REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 21 OF 2017

(FORMERLY ELDORET HCCRA NO. 176 OF 2012)

WILLY JOEL MAKUDO.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 141 of 2012 delivered on the 18th day of October, 2012 by Hon. S.M.S. Soita, SPM]

JUDGMENT

1. The appellant was on 18/10/12 convicted and sentenced to death for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that he had *"on the 2nd day of March 2012 at Tangulbei Trading Centre in East Pokot District within Baringo County, jointly with another not before the Court armed with dangerous weapon namely Assault Rifle AK 47, robbed SSL her 3 mobile phones, Inverters, chargers all valued at Ksh.17,750/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said SSL."*

2. By an Amended Petition of Appeal dated 29th October 2012 and amended on 18/9/17 the appellant through the Counsel, M/S M.K. Chebii & Co. Advocates, filed grounds of appeal as follows:

> *1. The learned trial Magistrate erred in law and fact by misdirecting himself on the essential ingredients of the offence of Robbery with Violence under section 296 (2) of the Penal Code and hence arrived at a wrong conclusion in finding that all the ingredients of the offence had been proved against the appellant.*
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> *2. The learned trial Magistrate erred in law and fact by misdirecting himself on the burden and degree of proof in a charge of Robbery and hence arrived at the wrong conclusion that the appellant did not displace the allegations made against him and further that the charge had been proved as required by law.*
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> *3. The learned trial Magistrate erred in law and fact by misdirecting himself on the evidence in failing to find that the circumstances under which the offence was committed as not conducive to properly and accurately identified the suspects, the offence having been committed at night (7:30 p.m.) and hence arrived at the wrong conclusion in holding that the appellant had been properly identified by Pw1, Pw2 and Pw3.*
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> *4. The learned trial Magistrate erred in law and fact by failing to find that Pw1 did not mention the name of the appellant to the police immediately after the robbery.*
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> *5. The learned trial Magistrate erred in law and fact in accepting the Prosecution evidence that the Pw1's stolen items had been recovered with the assistance of the appellant and/or the appellant had led them to where they were hidden as there was no inventory signed by the appellant that the items were recovered in his presence.*
>
> *6. The learned trial Magistrate erred in law and fact in failing to find that there was no evidence that the appellant had been armed with any offensive weapon and further that none as produced before the Court as exhibit and hence the charge of Robbery with Violence under section 296 (2) of the Penal Code was not sustainable on the evidence before the Court.*
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> *7. The learned trial Magistrate erred in law and fact in failing to find that the evidence tendered does not disclose an offence of robbery with violence but an offence of simple robbery and/or stealing from the person.*
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> *8. The learned trial Magistrate erred in law and fact in failing to take into consideration the appellant's defence and the fact that he*

took himself to the police station when he heard that there was a rumour that he was involved in the robbery.

9. The learned trial Magistrate erred in law and fact by failing to accord the appellant humble time to prepare his defence as enshrined in section 50 (2) c of the Constitution thereby leading to a miscarriage of Justice.

10. The learned trial Magistrate erred in law and fact by convicting the appellant on a charge whose plea was not an equivocal and/or the learned trial Magistrate failed in his duty to warn the appellant that the charge he was facing carries a mandatory death sentence.

3. At the hearing of the appeal, the Counsel for the appellant and for the DPP made oral submissions as set out in the record of this Court's proceedings for the day as follows:

Mr. Chebii for the appellant

Appellant charged with robbery with violence c/s 296 (2) of Penal Code and convicted and sentenced to death.

Amended petition of Appeal dated 18/9/17 to be argued.

Identification

The robbery is alleged to have taken place at 7.30 pm. There is evidence that it was already dark. Pw1 states that he identified the appellant through the light emanating from solar lighting in the premises.

Pw2 states that he was molested as well as Pw3. They also stated that they identified appellant by his voice.

Pw1 did not indicate to the police that it was the appellant who had robbed her. The only report was when he made to Pw5, the Investigating Officer. When the appellant and complainant went to the police station. The offence took place at Tangulbei. There is no OB at Tangulbei.

Pw4 officer at Tangulbei states that at 7.30 pm 2 girls came and reported that a robbery was going on their home and they had identified 1 of the attackers.

Evidence of Pw2, G states that she was sent to the Centre by the complainant to call people that there were people who had come to pick items from their mother's premises.

Pw3 states that she was sent by her mother to go and call the head master and she said that she did not find the head master and she came with the watchman. It is not possible that the 2 girls went to Tangulbei center and reported at 7.30 pm that he was a robbery that there was ongoing.

Evidence of Pw1 does not show that it is the appellant who had come and robbed her.

Complainant was disabled. She did not go to the police station or APC Offices to tell that it was the appellant.

Source of lighting

Moon light. The trial court did not establish the intensity of the moonlight. Was it enough for identification.

Evidence of Pw2, Pw3 and Pw1 was that the robbers stood at the verandah. If they were using the moon light the issue of moonlight ought to have been addressed so as to establish the amount of moonlight which was reflecting or cast on the verandah. The solar light has also not indicated as to whether it was in the house or the verandah.

The issue of the voice was not shown to the different from other people. It is merely dock identification which is unsafe.

Proof beyond reasonable doubt

Material contradiction between Pw1, Pw2 and Pw3.

Pw1 said she came out of the building and went to downstairs because it was very hot. He saw 2 people and thought they were customers.

Pw3 said they entered the house together with the robbers which is not true. Evidence of Pw2 states that at the time she was preparing food and saw 2 people in verandah. It is not explained which kitchen. It is not shown how they could see after shortly coming out of the kitchen.

Pw1 is disabled and she never woke up from where she was.

A phone was shone to her. It was dark and the robbers were using torches. Identification is difficult.

Pw2 and Pw3 were coached witnesses. Their evidence is word for word, the same.

The prosecution did not prove that it was the appellant who robbed the complainant as no ID parade was conducted.

Appellant went to the APC after hearing rumors that he had robbed the lady who is a neighbor.

Pw2 was called to the station to identify the appellant. "I was asked whether it was willing and I confirmed it was willing".

There was no proper identification.

The prosecution failed to prove robbery as the charge as read. Evidence of Pw1, Pw2 and Pw3 is that no firearm used either before or after nor alleged robbery.

It was stated that the appellant was holding a fire arm. The appellant gave out the fire arm to someone else. There is no where it is claimed the appellant threatened the complainant or the witnesses. The possession of a firearm is a normal thing. One puts it outside when entering a colleague's house. It was a simple robbery under 296 (1) of the Penal code.

Trial court did not accord the appellant fair opportunity or ample time to prepare his defence under Article 50(2) of the Constitution.

The trial court knew that appellant was facing serious charge of robbery with violence. The court did not warn the appellant on the offence carries a mandatory sentence of death. The court treated the charge as simple charge.

Page 2 of the record. Trial court denied bail to appellant and he was not able to mount his defence and call witnesses.

On the date of hearing of the case, appellant had not been given witnesses statements. The court directed that the accused looks at the statement and proceed.

Appellant was an illiterate person. There was factors on the trial court to allow the appellant mount his defence.

Recovered items

There is no inventory of the recovered items showing that the items were recovered in his presence.

I submit that the trial court erred in not taking into account the appellant defence, which through unsworn explained where he was at the time of the robbery.

Recognition by voice was not analyzed by the trial court.

I refer to Jadiel Nchebere HC at Meru (2005) eKLR.

I urge the court to quash the conviction and set aside the sentence.

Miss Macharia

Appeal is opposed.

Appellant convicted for offence of robbery with violence c/s 296 (2).

Ingredients of robbery with violence were proved.

Pw1 and Pw2 evidence shows the appellant was armed with an dangerous weapon which was an AK47 and in the company of another person who was not arrested.

The fact that AK47 was not recovered does not interfere with the ingredient because the ingredients are based on evidence.

Pw1 and Pw2 were consistent that the appellant was armed with AK47.

Pw4 states that on interrogating the appellant he told them the other one who accompanied him had gone away with the rifle. Pw1, Pw2 and Pw4 corroborate each other.

Identification

Pw1, Pw2 and Pw3 identified Pw1 and Pw2 stated that they had knew the appellant for a long time and he was their neighbor. There was a conversation when the appellant asked for his phone. Pw2 also heard the appellant ask for the phone and they were able to identify him by voice.

Pw2 testified that there were 2 people who robbed them although it was at 7.30pm they testified that there was solar light and they were able to identify the appellant.

Pw1, Pw2, Pw3 were consistent on the clothes that the appellant was wearing on the material night.

Pw1-Pw3 stated that he was wearing a red shuka and an Askari Jacket.

Pw1 and Pw2 stated that we were 2 people who robbed them and they were able to identify one.

If the witnesses sought to implicate the appellant they would not have talked about the other one.

Time of 7.30 pm

None of the witnesses said that they used a watch and that they knew the exact time. Time does not have to be exact. The robbery took place at around 7.30pm and at about the same time they reported to the police.

Pw1, Pw2 and Pw3 gave the same report and even gave the name of the appellant.

There were 2 people out of whom was Willy and they could not identify the other person.

Appellant took himself to the administration police. He told the police that he had rumors that he was not one of the people who robbed Pw1.

Pw4 testified that when the appellant was arrested he led the police to the bush where he had hidden 3 chargers belonging to Pw1. One of the chargers had the name Saana which is the name of the complainant.

The other items which were 3 phones and inverters were not recovered.

The police could not have known where the chargers were if the appellant had not taken them.

Preparation of defence

At page 23 of the proceedings ruling on case to answer was delivered on 25/4/12 and defence was given on 16/8/12. It was almost 4 months which was enough to prepare for defence.

Threats by appellant with rifle

Seeks to justify appellant having a rifle. The appellant did not have to mention anybody.

We refer to case of Daniel Njoroge Mbugua v. R (2014) e KLR referring to ***Oluoch v. R.*** *the fact that he was armed is sufficient.*

The threshold of the charge has been met by the prosecution evidence overwhelming.

Mr chebii in reply

The use of threat is not there. It has not been proved the appellant was armed. These are mere allegations.

Identification

Pw4 did not go to the appellant's house to check the green Jacket and the red Shuka as proof that the appellant was the attacker.

The witnesses did not express surprise that the appellant whom they knew was wearing a red Shuka.

There is no confession that it was Wareng who was armed.

Appellant's time to prepare defence

Defence starts from the plea not from the time he was found to have a case to answer. He should have been given the statements early so as to call the witnesses. He was not facilitated.

Even the ruling does not show that he submitted under section 210 of CPC.

There was no proper identification of the appellant. The complainant could have said it was Joel who had robbed. Pw1- Pw3 are relatives.

Issues for Determination

4. The issues for determination in his appeal are, therefore, whether the ingredients of the offence of robbery with violence were proved and if so, whether the appellant was identified to have been one of the robbers.

Analysis of Evidence

5. The evidence of the witnesses before the trial Court were principally as follows:

> *"**PW1***
>
> *I am SS. I stay at Tangulbei. I do dress making and I also charge phones at the Full Gospel Church. I know the accused. He is called Willy. He comes from home. On 2/3/12 I was doing my work. At about 7 pm I went out because of the heat. I wanted to relax. I went downstairs with the girls I stay with. At about 7:30 p.m I heard footsteps. The door was open and the solar light was on. I saw two persons. I believed they were customers. I was able to identify the accused who was known to me. The other one was a stranger. I wondered what Willy was doing as he had a firearm. It was an AK 47. The other man did not have a firearm. My girl asked what they wanted. The girl is aged about 10 years. A torch was shone into my eyes. The accused said he wanted a phone. I asked whose phone and he did not respond. He handed the AK 47 to his colleague and entered the premises. He took an inverter, 3 mobile phones make Kabambe and 2 Nokias. He also took several chargers, CDs. I had inscribed my names of my chargers and others had names of customers. These are the chargers (MFI (i) – ix). They took several CDs. He also took a metal box. The properly taken was worth Kshs.17,750/=. I screamed when he entered the house as my girls ran to seek assistance. As they were going the inverter fell down and broke. They spend about 20 minutes before leaving. Neighbours came.*
>
> *Later I heard a gunshot after the secondary school. Police came to the house and I explained what had happened. I told police one of the phones stolen was mine. The following evening officer of Tangulbei summoned me and I found the accused and another suspect had been arrested. I was shown my mobile charges and I identified them. I was told the accused had led them to where the chargers were recovered. I had known the accused for long.* ***The person who had been arrested was not the one who came to my home with the accused.***
>
> ***Cross-examined by accused***
>
> *You were wearing a reddish bedsheet. My home is 100m from where you reside. I am telling Court the truth. The school is 100m away. It is the police who recovered the charges. I was told you led to the recovery. I recorded this in my statement. I say you very well. It was not a case of mistaken identity.*
>
> *Re-examination*
>
> *The accused was wearing a reddish shake and a green jacket. We were with them for 20 minutes. I was not present when the chargers were recovered. I did not mistake the accused with another as he is known to me and he conversed with us."*

The complainant's evidence was obviously one of recognition of the appellant.

6. Pw2, a thirteen year old child testified on Oath as follows:

> *"**PW2***
>
> *I am GC. I am 13 years old. I come from Tangulbei. I am in Tangulbei. I am in [Particulars Withheld] Primary school in Std. III. I know Sepei. She is my mum. She is not my biological mother. I know the accused. He is called Willy. His home is near ours. On 2/3/12 I was in the kitchen cooking. I was alone. J and mum were outside. I saw two people in the verandah. It was at 7:30 p.m. They went to where mum was. I was able to recognize Willy. The other man I had not seen him before. Willy had a gun. I heard Willy saying* ***"Lete Simu! Lete Simu!"*** *Mum asked whose phone he wanted. Willy did not answer. He gave the other man the gun and entered the house. My mother told me to run to the Centre to call people. I went with Adoke. The Centre is Tangulbei. I went home. When I got home I saw many people. I did not find the accused and his friend. After sometime the people who had come went. Later police came. On Saturday I heard Willy had been arrested. I went to the police station.*
>
> ***I was asked if it was Willy, who had come to steal and I confirmed he was the one****. My mum lost her phones, inverter, a box and chargers. I cannot identify them.*
>
> ***Cross-examined by accused.***
>
> *I moved out of the kitchen. You were wearing a red shuka and an askaris jacket. I am telling Court the truth. I ran to the police. Others were sent to school.*
>
> ***Re-examination***

When he came and talked to my mum I was able to identify him as there was light and I also know his voice.

It is noted that despite her tender age of 13, no *voire dire* was conducted. I consider, however, that the default only goes to the weight to be given of her testimony not to her competence to testify. The Court shall in caution seeks corroboration of her evidence even though it was given on Oath. See section 19 of the Oath and Statutory Declarations Act and 124 of the Evidence Act.

7. Pw3 was a 10 year old child of the complainant who gave evidence upon being **affirmed**, the trial Court finding upon a *voire dire*:

*"Court witness appreciates to ready tell the truth. She shall be **affirmed**."*

8. The trial Court obviously erred in assuming that affirmation is the alternative where a child does not understand the nature of Oath. As a matter of law, affirmation is a form of swearing taken by a witness who of course understands the nature of the Oath, but objects from religious or other reason to taking Oath. When a child of tender years, in terms of section 19 of the Oaths and Statutory Declaration Act is possessed of sufficient intelligence to justify reception of the evidence but does not understand the nature of the Oath but understands the duty to tell the truth, she shall give evidence unsworn, not affirmed. Unsworn evidence is generally subject to corroboration under s. 124 of the Evidence Act, cap 80.

9. Pw3 told the Court as follows:

"PW3

I am JC. I am 10 years old. I am in standard II in [Particulars Withheld]. I know that person (accused). He is Willy. He is a neighbor. On 2/3/12 I was standing in the verandah at home. It was at 7:30 p.m. My mother was present and she was chewing sugar cane. G was in the kitchen. While in the verandah two men came. They ordered us to get into the house. I only knew one of them. He is Willy. I recognized his voice. There was also moonlight. When they entered the house I was sent to call the headmaster. I went. I found the watchman and explained to him. He called the headmaster on his phone and he said he was mteja. I went home with the watchman. I found very many people. The accused and the other men were not there. Later police came. Willy took 3 phones, CDs, Chargers and a box. They also took an inverter. Later I heard Willy had been arrested. I did not go to see him. I recorded a statement with the police. I saw Willy well. He was wearing an askaris jacket and a shuka. He had a gun. It had wooden parts. He gave it to the other man before he entered to take the things.

Cross-examined by accused

I recognized your voice first. I know your voice well. I am telling the truth.

Re-examination

I know the voice of Willy. I knew him at the Centre. I have told Court the truth."

Pw3 also asserted to have recognition of the appellant.

10. Pw4, was the arresting Police Officer to whom the first report of the robbery was made as follows:

"PW4

I am No. 235379 APC Olesina Richard Rutto. I am attached to Tangulbei DO's office. On 2/3/12 at 7:30 p.m I was on duty with APC John Ng'ang'a when two girls came and reported a robbery was going on at their home and they had identified one of the robbers as Willy who was known to them. We booked the report and proceeded to their home. We found their mother who said 3 mobile phones, inverter, chargers, CDs and a box had been stolen. When we arrived the robbers were gone. The following day Willy came and said he had heard he had been mentioned. We arrested him and started interrogating him and he led us to a bush where we recovered some chargers. I was with APC Ng'ang'a. these are the chargers. The chargers were hidden in the bush. They were covered by a stone. We took the chargers and called the complainant who came and identified the chargers. We did not recover the other items. We interrogated the accused on who the second man was and he gave us the name of Lokware Nakepel. We were not able to get him. We did not recover the firearm. The accused said the firearm was with Lokware. I recorded my statement.

Cross-examined by accused

It is not correct we followed footprints to recover the chargers. It is you who led us to where we found them. We did not beat you up so that you can produce the AK 47.

Re-examination

The accused led us to where he had hidden the items. We did not beat up the accused."

11. Pw5, the Investigating Officer produced the chargers allegedly stated from the complainant and recovered as follows

*"**PW5***

I am No. 74675 PC Johnstone Changole. I am stationed at Loruk police station. I am the Investigating Officer of this case. On 5/3/12 I was in the office when AP Officer from Tangulbei DO's office came with the accused and the complainant. It was alleged the complainant had been robbed off chargers, 3 phones, inverters, CDs and a box. I booked the report and recorded statements. The complainant is physically disabled. She stated she was robbed of by two persons and she knew one of them who was the accused. We were handed over some charger. One bore the name of Saana. This is the complainant's name. Another charger had the name of a customer. Other items were not recovered. It was alleged the accused had an AK 47. We were not able to recover the firearm.

The chargers we received are these ones. Only one had her name (identifies it). I wish to produce the chargers (PEX. 1 (a) – (ii). Later I charged the accused. I did not visit the scene as it was far and accessing there is difficult. The scene is roughly 50 kms. Form here.

***Cross-examined by accused**: Nil*

***Re-examination**: Nil"*

12. When put on his defence, the appellant gave an unsworn statement raising an alibi as follows:

*"**DW1***

I am Willy Joel Makudo. I stay at Tangulbei Centre. I am a herdsman. I know the charge facing me. It is not correct I robbed the complainant. On 2nd March 2012 I went to the market when I was called by a lady livestock trader who asked me to go and take her animals to her home. I was agreeable and even slept there. The following day I went to the market where I heard that there had been a robbery at the market and I was being mentioned. Since I was innocent I took myself to the police to clear my name. The police started beating me and even hanged me. Later I was charged. That is all."

Whether ingredients of the offence of robbery with violence proved.

13. I do not agree that carrying a gun is a way of life for the inhabitants of the area where the offence was committed and that, therefore, carrying a gun is not *"being armed with a dangerous weapon purposes of the offence of robbery with violence."* There is no innocent carrying of a dangerous weapon for an AK 47 gun during a robbery. That the appellant handed the gun to the colleague before entering the house is intentional.

14. As elaborated in ***Daniel Njoroge Mbugua v. R*** (2014) eKLR citing ***Oluoch v. R*** (1985) KLR, one of the ingredients of robbery with violence is that the offender is armed with any dangerous and offensive weapon or instrument, and the other is that the offender is in the company of one or more person or persons, never mind the third ingredient *"at or immediately before or immediately after the time of the robbery the offender wounds, beats, ...or uses other personal violence to any person."*

15. In this case, evidence points to the presence of the first two alternative ingredients - that of having of an armed with a dangerous weapon, namely an AK 47 gun and the offender accused herein being in the company of one other person at the robbery, as stated by Pw1, Pw2 and Pw3.

16. There was evidence of theft chargers, mobiles and other items and recovery of chargers, and the ingredient of stealing in the offence of robbery with violence was clearly proved.

Identification of the appellant

17. Reliance was placed by the Defence of the qualification of recognition as being more reliable than identification of a stranger *"that mistakes in recognition of close relatives and friends are sometimes made"* as observed in ***R v. Turnbull*** (1976) 3 ALL ER. 549, 552 cited in ***Ahmed Dima Huka & 2 Ors v. R*** Court of Appeals Criminal Appeal no. 117, 135 and 114 of 2003 Nyeri and I respectfully agree.

18. However, in this case it was a doubtable identification case of visual identification and recognition as there was solar light on by which the Pw1 saw 2 persons of whom she identified the appellant who was known to her as a person from home area and the other who was a stranger. The attacker had conversation with the witness when he demanded mobile phones from the complainant in response to a question by one of the complainant's daughters as to what the attackers wanted, and they were with the attackers for 20 minutes according to Pw1. There was ample opportunity and means with the solar lighting on for the witness to visually identify the appellant who they knew as a *"person from home"* and as well recognize him during their interactive conversation.

19. The appellant's alibi that he was elsewhere does not outweigh the sworn testimony of the Prosecution witnesses that place him in the robbery.

Corroboration of the evidence of Pw2 and Pw3.

20. As minors who gave sworn and unsworn testimony, the evidence of Pw2 and Pw3 is subject to corroboration. I find the evidence of their mother Pw1 who witnessed the robbery and that of Pw2 to whom a first report of the robbery was made by the two girls to corroborate their evidence of the robbery. Similarly, the recovery of chargers with the complainant's name on them also support the evidence of the robbery

given by the 3 eye-witnesses.

21. A plea of not guilty was entered was entered for the appellant and the matter proceeded to full trial on the evidence, and there is no merit in the ground No. 10 of appeal in Amended Petition of Appeal that:

> *"10. The learned trial Magistrate erred in law and facts by convicting the appellant on a charge whose plea was not [un]-equivocal and/or the learned trial Magistrate failed in his duty to warn the appellant that the charge he was facing carries a mandatory death sentence."*

22. It is also not accurate that the trial Magistrate failed *"to accord the appellant [ample] time to prepare the defence,"* as complained in ground no. 9 of the Amended Petition of Appeal. Plea was taken on 6/3/12, the appellant pleading not guilty. On 23/3/12, the trial Court minuted on request for statements by accused that:

> *"The accused has been supplied with copies of the witness statements and any other documentary evidence that the prosecution intend to rely on the cost be met by the accused."*

23. On return date of 19/4/12, the proceedings were as follows, and it was clear that the appellant was supplied with statements and he, despite Prosecution conceding an adjournment, chose to proceed with the trial after perusing the statements:

> ***"19/4/12***
>
> *Coram:*
>
> *Before: S.M. Soita (SPM)*
>
> *CP: CPL Nzemia*
>
> *CC: Nabori*
>
> *Accused: present*
>
> ***Prosecution:***
>
> *I am ready to proceed with two witnesses.*
>
> ***Accused****: I will not be ready to proceed as I have not been supplied with copies of witnesses' statements. I did not have money to procure them in time. I pray for an adjournment.*
>
> ***Prosecution****:*
>
> ***I will not oppose the application***.
>
> ***Accused****:*
>
> ***I can peruse the statements and we proceed***.
>
> ***Court****:*
>
> *Let accused peruse the statements and we proceed.*
>
> ***S.M.S SOITA***
>
> ***SENIOR PRINCIPAL MAGISTRATE***
>
> ***Later:***
>
> *Coram:*
>
> *Before: S.M. Soita (SPM)*
>
> *CP: CPL Nzemia for prosecution*
>
> *CC: Nabori/Nabori*

Accused: present

Accused:

I am now ready to proceed.

Court:

We shall proceed.

S.M.S SOITA

SENIOR PRINCIPAL MAGISTRATE"

I do not find that the appellant's right to adequate time and facility to prepare for his defence under Article 50 (2) (c) of the Constitution was violated in this case where the appellant elected, despite opportunity to have the trial adjourned for the purpose of preparation for the trial, to proceed forthwith upon perusal of the witness statements.

Orders

24. Accordingly, for the reasons set out above, this Court finds the appellant was properly convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code .

25. On the sentence, however, the trial Court appeared to proceed on then prevalent view of the law that the death sentence was a mandatory sentence, following ***Joseph Mwaura & Ors v. Republic*** by the Court of Appeal five Judge bench (2013) eKLR.

26. The point having now been clarified by the Supreme Court in ***Muruatetu v. R*** (2017) eKLR that the death sentence is not a mandatory sentence, the Court will review the sentence to commensurate with the level of the appellant's blame-worthiness in the offence.

Sentence

27. In this regard, this Court considers that the appellant did not beat, wound or injure any person during the robbery despite being armed with a dangerous weapon namely AK 47 and that the value of the stolen items being mobile phones and chargers was modest at Ksh.17,750/= only. I have also noted the mitigation that appellant was 20 years and bread winner for his family.

28. I would consider that an imprisonment for a term of 7 years would permit rehabilitation of the offender and allow his early release to be able to participate in nation-building and taking care of his family. The sentence shall run from **18/10/2012**, the date of conviction and sentence in the trial Court.

29. By that Count, the appellant has been in custody for close to 7 years since sentence, and over 7 years 3 months since arrest on 5/3/12. With remission, the sentence of imprisonment for seven (7) years (84 months) is fully served at 56 months or $4\,^1/_2$ years jail time, and the appellant has, therefore, fully served the sentence of imprisonment for 7 years.

Further Orders

30. Accordingly, there shall be an order for the immediate release of the appellant unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 12TH DAY OF JUNE 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S M.K. Chebii & Co. Advocates for the Appellant.

Ms. Macharia, Ass. DPP for the Respondent.