. On cross examination he said he saw the appellant on the road side when he was stopped. That he observed him for three minutes when he was stopped. That it is the police who told him that some people had been arrested and he attended the identification parade.

11. In the original record, the testimony of PW2 is in bits. The bit I found indicated that he testified on 9 th April, 2015 that he was the owner of the said motor vehicle, that the motor vehicle was recovered at Lessos, and he was informed by police that three suspects had been arrested. He also stated that his motor vehicle was valued at Kshs. 5.2 million and that he found the appellant at the police station.

12. Thereafter on 6th August 2015 the matter was placed before *Hon. JB Ndeda SPM*. He complied with **Section 200 of the Criminal Procedure Code.** The appellant and his co-accused requested that the matter proceed *de novo*, which request was opposed by the prosecution on the ground that PW1 and PW2 could not be availed. He gave a ruling date for the application on 20th August 2015.

13. The next record is of 21st October 2015 before Hon. *J. M. Omido Senior Resident Magistrate.* The matter did not proceed as the 2nd accused was missing for long until 15th February 2016 when *Hon. Omido* fixed the matter for hearing on 25th May 2016. From the record, from 25th February 2016, the file went missing until 21st July 2016 when it was placed before Hon. *F. Munyi SRM*. On 25th August 2016, the court having complied with **Section 200 of the Criminal Procedure Code** where the accused persons, the appellant included chose to proceed from where the case was stopped. On 4th August 2017 the record shows;

> "*PW2 43580 PC Makau, Moses reminded he is still on oath.*"
>
> I searched the preceding record and noted that he had begun his testimony on 24th April 2017 without the exhibit and was stood down.

14. His testimony was that he learnt of the theft of the said motor vehicle on 18th May 2013 around 3.00 p.m. from OCS and Surwa. On the same date about 6.00 p.m. they learnt that the motor vehicle KBS 034X Mitsubishi was spotted at Lessos heading for Eldoret with three occupants. Apparently these three were arrested and motor vehicle detained, as on 19th May 2013, his two (2) colleagues went to Lessos police station and brought the motor vehicle and the three suspects, who included the appellant. In the lorry they found the drivers DL and PSV licence, and three (3) jackets. Motor vehicle was photographed by scenes of crime personnel. [The owner later brought document to prove ownership]. He later learnt that the driver was admitted in hospital unconscious and visited him. He was later transferred to Mother Kevin Hospital from where he was treated and discharged. He recorded his statement, was issued with a P3 form and later attended the identification parade where he identified the three suspects. On cross examination he said the driver told him how he was robbed, that it was the appellant who hit him with a pistol, that when he recorded the driver's statement he did not record about the appearance, that he took him to court with holding charges because by then the whereabouts of the driver were unknown.

15. **PW3 John Thuku Kamau** was the lorry driver who testified that on 18th May 2013 about noon, he was approached by the appellant and another. They wanted to hire his lorry to transport their goods. From Rongai to Nairobi. His lorry was undergoing repair. So he contacted his fellow driver, and PW1 happened to be available. PW1 then went to the garage where he was left to do the job. He said of the two (2) men who approached him one had a cut on the face, on cross examination he said that the appellant was **not one** of the men who had approached him.

16. **PW4 No. 234309 CIP Paul Omollo** conducted the identification parade and testified that PW1 identified the appellant. He conceded that identification parade was conducted after the appellant had been charged in court but that at that time the PW1 was admitted in hospital.

17. **No. 85551 PC Calen Simbili** was the scenes of crime officer who took the photo of the motor vehicle upon its recovery. He produced the photos and his certificate as evidence.

18. **No. 25417 Sgt. Pashua Juma** he and his colleagues arrested the lorry at a place called Kimuagu between Napkui and Kapsabet. This was after a report was received at the Lessos Police Station that the lorry KBC 043 X had been stolen and was headed their way. Inside the lorry were three (3) suspects who were seated at the front. Both were escorted to the police station. The following day they were escorted to Nakuru Police Station. On cross examination by the appellant he testified that he arrested the appellant with two (2) others from inside the motor vehicle and escorted them and the lorry to Lessos Police Station, booked them then took them to Nakuru.

19. Dr. John Mwangi Murema produced the P3 on behalf of Dr. Nondi who examined PW1. He said the treatment notes showed that PW1 had ingested poisonous substance which had to be sucked out of his stomach. The prosecution closed its case.

20. **The Defence**: In his defence the appellant gave unsworn statement. He said he was a resident of Lessos on 18th May 2013, he was splitting timber until 2.00 p.m. He went to town to have lunch. Some officers were to collect some money from him since the work of splitting timber he was doing was illegal. He met the officers at 2.30 p.m. promised to give them the money. He continued working till 5.30 p.m. and proceeded to Lessos where he was to get the money. When he was unable to pay off the officers they arrested him and placed him in the cells. The following day a Saturday he had not gotten the money and that offended them. They placed him in cells. Inside the cells there was a person by name of Peter Keritu Wachira. He said his name was Peter Keritu Ngochi, but he was charged as Peter Keritu Wachira. He had nothing to do with the offence.

21. In her judgment the learned trial magistrate set out to determine whether the case for prosecution had been proved beyond a reasonable doubt. She was satisfied that on the evidence on record the appellant was properly identified as one of the robbers.

22. From the evidence and Amended Grounds of Appeal the issues for determination are;

i) Whether the trial court complied with the law – Section 200 Criminal Procedure Code, Article 50(2) of the Constitution, Section 151 of the Criminal Procedure Code.

ii) Whether the evidence of identification was contradictory.

iii) Whether the identification parade was credible.

iv) Whether the evidence of recovery was reliable.

v) Whether the trial magistrate erred in acquitting the other two (2) for stolen property.

Appellant relied on **Mark Oiruri Mose vs Republic [2013] eKLR,** submitting that this court was bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter.

23. i) On issue 1 Whether the trial court complied with the law – Section 200 Criminal Procedure Code, Article 50(2) of the Constitution, Section 151 of the Criminal Procedure Code.

The appellant submitted that the **Section 200 of the Criminal Procedure Code** was not complied as *Hon Ndeda* despite giving a date for ruling as to whether the matter would proceed *de novo* or not never delivered his ruling. Ms. Wambui for state in opposing the appeal submitted that this fact was overtaken by events because subsequently other magistrates handled the matter but never took any evidence. That the magistrate who took evidence and determined the matter complied with **Section 200 of the Criminal Procedure Code** as is evidenced by the record of 25th August 2016. On this day the appellant chose to proceed with the case from where it had stopped.

ii) On Article 50(2)

On fair trial, the appellant submitted that he had not been supplied with witness statements and relied on the court of appeal in the case of **THOMAS PATRICK GILBERT CHOLMONDELY (2008) eKLR held that:**

> ***"we think that it is now established and accepted that to satisfy the requirement of a fair trial granted under our constitution, the prosecution is now under a duty to provide an accused with and to do so in advance of the trial, all the relevant material such as copies of statement of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items"***

It was submitted for the state that the record shows statement were supplied after the testimony of PW1, and when PW1 testified the appellant cross examined him. That when directions were taken under **Section 200 of the Criminal Procedure Code** before the *Hon. F. Munyi*, the appellant had the opportunity to raise the issue and demand the recall of PW1 on that basis. However, the appellant chose to proceed from where the matter had stopped.

I have stated elsewhere that the duty is always with the prosecution to avail the material they will rely on against an accused person to enable him defend himself. That duty never shifts. The court's duty is to ensure that right is not violated. In this case the prosecution availed the statements but after the testimony of one witness, the court process is such that it gives the opportunity to deal with such issues, the appellant never raised the issue that he needed to recall the witness on the basis of having been supplied with the statements and the same was denied. He exercised is right when *Hon. Munyi* complied with **Section 200 of the Criminal Procedure Code.**

Clearly the appellant was aware of his right as he had expressed earlier before *Hon. Ndeda* requesting that the matter started *de novo. T*hough the magistrate never delivered his ruling on the issue, the same was never raised before *Hon. Munyi.* The appellant cannot now be heard of accusing the same court of failing to accord him a fair trial.

iii) He argued that the trial court refused to allow the application by both the prosecution and the complainant to withdraw under **Section 87(a) of the Criminal Procedure Code** arguing that the trial court did not have the discretion to do so. He argued further that the prosecution had sought to withdraw because the matter had taken long and the appellant's rights were violated contrary to **Article 159(2) (d), 50(2) (e), 47.** That the trial magistrate misdirected herself by rejecting the application and summoning witnesses under **Section 150 of the Criminal Procedure Code.**

In response Ms. Wambui submitted that the court had discretion Under **Section 87(a) of the Criminal Procedure Code** to either reject or accept the application. That the trial court did not violate even the DPP's authority conferred under **Article 157 (ii).**

Section 87(a) of the Criminal Procedure Code states;

> *In a trial before a subordinate court a public prosecutor may, **with the consent of the court** or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal—*
>
> *(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;*

In this case the court did not consent to the application to withdraw, for good reason, in the public interest due to the nature of the offence and interests of justice.

Section 150 of the Criminal Procedure Code states;

> **150. Power to summon witnesses, or examine person present**
>
> ***A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness,*** *or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case: Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.*

Clearly the trial court was within its mandate to summon the said witnesses. The appellant would have been prejudiced if he had not been given any opportunity to cross examination them.

iii) **Regarding Section 151 of the Criminal Procedure Code** which states:

> ***"S. 151. Evidence to be given on oath***
>
> *Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath."*

24. The appellant argued that the evidence of PW2 was not taken on oath, and therefore it ought not to have been admitted. He relied on **James Mwangi Kamako vs Republic [2020] eKLR**. These are the proceedings that were missing both in original and in the typed proceedings. It would not be clear whether or not he testified on oath. The question this court must address is even if his testimony was not taken on oath, was there other testimony to corroborate the case for the prosecution? He was the owner of the lorry. He came to confirm that. In addition, the documents he referred to had been referred to by PW1 and later by the investigating officer on oath and produced in evidence, hence, in the event his testimony was not on oath, there was other evidence that was on oath.

25. The appellant urged this court to find that there was insufficient identifying evidence. He submitted that the evidence of PW1 and that of Thuku, PW3 could not be relied on, that PW1 never gave any description, of the appellant and it could not be explained how then he could attend the identification parade and purport to identify the appellant. Further that Thuku clearly contradicted himself by 1st saying that he had seen the appellant and in the same breath that he had not seen him. He relied on the following cases on identification;

ü **Francis Kariuki Njiru & 7 others vs Republic [2001] eKLR**

ü **R. v. Turnbull [1976] 3 All ER 549**

ü **Cleophas Otieno Wamunga vs Republic [1989] eKLR**

He submitted that there was insufficient evidence of identification and that the prosecution had not fulfilled the parameters set in various celebrated decisions on identification: KARIUKI **NJIRU & 7 OTHERS VS REPUBLIC,** where the court held that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

He submitted that in scrutinizing the identification evidence the court was expected to have answered the following questions.

a) What were the lighting conditions under which the witness made her observation?

b) What was the distance between the witness and the perpetrator?

c) Did the witness have an unobstructed view of the perpetrator?

d) Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

e) For what period of time did the witness actually observe the perpetrator?

f) During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

g) Did the witness have a particular reason to look at and remember the perpetrator?

h) Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

i) Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused appearance to have been on the day in question?

j) What was the mental, physical, and emotional state of the witness before, during, and after the observation?

k) To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

He argued that the prosecution did not provide the answers to these questions but more importantly that the trial court did not address them. That PW3 recanted his evidence, leaving only PW1 whose evidence on identification was unreliable, and who on cross examination by the 2nd accused person testified that he never gave any description / details of his attackers to the police. He argued that any identifying evidence e.g. description of clothing was therefore doubtful. He cited R –VS- TURNBULL & OTHERS [1976] 3 ALL ER 549 where it was held;

> ***"The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?***
>
> ***Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

He also cited CLEOPHAS OTIENO WAMUNGA vs R [1989] eKLR where the court of appeal while addressed the issue of visual identification as follows: -

> ***"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. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more alleges 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.***
>
> ***Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

In response to these submissions the Ms. Wambui relied on **Jackson Kihara Gachura vs Republic** **[2019] eKLR** where the High Court relied on **Nathan Kamau Mugure** **[2009] eKLR, where t**he Court of Appeal was of the view that the real issue ought not to be failure to give a description but;

> ***"We need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court warns itself of the possible danger of mistaken identity."***

26. I have considered the evidence of identification placed before the trial court. First this was not a case of a single identifying witness. Two witnesses were presented and while it is true that Thuku the other identifying witness gave contradictory evidence PW1 testified how he saw the appellant for three minutes and identified his grey jacket, but it is also true that he never mentioned any appearance to the investigating officer. However, taking it from the Court of Appeal's observations in **Nathan Kamau Mugure** above, the circumstances of this case give additional credibility to the PW1's testimony. From the record the robbery took place in the morning, sometime after 7.00 a.m. Hence there was light to see who was doing what and it is not impossible that the PW1's eyes fell on the appellant to be able to see who he was. The learned trial magistrate took into consideration the contradictory evidence of Thuku, and ignored it, but was persuaded that the PW1 was telling the truth. Considering the time of the offence and the circumstances of the same it would not be farfetched to say that the complainant saw the appellant at the scene.

27. There is the issue of the identification parade after the appellant had taken plea. Obviously that would be an unfair identification parade and this was conceded by the prosecutor. However, the interaction with the appellant during the robbery, the appellant's arrest the same day in the lorry, cumulatively adds up to overwhelming evidence before the trial court.

28. The appellant challenged the alleged recovery of the lorry. That the appropriate procedure of drawing an inventory, photographing the scene or dusting the same were not carried out. What is evident from the evidence is that the appellant was arrested inside the lorry and escorted with the lorry to Lessos police station. This was after an ambush was laid by the police officers following information about the lorry heading to Eldoret.

29. The appellant's further complaint was that the informant and the OCS Surwa, who reported to officers in Lessos ought to have been called. Evidence of informants need not to be called, unless it is the evidence that points to the guilt of an accused person. In this case the police received information acted on it, and recovered the lorry and arrested suspects.

30. The information was not that the appellant had stolen the lorry or committed the robbery, but that the stolen lorry was on its way to Eldoret. The prosecution was at liberty to call the witnesses they chose, and the appellant could have requested for summons for these witnesses if he needed them for this case.

31. Hence I find that the trial court is arriving at the position that the appellant was properly identified, considered all the relevant facts.

32. Was there proof that appellant committed the robbery vis a vis his co-accused being found guilty only of possession of stolen property?

33. PW1 placed him at the scene and I find that the fact that he was found in the stolen lorry hours after the robbery was additional evidence to support the charge of Robbery with Violence. The co-accused were not placed at the scene of robbery by the other witnesses and were only found in the stolen more vehicle. There was no error.

34. The appellant argued that the burden to prove his innocence had been placed on him contrary to laid down principles that he was innocent until proven guilty, a burden on the prosecution. He argued that this burden had not been discharged. He relied on numerous authorities including of **R. V. KIPKERING ARAP KOSKE & ANOTHER [1949] 16 EACA 135**, where it was held:

> ***"The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."***

35. This could not be further from the truth. The prosecution placed evidence before the court and having been found inside the stolen motor vehicle he had burden to explain what he was doing in the said motor vehicle. His explanation that he was arrested and charged with this offence for failing to pay accumulated bribes to some police officers was an afterthought. It never came up during the trial and the learned trial magistrate was right to reject the same.

36. A question that has nagged throughout this judgment is whether the appellant was prejudiced by the incomplete record. The fact of the incomplete record is an indictment of manual taking and keeping of court proceedings. I have demonstrated I did not find that the bit of missing proceedings was prejudicial.

37. I find therefor that the appellant was properly convicted for the offence of robbery with violence c/s 296(2) of the Penal Code.

38. As regards the sentence of death, the record shows that the same was meted out as the mandatory sentence for robbery with violence. The holding in the ***Muruatetu case*** declaring the mandatory nature of the death sentence unconstitutional equally applies to this case.

39. At paragraph [71] the Supreme Court stated;

> *As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:*
>
> *(a) age of the offender;*
>
> *(b) being a first offender;*
>
> *(c) whether the offender pleaded guilty;*
>
> *(d) character and record of the offender;*
>
> *(e) commission of the offence in response to gender-based violence;*
>
> *(f) remorsefulness of the offender;*
>
> *(g) the possibility of reform and social re-adaptation of the offender;*
>
> *(h) any other factor that the Court considers relevant.*

38. These guidelines are relevant in determining the appropriate sentence. The appellant was said to be a first offender. The motor vehicle was recovered. And violence against the complainant was not aggravated. In mitigation his request was for the court to consider the period he had already spent in custody.

39. Taking all these into considerations I find that a sentence of 20 years' imprisonment to be appropriate in the circumstances of this case.

40. The sentence of death is substituted with 20 years' imprisonment to run from 20th May 2013 the date of the appellant's first date in remand 40.

Right of Appeal 14 days

Delivered, Signed and dated at Nakuru this 9th October 2020

<u>In the presence of: VIA ZOOM</u>

Court Assistant Edna

For state Ms. Rita

Appellant present

Mumbua T. Matheka

Judge