REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 23 OF 2017

PAUL KABIRU MURIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from both conviction and sentence arising from the

Judgment of Hon. J. Wambilyanga delivered on 21st April 2017)

JUDGMENT

1. The accused person was charged with two counts. In the first count, the accused was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence are that on 8th October 2013 at around 11.00pm at [particulars withheld] Village in Kieni West District within Nyeri County the Appellant jointly with others not before the court while armed with dangerous weapons namely pangas and rungus robbed IWM of cash Kshs. 6,000/- and beer worth Kshs. 18,000/- and at or immediately after the time of robbery injured the said IWM.

2. In the second count he was charged with gang rape contrary to section 10 of the Sexual Offences Act No.3 of 2006. The particulars of the charge are that on the 8th day of October 2013 at around 11.00pm at [particulars withheld] Village in Kieni West District within Nyeri County the Appellant jointly with others not before court intentionally and unlawfully did an act of penetration by inserting his penis into the vagina of a woman namely IWM.

3. The accused pleaded not guilty to both counts. The prosecution called five (5) witnesses and the Appellant gave a sworn testimony in his defence.

4. the Appellant was convicted and sentenced to death on the first count of robbery with violence and was acquitted of the second count of gang rape under section 215 of the Criminal Procedure Code.

5. Aggrieved by the decision of the trial court, the Appellant preferred the instant appeal against both conviction and sentencing on the following grounds:-

a) The learned magistrate erred in law and in fact by failing to observe that the provisions of Section 200 (3)of the Criminal Procedure Code (CPC) was not complied with and as per Article 25 (c) of the Constitution hence the conviction was unsafe and bad in law.

b) The learned magistrate erred in law and in fact by failing to observe that the application of identification by recognition evidence adduced in court by the prosecution was not applicable as per the circumstances of the case hence the conviction was unjustified.

c) The learned magistrate erred in law and fact by failing to note that the charge was defective in nature due to the variance of evidence in respect to the amendment of the charge sheet made after the full examination of PW1 who was not recalled after the renewal of the charges thus causing a miscarriage of justice.

d) The Trial Magistrate erred in law and fact when convicting the Appellant because he was not accorded a free and fair trial as per Article 50 (2) (b) (c)(j) of the Constitution.

e) The trial magistrate erred in law and fact when convicting the Appellant for failure to accord the Appellant his right to be released

on bail under Article 49 (1)(h) of the Constitution.

f) The provision of Section 196 (1) of the CPC was not complied with in relation to the appellant's statement.

g) Pursuant to the decision in the **Supreme Court vide Petition No.15 of 2015 of Francis Karioko Muruatetu and Another**, the Appellant urged the Court to consider the case regarding sentencing for his mitigation to be factored.

6. Both the Appellant and the prosecution made oral submissions. The Appellant relied on his written submissions dated 10th September 2018.

The Appellant's submissions

7. He submitted that the people who reported the incident did not identify the robbers. There were five men with masks according to the report to the police. Further that he had a witness who confirmed this fact but the lower court disregarded his testimony.

8. On noncompliance with section 200(3) of the CPC the Appellant submitted that the initial trial commenced on 25th June 2015 before S. Ngugi PM who heard PW1 on 20th August 2015. When the matter was taken over by Hon. D. Orimba, PM, the Appellant opted to proceed without recalling any witnesses. When the matter was taken over by J. Wambilyanga she rejected the Appellant's choice to have witnesses recalled contrary to Section 200(3) of the CPC. Further the day to day proceedings were conducted by different magistrates. The Appellant relied on **Bob Ayub Alias Edward Gabriel vs Republic [2010] eKLR, Richard Charo Mole vs Republic Cr. Appeal No.135 of 2004** and **Erick Omondi vs Republic [2007] eKLR**.

9. He pointed out that PW1 was not recalled following the substitution of charges as ordered by the court. He also argued that he was not given the amended charge sheet. He lamented that he was denied a fair trial according to Article 50(2) (b) (c) and (j). That he was denied bail in the subordinate court contrary to article 49(1) (h) leading to a miscarriage of justice.

10. He also submitted that the charges were defective. That there were inconsistencies in the evidence by the prosecution witnesses relating to the amount of cash alleged to have been stolen, the time of the offence, and that there was no evidence of rape.

11. There was no corroboration of the evidence as stipulated in section 214 of the CPC. He relied on **Yongo vs Repbulic [1983] eKLR**.

12. He also argued that the trial court did not comply with section 169 of the CPC that requires the court to state points for determination and unfairly dismissed his defence.

13. He challenged the death sentence on the strength of the Muruatetu decision

The Prosecution's submissions

14. The prosecution placed a lot reliance on the complainant's testimony. It was submitted for the prosecution that the Appellant was properly convicted and sentenced to death. That complainant was able to recognise two of the five robbers who entered the bar that night because they were regular customers. She said it was Paul Muriithi and his brother. That she saw it was the accused who was distributing beer from the counter to the rest of the robbers.

15. She also narrated how three of the robbers took her into the forest raped her, while threatening her with death if she mentioned their names. They abandoned her there but she was able to get help and to call her employer who called the police and they went for her. At the scene of the crime of the rape police recovered a Jacket and a Marvin.

16. According to the complainant when the robbers walked in there was a kerosene lamp which was sufficient lights that was the light that was used in the bar.

Rejoinder

17. The accused produced an OB of the Police Station where the incident was reported. The OB report showed that what had happened was a burglary by masked men and there was nothing about a rape. He also argued that no connection was made between the items recovered at the scene and him.

Issues for determination

18. A perusal of the record and submission of the parties raise the following issues for determination in disposal of the appeal:-

a) Whether the Appellant was properly identified

b) Whether the offence of robbery with violence contrary to section 296(2) of the Penal Code was proved to the required threshold.

c) Whether section 200(3) of the CPC was complied with and if not the consequences of such non-compliance if any

d) Whether section 196 of the CPC was complied with and if not the consequences of such non-compliance if any

e) Whether the Appellant's rights under Articles 49(1)(h) and 50 of the constitution were contravened and consequences of such contravention if any

f) Whether the Appellant deserves a resentencing in accordance with Supreme Court decision in Petition no.15 of 2015 for the trial court's failure to consider his mitigation.

19. The Court of Appeal in **Suleiman Kamau Nyambura v Republic (2017)eKLR** cited with approval the case of **Patrick & Another versus Republic [2005] 2KLR 162**; in which the court held inter alia that:-

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate own decision on the evidence. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and drew its own conclusions."***\

A) WHETHER THE APPELLANT WAS PROPERLY IDENTIFIED

20. This case involved an identification by recognition. The Court of Appeal in the case of **Wamunga vs Republic [1989] KLR 426** stated as under;-

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

21. It was also held in **Nzaro vs Republic [1991] KAR 212** and **Kiarie vs Republic [1984] KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

22. In **R –vs- Turnbull & Others [1973] 3 ALL ER 549**, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

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

23. There can be safe recognition even at night where the court observes proper caution. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic [2014] eKLR** in upholding the evidence of recognition at night held as follows:-

> ***"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-***
>
> *"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."*
>
> ***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."***

24. The Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R [unreported]** stated as follows regarding the evidence of recognition at night:-

> ***"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."***

25. PW1 stated as follows during examination-in-chief:-

> ***"At around 11pm I told the persons that I wanted to close down. The others left but Murege remained and asked me to let him go for a short call which I did. I then saw 5 men, two of whom I recognized as Paul the 1st Accused on the dock and his brother***

whom I knew physically but not by name."

26. During cross-examination PW1 was not shaken and stated as follows:-

"I was only able to recognize two of the five-yourself and your brother…I knew you when you came to nearby Bar for the whole year in Lare where you frequently used to drink."

27. On re-examination she confirmed that when she recorded her statement with the police she clearly mentioned the appellant by name as one of the robbers who entered her bar that evening. She explained that he was a regular customer, and when they came in he was the one distributing the beer to the others.

The appellant tried to discredit her evidence using the OB report for that day. What is clear is that that was not her report. It was the report allegedly made by DW1 the appellant's witness that he was a victim of the same robbery, that the robbers were masked and no one saw their faces.

28. In **Vitalis Obonya vs Republic [2016]eKLR** the Court observed:-

"The applicant pressed his case based on Kisumu Central Police Station Occurrence Book entry No. 70/5/11/2002. He submitted that the Occurrence Book would show that he was arrested for a totally different offence and not the offence he was convicted... The production of the Occurrence Book would not change the fact that the applicant was convicted based on the testimony of eye witnesses."

29. PW1 was the victim. She is an eye witness. She mentioned her attacker s immediately. She told PW2 that the appellant was one of the attackers. It was the same name she gave the police officer Cpl Peter Gitonga who came to her rescue the same night. This was also confirmed by PW4 PC Christine Makiya – that the complainant named the appellant. Hence there is no doubt about the identification as the complainant immediately recognized him as one of her customers and told everyone who came to her that the person she recognized was the appellant. There no evidence of any issues that would make her frame him for such an offence.

B) WHETHER THE OFFENCE OF ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE WAS PROVED AT THE REQUIRED THRESHOLD.

30. The Court of Appeal decision in **Johanna Ndung'u vs Republic - Criminal Appeal No. 116 of 2005, [unreported]** sets out the ingredients of robbery with violence pursuant to ***Section 296 (2)*** of the ***Penal code*** as follows:-

a) If the offender is armed with any dangerous or offensive weapon or instrument, or;

b) If he is in the company with one or more other person or persons, or;

c) If at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

31. The Court of Appeal in the case of **Odhiambo & Another vs Republic [Omolo, Githinji & Deverell JJA] [2005] 2 KLR 176** explained the ingredients of the offence of robbery with violence as follows:

"The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295."

32. In **Suleiman Kamau Nyambura vs Republic [2015]eKLR** the Court of Appeal held:-

"Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction under Section 296 (2) of the Penal Code. See Oluoch vs Republic [1985] KLR 549."

33. In the instant case there were five robbers, one violently grabbed the complainant by her neck and covered her mouth, and some money and beer were stolen. Hence more than one of the ingredients that amount to robbery with violence was proved.

34. The appellant raised the issue of discrepancies in the testimonies of the witnesses. In **Joseph Maina Mwangi -vs- Republic – Criminal Appeal No. 73 of 1993** the Court of Appeal held:

"In any trial, there are bound to be discrepancies. An appellate Court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code vis whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences"

35. In my considered view none of them was for such weight as to vitiate the evidence in support of the conviction against the appellant. The appellant's defence confirmed that he and the complainant were known to one another. He said for over a year was properly considered. He

alleged to have been away working in Laikipia that day at a place called Jikaze packing potatotes in sacks. He called DW2 who testified that he was in the pub that day and was a victim of the same robbery but the robbers were masked. He denied that the complainant was raped that day. He said they went to report to the police as a group. However his testimony is not supported by the OB extract relied on by the appellant because it just shows that one Murege reported a burglary. The issue of reporting as a group is not seen in the OB. The appellant also tried an alibi considered on the strength of the rest of the evidence it appears unlikely that appellant was not at the scene. In any event he packed potatoes in the day, what about the night? Where was he? He does not remove himself from the scene. He raised his alibi for the first time when he was put on his defence.

36. This Court is aware of the holding in **Republic vs Silas Magongo alias Fredrick Namema [2017]eKLR** that:-

> ***"In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. That burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person."***

37. Further in **Kiarie vs Republic, [1984] KLR 739**, the Court of Appeal held that:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi."***

38. However in **R. vs Sukha Singh s/o Wazir Singh & Others [1939] 6 EACA 145**, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

> ***"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".***

39. In **Festo Androa ASenua vs Uganda, Cr. App. No. 1 of 1998** the Court made the following:

> ***"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."***

40. In **Victor Mwendwa Mulinge vs Republic [2014] eKLR** the Court of Appeal declared itself on the proposition on alibi defence:

> ***"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution. See Karanja v Republic [1983] KLR 501. This court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought."***

41. In **Republic vs Geoffrey Wambua Musau [2017]eKLR** it was held:-

> ***"As a general it is not all alibi defence further evidence must be adduced by the prosecution to disapprove the alibi. If the prosecution adduces sufficient evidence to diminish the alibi defence then there is no more burden to prove an established fact. I wish to point out that this case falls under the category where the prosecution never sought leave to investigate the alibi by the accused.***
>
> ***The question is can this court find evidence from the case for the prosecution to destroy the alibi put forth that the accused was elsewhere away from the murder scene."***

42. The belated alibi defence raised is not credible when weighed against the unshaken testimony of the eye witness, PW1, which puts the Appellant at the scene of the crime. The offence of robbery with violence was properly proved beyond reasonable doubt.

C) WHETHER SECTION 200(3) OF THE CPC WAS COMPLIED WITH AND IF NOT THE CONSEQUENCES OF SUCH NON-COMPLIANCE IF ANY

43. Section 200(3) of the CPC provides:-

> ***"Where a presiding 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"

44. The Appellant submitted that Hon. Wambilyanga (SRM) did not comply with the said section when he took over the case from Hon. D. Orimba (PM).

45. The record indicates that the first hearing was conducted by Hon. S.Ngugi on 25th June 2015 who heard only one witness, PW1. When Hon. D. Orimba took over the case on 20th August 2015, The section 200(3) of the CPC was explained to the Appellant who chose to continue with the case from where it was left without recalling any witnesses. There was satisfactory compliance of section 200(3) of the CPC.

46. When Hon. Wambilyanga (SRM) took over the case from Hon. D.Orimba on 16th August 2016, she also explained on 25th April 2016, section 200(3) to the Appellant who chose to recall all the witnesses.

47. The Prosecution objected to this prayer for the reason that the matter was already too old. The court gave its ruling on 18th August 2016 in which it denied the Appellant's prayer to recall all the witnesses and ordered to proceed with the case.

48. The Appellant stated that it would appeal the said ruling and expressed lack of confidence in the court. The court gave the accused 14 days to appeal. No appeal was filed against the said ruling and when matter came up for mention on 1st September 2016 the Appellant stated that he was ready to proceed with his defence.

49. In **Office of the Director Of Public Prosecutions vs Peter Onyango Odongo & 2 Others [2015]eKLR** it was held:-

> ***"The succeeding Magistrate before determining the accused demand for retrial or recalling or re-summoning of any of the witnesses, in my view, as Section 200(3) is not mandatory for the accused demand to be granted or to be allowed, the succeeding Magistrate is not supposed to deal with Section 200 (3) of C.P.C. in isolation of several articles of the constitution dealing with the Bill of Rights as Section 200 (3) of CPC is not exhaustive in itself."(Emphasis mine)***

50. In the case of **Mercy Mugure vs Republic[2018]eKLR,** the court noted as follows:

> ***"I must however clarify that the duty on the part of the succeeding magistrate is only limited to informing the accused person of that right. The succeeding magistrate is however not bound to oblige the request which may thereupon be made by the accused person. The magistrate must consider the request, if any, in light of the circumstances of the case and upon hearing all parties. The court may or may not accede to the request made by the accused person."***

51. Section 200(3) was complied with by all the trial magistrate who handled this matter and this ground of appeal fails.

52. The Appellant also complained that the charge was substituted but an order by the Court to recall PW1 who had already testified before the substitution was not complied with. In the original charge sheet the Appellant was charged of only one of offence, robbery with violence contrary to section 296(2) of the Penal Code. In the amended charge sheet there was an added charge of gang rape contrary to section 10 of the Sexual Offences Act No.3 of 2006.

53. Section 214 of the Criminal Procedure Code provides:-

> ***"(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***
>
> ***Provided that-***
>
> ***i. where a charge is so altered, the court shall thereupon call upon the accused person 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 give their 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."***

54. The record indicates that the Appellant took another plea on the amended charge sheet but PW1 was not recalled. The question is whether the appellant was prejudiced by this omission. The record shows that this witness would have come to testify with regard to the charge of gang rape. However, that charge was dismissed under s.210 of the CPC so, really no prejudice or miscarriage of justice was occasioned.

55. In **Josphat Karanja Muna v Republic [2009]eKLR** the Appellant complained that he had not been given a chance to recall witnesses who had testified. The Court of Appeal stated:-

> ***"On non-compliance with section 214 of the Criminal Procedure Code, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant. When he gave***

evidence, on 29th September 2002, he gave his name as Ben Cheche Gikonyo whereas his name Ben Chege name in the first charge sheet was given as Gikonyo. The amendment only took care of that. That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non compliance with the provisions of section 214 of the Criminal Procedure Code resulted into injustice to the appellant."

D) <u>WHETHER SECTION 169 OF THE CPC WAS COMPLIED WITH AND IF NOT THE CONSEQUENCES OF SUCH NON-COMPLIANCE IF ANY</u>

56. Section 169 (1) of the Criminal Procedure Code provides as follows:

"169. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."

57. The Appellant's submissions are not supported by the record. The record indicates otherwise. The judgment dated 21st April 2017 clearly sets out the points for determination and considers the defence of the Appellant.

In any event In **<u>Republic vs Edward Kirui [2014]eKLR</u>** the Court of Appeal held:-

"Non-compliance with the requirements of section 169 does not automatically result in the trial process being vitiated. See the authority of HAWAGA JOSEPH ANSANGA ONDIASA V R Criminal Appeal no. 84 of 2001 where the appellant asked the court to set aside his conviction at the trial saying that that court had not complied with section 169 Criminal Procedure Code. This Court found that –

"It is true that the trial magistrate may be criticized for the perfunctory way in which he expressed himself in his judgment. However, even if we were to hold that he did not prepare his judgment strictly in accordance with section 169 of the Criminal Procedure Code, this would not, of itself mean that the conviction of the appellant was wrong or is to be invalidated"

E) <u>WHETHER THE APPELLANT'S RIGHT UNDER ARTICLES 49(1)(H) AND 50 OF THE CONSTITUTION WERE CONTRAVENED AND CONSEQUENCES OF SUCH CONTRAVENTION IF ANY</u>

58. The Appellant submitted that his right to bail was contravened hence his right to fair trial was trampled upon. This is not true because the record shows that on 28th September 2015 Hon. Orimba (PM) granted him bond of Kshs. 500,000/- with surety of the like amount. Previously on 7th January 2014 the Court sought for pre-bail report to guide on bond terms.

F) <u>WHETHER THE APPELLANT DESERVES A RESENTENCING IN ACCORDANCE WITH SUPREME COURT DECISION IN PETITION NO.15 OF 2015 FOR THE TRIAL COURT'S FAILURE TO CONSIDER HIS MITIGATION.</u>

59. The Appellant submitted that he was sentenced under section 296 (2) of the Penal Code which provides for mandatory death sentence that was ruled to be unconstitutional by the Supreme Court in the case of **<u>Francis Karioko Muruatetu & Another vs Republic [2017] eKLR</u>**. The Appellant seeks resentencing for his mitigation to be considered.

60. The Supreme Court did not outlaw the death penalty but declared its "mandatory nature" unconstitutional. The petitioner was sentenced to death under Section 296(2) of the Penal Code in pursuance with the mandatory nature of the provision; ***<u>"he shall be sentenced to death"</u>***. It therefore opened the window for those persons who suffered the sentence to get an opportunity to present their mitigation for consideration as it now became that one would be liable to be sentenced to death.

The appeal on the conviction and sentence fails as it is without merit.

61. However on the issue of the sentence and in compliance with the Supreme Court directions, the petitioner's case Nyeri Chief Magistrate Criminal Case No. 947 of 2013 is remitted to the Chief Magistrate Nyeri for re- sentencing. Mention before the CM on 14th March 2019 for directions.

Dated, delivered and signed at Nyeri this day of 1st March 2019.

Mumbua T.Matheka

<u>Judge</u>

In the presence of:-

Court Assistant: Juliet

Ms.Jebet for state

Appellant –present

Mumbua T.Matheka

Judge

1/3/19