



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO.88 OF 2016**

**KABUI KARIMI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against the Judgment, conviction and sentence by Hon. K.T. Onesmus S.R.M in Nyeri CMCRC. No. 279 of 2012 delivered on 24<sup>th</sup> November, 2016)***

**JUDGMENT**

The appellant **Kabui Karimi** was charged with the offence of Robbery with Violence contrary to section 295 as read with 296(2) of the Penal Code.

It was alleged that on 17<sup>th</sup> March 2012 at Nyeri Township, Nyeri County within Republic of Kenya, jointly with another not before court while armed with dangerous weapons namely pistol and knives robbed **Meshack Mwangi Gikonyo** of his motor vehicle Reg. No. KBJ 751Y make Toyota NZE Metallic Silver in color valued at Kshs.800,000/- and at the time of such robbery used actual violence to the said Meshack Mwangi Gikonyo.

He was charged together with one **Jacinta Kariuki Gicobi** (Accused 2) who at the end of the trial was acquitted under s. 215 of the CPC, while he was found guilty of the offence, convicted and sentenced him to death. Aggrieved with the conviction and sentence he filed this appeal with four grounds of appeal: -

- 1. THAT, the trial magistrate erred in both law and fact while basing my conviction in reliance with the purported identification at the scene of crime without considering that no first report was tendered into the record with my descriptions.*
- 2. THAT, the trial magistrate erred in law and fact in convicting I the appellant herein without considering I am being tried with charges which were not adequately proved if the offence as alleged was committed volatility immediately before or immediately after such robbery violence was used to the complainant.*
- 3. THAT, the trial magistrate lost direction while becoming influenced impressed with the mode of my arrest without further considering the advanced evidence that I led the police to the recovery in connection with the robbery in question was not either proved with any confessional statement of the same.*
- 4. THAT, the trial magistrate further erred in law and facts while rejecting my defence without considering it was not displaced by the prosecution side as per section 212 of the CPC Laws of Kenya.*

On 30<sup>th</sup> November 2016 when Mr. H. K. Ndirangu Advocate came on record for him he filed supplementary grounds of appeal: -

- 1. THAT the charge sheet was defective in that it was duplicitous for the fact that it incorporates both section 295 and 296 (2) of the Penal Code.*
- 2. THAT the learned trial magistrate erred in both law and fact in basing his judgment on inadequate evidence of identification.*
- 3. THAT the learned trial magistrate erred in both law and fact in not considering the alibi evidence.*

On 27<sup>th</sup> September 2018 the appellant's counsel made oral submissions and relied on-

- 1) John Nduati Ngure -Vs- Republic (2016) eKLR**

(Court of Appeal Cr.case No.121 of 2014)

2) **Joseph Musyoki Mutua –Vs- Republic (2017) eKLR**

(HCCR of 52/2015)

3) **Joseph Njuguna Mwaura & 2 others -Vs-Republic (2013) eKLR** (Court of Appeal Cr.Case No.5/2008)

The appellant argued that the charge sheet was defective for incorporating both Section 295 and 296 of the Penal Code. That this defect was incurable under s.382 of the CPC. That the case of **Joseph Musyoki Mutua** plus **Joseph Njuguna Mwaura** had settled the issue with regard to defective charges related to the citing of section 295 and 296 together.

The appellant also challenged the evidence on identification arguing that the trial magistrate relied on dock identification. He also argued that the trial magistrate did not consider the appellant's alibi, and neither did the prosecution dislodge the same.

The state through prosecuting counsel Kennedy Magoma opposed the appeal urging the court to find that there was proper identification and violence was used against the complainant. That the appellant failed to establish his alibi. He argued that the appellant was properly charged, convicted and sentenced under section 296(2) of the Penal Code for the offence of robbery with violence.

My duty as the 1<sup>st</sup> appellate court is settled as was held in **Okeno vs Republic (1972) EA 32** is to re-evaluate the evidence and draw my own conclusions from the same. I must be conscious of the fact that I neither saw nor heard the witnesses see **Kimeu vs Republic (2003) KLR 756**.

The facts of the case as given by **PW1 Meshack Mwangi** are that at the material time he was an employee of one Lucy Wanjiku as a taxi driver of motor vehicle Reg. No. KBJ 751 Y Toyota NZE. On 17<sup>th</sup> March 2012 at 1:00pm he was parked near Green Oak Hotel near Mathai Supermarket when 2 men came and requested him to take to Mweiga. They told him to pass by Kobil Petrol station to pick a lady. He was give Kshs.1000/- to fuel the motor vehicle. He went to Kobil Petrol station. He picked the lady whom he identified as Accused 2. She sat in front. She had a small bag which he identified in court.

At a place between Nyeri and Mweiga called Embassy, the 2 men who included the 1<sup>st</sup> accused, and who were seated at the back told him to take a left to Ikumari to pick another person. He told them they would have to pay more. He went up to Ikumari shopping Centre where they waited for a while. They all got out of the car. They invited him to take a soda in a butchery. He said he wanted to leave. They all took the sodas. They pleaded with him not to leave with them. He agreed. As they were leaving Accused 1 asked to be allowed to drive the car. The complainant refused. They were now on the road towards Aberdare National Park near the Ark. It was then that the other man shot a gun and the bullet went through the windscreen. He stopped the car asking what the problem was. The record indicates the following

*“The person was behind me and is not before the court. He told me he was testing the gun. Then he took out a wire and hanged me with it. I fell backwards I was pulled backwards I became unconscious and did not know what was happening. I regained consciousness after three months”*

That is when he realized that he had sustained cuts on the head, and fingers, and had lost three teeth. Two of the people he saw that day he identified as the 2<sup>nd</sup> accused who sat in front, 1<sup>st</sup> accused who sat at the back with the man who had the gun, and who never said anything.

On cross-examination he told the court that he was approached by 1<sup>st</sup> accused and a 3<sup>rd</sup> person who was not in court at the taxi rank. That these two were not seen by other taxi drivers when they approached him but passersby saw them commit the crime. That the 2<sup>nd</sup> accused did not participate in the shooting/beating him but that the 3<sup>rd</sup> person is the one who strangled him. That he learnt after he regained consciousness that some of the suspects were arrested.

He was recalled on 6<sup>th</sup> May 2014 for further production of exhibits and further cross-examination. He identified a jungle jacket and blood soaked both of which he said were worn by the suspect who was not in court. He said he met the 1<sup>st</sup> accused for the first time on the day of the robbery. He said he had been drugged but he had seen him and the 2<sup>nd</sup> accused and was able to identify them. He said he was not involved in the arrest of the suspects.

On further cross-examination he told the court that

*“a short man was sited next to me at the front and there was a lady at the back. One person sited next to me fired a gun and removed a rope and tied me on my back from behind.....i was driving and did not see what was happening at the back.....i could not see who was tying the rope on my neck. A few minutes later I lost consciousness”*

That the rope and weapons were in the lady's bag. At some point the three passengers ganged up and beat him up – one of them took control off the motor vehicle. On re-examination he said the 1<sup>st</sup> Accused sat at the front, the tall man and the lady sat at the back.

**PW2 No.9708396 Sgt James** was attached to G4S security desk Nyeri. On 17<sup>th</sup> March, 2012, they were escorting money to Ark Hotel when they met motor vehicle KBJ 751Y speeding with one rear door open. He told the driver of the motor vehicle he was in to stop- he alighted and so did the others- the motor vehicle KBJ sped on. He rang their operator one Sgt King'ori at Nyeri station and reported the incident so that police would look out for the motor vehicle. Two officers noted that a bag had been thrown out of the moving car- and they found a

passport and ID card for one Jecinta Gichobi and some clothes. They took them to Mweiga police station. PW15 No.2002049416 police officer Patrick **Mwaniki Ngare** was with G4S together with PW2.

PW3 **Alex Maina Wairimu** was an enforcement officer with Nyeri County Council and was stationed at Mweiga stage. On the material date while he was at the stage he heard that a person had been “felled” from a moving motor vehicle. He rushed there with others and they found a man who was bleeding on the face. A colleague came and they rushed him to Mary Immaculate hospital. He did not know the person and did not see the passengers in the motor vehicle.

PW7 **Lucy Wanjiku** was the owner of motor vehicle Reg No.KBJ 751 Y Toyota, and employer of the complainant. On 17<sup>th</sup> March 2012 she received a call that the driver was injured and at hospital in Mweiga. She went there and saw him, he could not talk. She then went and reported at Mweiga police station. She identified photos of her motor vehicle.

PW12 **No.76241 PC Daniel Makoko** was the arresting officer. He told the court that they received information on 18<sup>th</sup> March 2012 about a suspect who had been involved in a carjacking incident with relation to motor vehicle KBJ 751Y which had happened on 17/3/12. They left Nyeri at 9:00am together with other officers and went to Kerugoya police station. From there they were joined by other CID police officer. Acting on the information they had received they laid ambush at Kerugoya stadium. The 2<sup>nd</sup> accused appeared together with her 2 friends. They arrested her and took her to her house where they conducted search and recovered a knife and some clothes she was alleged to have been wearing the previous day, a pair of black trouser, a black and white woolen blouse and a knife.

PW13 **No.58967 Cpl Fredrick Mbingu** was the Investigating Officer. He testified that the complainant was thrown out of the moving car together with the Accused 2's bag which contained her phone, ID card, clothes. Investigations started on 18<sup>th</sup> March 2012.

Crucial details from persons arrested established that the pistol used belonged to a prison warden based at Kerugoya Prison. Officers went to Kerugoya prison but Paul Kibet the 3<sup>rd</sup> suspect managed to escape. It was established by **PW6 Silas Muriuki** who was at the Armory on 17<sup>th</sup> March 2012 that he issued Paul Kibet PF 24254 with a Ceska No.112703 with 15 rounds of ammunition- he returned the pistol in the evening with 13 rounds – claiming that his child had fired 2 rounds by accident. PW6 did not believe him but entered the information in the register which he produced as PEx7. He reported to the Duty Officer in- charge one Mr.Kuloba.

PW8 **Chief Inspector Sammy No.90039900** was the Deputy in-charge of Kerugoya Prison at the material time. He confirmed what PW6 stated and that they did not believe the story of the child firing the 2 rounds because the gun shots would have been heard and Paul Kibet should have produced the spent cartridges. He also confirmed that when the police went to the prison on 18<sup>th</sup> March 2012 at 8:00pm he and PW6 were interrogated and the police took away the pistol and the register but Paul Kibet had disappeared without trace.

The ballistics expert PW5 confirmed that the spent cartridges recovered in the motor vehicle were fired from the ceska pistol that had been issued to Paul Kibet.

The motor vehicle was recovered in the outskirts of Mweiga and the scene of crime officer PW11 **No.58640 Sgt John Mugo** took photos of the motor vehicle and bullet head that was recovered in the motor vehicle.

By then the accused 2 had been arrested on 20<sup>th</sup> March 2012 and gave useful leads – leading to where the motor vehicle was recovered, plus jacket and pair of clothes that were stained with blood. The government analyst PW4 confirmed that the clothes were stained with blood that matched the blood of the complainant. The complainant remained in a coma for a long time and the P3 was produced by PW14 **Dr.Mugambi Jackline Wanjiku**.

The I.O produced all the exhibits including the ID card which was confirmed to belong to Accused 2 by the officer from National Registration Bureau PW9 **Lucy Mwaura**.

Upon his arrest, accused 1 recorded a confession which was witnessed by his brother. This was recorded by PW10 No.230058 Superintendent of police **Francis Lomoshila**. In it the 1<sup>st</sup> accused told the story of how the incident occurred and the fact that he was an innocent participant.

In his defence the appellant told the court that on the material date he was at home in Kirinyaga Kangaita. He left home at 9:00am and went to visit his 2 colleagues who were in Kamiti prison. He met them between 2-2:30pm. Then he left for home and got home at 5:30pm. He produced receipts for 2NK dated 17<sup>th</sup> March 2012 but production was objected and he was asked to produce the maker. On cross-examination he said he used 2 motor vehicles – one receipt indicated 17<sup>th</sup> August 2012 but he asserted that it was 17<sup>th</sup> March 2012.

DW2 **Benard Karanja Mwangi**. He said that he was at Kamiti prison on 17<sup>th</sup> March 2012 when 1<sup>st</sup> Accused visited him.

Accused 2 testified that she and Kibet were friends. At the material time she worked with Blue Shield Sacco. She was at Nyeri at 10:00am and met Paul Kibet who was to introduce her to his colleagues. They met at Total Petrol station Nyeri- Kibet arrived in a motor vehicle having told her that he was in the company of friends who were heading same directions. That 1<sup>st</sup> accused was co-driver, while she and Kibet sat in the back. Accused 1 was to be dropped somewhere along the way. The driver complained about cash. He stopped the car. Kibet pulled out a gun and pointed at the driver who got hold of it. A bullet was “released” from the gun and it hit the windscreen. In that moment Kibet and the driver engaged in a struggle. Accused 1 took over the motor vehicle and they drove off. She decided to open her door to get out. She could not. She began to scream and as the struggle continued another bullet was fired from the gun hitting the back windscreen. Kibet overwhelmed the driver. Hit him with the gun on the head. The driver was bleeding and became unconscious. As they joined the main road, she saw G4S motor vehicle. It appears they heard her screams because they stopped and she threw her bag out of the window.

They drove into a bush. Kibet tied the driver with a rope and threw him out of the motor vehicle as the motor vehicle was still speeding. They reached somewhere where they stopped. Kibet's clothes were full of blood. He threw them away. Accused 1 gave him a jumper. He told them he had to return the gun. He ran away. The 2 parted ways. She got help, called her father, was sent bus fare and later got home. She was arrested at Kerugoya stadium.

On cross-examination she said Accused 1 was the co-driver – she saw him well. She did not produce any documents to support her claim that she had loan forms for Blue Shield Sacco. She admitted that Kibet was her friend but denied that she planned the robbery with him. She denied that was PW1 who threw out her bag. She said she saw no reason to report the incident, and was arrested after she was called to the stadium.

Her mother was DW3 **Mary Njoki**. She was rang on 17<sup>th</sup> March 2012 on her daughter's phone by one Peter Mwaniki that her daughter had been kidnapped into Mweiga forest. The Accused 2 later called and was sent money for fare to get home.

DW4 **No.1981150470 IP George Matibo Njeru** was called by the prosecution to dislodge the Accused 1's alibi. He produced the visitor's book from G.K Prison Kamiti for 17<sup>th</sup> March 2012 and testified that there was no evidence that Accused 1 had visited the prison, or the persons he names as prisoners were visited on that day.

In his judgment delivered on 20<sup>th</sup> July 2017, the last trial magistrate Hon. K.T Onesmus found that the Accused 1 was guilty as charged. Accused 2 was given benefit of doubt and acquitted.

Having considered the evidence and the submissions I found that the appeal raised four issues which I will consider in turn.

**1) Whether the charge was defective, duplicitous for incorporating ss.295 and 296 of the Penal Code, and if so, whether it is sufficient ground to dispose of the appeal.**

In the case of **Joseph Musyoki** –where the court was dealing with a similar issue the prosecution conceded that the charge was indeed duplicitous for incorporating the 2 provisions of the law. The court relied on the Court of Appeal case of **Joseph Njuguna Mwaura & 2 others** – which was also cited by the appellant herein. In that case the Court of Appeal settled this issue;

*“that the offence of robbery with violence is totally different from the offence defined under s.295 of the Penal Code...it would not be correct to frame a charge for the offence of robbery with violence under ss.295 and 296 (2) of the Penal Code as this would amount to a duplex charge”*

The argument for the appellant is that this ground alone would be sufficient to dispose of the appeal as per the Court of Appeal authorities including **Simon Materu Munialu vs.Republic (2007) eKLR**, and **Joseph Onyango Owour & Another vs. Republic (2010) eKLR**.

These authorities challenge my view which has always been that s.295 of the Penal Code is the definitive section of what constitutes the offence of Robbery. It is headed –295: Definition of Robbery and states:

*“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 the resistance to its being stolen or retained is guilty of the felony termed robbery”*

So that for the offence of robbery you have to prove theft of something and the threat or use of violence actual violence. So that when we come to s.296(2) regarding robbery with violence it becomes aggravated robbery with the additional ingredients and enhanced punishment of the maximum as the death penalty.

I am fortified in my understanding by the findings and holdings in **Joseph Kaberia Kahinga & 11 others vs. AG (2010) eKLR** where a High Court Bench constituted to deal with the constitutionality of sections 296(1) and 297(1) discussed the issues of robbery and robbery with violence at great length. Citing from Johana **Ndung'u vs.Republic Criminal Appeal No.116/119**. Where the Court of Appeal stated as follows:

*“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:*

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

*Analyzing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use*

actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed (sic) of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in S.295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him. In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction there under must follow. The court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly.”

“Going by the above case of *Johanna Ndungu* (supra) it is apparent that the offence of aggravated robbery, in addition to the ingredients under **Section 295 of the Penal Code**, is sufficiently proved if any of the three elements set out under **Section 296(2) of the Penal Code** is established. In *Johanna Ndungu* case (supra) the court found the offence proved based on the facts which they set out thus:”

‘In this appeal the facts that are proved are as follows:

i). The appellant at the time of robbery as defined in S.295 of the Penal Code was a member of a gang of three, one of whom was armed with a knife and one other was armed with a stick. That finding alone was enough to convict him under sub-section (2) of section 296 of the Penal Code.

ii). The appellant was in company with two other persons at the time of the said robbery. That finding again on its own was enough for a conviction under S.296 (2).

iii). The complainant (victim) at the time of robbery was actually beaten and wounded by the gang of three of which the appellant was a member. That finding also on its own was enough to convict appellant under sub-section (2)

See also **Shadrack Karanja vs. Republic Criminal Appeal 119 /2005 (2006)eKLR**

On the other hand, if I am wrong, the question is; What is the justice of the case? Was the appellant prejudiced by the mere citation of the two provisions of the law in the charge sheet? I do not find so. There was a full trial and the appropriate questions were asked. Hence from the record it is clear that the appellant was well aware he faced the charge of aggravated robbery. Hence the issue would be whether that charge was proved beyond a reasonable doubt.

## **2. Whether the appellant properly identified**

From the testimony of PW1, he was approached by the appellant and another to ferry them to Ikumari. Appellant sat in front with him. At Ikumari they all came out of the car, and took sodas in a butchery as they waited for someone. They had an argument where the PW1 was telling them that he could no longer just wait but he wanted to leave. They begged him not to leave them but to wait for them. This was during the day. Clearly therefore the PW1 spent a lot of time with these people and the possibility of his identifying them was high. The attack came long after they had spent all this time together. In any event the 2<sup>nd</sup> accused who was acquitted because the lower court found she was a victim of circumstances, conceded she was with the accused and her friend the prison officer Kibet who disappeared.

I am well aware that evidence of identification is very crucial in criminal cases as it can lead to miscarriage of justice. I am also well guided by the Court of Appeal case of **John Nduati Ngure vs R (2016) eKLR** where it was held that:

“Evidence of visual identification can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. However, the case against a defendant depends wholly or to a great extent on the correctness of mere identification of the accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. See ***Wamunga vs. Republic (1989) KLR 424***”

The appellant argued that what PW1 did was dock identification but it is not always worthless. ***James Tinega Omwenga vs. Republic Criminal Appeal No.143/2011***. Not all dock identification is worthless. Each case must be considered on its own merits bearing in mind the caution by the Court of Appeal. It is only in some cases that it is regarded worthless see

It is evident from the record that the trial magistrate did not specifically address the issue of identification of the appellant but he did reject his defence that he was not at the scene that day. The trial magistrates was persuaded by the defence of the Accused 2 who identified the appellant as the person they were with during the whole time the incident took place.

## **So it necessary to hold an identification parade?**

Yes, taking into consideration that the PW1 did not participate in the arrest of the appellant and had not given any descriptions an identification parade would have been necessary. But then, the amount of time PW1 spent with the three persons was sufficient for him to

recognise them later. Nevertheless, there was other evidence available to place the appellant at the scene.

1) The appellant made a confession which was produced in evidence. Although there are certain specifics that the state could have verified for example;

-That the appellant had been imprisoned in a prison where the key suspect herein Kibet was a prison warden.

-That there had been phone calls between the appellant's phone and Kibet's phone which could have been availed by the service providers. That there was communication on phone on 18<sup>th</sup> March 2012.

It is however evident that statements of confession were a finger pointing exercise with each accusing the other of being the key participant together with Kibet, and each claiming to have been the innocent party.

In my view these disparities however simply point out to accomplices trying to get out of a sticky situation by heaping blame on the other.

The **Evidence Act at Section 141** says this of accomplices: -

*An accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.*

All that the accused 2 stated on oath was believed and acted upon by the trial magistrate who had the advantage to observe her demeanor and to arrive at the finding that she was an innocent victim of the circumstances. She knew Kibet personally. She was in the car, with the three of them. She did not report the incident to the police or anyone but went about her business as though nothing had happened even after witnessing PW1 being beaten by Kibet, gunshots being fired, and he being thrown out of the moving car. To me these facts reek of more than an innocent participant. In any event I found her testimony to be a confession.

**Section 32 Evidence Act** defines that kind of confession: **Confession implicating co-accused:-**

*(1) When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take the confession into consideration as against such other person as well as against the person who made the confession.*

*(2) In this section "confession" means any words or conduct, or combination of words and conduct, which has the effect of admitting in terms either an offence or substantially all the facts which constitute an offence—*

*"offence" includes the abetment of, or an attempt to commit, the offence.*

The evidence of 2<sup>nd</sup> accused placed the appellant there at the scene participating in everything that happened. Hence the need for an identification parade was vitiated by all the other available evidence.

#### **4. Whether the appellant's Alibi was considered.**

The appellant's defence was that he was not anywhere near the scene on that day. However, the trial magistrate considered the evidence and found the DW2 as untruthful witness and on that ground the appellant's alibi collapsed. This again is evidence of demeanor which this court did not have the advantage of observing. In addition, I looked at the said evidence. Alibi evidence must be weighed against the other available evidence. In this case the alibi was not credible and the prosecution brought evidence which dislodged it.

**In Conclusion: the appeal on conviction fails because the prosecution discharged its burden to prove the charge beyond a reasonable doubt; and;**

- 1) The defect of the charge sheet is not absolutely fatal.
- 2) The appellant was properly identified even without the Identification Parade and placed at the scene by other available evidence.
- 3) Sections 32 and 141 of Evidence Act Cap 80 Laws of Kenya apply to the evidence of PW2.
- 4) The Alibi was properly considered. The same was rebutted by prosecution evidence
- 5) Paul Kibet, the key suspect ought to have been charged in absentia and a warrant of arrest issued against him.

On sentence, following the Muruatetu Case, the file be remitted to Chief Magistrate's court for directions on sentence rehearing.

Right of appeal 14 days.

**Dated, delivered and signed at Nyeri this 7<sup>th</sup> day of March 2019.**

**Mumbua T. Matheka**

**Judge**

In the presence of: -

Juliet: Court Assistant

Mr. Magoma for state

Ms. Mwai for appellant.

**Mumbua T. Matheka**

**Judge**

**7/3/19**