



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 60 OF 2017

(CORAM: HON. R.E. ABURILI - J)

AUSTINE OWUOR ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against Judgment, conviction and sentence in Siaya Law

Courts vide Siaya PMCR Case No. 1080 of 2016 dated 29/6/2017 before

Hon. T.M. Olando, SRM) (Originally Ukwala SRM Cr. Case No. 22 of 2016)

JUDGMENT

1. The Appellant **Austine Oduor Onyango** was vide *Siaya PM Cr. Case No. 1080/2016* originally *Ukwala SRM Cr. Case No. 22/2016* charged with the offence of Robbery with violence contrary to **Section 296(2) of the Penal Code**.
2. It was alleged that on 1/11/2016 at Ramunde Village, Got Osimbo sub-location, Ugunja Sub-county within Siaya County, he robbed Josephine Atieno Owino of Kshs. 1,550/= and a mobile phone make NOKIA valued at Kshs. 2,000/= immediately at the time of such robbery wounded by strangling her.
3. The Appellant pleaded not guilty to the charge and the trial commenced at Ukwala SRM's court where 2 prosecution witnesses testified before Hon. R.M. Oanda, SRM who was transferred midway. As the then Presiding Magistrate who remained in the station Hon. Adhiambo was a close relative of the appellant, she could not continue with the trial hence she disqualified herself from hearing the case. Her colleague in the station was a Resident Magistrate, without jurisdiction to handle the matter. Consequently, the matter was referred to the High Court at Siaya where Hon. Makau J directed that the trial be conducted at Siaya PM's court.
4. On 26/1/2017 directions were given before Hon. T.M. Olando under Section 200 of the Criminal Procedure Code. The Appellant urged the court to proceed from where the matter had reached. The trial proceeded with the prosecution calling a total of 4 witnesses. In his defence, the Appellant gave sworn testimony denying the charge. He did not call any witness.
5. This being a first appeal, as required by law, I must re-evaluate and reassess the evidence adduced in the trial court and arrive at my own independent conclusion taking into account the fact that I neither saw nor heard witnesses as they testified. See **Okeno vs Republic [1912] EA 32**.
6. Revisiting evidence before the trial court, which evidence was very brief, PW1 Josephine Atieno Owino testified that on 1/1/2016 she left church, made tea and was called by one of her fellow church members who had been operated on so she went to see her at Ramunde. At 7.00 pm, while on her way back, she met the Appellant, greeted him but he did not answer. Instead, she saw him follow her from behind at high speed. He caught up with her at a bridge, held her from behind, she tried to scream but he held her by the neck, lifted her and threw her into the bridge. She pleaded with him not to kill her.
7. PW1 stated that the appellant is a person she knew and that as it was not very dark, she was able to see him very well as she used to work for his mother. That he had a deformity and that at that time he was stark naked. She stated that she had Kshs. 1,500/=, a handkerchief and a NOKIA Phone which the Appellant took. She then crawled from the waters and when she saw that he had vanished, she screamed for help. She then walked to her home and called the "Give Direct" people and told them that her phone had been stolen.
8. The following day on 2/1/2016 she reported the matter to Mr. Odero her Clan elder who advised her to report the matter to the police so she reported to Sigomere Police Station, she was given a P3 form which was filled at Ambira Hospital.

9. In cross examination by counsel for the Appellant Mr. Ingosi, PW1 reiterated her testimony in chief and stated that that evening was the first time that she had seen the appellant naked and that he only stripped himself naked after she had passed him. She stated that she struggled with the appellant in the waters as she held the money and phone wrapped in the handkerchief. She stated that she had withdrawn her money from "Give Direct". She stated that she used to do menial work for the appellant's mother.

10. **PW2, Cleophas Odera Rambo** testified that on 2/1/2016 he was at his home when PW1 the complainant went to him as a Clan elder and reported that on 1/1/2016 she had been robbed on her way home and that she knew her assailant. He advised her to go to hospital and report to the police station. He stated that he knew the appellant. He later recorded his statement. On being cross examined by Mr. Ingosi Advocate, PW2 stated that the appellant had never committed any offence in the village. He also stated that he knew the Complainant Josephine.

11. **PW3, Howard Okeno** a Clinical Officer from Ambira Sub-county Hospital testified and produced P3 form and clinical notes for PW1. He stated that on 2/1/2016 PW1 he went to Sigomere Health Centre where she was treated for assault by a person known to her. She had pain on the head, throat and right arm, and a swelling on the neck. She was treated for soft tissue injuries for assault and strangling. Her P3 form was filled on 6/1/2016, assessing the injuries as harm. In cross examination, the witness reiterated his evidence in chief.

12. PW4 No. 43479 PC Jemima Mwori from Sigomere Police Station testified that on 2/1/2016, she was at the station when the complainant reported that she was robbed on 1/1/2016 on her way back home from visiting her friend. That she was robbed by the appellant who held her by the neck and pushed her down and took her NOKIA phone valued at Kshs. 2,000/= and cash 1,550/= and that she was injured on the neck. PW4 referred the witness complainant to hospital and issued her with a P3 form which was taken to Ambira Hospital for filling. She recorded witness statements and later the Appellant was arrested on 13/1/2016 in his home and charged. In cross examination, PW4 stated that the Complainant knew the Appellant from childhood and that she worked for the Appellant's family.

13. On being placed on his defence, the appellant who was self-represented during the second phase of his trial at Siaya Law Courts gave sworn testimony and stated that he was from Bar Osimbo and a businessman. He stated that he was arrested on 13/1/2016 at 4.00 am by people who knocked at his door and identified themselves as police officers, who took him to the police station and charged him with the offence of robbery with violence which offence he did not know. He stated that there was ambiguity on his identification as he has a deformity on the left hand which is weak and cannot hold an object yet the Complainant stated that her attacker had a deformity on the right hand.

14. On being cross examined, the appellant stated that it had been a year since he had been charged and that he did not give the police any explanation on where he was.

15. In his judgement dated 4/7/2017, Hon. T.M. Olando found the Appellant guilty of the offence of Robbery with violence as charged. He convicted the appellant and sentenced him to death.

16. It is that judgment which the appellant by his Petition of Appeal filed on 6/7/2017 is challenging before this court.

17. The petition of appeal set out 6 grounds of appeal. At the hearing of the appeal which was canvassed by way of written submissions, the appellant filed supplementary grounds of appeal which he urged on. I shall therefore determine this appeal on the basis of the supplementary grounds of appeal as argued by the appellant in his written submissions which he highlighted orally. The grounds of appeal are:

(1) That the trial court erred in law by the convicting on a defective charge sheet.

(2) That the trial court failed to consider that the circumstances prevailing during the alleged offence could not warrant a positive identification.

(3) That the trial court failed to consider that the first report had nothing to link the appellant with the alleged offence.

(4) That the trial court failed to consider that the prosecution case was full of inconsistencies.

(5) That the trial court unjustifiably awarded an excessive harsh sentence.

18. In his submissions in support of the above grounds of appeal, the appellant submitted as follows: -

(1) On the ground one that the charge sheet was defective, the appellant contended that the charge sheet on record does not disclose the offence of robbery with violence contrary to Section 296(2) of the Penal Code and as defined under the said section.

19. In the view of the appellant, the charge should have stated whether the attacker was armed with any dangerous or offence weapon or instrument. Further, that the complainant's testimony does not indicate that the attacker was in company with another hence the evidence on record does not support the elements of the charge.

(2) On identification, the appellant submitted that as the complainant claimed that she was attacked at 7.00 am which is ordinarily usually dark, then there was no clear light to facilitate positive identification of the attacker. That PW4 was not given any description of who the attacker was and whether he had any infirmity. That the complainant did not explain how the robbery was executed and how the money and phone allegedly robbed were retrieved from her.

20. According to the Appellant, the P3 form for the complainant shows that she was assaulted by unknown person.

(3) **On first report** the appellant submitted that there is no reason why the complainant after being attacked on 1/1/2016 only reported to the police on 2/1/2016 and was sent to hospital on 6/1/2016. That the treatment notes used by PW3 to fill the P3 form have no date and neither do they disclose the kind of treatment administered to the complainant.

(4) **On inconsistencies**, the appellant submitted that in the Medical Report, the victim alleges to have been strangled which according to the Appellant, was impossible because he has a disabled hand with a permanent fracture, which renders it very weak. Further, that the P3 form claims that the injuries were caused by a blunt object which is inconsistent with the complainant's evidence that the attacker did not use any weapon against her. The Appellant further claims that there is no reason why he was not arrested immediately yet the victim claimed that she knew the appellant very well, and that in any event, there was no evidence that he was ever at 'large' to warrant him being arrested on 13/1/2016. He claims that there was a plan to incriminate him during that period.

(5) **On the harshness of the sentence**, the appellant submitted that the trial court failed to consider sentence guidelines, his mitigation and proceeded to proclaim that the only sentence for the offence was death which violated **Section 329 of the CPC** and against the spirit of **Articles 27(1)(2), 25(c) and 50(2)(p) of the Constitution**.

(6) **On Section 207 of the Criminal Procedure Code** the Appellant alleged that the trial court never complied with **Section 207 of the Criminal Procedure Code** on taking of the plea hence the appellant's right to a fair hearing was violated.

21. The appeal was opposed by the Respondent represented by Senior Principal Prosecution Counsel, Mr. Okachi who submitted that the charge sheet was clear and consistent with the law.

22. **On identification parade**, it was submitted in contention that the same was done professionally and in a manner acceptable to the appellant. That he never protested hence he cannot protest at this stage.

23. **On the question of first report and P3 form**, the Prosecution Counsel submitted that the medical expert gave details of how a P3 form was filled and the source of the information.

24. **On alleged inconsistencies**, it was submitted that the Appellant had not raised any such inconsistencies in the P3 form or the evidence adduced which was not rebutted.

25. **On alleged harsh sentence**, it was submitted that the sentence imposed was in accordance with the law.

26. **On alleged breach of Section 207 of the Criminal Procedure Code**, it was submitted that the court did not abdicate its duty. Counsel urged the court to dismiss the appeal.

27. In a brief rejoinder, the appellant submitted that in this case, no parade identification was carried out because the complainant stated that she knew the appellant. He urged the court to consider the entire trial court record as his trial was delayed due to the back and forth conduct of proceedings from Ukwala to Siaya Law Court.

28. This judgment ought to have been delivered on 26/3/2019 but this court was engaged in serious judgment writing in three Judge Bench constitutional Petitions hence the delay in judgment delivery.

DETERMINATION

29. I have considered the evidence adduced before the trial court, the grounds of appeal and the submissions for and against the appeal. In my humble view, the following are the main issues for determination in this case.

(1) **Whether the charge sheet is defective.**

(2) **Whether the complainant positively identified her attacker.**

(3) **Whether there were inconsistencies in the prosecution's case.**

(4) **Whether the death sentence meted out on the appellant was excessively harsh.**

(5) **Whether the appellant's rights to a fair hearing were violated.**

(6) **Whether the Prosecution proved their case against the appellant beyond reasonable doubt.**

30. On the first issue of **whether the charge sheet was defective**, the Appellant laments that the charge sheet does not disclose the offence of robbery with violence and that neither does the prosecution evidence meet the threshold of proving the ingredients of the offence of robbery with violence because the offender was not armed with any dangerous or offensive weapon.

31. A charge can also be defective, if it is at variance with the evidence adduced in its support. **Archbold on Criminal Pleadings, Evidence and Practice at page 52 para 53 40th Edition was cited in Yongo V R (1983) eKLR** as follows: -

"In England, it has been said:

An indictment is defective not only when it is bad on the face of it, but also:

(i) when it does not accord with the evidence before the committing Magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or offense not disclosed in that evidence or fails to charge an offence which is disclosed therein,

(ii) when for such reason it does not accord with the evidence given at the trial.”

32. Section 137 of the *Criminal Procedure Code* provides:

“The following provisions shall apply to all charges and information, and notwithstanding any rule of law or practice, a charge or information shall, subject to this code not be open to objection in respect of its form or contents if it is framed in accordance with this code.”

(a) (i) a count of charge or information shall commence with a statement of the offence charged, called the statement of offence.

(ii) The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible, the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the Section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary;

Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those required.”

33. In the instant case, the charge as framed is that of Robbery with violence contrary to **Section 296(2) of the Penal Code**. Particulars of the charge against the appellant are that:

“Austine Owuor Onyango, on the 1st January 2016 at Ramunde village, Got Osimbo sub-location, in Ugunja Sub-county robbed Josephine Atieno Owino of cash Kshs. 1,550/= and a mobile phone make NOKIA valued at Kshs. 2,000/= immediately at the time of such robbery wounded by strangling her.”

34. **Section 124 of the Criminal Procedure Code** stipulates that: -

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with particulars as may be necessary for giving reasonable information to the nature of the offence.”

35. In *Joseph Njuguna Mwaura & 2 Others Vs. Republic [2013]eKLR*, the Court of Appeal considered what should be contained in a charge sheet where an accused person is to be charged with the offence of robbery and stated as follows: -

“This issue has been dealt with by this court before in Simon Materu Munialo Vs. Republic [2017]eKLR (Cr. Appeal 302 of 2005). This court was confronted with the issue whether a charge sheet citing only Section 296(2) of the Penal Code was sufficient.”

36. The court in that appeal considered the submission that **Section 295 of the Penal Code** creates the offence of robbery, but held that: -

“.....the ingredients that the appellant, and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where This is the section that proves the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.”

37. In the present appeal, the Appellant was charged with the offence of robbery with violence. The particulars of the offence state that the Appellant *robbed the victim of Kshs. 1550/= and a NOKIA mobile phone valued at Kshs. 2,000/= and immediately at the time of such robbery wounded the complainant by strangling her.*

38. It is clear to me that the appellant, according to the charge and particulars given, was not armed with any dangerous or offensive weapon and neither was he in the company of others. He was alone hence the particulars fall in the last part of the ingredients of Robbery with Violence in **Section 296(2) of the Penal Code**. I do not therefore agree with the appellant’s demand that the particulars should have contained the ingredients of being armed with dangerous or offence weapons or being in the company of others. The offence is complete even where the attacker is alone, is not armed with any dangerous or offensive weapon or instrument, but uses personal violence to the victim. Accordingly, the allegation that the charge sheet is defective is farfetched and is dismissed. Furthermore the appellant who was represented by an advocate up to the stage where 2 witnesses testified never challenged the charge sheet. In my humble view, the challenge herein besides lacking merit is an afterthought and the same fails.

39. The Appellant also claimed that *the evidence adduced by the victims did not support the offence or elements of the charge*. This aspect

of challenge will be dealt with in determining the issue of whether the prosecution proved their case against the appellant beyond reasonable doubt that he indeed committed the offence of Robbery with Violence against the complainant.

40. **On whether the appellant was positively identified by his victim since it was at 7.00 pm and dark**, the appellant claimed that as it was dark, the complainant could not have identified him. PW1 testified that it was not dark and that she recognised the appellant very well because she had worked for his mother.

41. The law regarding identification of offenders is that the court must be cautious in considering the evidence of recognition. In **Hassan Abdalah Mohammed Vs. R [2017]eKLR**, the court stated:

“Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested.” The court in **Wamunga Vs. R[1989]KLR 424 at 426** stated:

“where the only evidence against the 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 or before it can safely make it the basis of a convictions.”

In Nzaro Vs. R (1991) KAR 212, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justice convictions.”

42. The factors to be considered in recognition were set out in **Turnbul Vs Turnbull & Others [1976]3 ALL ER 549** that: -

“....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 occasion.

43. Therefore, in this case, the main question is whether conditions for mistaken identity existed.

44. The Appellant wishes this court to believe that 7.00 pm was dark and therefore the complainant could not have positively identified him.

45. The Complainant in her testimony which was brief and to the point was that it was at 7pm and she was on her way back from visit her fellow church member who had been operated on at Ramunde. She met the appellant and she greeted him but he did not respond. She then saw him following her at a high speed and held her from behind at a bridge. She stated that she was able to see him very well as he has some deformity and he was stark naked. She tried to scream but he held her neck and lifted her and threw her into the bridge. She pleaded with him not kill her. He took the items she had kept in her handkerchief being a NOKIA phone and Kshs. 1,550/=. She crawled from the waters and when she could not see him she screamed and walked to her home and called “Give Direct” people and told them that her phone had been stolen. The following day, she reported the incident to the clan elder Mr. Odero who advised her to report to the police. She maintained that the incident took place at 7pm and that she knew the accused before as she used to work for his mother and that it was not yet very dark.

46. From the above testimony, it is clear that the complainant knew the appellant before the incident, met him, greeted him and proceeded on with her journey. There was no contrary evidence that she used to work for the appellant’s mother and so she knew him well. She also stated that it was not yet very dark and that they struggled in the waters.

47. In my humble view, there was no mistaken identity as the complainant was struggling with someone she knew well and even described him as having a deformity. The appellant admits in his submission that he has a deformity on the hand but claims that the hand is weak such that it could not have held her. In my humble view, the complainant was familiar with the appellant, having worked for his mother and having recognised him at the point that she met him and greeted him before he removed his clothes and ran after her while stark naked. He was not masked and as PW1 stated that it was not very dark at 7.00 pm, I find no reason why the Complainant could have framed the appellant with the offence.

48. PW1 also informed PW2 of what the Appellant had done to her and when she made a report to the police at Sigomere, she gave the name of the appellant as her attacker. In my view, the attacker and the victim were very close. They struggled as the victim was trying to free herself from the attacker whom she had known very well. I am satisfied that the circumstances of identification by way of recognition of the appellant were favourable and free from possibility of error.

49. In **R Vs. Eria Sebwato CRA 37/1960**, the court held that where the evidence alleged to implicate the appellant is entirely of identification that evidence must be absolutely watertight to justify a conviction. But as stated earlier, the present case was one of recognition rather than identification and I have satisfied myself that the Appellant was positively recognised by PW1 as the prevailing conditions and circumstances as described by PW1 were conducive to proper recognition. Therefore, the allegation that the complainant did not describe how the robbery took place or how her phone and money were retrieved from her does not arise as the Complainant stated in her evidence in chief and in cross examination that she had kept the items in the handkerchief and that the appellant took them away from her.

50. In addition, the appellant’s allegation that the P3 in part 2 suggests that the complainant was assaulted by unknown person is false. The P3 from produced in evidence clearly shows that the complainant reported to have been assaulted **by a known person, not unknown person.**

51. In the end, I find and hold that the Prosecution’s evidence of recognition of the Appellant by the Complainant was watertight and free

from error of mistaken identity. The ground of appeal thereof fails and is dismissed.

52. **On the ground that although the offence allegedly took place on 1/1/2016 but the report was only lodged to the police on 2/1/2016, and that the victim only went to hospital on 2/1/2016**, I find and hold that the report to the police and the referral to the hospital was not made too late as the offence took place in the evening. The fact that the report to PW2, to the police and hospital were made on 2/1/2016 and not the night of 1.1.2016 does not in itself prejudice the prosecution's case and neither does it prejudice the appellant. The Appellant did not pose any question to the witness victim as to why she reported the incident on 2/1/2016 and not 1/1/2016, the date of the attack.

53. By raising that question on appeal, he is trying to steal a march on the prosecution as he had an opportunity to ask for an explanation which explanation the trial court would have either accepted or rejected. I find the ground of appeal frivolous and an afterthought. It is found to be devoid of any substance. It is hereby dismissed.

54. **On alleged inconsistencies**, the appellant submitted in contention that as his hand is incapacitated, he could not have strangled the complainant as per the P3 form and testimony of the complainant. However, in my humble view, I find no inconsistency in that evidence by PW1 and PW4. PW4 recorded what he was told by PW1 and what he observed. PW1 did not state that the appellant strangled her using the deformed hand and neither is there evidence that to the effect that the Appellant is so incapacitated that he cannot strangle anyone. I saw him during the hearing of this appeal. Though his right hand is deformed, he is muscular and has a very strong built physique with no deformity on the left hand.

55. The Appellant also claims that the P3 form states that the complainant sustained injuries caused by a blunt object and that this contradicts what the complainant stated that the appellant did not use any weapon against her. However, the Complainant was clear in her evidence that the Appellant held her by the neck, strangling her and carried her and threw her under the bridge. In my view, the effect of being thrown into the bridge and being strangled do not require sharp objects to inflict injuries, although if there were sharp stones and other objects in the stream, they could have pierced her.

56. The Appellant also claims that there is no reasonable explanation as why he could not be arrested immediately yet the Complainant alleged that she knew him and that she previously worked for the appellant's mother. That there was no evidence that he was at large hence the incident having been reported on 2/1/2016. That there is no justification for arresting the Appellant on 13/1/2016 11 days later. He claims that the delay was because a plan was being hatched to frame or incriminate him.

57. This court observes that indeed the offence was committed on 1/1/2016, it was reported on 2/1/2016 to the police who referred the victim to hospital for treatment and according to PW4, and the appellant was arrested on 13/1/2016.

58. The P3 form produced as an exhibit shows that the victim was referred to Ambira Hospital on 2/1/2016. The P3 form was filled on 6/1/2016 after the complainant had been treated at Sigomere health Centre as per Exhibit 2, patient's record book of 2/1/2016. When PW4 testified, the appellant questioned him on the time taken to arrest the appellant and the answer was that the police took time to arrest the appellant and the witness stated that the delay was because the P3 form had not been filled. There was no indication that the Appellant was at large. In my humble view, this ground of appeal has no substance as the delay in arresting and charging the Appellant was not inordinate and it was explained. There is also no evidence to show that the prosecution in anyway had no reason to charge him or that he was framed by the complainant. He did not lay any basis for alleging that he was framed, which allegation was made in this appeal and not before the trial court.

59. Accordingly, I find and hold that the ground of appeal by the appellant that there were inconsistencies of various categories in the prosecution evidence is unfounded and unsupported. There were no inconsistencies let alone material inconsistencies in the evidence adduced by the prosecution witnesses to warrant any legal intervention. The ground of appeal fails and is hereby dismissed.

60. On the allegation that **Section 207(1) of the Criminal Procedure Code** was violated and that the trial court failed to consider the appellant's rights to fair hearing, the appellant does not specify how his right to fair hearing were violated.

61. I have perused **Section 207(1) of the Criminal Procedure Code** and it simply provides for how a plea should be taken. The trial record shows that the appellant took a plea which was of not guilty and that is why the case went on to a full trial. This was on 14/1/2016. He did not seek for plea bargain therefore a mere omission of the condition for plea bargain, in my view is not fatal and neither is it prejudicial to the appellant. Accordingly, the ground of appeal fails as no right of the appellant is demonstrated to have been violated.

62. On whether the sentence of death meted out on the appellant is exceedingly harsh and or violated **Articles 27(1)(2), 25(c) and 50(2)(p) of the Constitution or Section 329 of Criminal Procedure Code**, the appellant claimed that the trial court failed to consider the mitigation and went ahead to declare that there is only one sentence for the offence.

63. I have perused **Section 296(2) of the Penal Code** and indeed it provides for only one sentence which is death. Therefore, the trial court did not err in stating so. However, there jurisprudence espoused in the *SC Pet. No. 15&16/2015* in the case of *Francis Muruatetu & Others Vs. Republic* has since changed the landscape of the mandatory nature of the death penalty. The legal position now is that in as much as death penalty is lawful because it exists in our statutes as stipulated in **Article 26(2) of the Constitution**, and therefore the trial court can, in appropriate cases, having regard to the circumstances of each case impose a death penalty, but that the said death penalty is not the only available sentence in such cases where the conviction is for murder or robbery with violence. The trial court must in sentencing take into account mitigations by the accused person.

64. In the present case, the prosecution indicated that the appellant was a first offender and that upon being called to mitigate, he read out to the court *Deuteronomy 19:15 - 12 which says:*

15. Witnesses: one witness is not enough to convict anyone accused of any crime or offence they may have committed. A matter

must be established by the testimony of two or three witnesses.

16. If a malicious witness takes the stand to accuse someone of a crime,

17. the two people involved in the dispute must stand in the presence of the Lord before the priests and the Judges who are in office the time.

18. The Judges must make a thorough investigation, and if the witness proves to be a liar, giving false testimony against a fellow Israelite,

19. then do to the false witness as that witness intended to do to the other party. You must purge the evil from among you.

20. The rest of the people will hear of this and be afraid and never again will such an evil thing be done among you. 21. Show no pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.”

65. Having read and reproduced the above Bible verses and having set out the new jurisprudence in the **Francis Kairoko Muruatetu Petition (supra)**, the next question, before determining the lawfulness of the death sentence imposed on the Appellant is whether the prosecution proved their case beyond reasonable doubt that the Appellant robbed the Complainant and wounded her as per the charge sheet.

66. I have already found that the charge sheet disclosed the offence as charged. It is not in doubt that the identifying witness is one, PW1 and that only her testimony touched on the occurrence of the robbery. No other witness was present when she was robbed and this court has already found that she positively and without any error of mistaken identity she recognized the appellant as her attacker as she knew him very well, having worked for his mother in menial jobs and that it was at 7.00 pm but not very dark.

67. I have found that the circumstances prevailing having regard to the time the appellant took with the complainant were favourable for positive recognition of the appellant and therefore an identification parade was not necessary as she reported to PW2 and to the police with certainty that it was the appellant who had attacked her.

68. In **Oluoch Vs. R(1985) KLR**, the Court of Appeal stated: -

“A fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the condition favouring a correct identification were difficult.”

69. See also **Kiilu & Another Vs. R[2005]eKLR** where the Court of Appeal added: -

“...In such circumstances, whether it be circumstantial or direct, pointing to guilt, from where Judge or jury can reasonably concluded that the evidence of identification although based on the testimony of a single witness can be safely accepted as free from possibility of error.”

70. Apart from the complainant who stated that she met the appellant, greeted him, he did not respond and as she proceeded on, he emerged from her rear, stark naked and attached her and threw her in the waters under a bridge, it was at 7pm and not very dark. The complainant knew the appellant well as a person she had worked for his mother before. Upon being thrown in the bridge, the complainant sustained injuries on her neck and other parts of the body as per the P3 form.

71. **Section 143 of the Evidence Act** stipulates that, **“no particular number of witness shall in the absence of any provision to the contrary be required to prove any fact.”** The trial court stated that he had no reason to doubt the evidence of the Prosecution witnesses. He found that the appellant robbed the complainant of the listed items and used force against her.

72. I have given equal consideration to the evidence of PW1, PW2, PW3 and PW4 as a whole and I find no reason to differ with the findings of the learned trial magistrate, despite the fact that he did not warn himself of the dangers of relying on evidence of a single identifying witness, which identification was by way of recognition.

73. Accordingly, I find and hold that the prosecution proved their case against the accused/appellant that on 1/1/2016 at about 7.00 pm, the appellant robbed the complainant and wounded her.

74. There was no defence of alibi raised by the appellant to the effect that he was not at the scene of crime on the material date and time. It was not his duty to rebut the prosecution’s case against him but in his defence he merely denied committing the offences and narrated how he was arrested on 13/1/2016 at 4.00 pm, a search was carried out and that nothing was found at his home then they took him to the police station and his finger prints were taken then on 14/1/2019, he was arraigned with an offence.

75. The appellant also misapprehended the prosecution evidence to the effect that the complainant claimed that the person who robbed her had a deformation on the right hand yet he was deformed on the left hand which is so weak that it cannot hold an object. The evidence of PW1 was that the appellant had a deformation but she did not specify the type of disability.

76. In the end, I find that the third element of robbery with violence under **Section 296(2) of the Penal Code** was proved against the appellant herein beyond reasonable doubt that (c) or at or immediately before or immediately after the time of the robbery, he wounded the

complainant. Accordingly, I find and hold that the conviction of the appellant for the offence charged was sound and safe. The appeal against conviction is hereby dismissed.

77. On sentence, as earlier stated, there is no mandatory death sentence as stated by the Supreme Court in the *Francis Karioko Muruatetu* case. In this case, the appellant was accorded an opportunity to mitigate and he read the trial court *Deutonomy 19:15-21* which I have reproduced herein. In other words, he was, maintaining his innocence. The trial court reminded him in the sentencing remarks that death sentence was mandatory. This was before the determination in the *Francis Muruatetu* case. However, a constitutional determination by the apex court binds this court.

78. In that regard, I shall resentence the appellant as the trial magistrate who convicted and sentenced him is no longer in the station. Such resentencing shall be done after hearing the appellant's fresh mitigations and a social inquiry report from Siaya County and Ukwala Sub County Probation.

Dated, Signed and Delivered at Siaya, this 22nd Day of October 2019.

R.E. ABURILI

JUDGE

In the presence of:

Appellant, Austine Owuor Onyango

Mr. Namasake, Prosecution Counsel for State

Court Assistants: Brenda and Modestar