REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 186 OF 2010

JOHN ITHUITA NJARI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence in the Chief Magistrate''s Court in Kibera Cr. Case No. 4565 of 2007 delivered by Hon. Kidula, CM on 22nd March 2010).

JUDGMENT

Background

1. The Appellant, **John Ithuita Njari**, was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on unknown date between 27th June, 2007 and 1st July, 2007 in Kiserian township in Kajiado District of the Rift Valley Province, jointly with another not before court, while armed with crude weapons namely metal bars robbed David Kinyanjui Kagiri 6 sofa seaters, 1 bed, 1 mattress, 2 mobile phones make Nokia, 1 cap, 3 television sets, 3 radios, 4 tables, 4 stools, assorted clothes, 1 gas cooker, 5 pillows, 8 blankets, 1 flower stand, 3 wall clocks, 3 mosquito nets, 2 speakers, 1 canvas, 1 bedcover, 1 mirror, assorted kitchen ware, 1 kiondo, 1 jerrican, 2 dolls, 2 baskets, 1 bag, 4 artificial flowers, 1 remote control, 3 jacks, 3 sunglasses and carpet all valued at Kshs. 450,000/= and at or immediately before or immediately after killed the said David Kinyanjui Kagiri.

2. In the alternative, the Appellant was charged with handling stolen property contrary to **Section 322 (2)** of the **Penal Code.** The particulars being that on the 2nd day of July, 2007 at Naromoru village Kiserian township in Kajiado District of the Rift Valley province, otherwise than in the cause of stealing, dishonestly assisted in the retention of the aforesaid property for his own benefit, knowing or having reasons to believe the same were stolen goods. The Appellant pleaded not guilty to both counts. He was however convicted of the main charge and sentenced to death. He was aggrieved by both his conviction and sentence and preferred an appeal to this Court.

Grounds of Appeal

a) The Appellant relied on the amended Grounds of Appeal filed alongside his written submissions on 13th November, 2018. The said grounds have been reproduced verbatim hereunder;

b) THAT the trial magistrate erred in law and fact when she convicted him in the present case yet failed to find that no proper and independent investigations were conducted in the case.

c) THAT the trial magistrate erred in law and fact when she convicted him in the present case yet failed to find that most crucial witnesses were withheld from testifying.

d) THAT the trial magistrate erred in law and fact when she convicted him in the present case yet failed to find that the evidence adduced was highly contradictory and could not sustain a safe conviction.

e) THAT the trial magistrate erred in law and fact when she convicted him in the present case yet failed to find that the allegations were never proved.

f) THAT the trial magistrate erred in law and fact when she dismissed his formidable defence that was truthful and honest statement.

g) THAT the trial magistrate failed to duly comply with Section 200 (3) of the Criminal Procedure Code as was prayed for by the Appellant.

Evidence

3. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the Trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses as they testified and cannot therefore comment on the demeanour of the witnesses. (See **Okeno v Republic (1972) EA 32).**

4. On Saturday, 30th June, 2007 around 5.00 pm, Rebecca Wangare Mwaura (PW1) travelled from Kibwezi where she worked as a teacher to their home in Kiserian where her deceased husband David Kinyanjui Kagiri was living. Upon reaching the gate, she found two Maasai men being PW4 and PW5 who asked her whether she was the owner of that home and informed her that the son of that home had sold them some livestock but they had decided to get their money back upon finding out who the owner was. PW1 told the two men that they did not have a son and she was not aware of the said sale. Upon PW4 and PW5 leaving at around 6.00 pm, PW1 entered the compound and found the door locked with a different padlock. She tried calling her husband on his mobile phone but could not reach him. She also called her husband's employer to inquire whether he had reported to work but was informed that he had not. As such, she broke the padlock and entered the house through the kitchen door. Inside the house, there were no utensils in the kitchen and no household goods in the siting room and bedrooms except for one 3- seater sofa and one 1-seater sofa. PW1 called one of her step daughters PW2 and informed her about the state of affairs at their home and asked her to go to the farm immediately. However, PW2 told her that she would go home on the following day since it was late. PW1 slept at their neighbour's house that night.

5. On the next morning, 1st July, 2007, PW1 went back to their home where she met a young man who was not known to her inside the compound. PW1 asked the young man who he was and also enquired about the whereabouts of the owner of the home. He told her that his name was John and that 'Mzee' had gone on safari. Thereafter, PW1 went and requested a neighbour's shamba boy to come and help her cut some grass to feed their livestock. However, as they were searching for long green grass, she saw her husband's body covered in a maasai leso and floating in a hole filled with water which they had dug for purposes of making a borehole. PW1 ran off towards the gate screaming so as to raise alarm. Two of her step daughters **(PW2** and one **Mary Ann Muthoni**) also arrived around the same time and they all proceeded to view the body. Thereafter, they called the police who came and took various photographs of the body before taking the deceased's body to the mortuary. Later on 2nd July, 2007, PW1 learnt that the Appellant who was the deceased's worker had been arrested and led the police to a house where the stolen household goods were. PW1 went and identified both the household goods and the Appellant.

6. Millicent Wangari Kinyanjui (PW2), the deceased's daughter was preparing to go and visit her father in Kiserian on 30th June, 2007 when she received a call from PW1 asking her to rush home as PW1 could not trace her father yet there were things missing from the house. PW2 decided to go and share he information with her sister first then they both travelled to Kiserian the following day. On arrival, they met their step mother and two men at the gate. She told them that she had found their father's dead body in a well. They went and viewed their father's body and also saw the house which had been emptied of all household goods. She identified the Appellant as the man who used to help her deceased father with his cows. PW6, Ann Njeri Maina, who was the deceased's eldest daughter also arrived later on and viewed the deceased's body.

7. Julius Maina Gathii (PW3) ran a kiosk in the deceased's neighbourhood. He last saw the deceased on 27th June, 2007 when he went to his shop to buy a few items. On 30th June, 2007 at around 11.00am, the Appellant who was known to him as the deceased's worker went to his kiosk and bought airtime worth Kshs. 50/=. The Appellant gave PW3 the phone to assist him load the credit and also asked PW3 to help him delete some messages from the said phone but PW3 told him that he did not know how to do so. However, since PW3 knew the phone belonged to the deceased having seen him with it a couple of times, he asked the Appellant why he had the phone. The Appellant told him that he deceased had gone on safari for two weeks and left him the phone so that he could keep him informed about his home.

8. On 1st July, 2007 at around noon, PW3 learnt, through a neighbour, that the deceased had been killed and thrown in a hole full of water in his home. He went to view the deceased's body when the deceased's daughter Njeri requested him to help them trace the Appellant. On 2nd July, 2007, PW3 while in the company of a person called Njoroge, met the Appellant near Naro Moru shopping centre. The said Njoroge tipped the police who came and arrested the Appellant. They then informed the deceased's daughter Njeri about the Appellant's arrest.

9. According to PW4 a cattle trader by the name Joel Shapara, on 30th June, 2007 at about 2.00 pm, was informed by a boy called Kasino that there were some livestock being sold near St. Patrick's School Kiserian. PW4 proceeded to the said home. There he met the Appellant who showed him the livestock on sale. PW4 paid the Appellant a deposit of Kshs. 12,600/= and told him to go with Kasino to Kiserian to get the balance of Kshs. 7,000/= which they did and left PW4 waiting near the home. As he was still waiting, PW5 who was also a cattle trader by the name Simon Eriesi Ole Loorkire joined him and enquired about who had sold him the cattle. Upon revealing the same, PW5 warned PW4 that the deal could be fishy as the owner of the home whom he knew very well could not sell the livestock at such a low price. Immediately thereafter, they called Kasino and told him to ask the Appellant to give them the deceased's telephone number to enable them make further enquiries about the sale. However, the Appellant told Kasino that he did not have the said number. As such, they told Kasino to take back from the Appellant the deposit paid earlier.

10. While PW4 and PW5 were still waiting at the gate, PW1 alighted from a matatu and joined them. She informed them that she was the owner of the home but was not aware of any plans by her husband to sell their livestock. In the circumstances and upon informing PW1 of their decision to drop the deal, PW4 and PW5 asked PW1 to confirm that none of the livestock was missing before they left. They also gave her their phone numbers to contact them in case of any issue regarding the purported sale. About three to four days later, both PW4 and PW5 were informed about the deceased's death and were required to go to Rongai Police Station to record their respective statements regarding the purported sale.

11. Dr. Francis Maina Ndiangui (PW7) performed a post mortem on the body of the deceased. He formed the opinion that the cause of the

deceased's death was brain laceration and hemorrhage due to head injury due to blunt trauma on the head. He produced the post mortem report in evidence.

12. The robbery and death of the deceased was reported to **Chief Inspector Philip Mwania (PW10)** on 1st July, 2007 by the deceased's daughter Ann Njeri. The following day, 2nd July, 2007, a neighbour of the deceased informed PW10 that he had spotted the Appellant in NaroMoru near Kiserian wearing the deceased's shirt and cap. PW10 immediately directed **PC Marcus Wameyo (PW8) and PC Joseph Kamau (PW9)** to go and arrest the Appellant. Upon arrest, they took him to the police station where he was searched and found in possession of a blue Nokia phone that was later identified as belonging to the deceased. Upon further interrogation, the Appellant led them to a house in Naromoru area where they recovered several items that were identified as belonging to the deceased. An inventory of the said items was prepared. Photographs of the same were also taken by scenes of crime personnel and the items taken to the police station. The Appellant also led them to arrest another person whom he said was part of the robbery.

13. PW11, Senior Sergent Martin Mwaka, was the scenes of crime personnel who took photographs of the deceased's home on 1st July, 2007. He prepared a report to that effect which he produced in evidence. On the other hand, **PW12, Samuel Wambugu,** an officer in charge of scenes of crime Nairobi Area produced photographs taken by his junior Anthony Kwatemba who had died before writing his report. From the office reports, the late officer had taken further photographs of the deceased's house and a toilet where the weapons allegedly used to kill the deceased had allegedly been thrown. He also took photographs of the items recovered from the Appellant's house. **PW13, Senior Sgt, Geoffrey Kinyua** was the investigating officer who produced the exhibits during the trial court.

14. In his defence, the Appellant gave a sworn statement. He testified that he was a tout on the Isinya-Kiserian route but had worked casually with the deceased between January and April 2007. He stated that he was arrested on 2nd July, 2007, taken to court and charged with offences he knew nothing about.

15. The Appellant presented both written and oral submissions in support of the appeal. He condensed his grounds of appeal to four namely, unfair trial, failure by the prosecution to call crucial witnesses, contradictory and inconsistent evidence and failure by the trial court to consider his defence. Ms. Atina the learned State Counsel opposed the appeal and prayed that the same be dismissed and the conviction and sentence be upheld. This court has carefully re-evaluated the evidence on record and considered the parties respective submissions and found that there are only four issues for determination. The first issue is whether the Appellant's trial was unfair. Secondly, whether the evidence tendered by the prosecution was contradictory and inconsistent. Third, whether the prosecution failed to call crucial witnesses and lastly, whether the trial court failed to consider the Appellant's defence.

Analysis and determination.

Whether the prosecution established the case against the Appellant.

16. The Appellant submitted that he was convicted on the basis of circumstantial evidence which did not prove his guilt for the offence of robbery with violence to the required standard, beyond reasonable doubt. In his view, the case was poorly investigated since the police failed to retrieve communication details from the phone recovered from him which was alleged to belong to the deceased. He also faulted the police for allegedly refusing to record statements from other witnesses in view of PW6's testimony that she had been initially been told that her statement was not necessary as the ones already recorded would suffice in the trial. It was therefore his submission that the trial magistrate should not have convicted him on the basis of the evidence adduced.

17. As regards this issue, Ms. Atina for the state submitted that even though there was no eye witness, the circumstantial evidence adduced by the prosecution witnesses pointed to the guilt of the Appellant. This therefore meant that investigations were properly conducted which led to his being charged with the offence.

18. There is no doubt that the trial court convicted the Appellant on the basis of circumstantial evidence since there was no eye witness who saw the Appellant robbing the deceased and neither was there any other direct evidence connecting the Appellant to the same. It is trite law that for a conviction to stand on the basis of circumstantial evidence, the evidence adduced by the prosecution witnesses must irresistibly point to the guilt of the Appellant and no one else as the person who committed the offence. This was aptly established in the case of **Sawe V Republic [2003] KLR 364** at page 372 where the Court of Appeal held that:

> ***"In order to justify, on circumstantial evidence, 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. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other 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."***

19. The legal threshold which must be met for a conviction to stand on the basis of circumstantial evidence was also set out in the case of **ERNEST ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** where the learned Judges of the Court of Appeal stated as follows:

> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:***
>
> ***i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***
>
> ***ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***
>
> ***iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that***

within all human probability the crime was committed by the accused and none else."

20. From a re-evaluation of the evidence adduced during trial, the court notes that PW3 stated that he last saw the deceased on 27th June, 2007. The deceased had gone there to buy Omo determination and a piece of bar soap. On 30th June 2007, a day before the deceased's body was discovered, the Appellant went to his shop to buy airtime and he had a phone which PW3 knew belonged to the deceased as he had helped the deceased load airtime on the said phone several times before. Upon PW3 inquiring what he was doing with the deceased's phone, the Appellant told him that the deceased had gone on safari for two weeks and left him the phone so that he could update him about his home. Further, the Appellant attempted to sell the deceased's livestock to PW4 on 30th June, 2007 on the pretence that he was the deceased's son. When PW4 told Kasino to ask the Appellant for the deceased's mobile phone number to enable him make further inquiries about the purported sale, the Appellant declined and said that he did not have the number. The inference that can be drawn from the Appellant's aforesaid actions is that he was confident that the deceased would not challenge them since he was aware that the deceased was dead already.

21. In addition, upon his arrest on 2nd July, 2007, the Appellant was searched and found in possession of the deceased's phone. On further interrogation, the Appellant led PW8 and PW9 to a house in Naromoru area where the household goods stolen from the deceased's home were recovered. All these facts incriminated the Appellant and are incompatible with his innocence. When the Appellant was put on his defence, he merely denied committing the offence but did not tender any explanation as to why he was found in possession of the deceased's mobile phone a few days after he was last seen by PW3 and later found dead by PW1. He also did not challenge the fact that he led the police towards the recovery of the stolen goods. He therefore failed to discharge his statutory obligation under **Section 111** of the **Evidence Act. The said Section** provides thus:

"Where a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence which is charged and the burden of proving any fact especially within the knowledge of such person is upon him."

22. This Court is further guided by the Court of Appeal case of **ERNEST ABANGA alias ONYANGO V. REP (**supra), where it was observed as follows:

"In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the Appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect".

23. In view of the foregoing therefore, this court is satisfied that the trial court was right in finding that the circumstantial evidence adduced by the Appellant sufficiently proved that the Appellant was guilty of the offence of robbery with violence that led to the death of the deceased.

24. Under this head the, Appellant also submitted that the evidence in support of the prosecution's case was contradictory and inconsistent and could not therefore sustain a safe conviction. He submitted that PW1 testified that the well where the deceased's body was discovered was not covered by a wire mesh whereas PW6 said it was hence, it was not possible to see the body floating therein unless the obstruction was removed. On its part, the prosecution submitted that the Appellant's claim that the evidence was contradictory was misplaced. This was in view of the fact that a scrutiny of PW1's evidence reveals that she did not state whether or not there was a mesh covering the hole where the deceased's body was discovered.

25. This court has carefully perused the trial court's record and agrees with the State Counsel that there was no contradiction between PW1 and PW6's testimony as alleged by the Appellant. The Appellant's assertion that the evidence was contradictory is therefore unfounded.

26. Further, the Appellant contends that the actions taken by PW1 on 30th June, 2007 when she first arrived at their home in Kiserian were not consistent with innocence. In his view, PW1's failure to report the fact of the missing household items to the police until after the deceased's body was recovered was highly questionable. It was also submitted that PW6 was suspicious of PW1 as she and the deceased had some differences. On this, the Appellant did not question PW1 on cross examination. It is factual that PW6's suspicions were baseless in view of the compelling evidence tendered in court.

Whether the Prosecution deliberately failed to call crucial witnesses.

27. The Appellant submitted that the prosecution deliberately declined to call some crucial witnesses who were the neighbor's shamba boy who was with PW1 when they discovered the deceased's body as well as the neighbour that hosted PW1 on 30th June, 2007 when she first arrived home. Further, the Appellant faulted the prosecution for failing to call the landlord of the house where the stolen goods were recovered. In support of these submissions, the Appellant cited the case of **DAITANYI V. REPUBLIC [1950] 23 EACA [439]** where the Court held that where the prosecution does not call a vital witness, the Court may presume that it was so done since his evidence would have been unfavorable to the prosecution's case.

28. On the other hand, the learned State Counsel submitted that the Prosecution was only obliged to call sufficient witnesses to prove its case. She submitted that the landlord referred to by the Appellant had since died and could not therefore be called as a witness. Further and in any case, the landlord's evidence would have been similar to that of the arresting officers who prepared and signed an inventory of the goods recovered from the house where the Appellant led them to. As regards the shamba boy who was with PW1 when the body of the deceased was discovered, the learned State Counsel submitted that the investigating officer had categorically stated that the shamba boy had long been

sacked by his employer and could not be traced to testify during trial. In any event, the evidence of PW1 sufficed in that respect.

29. In criminal cases the prosecution is required to avail to the court all relevant evidence to enable court make an informed decision. However, there is no legal requirement in law on the number of witnesses that should be called to prove a fact but should only call sufficient witnesses to prove a fact beyond reasonable doubt. **See Section 143 of Evidence Act which** provides as follows that:-

> ***"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"***

30. The court will therefore not interfere with the prosecution's discretion to call a certain number of witnesses so long as the witnesses called sufficiently establish their case. (See ***Julius Kalewa Mutunga vs Republic****). In the present case though the Appellant has not laid any basis for this court to draw an adverse inference* on the failure by the prosecution to call the said persons as witnesses. In any event, a careful scrutiny of *the evidence on record shows that the prosecution witnesses sufficiently established that the Appellant committed the offence he was charged with and/or had a hand in the same.*

Whether the trial against the Appellant was unfair.

31. The Appellant made several assertions regarding the issue of unfair trial. Foremost, he contended that the trial magistrate erred in law by ignoring his application to visit the scene where the deceased's body was retrieved. In his view, it was necessary for the trial court to do so for purposes of confirming that the hole had never had water as alleged by the prosecution witnesses. He submitted therefore that the failure by the trial court to make any orders on the same infringed on his right to a fair trial.

32. The view of this court is that the Appellant's case was not deserving of a visit to the scene by the trial court to the scene of crime. The nature of the scene was not under consideration in the charges facing the Appellant. The court was only concerned with the fact of occurrence of alleged offences under trial. A visit to the scene was therefore unnecessary and the trial magistrate's failure to accede to his request did not prejudice him in any manner whatsoever.

33. Secondly, the Appellant contended that **Section 200(3)** of **the Criminal Procedure Code** was not complied with. It was his submission that when the learned magistrate took over the proceedings, she applied for the trial to start afresh but the court only directed that witnesses be recalled for further cross examination. The learned State Counsel disputed this assertion and submitted that the provision was duly complied with by all the magistrates who conducted the proceedings during trial.

34. Section 200(3) of the **Criminal Procedure Code** provides as follows:

> ***"(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right."(emphasis mine)***

35. The learned magistrate, Hon. Kidulla took over the proceedings from the previous magistrate. The Appellant was duly informed of his right under **Section 200(3)** of the **Criminal Procedure Code** as can be gleaned at page 81 of the trial court proceedings. However, upon the application by the Appellant that the trial starts *de novo*, the court ordered that the trial proceeds from where it had stopped but witnesses be recalled for further cross examination by the Appellant. Earlier, the trial had been conducted by Hon. Wanjala and Hon. Maundu, all of whom duly complied with the provision. It suffices to state that the trial court must not accede to the choice of the accused. The request may be declined based on the circumstances of the case. With respect to Hon. Maundu he noted that the witnesses could not be traced for further cross examination. Hon Kidula on the other hand granted the Appellant a chance to recall PW6 for fresh testimony and other witnesses for further cross examination. It is therefore clear that **Section 200(3)** of the **Criminal Procedure Code** was not violated.

36. Thirdly, the Appellant contended that the charge sheet was defective as did not clearly state the date of his arrest as it indicates that he was arrested between 2nd and 12th July, 2007. According to the learned State Counsel however, there was no such defect on the charge sheet as it only showed that the Appellant was arrested on 12th July, 2007 and arraigned on 24th July, 2007. The court has confirmed that the Appellant's contention regarding the date of his arrest is also not factual as it is evident in the charge sheet that he aws arrested on 12th July 2007 and arraigned on 24th July, 2007.

37. Fourthly, the Appellant faulted the arresting officer's failure to administer a cautionary statement regarding his purported admission of being in possession of the stolen household goods. He relied on the case of **SHABAN BIN HUSSEIN V CHONG BOOK (1969)** and submitted that the prosecution ought not to have used that evidence against him.

38. A look at the proceedings clearly shows that no confession pursuant to **The Evidence(0ut of Confessions) Rules** commonly referred to as the Confession Rules was recorded. The Appellant was convicted based on strong circumstantial evidence after he led PW8, PW9 and PW10 to the house where the stolen goods were recovered. His conduct led to an inference that the Appellant may have committed an offence. The trial court did not at all rely on the evidence of the Appellant but partly by the application of the doctrine of recent possession which this court has upheld. His contention that a confession was a basis of his conviction was a total misapprehension of the law and unfounded.

Whether the Appellant's defence was considered.

39. The Appellant alleged that his defence was not given due consideration by the trial court before finding that the prosecution had proved beyond reasonable doubt that he was guilty. The Respondent disputed this contention. This submission was baseless as his defence contained mere denials without any attempt by him to explain and/or rebut the evidence tendered against him by the prosecution witnesses. There was

therefore no formidable defence capable of dislodging the weighty prosecution evidence. The trial court therefore, rightly dismiss it.

40. In the upshot, I find that the prosecution proved their case beyond all a reasonable doubt that the Appellant was guilty of the offence of robbery with violence. I accordingly uphold the conviction.

Sentence

41. The Appellant submitted that the death sentence was harsh and excessive in the circumstances. He offered nothing in mitigation although this may not be faulted as the death sentence then was mandatory. From the circumstances of the case, the Appellant robbed the deceased and killed him. He further tried to conceal the death by throwing his body in a hole full of water. He left his family without a loved one. The court could be inclined to uphold the death sentence, but again must consider the fact that life may never be replaced. The Appellant must however be made to suffer the consequences of his action. He was a first offender. Taking all these circumstances into consideration, it is my view that a sentence of 30 years imprisonment will suffice. I therefore set aside the death sentence and substitute with 30 years imprisonment. The period so far spent in custody since the Appellant's arraignment in court shall be taken into account.

DATED and DELIVERED this 4th day of March, 2019

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Appellant in person.*

2. *Miss Atina for the Respondent*.