REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HCCRA NO. 56 OF 2017

CONSOLIDATED WITH NYERI HCCRA 50 OF 2017

SAMUEL NDUATI WAIGWA..... 1ST APPELLANT

LAWRENCE WAICHUNGWA WANGECHI.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate Hon. R. Kefa dated 24/08/2017 in Nyeri CMCR Criminal Case No. 121 of 2016.)

JUDGMENT

1. **Samuel Nduati Waigwa** and **Lawrence Waichungwa Wangechi** referred to as the 1st and 2nd Appellants were charged with the following offences:

> **Count I:** Robbery with violence contrary to section 296(2) of the Penal Code: The particulars are that 1st and 2nd Appellants on the 5th day of February 2016 at about 01:20 hours at Nairutia township in Kieni west district within Nyeri county jointly robbed **James Kagiri Gachenga** of Kshs.2,000/=, a mobile phone make Itel, a safaricom wallet containing identity card, electors card and other personal effects all properties valued at Kshs.2,500/= and at or immediately before or immediately after such robbery used actual violence to the said **James Kagiri Gachenga**.
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> **1st alternative count:** Handling stolen goods contrary to section 322(1)(2) of the Penal Code. The particulars are that the 2nd Appellant on the 5th day of February 2016 at about 0120 hours at Nairutia trading centre in Kieni West district within Nyeri county otherwise than in the cause of actual stealing dishonestly retained mobile phone make Itel knowingly or having reason to believe it to be stolen.
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> **2nd alternative count:** Handling stolen goods contrary to section 3221)(2) of the Penal Code. The particulars are that the 1st Appellant on the 5th day of February 2016 at about 0120 hours at Nairutia trading centre in Kieni west district within Nyeri county otherwise than in the cause of actual stealing, dishonestly retained a safaricom wallet containing identity and electors card and other personal effects knowing or having reason to believe it to be stolen.
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> **Count II:** Escape from lawful custody contrary to section 123 of the Penal Code. The particulars are that the 1st Appellant on the 5th day of February 2016 at around 0150hours at Nairutia police station in Kieni West district within Nyeri county being in the lawful custody of No. 69797 Cpl. Julius Sang, No. 70595 PC Salim Matano and No. 86021 Pc Abraham Kosgei, escaped from the said custody.

2. They denied the charges and the matter proceeded to full hearing with the prosecution calling four (4) witnesses. Each Appellant gave a sworn defence. Later the Appellants were found guilty, convicted and sentenced to death on the 1st count. The 1st Appellant was convicted on count II but his unpronounced sentence was held in abeyance.

3. They were aggrieved by the judgment and filed separate appeals. For purposes of this judgment the two appeals are consolidated with the lead file being Nyeri HCCRA No. 56 of 2017.

4. The 1st Appellant's appeal was filed by Muhoho Gichimu & co. advocates. His grounds of appeal are:

a) **That,** the learned Magistrate erred in law and in fact in convicting him on evidence that was not to the required standard which is that of beyond reasonable doubt.

b) **That,** the learned trial Magistrate erred in law and in fact in convicting, the Appellant on evidence that did not support charge.

c) **That**, the learned Magistrate erred in law and in fact in convicting the Appellant without all the ingredients of the charge herein being proved.

d) **That,** the learned Magistrate erred in law and in fact in relying on inconsistent and contradictory evidence.

e) **That,** the learned Magistrate erred in law and in fact reliance of evidence regarding to identification/recognition without considering other factors that watered down the purported/identification/recognition.

f) **That,** the learned Magistrate erred in law and in fact in dis regarding and/or failing to consider the defence of the appellant whose evidence was not shaken by the prosecution.

5. The 2nd Appellant's grounds of appeal are:

a) **That,** the trial Magistrate erred in both law and fact while convicting the him in reliance with the purported identification by recognition by Pw1 and Pw2 without considering that no first report was ever made in record by pw2 when he called the police.

b) **That,** the trial Magistrate erred in both law and fact convicting him with charges that were not adequately proved especially on the alleged mobile phone of which same no serial numbers were given by the complainant nor the sim card numbers said was in it.

c) **That**, the trial Magistrate further lost direction in believing the evidence of the complainant that his assailants each removed one item i.e. wallet and a mobile phone from same pocket which was left in doubt because no inventory was made by the police at the scene of his arrest.

d) **That,** the trial Magistrate further lost direction while becoming influenced by the adduced evidence of the prosecution and failed to consider his plausible defence.

6. **Pw1 James Kagiri Gachenga** who is the complainant testified that on 4th February 2016 at around 10:00 pm he was looking for a motorbike to take him home after dropping milk for his sister. He met the 2nd Appellant, who he knew as a conductor, and he told him to wait as he got a motorbike. He later came with a tailor (*Samuel Nduati*) who is the 1st Appellant. They left and returned with a 3rd person whom he did not know and upon arrival the 2nd Appellant held him and strangled him at the neck.

7. They held him and he sat down and started screaming. The 2nd Appellant removed his wallet from the jacket pocket while the 1st Appellant removed his phone from the same pocket. The wallet had his identity card, Kshs.2,100/= and electors card. The 1st Appellant took his wallet, phone, two phone batteries and medicine for spraying cattle.

8. He screamed and Pw2 and Ciru heard him from the Kariguini bar. He crawled into the said bar which was roughly 50 metres from where he had been. He was followed into the bar by both Appellants. Police officers (*Pw3 and Pw4*) were called by Pw2 and they came.

9. The police upon arrival ordered the Appellants to lift their hands and his items were recovered from them. He identified them as:

From 1st Appellant

· His wallet (EXB3) which had his identity card (EXB4), his electors card (EXB5), KRA tax card (EXB6).

From 2nd Appellant

· Itel phone EXB1

· Two stones EXB2.

An inventory (EXB7) was prepared by the police but the Appellants refused to sign it.

10. In cross examination he denied having been drunk that night. He confirmed having signed the inventory form (EXB7). He explained that the phone (EXB1) was given to him by a family friend. The Appellants followed him into the bar for purposes of reconciliation. His Kshs.2,000/= was not found in the wallet when the police conducted a search on them because the 3rd person escaped and disappeared. He also stated that while in the bar the Appellants got into another room where they started fighting demanding for the stolen items.

11. **Pw2 Teresia Njeri** who works in a pub at Nairutia was on duty on 04/02/2016 at 11:00 pm doing her calculations when she heard a commotion. She peeped through the window and saw some people outside and one was being beaten. On opening the door she found it was people she knew i.e. the two Appellants and Pw1 whom they were beating.

12. Pw1 entered the pub and the two Appellants later forced themselves inside. She left the three in one room as she went to call the police. They came and did a search on the Appellants. On the 2nd Appellant they found EXB1 and 2 while EXB3-5 were found on the 1st Appellant.

13. In cross examination she confirmed that her workmate Ciru did not witness the commotion as she was drunk and left to go and sleep.

14. **Pw3 No. 70595 Salim Matano** is one of the officers who arrested the Appellants on 5th February 2016 at 1:00 am after receiving a report and call about the occurrence. He was with Pw4 and another on patrol. At the scene they asked the two Appellants to surrender. He searched the 1st Appellant and an Itel phone and two stones were found on him. The 2nd Appellant was searched by Pw4. A safaricom wallet (EXB3) was found on him. Inside it was found EXB4 and 5.

15. They were arrested and taken to the police station. While there, the 1st Appellant attempted to escape but was arrested by Pw4. At the bar they had found Pw1 sitting in between the 1st and 2nd Appellants. Pw1 explained to them how the Appellants had grabbed and robbed him outside the bar.

16. In cross examination he said Pw2 told him the victim had been drinking at the bar. There were no customers when they arrived at the bar but the bar attendants were there. He said Pw1 was not stable as he was moderately drunk. He invited the 2nd Appellant to switch on the phone but he was unable but Pw1 comfortably switched it on.

17. **Pw4 No. 69797 Cpl Julius Kipkoech Sang** came to the bar with Pw3 and they recovered the mentioned items EXB1 – 6. He gave similar evidence to that of Pw3. In cross examination he owned up to the alterations on the inventory (EXB7).

18. In his sworn defence the 1st Appellant denied the charge. He admits having gone to the bar at 8:30 pm and was there for some hours before the police arrived. Him and others were arrested for drinking after 11:00 pm. The police wanted a bribe of Kshs.500/= but he only had Kshs.200/=. He was later charged with robbery with violence he knew nothing about. He denied seeing Pw1 at the bar nor being searched at the bar.

19. In cross examination he said there were many people at the bar and he had only taken citizen beer. He said the police were framing him and he could not have remained in the bar if he was a robber.

20. The 2nd Appellant in his sworn defence denied the charge. He said on 4th February 2016 at 10:00 pm – 11:00 pm he was in Kariguini bar taking alcohol with other people. He was seated with one Ciru who was serving customers at the bar. He denied knowing Pw1 nor

seeing him at the bar that night. At 11:05 pm Pw3, Pw4 and Boen arrived at the bar.

21. They told them they were drinking past working hours, and ordered them to stand in pairs of two and were taken to the police station. He failed to afford a bribe of Kshs.1,000/=. About seven (7) others were in the same category with him. He denied being searched at the bar and he never had those alleged items.

22. The appeal was disposed of by written submissions.

23. Learned counsel Mr. Wahome Gikonyo for the 1st Appellant has submitted that the prosecution case was not proved beyond reasonable doubt. He could not imagine how a robber could go and sit with the victim or even follow the victim for reconciliation. He also pointed out some inconsistencies between the evidence of Pw1, Pw2 and Pw3. He submits further that crucial witnesses like Ciru, Pc Boen and the bar attendants present were not called as witnesses.

24. He cited the case of **Nguku –vs- Republic (1985) KLR 412** where the Court of Appeal held that:

> *"Where a party fails to produce certain evidence a presumption arises that the evidence if produced would be unfavourable to that party. This presumption is not confined to oral testimony but also apply to evidence of tape recording which is withheld."*

He urges this court to make a similar finding.

25. Counsel refers to the evidence of Pw3 and Pw5 and submits that Pw1 was drunk. That his evidence should be treated with a lot of caution. He submits that Pw3 confirmed that there was no report of the incident in the occurrence book. It's only the booking of the Appellants that was there which to him was a confirmation that the whole thing is a frame up as stated by the 1st Appellant in his defence. To add on that the date and time on the inventory were altered. He had asked the court to disregard the inventory (EXB7) as an exhibit.

26. Mr. Wahome has also submitted that the learned trial Magistrate at page 6 lines 32-38 of her judgment shifted the burden of proof to the Appellants which is an error of law. He contends that identification was not an issue as the Appellants were arrested while seated with the complainant. His submission is that the trial court erred by making it an issue. He further submits that there was no evidence to support count II. He refers to the evidence of Pw3 and Pw4 who talk of an attempted escape. It was therefore an error for the trial court to convict him on count II.

27. On whether the Appellants were found in possession of the items, counsel submits that this was not established since the Appellants and complainant were found together and EXB7 was altered and was not signed by the Appellants and bar attendants. He submits that the trial

court could not therefore rely on the doctrine of recent possession as it was not applicable. Referring to the case of **Evans Wanjala Wanyonyi –vs- Republic (2019) eKLR** counsel has submitted that the death sentence passed was unconstitutional.

28. Learned counsel Mr. Kiboi for the 2nd Appellant submits that the identification process was flawed first because the conditions for identification were not stated and secondly Pw2 never gave any names in her first report. On this he referred to several authorities namely: **Lesaru –vs- Republic (1988) KLR 783; Wamunga –vs- Republic (1989) KLR 424; Hamisi Mungale Burehe –vs- Republic (2015) eKLR (Criminal Appeal No. 37 of 2013 (Court of Appeal – Mombasa) and Kariuki Njiru & 7 others –vs- Republic Criminal Appeal No. 6 of 2001 (U R**).

29. He further submits that the ingredients of robbery with violence section 296(2) of the Penal Code which he has outlined were not proved. He contends that there being no proof of violence the Appellants should at least have been charged with simple robbery.

He refers to the case of Stephen **Khaega Atakha –vs- Republic (2015) eKLR** in support.

30. He submits on ground 3 that the Appellant's defence was disregarded. He refers to the contradictions in the evidence of Pw1, Pw2 and Pw3 and submits that the 2nd Appellant's defence is more probable. He was drunk and was arrested for drinking beyond the hours allowed. Counsel urges the court to allow the appeal.

31. The appeal was opposed by the Respondent through learned counsel M/s Claire Muriithi. On the issue of identification she submits that the Appellants were well known to Pw1. He knew them by names. Pw2 also confirmed knowing them and the light that enabled her see them. Further they were arrested at the scene. Counsel further submits that the ingredients forming the charge of robbery with violence contrary to section 296(2) of the Penal Code were all proved satisfactorily.

32. On the Appellant's defence she has submitted that the same was an afterthought and only tailored to fit into the account of the event as narrated by the prosecution witnesses. That the same was properly dismissed since it lacked substance and did not displace the prosecution case.

33. She finally submits that in the unlikely event that the court finds that the charge under section 296(2) of the Penal Code was not proved it should consider section 296(1) of the Penal Code acting under the powers provided for in section 179 of the CPC. She relies on the case of **Kalu –vs- Republic (2010) eKLR** where the Court of Appeal observed as follows:

> *"Convictions for offences other than those charged and beginning with section 179 up to section 190 deal with situations in which a court is entitled to convict a minor an cognate offence where a*
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> *person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under section 296(2) of the penal Code for the offence of simple robbery contrary to section 296(1) of the Penal Code …"*

Analysis and determination

34. The duty of the first appellate court is to re-analyse and re-consider the evidence tendered before the trial court with a view to arriving its own independent conclusion. See **Okeno –vs- Republic (1972) E.A 32.**

In Kiilu & Another –vs- Republic (2005) I KLR 174 the Court of Appeal stated thus:

> *"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; 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".*

35. The same was reiterated in the case of **David Njuguna Wairimu –vs- Republic (2010) eKLR** where the Court of Appeal stated:

> ***"That the duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

36. I have considered the evidence on record, grounds of appeal, both submissions and the law, and the main issue I find falling for

determination is:

i. Whether the charge of robbery with violence contrary to section 296(2) Penal Code was proved against the Appellants.

ii. Whether the charge of escape from lawful custody was proved against the 1st Appellant.

Issue no. (i) Whether the charge of robbery with violence was proved against the Appellants.

37. This incident is said to have occurred on 4th February 2016 at around 10:00 pm. The persons who allegedly attacked Pw1 did not leave the scene. Infact they crossed over with him to Kariguini bar as he crawled. All the three i.e. both Appellants and Pw1 were locked up in the bar until the police officers (Pw3 and Pw4) came.

38. The first ingredient to be proved in a charge of robbery is theft. Pw1 testified that his phone (make Itel) and his wallet with contents (EXB3-6) were stolen from him. According to Pw1 – Pw4 these items were recovered from both Appellants by Pw3 and Pw4 when a search was conducted on them inside the bar. Infact Pw3 said before he could even do the search the 2nd Appellant raised up the phone in his hand, inform of a surrender.

39. In their defence the Appellants admit having been in Kariguini bar on the material day and time taking alcohol. They also denied seeing Pw1 on the material night though the 1st Appellant knows him. To them this was a frame up as nothing was recovered from them inside the bar.

40. Pw3 and Pw4 are police officers and they went to the bar upon receipt of a complaint from Pw2. They confirmed having found the Appellants, Pw1 and Pw2 in the said bar and conducted a search on the Appellants. The items stated in the inventory were found with both Appellants and not Pw1.

41. The wallet (EXB3) which contained EXB4-6 was found on the 1st Appellant while the 2nd Appellant had the phone (EXB1 and two stones (EXB2). The phone had Pw1's name. His explanation was that he had taken it for charging hence the sticker with his name on the phone and battery.

42. The Appellants are not laying any claim to these items and all they are saying is they were not found with them. It is true the Appellants did not sign the inventory (EXB7) and its written on the face of the documents that they refused to sign it. Upon analysis, of the evidence above, I do find that both Appellants were found in possession of the items claimed by the 1st Appellant i.e. EXB3-6 and 2nd Appellant EXB1. The only other issue is whether the evidence proves a case of robbery with violence. How did the Appellants come into possession of these items?

43. The ingredients required for proof of robbery with violence are clearly set out in section 296(2) of the Penal Code. They clearly are:

· Offender was armed with a dangerous or offensive weapon or instrument OR

· The offender is in company with one or more other person or persons OR

· The offender 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.

44. Proof of any of these ingredients is sufficient. Pw1 claimed to have been beaten by the Appellants to the extent that he could not walk but crawl. Pw2 also alluded to that. One would have expected that medical evidence be adduced to give credence to that evidence but there was none. There is no evidence that the attackers were armed with any weapon/ or offensive instrument. The only evidence available is that the attackers were more than one.

45. The happenings as narrated by Pw1 and Pw2 prior to the arrival of Pw3 and Pw4 are very critical in this case.

· Already the issue of beatings/assault has been discounted.

· Pw2 confirmed that Pw1 is her frequent customer in the bar but on this night he did not come to Karuinguini bar. Pw1 was quick to state that he took milk to his sister who was taking alcohol with somebody (*in Cyber bar*). She however bought him soda which he took from 9:00 – 10:00 pm. This cannot be true as he was known to love his beer bottle. He never told the court what kept him in Cyber bar when his sister had the company of somebody else.

· He too must have been taking alcohol and was drunk. Even Pw3 attested to that.

· Pw1 was in Karuingini bar seated with the alleged robbers in one room according to Pw2, whereas Pw1 himself said the Appellants were in a separate room fighting over the stolen items. Pw3 said when they arrived they found Pw1 sitting in between the Appellants. According to Pw4 they found the Appellants squatting while Pw1 was seated beside them. Pw2 had locked the door to the bar.

· There is no evidence at all to suggest that the Appellants tried to escape or throw away the items (EXB1-6) which they had on them. This is not the conduct of a robber or robbers.

· The presence of a 3rd person at the scene is neither here nor there. Pw1 did not explain the role this person played. Its only later that he says the 3rd person could have taken his Kshs.2,000/=. He never saw him take anything from him at the scene. It is not even proved that Pw1 had any money on him that night.

46. Considering all these points I have raised in the bulletins above I find a lot of inconsistencies and contradictions in the said evidence. I further find that there was something hidden by both Pw1 and the Appellants about their encounter, that night. Pw1 was not being truthful. Pw2 may have said what she saw with her naked eyes but Pw1 was not beaten as alleged. How would the Appellants rob Pw1 and follow him to where he had taken refuge? They not only followed him but sat with him asking for reconciliation knowing very well the police had been alerted. They never attempted to disappear or dispose of the items (EXB1-6). Mr. Kiboi called it drama and I find it as such.

47. Can Pw1 therefore be said to be a credible and reliable witness? In the case of **Kiilu & Another –vs- Republic (2005) I KLR 174** the Court of Appeal stated thus of such a witness:

> *"The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."*

48. I find the evidence of Pw1 not to have been forthright. There was something between him and the Appellants which only them knew about. How could Pw1 and Pw2 lie that Pw1 came to the bar crawling? It meant he was so badly beaten. Had he indeed been so injured to the extent that he was unable to walk and had to crawl, then he could automatically have been taken to hospital. That was never done as no medical documents were produced.

49. The Appellants in their defence said the charges were fabricated by the police. It was the duty of the trial court to weigh their defences against the evidence by the prosecution witnesses. In her judgment the learned trial Magistrate at page 6 lines 32-38 seems to shift the burden of proof to the defence which can never be the case in a criminal trial. **Section 107 of the Evidence Act** provides:

> *"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

Section 109 Evidence Act provides:

> *The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

50. The burden of proof in a criminal case always lies on the prosecution. The standard of proof is that of beyond reasonable doubt. I agree with Justice Mativo when he made the following observation in the case **of Elizabeth Waithiegeni Gatimu –vs- Republic (2015) eKLR**

> ***"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any***
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> ***reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."***

51. My finding is that there were many gaping holes in the prosecution case such that convicting on the available evidence would amount to rewarding Pw1.

> **Issue no. (ii) Whether the charge of escape from lawful custody was proved against the 1st Appellant.**

52. The trial court relied on the evidence of Pw3 and Pw4 to convict the 1st Appellant on the 2nd count. Their evidence is clear that the 1st Appellant attempted to escape and never escaped. What did he specifically do? Pw3 at **page 40 lines 11-13** stated:

> *"The 1st accused at the station attempted to escape but was arrested by Cpl Sang."*

Pw4 stated at **page 50 lines 11-15** as follows:

> *"While we were booking them the 1st accused made an attempt to escape from the police station, by attempting to dash towards main door (sic) but he was barricaded. He was arrested and also charged with the offence of trying to escape from lawful custody." (emphasis mine).*

53. In her judgment at page 8 the learned trial Magistrate made the following finding:

> *"On the second count Pw3 and Pw4 explained that after the arrest of the accused persons, they were taken to Nairutia police station and in the process of booking them the 1st accused attempted to escape through the main entrance but was apprehended. I therefore find the offence of escape from lawful custody been proved against the 1st accused".*

54. The charge and particulars of count II are clearly set out at paragraph 1 of this judgment. The evidence adduced by Pw3 and Pw4 does not support the charge. The evidence is to the effect that the 1st Appellant attempted to escape. He did not even set his foot at the main door. He only attempted to dash. It's not clear as to what he did in attempting to dash. The conviction on this count cannot be allowed to stand as the charge is one of escape and not attempt to escape.

55. All I can say of the issue of the constitutionality of the mandatory death sentence imposed on the Appellants is that it was passed on 24th August 2017 before the Supreme Court decision in **Francis Karioko Muruatetu –vs- Republic (2017) eKLR**. That was therefore the position at the time and the learned trial Magistrate could not have acted otherwise.

56. The upshot is that the appeal has merit. The conviction on both counts is quashed and the sentence arising therefrom set aside.

57. The Appellants to be released forthwith unless lawfully held under separate warrants.

Orders accordingly.

Dated and signed this 10th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge