REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R MWONGO, J)

CRIMINAL APPEAL NO. 7 OF 2017

(Being an Appeal from the Original Conviction and Sentence of 24/2/2017 in Criminal Case No 2319 of 2015 in the Chief Magistrate's Court, Naivasha, (P. Gesora –CM)

JOSEPHAT MACHARIA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. The appellant Josephat Macharia Mwangi was indicted and convicted on the charge of robbery with violence contrary to **section 295** as read with **section 296(2)** of the **Penal Code.** Two other accused persons charged alongside the appellant were acquitted after the court found they had no case to answer.

2. The particulars of the offence were that on the 6th of November 2015, at Site and Service Estate in Naivasha Sub county within Nakuru County, jointly with others not before the court while armed with offensive weapons namely a knife and metal bars stole a television set make Yantech, a 6kg gas cylinder, a woofer and speaker make Ampex, a high density mattress 6 by 4, 5 feet by 6 inches, a kerosene stove, 4 pairs of bed sheets, 8 sufurias and 4 hot pots all valued at Kshs 38,050/= the property of Esther Wanjiru Maingi and killed one Michael Atemo Mitwete..

3. Dissatisfied with the judgment of the lower court, the appellant appealed on the following grounds contained in his amended petition of appeal:

> ***"1. THAT the learned trial magistrate erred in law by convicting the Appellant on a defective charge sheet.***
>
> 2. ***THAT the learned trial magistrate erred in law and fact by awarding a sentence which was declared unconstitutional by the Supreme Court contravening Articles 163 (7) of the Constitution.***
>
> 3. ***THAT the learned trial magistrate erred in law and facts by holding that; the offence of Robbery with Violence was proved beyond reasonable doubt; but failed to note that; he used the wrong principles to arrive to this erroneous conviction.***
>
> 4. ***THAT the Appellants defence was truthful. It raised new matter not rebutted by the prosecution; it was an error to convict on such flimsy piece of evidence. "***

5. The issues which arise from the appeal are as follows:

> *a) Whether the charge sheet was defective*
>
> *b) Whether the sentence of death meted was unconstitutional*
>
> *c) Whether the evidence was proved beyond reasonable doubt on the correct principles of law*

6. The appellant filed written submissions together with his amended grounds of appeal. On his part, Mr. Koima for the Director of Public Prosecutions, made oral submissions relying on the evidence adduced. It is settled law that the role of the first appellate court is to re-

evaluate the evidence and arrive at its own conclusions noting that it did not hear the witnesses and observe their demeanour.

7. The brief facts of the case are that on 6th November 2015 at about 3.00am Lucy Wathiga Nyagutie (PW1) and her husband Michael Atemo Mitwetwe were asleep in their house when they were awoken by some commotion outside. According to Lucy Nyagutie), her husband went out to see what was happening and she then heard him scream. She hurriedly went out only to find him standing on the doorsteps having been stabbed. She got a shawl and covered the wound then called on neighbours. She got a taxi and took her husband to hospital where they were informed that he had died. She reported to the police who accompanied her to the scene. In the house of one of their neighbours, One Esther, the police fond blood stains.

8. PW3, Margaret Nyantana was in her house at 3.00am that same night when she heard a knock on her door. She woke her husband and together they went out. The neighbour, PW1, told them that there had been a break-in in one of the neighbour's houses and that her husband had been stabbed. PW3's husband called a taxi and accompanied the deceased to hospital. PW3 stayed behind and called her neighbour, PW2, who was away, and informed her of the incident. Police officers were called and confirmed the incident. PW3 noticed that there were household items missing from PW2's house, and that some of her own groceries were missing.

9. PW2, Esther Wanjiru Mwangi testified that she was away in Muranga on the night of 6th November 2015 when she received a call her neighbour, Michael. She didn't receive the call, and when she called back he did not answer. She later received a call from police in Naivasha to tell her that her house had been broken into. PW3 also called her and told her that her goods had been stolen. She thus travelled to Naivasha and recorded a statement. Six days later, on 12th November, she was called by the same police officer and told that some of her goods had been recovered and suspects arrested. She went and identified her TV Yentech (MFI 1), Hoofer Empex(MFI 2), Meko and burner (MFI 3) and Speaker Empex (MFI 4)

10. PW4, Caleb Gitenye was a guard at Finlays Horticulture. In addition to being a guard, he also operated a second hand stall. On 11th November, 2015, two young men approached him at his stall and offered to sell a TV set and hoofer to pay for medication for their sick sister. They then went away, and one of the men – the appellant. – returned at 6.00pm, with the TV "Yentech" and Hoofer Ëmpex". They agreed on a price of Kshs 3,000/= and PW4 asked the appellant to produce a receipt and identification. The appellant pleaded for at least Kshs 1,000/= for medication but PW4 agreed to give only 600/= until a receipt and identification was produced. The appellant left the goods but did not return.

11. PW4 also testified that the following day he received a call from the appellant who wanted the balance. He also received a call from a lady who said she was the appellant's sister and that she had been discharged and needed some money. He asked her to come to his stall. He then received a call from a police officer who wanted the goods that Macharia had brought, and he was eventually picked up by the police and taken to Naivasha Police station with the goods

12. PW5 PC Halake testified that he was on duty at Naivasha police station when he received a call from PW1 1, the deceased's wife, that there had been a robbery and her husband been stabbed. He went to the scene at Site Estate with another officer and observed the house that had been broken into, and noted some missing items as confirmed by PW1. They also received information that one Josephat Maina Macharia alias Maina, the appellant, had some suspected stolen goods. They went to his house and found nothing, but arrested and interrogated him. He told them he had sold the TV to a shylock in Karagita. They went there and recovered it. On 13th November, 2015 the appellant told PW5 he had sold the Meko to one Caroline Ngure in Maai Mahiu. They went there and recovered it. The TV, Hoofer and Meko, which had been recovered were in court. In cross examination, PW5 admitted that there had been no confession made by the accused.

13. PC Jared Mose, PW7, the investigating officer gave evidence that he went to the scene of the robbery and confirmed the theft of goods and the stabbing of PW1's husband. Later, they got information that the robbers were well known and their nick names were given. They visited the home of the appellant and found him with his wife. They took his mobile phone and arrested him. On the way to the police station, a call came through the appellant's phone. PW7 answered it and the caller, PW 4, said he wanted a receipt for the TV. He identified himself and the caller said he was a guard at Finlays Horticulture.

14. PW7 met the guard (PW 4) at his place of work and came to the store with him. There, he was shown the TV and Hoofer and PW4 explained that he had given part payment. The owner of the goods PW 2, later came and identified the goods. PW7 produced the TV, Woofer, Meko and Speaker as Exhibits 1, 2,3 and 4 respectively. The post mortem report was produced as Exhibit 5. In cross examination, PW 7 said that he did not go to Karagita to the lady where the Meko was sold, but his colleague PC Halake did with another officer. He further said that the lady with the Meko feared for her life and she relocated. She did not avail herself as a witness.

15. In his defence, the appellant stated that on 12th November, 2015 he was in his house preparing to go to work, when PC Mose, (PW7) came to his house and demanded a bribe of 30,000/= to help his brother whio had a court case. Shortly thereafter, other policemen arrived and took him to the police station. The following day he was arraigned in court. The rrest of his evidence constitutes submissions as to why the evidence given by other witnesses is insufficient. In particular, he did not rebut the evidence of PW 4, Caleb, nor did he deny that PW4 knew him.

Whether the charge sheet was defective

16. During the hearing after the evidence of PW7, the prosecution applied to amend the charge sheet to delete the name of the deceased in the third line, where it was stated that the accused:

> ***"…robbed Michael Atemo Mutwetwe of a television set make Yantech, a 6kg gas cylinder, a woofer and speaker make Ampex, a high density mattress 6 by 4, 5 feet by 6 inches, a kerosene stove, 4 pairs of bed sheets, 8 sufurias and 4 hot pots all valued at Kshs 38,050/= the property of Esther Wanjiru Maingi and killed one Michael Atemo Mitwete."***

17. The application was opposed as having come too late in the proceedings. The trial magistrate ruled, however, that the amendment would not prejudice the accused, and allowed the amendment. His rationale was, inter, alia, as follows:

> ***"I gathered in the course of cross-examination that the investigating officer sought to depict deceased as the special owner of the stolen goods as a result of responding to the breaking. It is clear from the particulars that the property belonged to Esther Wanjiru Maingi. There appears to be some mix-up in the framing of the particulars but the same in my humble view is not fatal to the charge and an amendment as the one sought will cure the same. I allow the application as prayed for."***

18. The appellant argues that the defective charge sheet was amended in court without conformance to **Section 214** of the **Criminal Procedure Code** in that he was not informed of his right to recall witnesses or to give evidence afresh after the amendment. He asserts that this was an abuse of court process and in violation of his **Article 50(2)** rights to a fair hearing.

19. On this point **Section 214(1)(ii) CPC** provides as follows:

> ***"(i)where a charge is so altered, the court shall thereupon call upon the accused to plead to the altered charge;***
>
> ***(ii)where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and and give evidence afresh or be further cross examined by the accused or his advocate, and, in the last mentioned event the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."*** (emphasis supplied).

20. I note from the proceedings that after amendment of the charge sheet, the court caused pleas to be taken afresh in accordance with the above provision. It is clear that the trial court has a statutory obligation to ensure that a fresh plea is taken after amendment of the charge sheet. However, the language of the provision places a statutory discretion to re-call witnesses on the accused, and not on the trial court. Whilst it may be a helpful practice for the court to assist unrepresented litigants by informing them of their discretion to recall witnesses after amendment of a charge, there is no violation of their constitutional rights if such information is not given to the accused.

21. I am fortified in this by the Court of Appeal's position in the case of **Samuel Kilonzo Musau v Republic [2014] eKLR,** where the Court, referring to **Section 214(1)(ii**) of the **CPC,** stated:

> ***"We agree with the first appellate court that under the above provision, the recall of witnesses is at the instance or request of the accused person. There is no automatic right for recall of witnesses. To the extent that the appellant did not request for any of the witnesses to be recalled, the trial court cannot be faulted for failure to recall them. While it may be good practice for the court to inform the accused person, particularly one who is not represented by counsel, that he has such a right, that is not mandatory and failure to do so of itself cannot vitiate a trial. We note too that the amendment that was allowed was to ensure technical compliance of the charge and that it did not impinge on the appellant's defence. As far as we can deduce, the appellant's defence was all along that he had not committed an act that caused penetration of MN. It was not his defence that penetration had occurred, but unintentionally or otherwise lawfully. We do not see any merit in this ground of appeal too."***

22. I have perused the defective charge sheet. It in fact indicates the stolen goods to be the property of Esther Wanjiru Maingi, but simultaneously and erroneously states that the property was robbed from Michael Atemo Mutwetwe. I am therefore satisfied that the rationale given by the magistrate for the amendment was sufficient, and that since the charge was clear, there was no prejudice to the appellant. This ground of appeal cannot therefore succeed.

Whether the evidence proved the offence beyond reasonable doubt

23. The essence of the appellant's argument here was that the ingredients of robbery with violence under **sub-section 2** of **section 296** were not proved. He further argues that the person killed did not possess any legal title to the goods stolen, effectively meaning he was not robbed. He also alleges that there was no evidence of identification, and impugns the adoption of the doctrine of recent possession on the ground that there trial magistrate was not guided by the Court of Appeal decision in **Arum v R [2006] eKLR.** Further that there was no proof that the goods allegedly produced by PW4 were receipted from him or were shown in a register held by PW4 to have been from him, nor was PW4 able to state what the appellant's telephone number was despite claiming he had called the appellant.

24. **Section 295** defines robbery as follows:

> ***"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 property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.*** (emphasis supplied).

The critical point to note is that robbery is the stealing by the accused of *"anything"* and the use of force at any time before, during or after committing the act of stealing. Thus, the appellant's argument that the property stolen did not belong to the person killed is dispensed with and holds no water.

25. A charge under **section 296(2**) has three essential ingredients that must be proved by the prosecution. In **Johana Ndungu v Republic, Criminal Appeal No. 116 of 1995**, the elements for the charge of robbery with violence were summarised to be as follows:

> ***"(i) if the offender is armed with any dangerous or offensive weapon or instrument or***

(ii) if he is in company with one or more other person or persons or

(iii) if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person" (emphasis supplied).

The use of the words *"violence to any person"* during the event of stealing also dispels the appellant's argument that it is only when the harm occurs to the complainant whose goods were stolen that the offence of robbery with violence is completed.

26. In the present case the evidence discloses that when the robbery took place, the husband of PW1 was stabbed, and died. The charge indicates that the appellant with others not before the court used a knife and metal bars in commission of the robbery. Thus, the only question with regard to proof of the ingredients of the offence of robbery is whether the appellant was one of the perpetrators.

27. The trial court reverted to the issue of identification and the doctrine of recent possession, to which I also now turn.

28. The Court of Appeal gave guidance on the application of the doctrine of recent possession in the case of **Arum v Republic [2006]1 KLR 233** as follows:

"28. In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version. That duty as has been said is wholly on the trial court and on the first appellate court. (emphasis supplied).

29. In summary, the application of the doctrine of recent possession requires positive proof of possession evidenced by four characteristics, namely that the property:

- was found with the suspect;

- is positively the property of the complainant;

- was stolen from the complainant; and

- was recently stolen from the complainant.

30. In a more recent decision, the Court of Appeal held in **David Mugo Kimunge v Republic [2015] eKLR** that where there is an unexplained possession of stolen goods an inference of fact arises; and that it is not acceptable that any fanciful or concocted explanation of possession will suffice. The explanation must pass muster of reasonableness and plausibility. The Court also explained the meaning of **"possession"** as defined in the **Penal Code** to mean actual or constructive possession. Thus, property recovered from the suspect and property he had given or passed on to another person are covered under the definition of possession. The **Penal Code** definition of possession in **Section 4** is as follows:

" (a) 'be in possession of' or 'have in possession' includes not only having in one's personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or her custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them; "

31. In his judgment, the trial magistrate confirmed that on the night of the robbery, no one was seen committing the offence as the robbers took off with the loot before any of the witnesses saw them. The trial court's assessment of the evidence in the trial was as follows:

"I have carefully considered the evidence on record and the exhibits procured herein. There is no doubt in my mind that PW2's house was broken into on the fateful night and her household goods stolen. A neighbor one Michael Atemo Mitwetwe who responded to the commotion that he heard was fatally injured after he was stabbed on his abdomen.

The incident herein occurred in the night and no one was seen committing the offence. By the time PW 1 rushed out after she heard screams, the robbers had taken off with the loot. It is the events that occurred later that led to the arrest and subsequent arraignment of accused and they were charged with the offence herein. The exhibits herein were positively identified by PW 2 as hers.

She gave a description of the same and the same was not challenged. In any event, there is no one who reported that his/her

property had been stolen at the time. The said goods were recovered from one Caleb Gitenye (PW4 herein). He was clear that he buys and sells second goods and that is how he came into contact with accused 1 herein.

The flow of events leading to the recovery clearly points at accused 1. PW 1 gave a detailed account of what transpired and I believe him. Accused was not able to rebut PW 4's evidence and I find and hold that he made a quick move to dispose of the stolen goods.

I note that the recovery of the goods was made about 5 days from the date of robbery and the doctrine of recent possession is applicable herein. Accused 1 was unable to explain the possession and even after PW 4 insisted that he produces receipts as proof of ownership he did not do so. He simply left the goods with him with a promise to produce the receipt which was a tactical move to get rid of the goods.

The reasons for acquitting accused 2 and accused 3 are that they were arrested after they were mentioned by accused 1. They were never linked to possession of the goods and at most we can only suspect that they were part of the group that stole from PW 2's house. In deed the ingredients of robbery have been sustained considering that PW1's husband was killed after he was stabbed.

The doctrine applied herein clearly placed accused 1 at the scene of crime and he is at fault. I find and hold that he is guilty and is convicted as charged. Accused 2 and accused 3 stand acquitted for the aforementioned reasons." (emphasis supplied).

32. Clearly, the trial magistrate believed the evidence adduced by the prosecution witnesses. He stringed together the flow of events from the time of the robbery to the recovery of the stolen goods. He concluded that the appellant was trying to quickly get rid of the stolen goods. He noted that the appellant was unable to explain his possession of the goods. Applying the doctrine of recent possession, the trial court convicted the appellant, whilst acquitting the other accused persons.

33. My assessment of the evidence as relates to the doctrine of recent possession is as follows: PW4, Caleb, who owned and runs a second hand stall called "Smart View 2nd Hands", testified that he knew the appellant. That on 11th November, 2015 at around 9.00am, the appellant approached him to sell him some goods saying his sister was sick and needed medicine. Caleb told him he needed to know the source of the goods. The appellant went away and returned at 2.00pm. He asked Caleb for bus fare to go and collect the goods. At 6.00pm the appellant returned to the stall with a TV and Hoofer and they agreed on a price of 3,000/=. However, Caleb, declined to pay for the goods unless the appellant produced a receipt showing the source of the goods, and identification. Caleb eventually agreed to part with 600/= and was left with the goods. The appellant did not return that day.

34. The next day Caleb received a call from the appellant him asking for the balance, but Caleb insisted on getting a receipt and identification. Later a lady called him and said she was the appellant's sister and was following up on the money for the goods as she had left hospital. He told her to come to his stall. He then received another call from a person who identified himself as a police officer and he wanted the goods the appellant had brought. The police then came and picked Caleb from his workplace, took him to the stall, and took him and the goods to Naivasha police station where he met the appellant, and he recorded a statement.

35. PW 7 PC Jared Mose corroborated the evidence of PW4, Caleb. He was the investigating officer and also did the arrest. PC Mose said he got information on the appellant and went to his house where he found him with his wife. He arrested the appellant and took his mobile phone. On the way to the police station a call came on the appellant's phone and he, PC Mose, took the call. The caller was asking for a receipt for a TV. PC Mose identified himself. Presumably, it was Caleb, PW4. He later went to Caleb's workplace and escorted him to the stall where he collected the TV and Woofer and brought him to the police station with the items. Caleb reported that the goods had been brought to him by the appellant. PC Mose produced the TV, Woofer as Exhibits 1, 2 and a Meko and Speaker as exhibits 3 and 4.

36. PW 5 PC Halake testified that he was also involved in the arrest of the appellant. He said that when he interrogated the appellant he admitted that he had sold the TV to a shylock in Karagita. He was involved in retrieving it from Caleb. He further testified that on 13th November, 2015 the appellant told them that he had sold the Meko to one Caroline Ngure in Maai Mahiu. He went there with other officers and recovered the Meko. No confession was however recorded, and the said Carline was no called to give evidence. Further it is not clear from whom the Speaker was recovered as no witness gave any evidence concerning it.

37. PW2 Esther Wanjiru Maingi testified that her goods were stolen whist she was away from her home. She identified the following goods which were recovered: TV "Yentech"; Hoofer "Empex"; Meko and burner, Speaker Ëmpex". All were produced as exhibits.

38. I am satisfied that the identity of the appellant in relation to the possession of the stolen TV and Hoofer found in the possession of Caleb was proved by the evidence of Caleb. All the stolen goods were identified by Esther. There is sufficient evidence to connect the stolen TV and Hoofer with the appellant. Further, there was only a five day gap between the theft and the attempt to dispose of the stolen goods. The only missing connections are: the actual presence of the appellant at the scene of the crime; and the fact that the appellant was not found in actual physical possession of any of the stolen items.

39. Understood in the light of the **David Mugo Kimunge case,** however, there is evidence of constructive possession by the appellant. In addition, his failure to explain the said possession in his defence enabled the trial court to draw an inference of fact connecting the appellant to guilt of theft, receiving or offences incidental thereto.

40. In the case of ***Malingi v Republic, [1989] KLR 225***, the Court of Appeal had this to say about the doctrine of recent possession:

"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of

time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he* either stole or was a guilty receiver*" (emphasis supplied).

41. Further, the Court of Appeal in **Peter Kariuki Kibue v Republic**, **Criminal Appeal No. 21 of 2001, Nairobi** (unreported) dealt with a similar matter where the appellant was found in possession of recently stolen items and he failed to give a satisfactory explanation as to how he came by them. The Court stated that:

"The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as the thief or guilty receiver. This is a rebuttable presumption of law based on the provisions of Section 119 of the Evidence Act"

42. The issue now outstanding in my view is whether it was proved beyond reasonable doubt that the appellant was involved in the robbery on the material night. So far, what is shown is that the appellant did handle the stolen property.

43. The question is whether the doctrine of recent possession can be applied, without more, to convict an accused person. In my view, the doctrine cannot supplant evidence proving an element of the offence. It is purely a doctrine intended to aid in the drawing of the inference of guilt for the offences of stealing or incidental offences. In my view, it is unsafe, to rely on the doctrine of recent possession for proof of robbery except where the evidence as a whole tends to disclose the suspect's involvement in the stealing, or collaboration or conspiracy in it. In **Andrea Obonyo & Others v R, (1962) EA 542** it was held by the Court of Appeal of Eastern Africa thus:

"(i) where it is sought to draw an inference that a person has committed another offence (other than receiving) from the fact that he has stolen certain articles, the theft must be proved beyond reasonable doubt and if a finding that he stole the article depends on the presumption arising from his recent possession of the stolen articles, such a finding would not be justified unless the possibility that he received the article has been excluded." (emphasis supplied).

44. The above quote from the **Andrea case** begs an inquiry as to whether there is on record independent and additional evidence that corroborates and identifies the appellant as one of the persons who attacked the house of PW2 and the deceased. In the absence of direct testimony on the identity of the persons who committed the crime, can an inference be drawn, ipso facto, from the doctrine of recent possession that the appellant was involved in the robbery and he was not a mere receiver or handler of the stolen goods?

45. In **Daniel Muthomi M'Arimi v Republic [2013] eKLR** the Court of Appeal stated that:

" Where identification arises from the possession of stolen items, it is advisable to seek corroborative evidence on identity. In cases where the doctrine of recent possession has been applied to convict an accused person, there has been additional evidence on identification such as confessions or the complainant being able to describe or identify the accused person and the recovery of the recently stolen items have been held to corroborate the evidence of identification".

46. In the present case, the prosecution's case at the trial was wholly based on circumstantial evidence which is that the appellant was found to have been in possession of the stolen goods. And whilst in the case of **Margaret Wamuyu Wairioko v Republic, Cr. Appeal No. 35/2005** it was stated that circumstantial evidence is very often the best evidence, it is however noted that in the case of **R v. Kipkering Arap Koske and Another, (1949) 16 EACA 135** on circumstantial evidence the East African Court of Appeal succinctly held:

"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. 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."

47. In my considered view, in the absence of additional independent and corroborative evidence that links the appellant to the robbery with violence committed on 6th November 2015, it is unsafe to uphold the conviction of the appellant for that offence. I find that the prosecution did not lead evidence to the required standard to identify the appellant as the perpetrator of the crime.

48. Having come to that conclusion on the issue of recent possession, but being convinced that the appellant handled the stolen goods, I am left in the same position as the Court of Appeal in the **Daniel Muthomi M'Arimi case** where the Court in a similar situation decided as follows:

"22. In totality, we find that the prosecution did not prove its case against the appellant on the charge of robbery with violence contrary to Section 296 (2) of the Penal Code. However, having re-evaluated the evidence on record, the applicable law and considered the submissions made, we find that the offence disclosed by the facts of the case is that of handling stolen goods contrary to Section 322 (2) of the Penal Code. Section 322 (1) of the Penal Code provides that "a person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so. Sub-section 322 (2) provides that "a person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term of not less than seven or more than fourteen years."

23. We accordingly substitute the charge of robbery with violence contrary to Section 296 (2) of the Penal Code with that of handling stolen goods contrary to Section 322 (2) of the Penal Code and convict the appellant for the same. The appeal is allowed to the extent that the sentence of death imposed as mandatorily required by Section 296 (2) of the Penal Code is set aside and we substitute the same by a term of seven (7) years imprisonment from the date when the appellant first appeared in court on 19th December, 2006."

49. In similar vein, I would substitute the charge of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** with that of handling stolen goods contrary to **Section 322 (2)** of the **Penal Code** and convict the appellant for the same. To that extent the appeal succeeds.

50. I turn to the final issue.

Whether the sentence of death meted on appellant was unconstitutional

51. The appellant was convicted and sentenced to death under **section 296** of the **Penal Code**. He argues that the Supreme Court in the case of **Francis Muruatetu and Another v Republic [2017] eKLR**, declared the death sentence unconstitutional.

52. **Section 296** of the **Penal Code** reads as follows:

"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 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."

53. The trial magistrate at the time of sentencing, considered the appellant's plea for leniency and stated that his hands were tied :

"I have carefully considered the plea by convict and also that he is a first offender. I have looked up the penal section of the same (Penal Code). The sentence prescribed therein is mandatory and as such this court's hands are tied…..

I order that convict is committed to Death as by law prescribed."

54. In the **Muruateutu case**, the Supreme Court, discussed the mandatory nature of the death sentence for murder under **section 204** of the **Penal code**. The wording under that section is similar to that in **section 296** on robbery with violence in that it provides that a convict ***"shall be sentenced to death".*** On this, it is apt to quote , at fair length, the Supreme Court's in **Muruatetu** determination as follows:

"[47]. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.

[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right

……

[52] We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. ……. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.

….

[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with

Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.

….

[*63] Article 27 of the Constitution provides for equality and freedom from discrimination since every person is equal before the law and has the right to equal protection and equal benefit of the law. Convicts sentenced pursuant to Section 204 are not accorded equal treatment to convicts who are sentenced under other Sections of the Penal Code that do not mandate a death sentence. Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law. Accordingly, Section 204 of the Penal Code violates Article 27 of the Constitution as well.*

…

[66] It is not in dispute that Article 26 (3) of the Constitution permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that Article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in Article 50 (1) of the Constitution must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.

[69] Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.

[71] As a consequence of this decision, paragraph 6.4-6.7 of the [sentencing] 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; No. 29 of 2014

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

[72] We wish to make it very clear that these [sentencing] guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process……

……..

[76] We have perused and analyzed the Petition and the written submissions and it is clear that the petitioners have not sufficiently argued and illustrated the particulars of why the indeterminate life sentence should be declared unconstitutional. Indeed, counsel for the 1st petitioner upon being asked by the Court to elaborate on this issue was not able to provide adequate submissions. A critical issue such as this, where legislation is to be examined is deserving of the reasoned and well-thought arguments of the petitioners, the Director of Public Prosecution and other interested parties or amicus curiae and input of the High Court and the Court of Appeal. This will allow this Court to benefit from the reasoning of these superior Courts and the parties will not be disadvantaged by this Court's holding which will in effect make this Court a court of first and last instance. It is therefore our view that the submissions made did not canvass the issue to our satisfaction. Consequently we will not make a determination on it.

The Supreme Court concluded its determination as follows***:***

[112] Accordingly, with regards to the claims of the petitioners in this case, the Court makes the following Orders:

a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.

b) This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment."

55. I have carefully considered the import of the Supreme Court decision in the **Muruatetu case**. It does not determine that the death penalty, per se, is unconstitutional, as the Court repeatedly clarifies. It also does not make any determination on the indeterminate duration of a death sentence. It determines that the death penalty is unconstitutional where the accused person has not been given the right to a fair hearing. It outlaws the peremptory meting out of the mandatory death sentence without giving the accused an opportunity to mitigate, or where the court has not demonstrably afforded itself and seized the discretion of taking into account the mitigating circumstances of the accused. It directs that in situations where the death sentence is to be applied, the court seized of the matter must exercise its discretion to award the mandatory death sentence only after hearing the other side upon that question.

56. Accordingly, the ground of appeal challenging the constitutionality of the death sentence fails to the extent that the said penalty was not declared unconstitutional.

57. However, having reviewed the determination of the lower court as shown, it is clear that other than considering the appellant's plea for leniency, the trial court did not take the appellant's mitigation prior to sentencing. Further, the trial magistrate applied the mandatory death sentence without demonstrably exercising his discretion. Instead he clearly stated that his hands were tied and applied the death sentence, indicating that he had no discretion. This is precisely what the Supreme Court warned against.

Conclusion

58. Had I found that the only matter in issue were the question of mitigation, I was inclined to direct that the file be remitted back to the trial magistrate to hear mitigation along, but not limited to, the guidelines instituted by the Supreme Court, and to sentence the appellant afresh in light thereof:

59. However, as I have also found that the appeal succeeds on the issue as to whether there was proof of robbery in respect of the appellant, I shall substitute the charges as indicated.

Disposition

60. Overall, therefore, the appeal succeeds and I hereby substitute the charge of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** with that of handling stolen goods contrary to **Section 322 (2)** of the **Penal Code** and convict the appellant for the same.

61. In light of the conviction, the appellant shall serve a sentence of ten (10) years to run from the date of 3rd December, 2015, when the appellant first appeared in court.

62. Orders accordingly.

Dated and Delivered at Naivasha this 7th Day of March, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Josphat M. Mwangi for the Appellant

2. Koima for the State

3. Court Clerk - Quinter Ogutu