REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 125 OF 2018

AS CONSOLIDATED WITH CRIMINAL APPEALS NOS. 126, 127 & 128 OF 2018

ENOCK KIPCHUMBA.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Being an appeal from the conviction and sentence passed by Hon. D. Alego, SPM, in Kapsabet Senior Principal Magistrate's Court in Criminal Case No. 1220 of 2014 dated 26 November 2018)

JUDGMENT

[1] This appeal was filed by **Enock Kipchumba**, (hereinafter, the 1st Appellant) on **10 December 2018**. He was dissatisfied with the decision of the Learned Trial Magistrate in **Kapsabet Senior Principal Magistrate's Criminal Case No. 1220 of 2014: Republic vs. Stephen Kiptanui and 4 Others.** The 1st Appellant was the 4th accused person in that case, in which he was jointly charged with **Stephen Kiptanui Letting** (as the 1st accused); **Silvester Kibiwot Letting** (as 2nd accused), **Levis Kiptarus** (as 3rd accused), and **Bernard Agolla** (as 5th accused). Consequently, this appeal was consolidated with the following three appeals:

[a] Eldoret High Court Criminal Appeal No. 126 of 2018: Levis Kiptarus vs. Republic;

[b] Eldoret High Court Criminal Appeal No. 127 of 2018: Stephen Kiptanui Letting vs. Republic; and

[c] Eldoret High Court Criminal Appeal No. 128 of 2018: Silvester Kibiwott Letting.

[2] The Appellants were jointly charged before the lower court with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code, Chapter 63** of the **Laws of Kenya**; a charge which they all denied. The particulars thereof were that on the **18th day of April 2014**, at about 7.00 p.m. at Lengubei Village within Nandi County, they jointly robbed **William Ruto** of **Kshs. 2,000/=** and that immediately before or immediately after such robbery they used actual violence to the said **William Ruto.**

[3] Upon trial of the facts the Learned Trial Magistrate found the Appellants guilty in a Judgment delivered on **26 November 2018**. The Appellants were consequently sentenced to suffer death as by law provided; and, being aggrieved by that decision, they lodged their respective appeals before this Court. In the case of the 1st Appellant who was the 4th accused before the lower court, he contended that:

[a] The Learned Trial Magistrate erred both in law and in fact in holding that the Prosecution had proved its case beyond reasonable doubt against the weight of the evidence;

[b] The Learned Trial Magistrate erred both in law and in fact in convicting him yet the particulars of the offence had not been established;

[c] The Learned Trial Magistrate erred both in law and in fact in convicting and sentencing him to death, haphazardly relying on uncorroborated, doubtful and insufficient evidence that cannot stand the test of law;

[d] That the Learned Trial Magistrate erred both in law and in fact in heavily relying on the evidence of **PW1** and disregarding the credibility of the Appellant, hence reaching an erroneous decision;

[e] That the Learned Trial Magistrate erred both in law and in fact by failing to find that the Appellant was not properly identified;

[f] That the Learned Trial Magistrate grossly misdirected herself in law and in fact by failing to find that there was no violence at all; and that the Appellant herein was a victim of circumstances;

[g] That the Learned Trial Magistrate erred both in law and in fact by failing to appreciate that it was out of fear for his life that the Appellant went to the Police Station to seek refuge; and therefore, that he did not in any way surrender or admit the crime;

[h] That the Learned Trial Magistrate erred both in law and in fact by not finding that the evidence of forgiveness had no link to the Appellant but to third parties who had no reason to fear for their lives;

[i] That the Learned Trial Magistrate erred both in law and in fact by admitting evidence of citizen arrest of the Appellant without proper investigation to support the conviction and sentence that was passed on the Appellant.

[4] The appeals for the 2nd, 3rd and 4th Appellants were premised on the same grounds aforestated; and thus, it was on the basis thereof that the four Appellants prayed that their appeals be allowed, the conviction quashed, and the death sentence set aside. The appeals were consolidated and argued as such vide written and oral submissions. On behalf of the Appellants, Learned Counsel, **Mr. Mwaka,** relied on the written submissions filed herein by him on **2 May 2019**. He argued the ten Grounds of Appeal under two broad heads; namely, contradictory evidence and identification. In his submissions, Counsel set out specific aspects of the evidence of **PW1** before the lower court to demonstrate that his evidence was marred by contradictions so numerous that he ought not to have been believed by the Trial Magistrate. In like manner, Counsel impugned the evidence of the other witnesses and urged the Court to find that the sum total of the Prosecution case failed to meet the mark set for such cases.

[5] It was the submission of the Appellants that no single Prosecution witness was able to identify any of the Appellants through recognition or otherwise and no description of the assailants was given to the Police at the first instance by **PW1.** Thus, the Court was urged to find that the trial court had no basis for finding otherwise. The Appellants also faulted the trial court for relying on allegations by **PW1** and **PW2** that the parents of the Appellants went to seek forgiveness from the Appellant; contending that the burden of proof was on the Prosecution to prove the charge beyond reasonable doubt. Counsel further urged the Court to discount the evidence of incrimination by co-accused persons, contending that the evidence was improperly obtained from the 3rd Appellant upon interrogation at the Police Station after his arrest. Reliance was placed on **R vs. Turnbull [1976] 3 AllER 549; Maitanyi vs. Republic [1986] eKLR; Cleophas Otieno Wamunga vs. Republic [1989] eKLR; Simiyu & Another vs. Republic [2005] 1 KLR 192; Titus Wambua vs. Republic [2016] eKLR** in urging the Court to find that the consolidated appeals have merit and allow them.

[6] Counsel for the Appellants also took issue with the manner in which the lower court proceedings were conducted. In particular, it was submitted that, although the case was handled by different magistrates, the provisions of **Section 200** of the **Criminal Procedure Code** were not complied with to the letter. According to Counsel, it was not sufficient for the trial court to simply observed the provision by noting that Section 200 of the Criminal Procedure Code had been complied with; but to ensure the requirements thereof were explained fully to the accused persons and their response noted.

[7] Ms. Mumu, Learned Counsel for the State, opposed the appeals, contending that the Prosecution proved its case before the lower court beyond reasonable doubt through its six witnesses. She took the position that the evidence of **PW1** was credible and straightforward; in that he told the trial court that he was on his way home when he was attacked and slapped on the cheek by a person he identified to be the 4th accused (the 1st Appellant herein); and that he was robbed shortly thereafter of his mobile phone and **Kshs. 2,000/=** in cash when his pockets were ransacked by the 1st, 2nd and 3rd accused (the 2nd, 3rd and 4th Appellants. She urged the Court to note the evidence that the Complainant was injured and was treated at **Nandi Hills County Hospital;** and that the treatment notes were exhibited before the lower court.

[8] It was further the submission of **Ms. Mumu** that the Appellants were well identified; and that two of them, namely, the 1st and 2nd Appellants were arrested at the scene; while the 3rd and 4th Appellants surrendered themselves to the Police shortly after the incident. According to her, the Appellants were well known to the Complainant and therefore were well identified as they were not strangers to him. Counsel for the State accordingly prayed for the dismissal of the appeal.

[9] I have given careful consideration to the appeal and taken into account the written and oral submissions made herein by Learned Counsel, being mindful that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. Hence, in **Okeno vs. Republic [1972] EA 32** this principle was expressed thus:

> **"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 court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

[10] Before the lower court, the Prosecution called 6 witnesses in proof of the charge of robbery with violence that was levelled against the Appellants. The Complainant, **William Ruto (PW1)**, testified on **28 January 2015** and told the court that he had gone to the local shopping centre and left for his home at about 7.00 p.m. on the **18 April 2014**; and that on his way home, he was attacked by some people who had been trailing him. In his account, he stated that one of the people asked if he was **Kipchumba** and that when he asked who **Kipchumba** was, he was slapped hard on the left cheek with what seemed to him to be a piece of wood; causing him to lose consciousness momentarily. He then struggled with the people as they ransacked his pockets. In the process they recognized his voice and ran away. He then realized that he had been robbed of **Kshs. 2,000/=** that he had kept in his shirt pocket**.** He raised alarm and the entire village responded, the first of whom were his nephews.

[11] PW1 further told the lower court that, on account of the quick turn out by the villagers, two of the assailants were arrested that night

with the assistance of the area Assistant Chief. He gave their names as **Kipchumba** (the 1st Appellant) and **Kiptanui** (the 3rd Appellant), mentioning that the 3rd Appellant had tried to seek refuge at a neighbour's home before fleeing from there. The 2nd and 4th Appellants later surrendered to the Police. It was further the testimony of **PW1** that he reported the matter to **Lessos Police Station** after being treated at **Emding Medical Clinic**. He identified before the lower court the treatment notes and the P3 Form that he was given at **Lessos Police Station**.

[12] The area Assistant Chief, **David Kipkurgat Songhor** testified that, he was at home on the night of **18 April 2014** at about 7.30 p.m. when he heard screams from the lower part of the village; and that, after some time, the Complainant's brother, **Lukas Rono**, rang him and informed him that the Complainant had been attacked and robbed. He further stated that he immediately proceeded to the scene, on the upper side, and although they made a search for the culprits, they did not trace them in the vicinity. They thereafter found two of the offenders at the bar, one of whom was the 4th accused before the lower court (the 1st Appellant herein). They were arrested and escorted to **Lessos Police Station**; and that upon interrogation, they implicated their three accomplices, namely **Levis Kiptarus** (the 2nd Appellant), **Stephen Kiptanui** (the 3rd Appellant) and **Silvester Kibiwott** (the 4th Appellant). It was further the testimony of **PW2** that on the morning of **19 April 2014**, they went in search of the three but did not find them; and that when they realized that they could not escape, they surrendered themselves to the Police for their safety.

[13] Thomas Sang, a resident of **Kibok Sublocation** testified at **PW3** before the lower court and stated that, he was at home on the **18 April 2014** at about 8.30 p.m. when he was rung by **Teacher Ruto** (the Complainant) and informed that he had been attacked and robbed by some young men. He proceeded to the scene and found the 4th accused already under arrest along with one **Wensta Kimutai**; and that, as people were baying for their blood, they escorted them to **Lessos Police Station**. He also stated that it was within his knowledge that the other suspects surrendered themselves to the Police thereafter.

[14] One of the neighbours of the Complainant, **Elizabeth Chesang (PW4)** testified on **20 November 2015** and told the lower court that she was at home on **18 April 2014** at about 7.00 p.m. when she heard screams from the lower part of their village; and that on going out to check who was screaming, she saw someone at the gate who she identified to be **Stephen Kiptanui** (the 1st accused). She stated that she then asked the 1st accused why he was running away from the scene; and that he told her that he did not want to be wrongly implicated in the crime. **PW4** added that she then sent her daughters, **Joyline Chepkorir** and **Mercy Chepkosgei** to go and find out what the matter was. She was later informed by **Joyline** on the phone that it was **Teacher William Ruto** who had been assaulted and robbed of his money.

[15] PC Kibet Cheruiyot was then based at **Lessos Police Station**. He testified before the lower court as **PW5** and stated that, he was at the Station Lines on **18 April 2014** when he heard some noise from the direction of the Report Office. He asked his colleagues who were at the Report Office what the noise was all about and was told to avail himself at the Report Office immediately. Upon going there, he found the Complainant, **William Ruto (PW1)** with the Assistant Chief of **Kibabet Sublocation, Thomas Sang (PW2)** and other members of the public. They had brought in two suspects, who included the 1st Appellant, on allegations that they had robbed the Complainant of **Kshs. 2,000/=.** He then placed the suspects in custody. He added that, later, other suspects surrendered themselves to the station and were equally placed in custody.

[16] The last Prosecution witness was **Paul Sanga (PW6),** a Clinical Officer at **Nandi Hills County Hospital.** He testified that on **19 April 2014,** he received a P3 Form from **William Ruto (PW1)** who presented himself for examination following allegations of assault. He stated that he examined **PW1** and noted the following injuries, which he assessed to be about one day old:

[a] Tenderness on the right cheek;

[b] Right eye ball was red;

[c] Bruises on upper lip

[d] Canine tooth was loose;

[e] Tenderness on right lower arm.

[17] He formed the opinion that **PW1** had suffered harm and that the probable type of weapon used to inflict the injuries was a blunt object. He filled and signed the P3 Form which he produced as the **Prosecution's Exhibit 1(b)** along with the treatment chits which were marked the **Prosecution's Exhibit 1(a)** before the lower court.

[18] On being placed on their defence, the Appellants denied the allegations against them in their respective unsworn statements. The 1st accused, **Stephen Kiptanui Leting** (the 3rd Appellant herein) told the lower court that on **18 April 2014** at about 7.00 p.m., he heard a distress call and went to the scene where he found the 4th accused (1st Appellant) and **Kimutai** under arrest; and that they were calling his name. He left the scene and went home. The next day he went to the Police Station to report that his life was at risk; and was arrested and charged with the offence of robbery with violence along with his co-accuseds.

[19] Silvester Kibiwot Letting was the 2nd accused before the lower court. He is the 4th Appellant herein. His unsworn statement of defence was that he was at home on **14 April 2014**; and that he never heard any screams or shouts. That on the **19 April 2014** he was arrested at 6.00 a.m. from his home and was taken to the Police Station; and that he equally feared for his life.

[20] The 3rd accused before the lower court was **Levis Kiptarus** (the 2nd Appellant herein). He stated that he was at home at 7.00 p.m. on **14 April 2014** when he heard a distress call and left with his parents to go to the scene. That at the scene, he heard his name being mentioned as a suspect and that was why he presented himself to the Police Station on **19 April 2014**. He was arrested and charged.

[21] The 4th accused, **Enock Kipchumba** (the 1st Appellant herein) told the lower court in defence that he was at the shopping centre till 8.00 p.m. when he heard a distress call; and that as he was about to leave the shopping centre he was arrested by members of the public along with his friend by the name **Kimutai**. He was taken to the Police Station by the Chief and Assistant Chief and was later charged.

[22] There was a 5th accused before the lower court, one **Benard Agolla**, who apparently did not make his defence. The record shows that he jumped bail on **4 December 2017** after the accused persons were placed on their defence. He never attended court thereafter. Nevertheless, in her Judgment, the Learned Trial Magistrate was of the view that he was not inculpated in the crime and accordingly acquitted him under **Section 215** of the **Criminal Procedure Code**. Thus, upon a re-evaluation of the evidence adduced before the lower court, can it be said that the Prosecution proved its case beyond reasonable doubt?

[23] The offence of robbery is provided for in **Section 295** of **the Penal Code,** which provision stipulates that any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery. And, **Section 296(2) of the Penal Code**, the provision pursuant to which the Appellant was charged, stipulates that:

> **"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

[24] In the premises, the Prosecution was under obligation to prove any of the following key ingredients of the charge:

> **[a]** That the four accused persons were armed with a dangerous or offensive weapon or instrument; or
>
> **[c]** That immediately before or immediately after the time of the robbery, they wounded, struck or used any other personal violence against the Complainant.

[25] Upon a re-evaluation of the evidence adduced by the 6 Prosecution witnesses and the defence statements made by each of the Appellants, there is credible evidence to demonstrate beyond reasonable doubt that **PW1** was attacked on the night of **18 April 2014** by a group of men as he was walking towards his home. The time was about 7.00 p.m. and the testimony of **PW1** that he was wounded and robbed of **Kshs. 2,000/=** was not in dispute. He raised alarm and the response of the neighbours was immediate. Hence, **PW3** and **PW4** who are both neighbours of **PW1** corroborated his testimony in that regard, as did the Assistant Chief of the area, **PW2**. The occurrence was reported to **Lessos Police Station** that very night and this was confirmed by **PW5**.

[26] There is, likewise, credible evidence to show that the Complainant was wounded in the course of the robbery. He narrated to the lower court how he was slapped so hard that he momentarily lost consciousness. He added that the following day, both his cheeks were swollen even though he was slapped only once on the left cheek. Thus, he surmised that that was not an ordinary slap by a human hand, but that his assailant may have used a piece of timber. He added that there was a resultant mark that took about one month to heal. The evidence of **PW1** in this regard was augmented by the evidence of the Clinical Officer, **PW6** who examined the Complainant the day following the incident. He stated that he noted the following injuries on the Complainant:

> **[a]** Tenderness on the right cheek;
>
> **[b]** Right eye ball was red;
>
> **[c]** Bruises on upper lip
>
> **[d]** Canine tooth was loose;
>
> **[e]** Tenderness on right lower arm.

[27] Thus, although Counsel impugned the Prosecution evidence in this respect, questioning whether the slap was on the left or right cheek, the evidence of **PW1** is clear that both his cheeks were swollen as a result. It is understandable therefore that in his findings, the doctor noted tenderness on the right cheek. And, whereas there appears to be no clear evidence as to the weapon used by the offenders and whether it was a dangerous or offensive weapon or instrument, ample evidence was presented before the lower court to demonstrate that the offence was committed by more than two individuals; and that immediately before or immediately after the time of the robbery, they struck and wounded the Complainant in order to subdue and rob him. Accordingly, what remains for verification is the issue of identification.

[28] It is manifest from the evidence adduced before the lower court that the offence occurred at about 7.00 p.m. and that **PW1** was the only identifying witness. Hence, the trial court was expected to test the evidence of identification with greatest care to ensure that it was free from mistake; and therefore, safe to support a conviction. In **R. vs. Turnbull & Others [1973] 3 AllER 549,** it was held 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 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?**

[29] Likewise, in **Wamunga vs. Republic [1989] eKLR** the same principle was restated thus:

"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."

[30] The Appellants took issue with the evidence of identification that was presented before the lower court. It was their contention that **PW1** did not state how he managed to identify them; and therefore, that the Trial Magistrate erred in relying on the evidence of **PW1** without an identification parade having been conducted beforehand. However, what emerges from the evidence is that **PW1** and the Appellants, as fellow villagers, were well known to each other. Thus, **PW1** explained that when they recognized him as "Mwalimu" the assailants ran away. And, because **PW1** had recognized them, the 4th accused (the 1st Appellant) who he identified as the person who hit him; was arrested soon after the occurrence. The others thereafter presented themselves to the Police Station and were inculpated in the offence by credible evidence.

[31] In the circumstances, an identification parade was neither necessary nor advisable. It would have served no purpose, granted that the accused persons were all hitherto known to the Complainant. Nevertheless, a pertinent technical issue was raised by the Defence in connection with compliance with **Section 200** of the **Criminal Procedure Code.** That provision states that:

(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummons the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

[32] It was, therefore, the submission of Counsel for the Appellants that there is no evidence that **Section 200** of the **Criminal Procedure Code** was explained to the accused persons by the court; and that the court record only records compliance; and that even then, this was done in the absence of one of the accuseds, namely Accused 5; and further that when he was arrested the same was not done afresh in his presence. According to Counsel, this omission was fatal to the Prosecution case.

[33] A consideration of the lower court record does confirm the Appellants' contention that their trial was handled by two different magistrates. In the premises, there is no question that **Hon. D. Alego, SPM**, who delivered the Judgment only heard the Defence case, having taken over the matter from **Hon. Adhiambo, SRM**, on **21 November 2016**. In the circumstances, it was imperative for the incoming Magistrate to comply with the provisions of **Section 200** of the **Criminal Procedure Code** and explain to the Appellants their rights under **Subsection (3)** thereof. This was not the case.

[34] In **Richard Charo Mole vs. Republic [2010] eKLR**, the Court of Appeal took the firm position that:

"Section 200 (3) (supra) requires in mandatory tone that the succeeding magistrate shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. The duty is reposed on the court and there is no requirement that an application be made by the accused person. The failure to comply with that requirement would in an appropriate case render the trial a nullity. In the case before us, we agree with both Mr. Kenyariri and Mr. Kaigai that the omission to comply with the section was grossly prejudicial to the appellant and the trial was thus vitiated."

[35] The aforementioned decision was followed by the Court of Appeal in **John Bell Kinengeni vs. Republic [2015] eKLR**, in which it was held that:

"…the duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and that failure to comply with that requirement would in an appropriate case render the trial a nullity as section 200(3) requires in a mandatory tone that the succeeding magistrate … shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. In Cyrus Muriithi Kamau and another versus Republic Nyeri Criminal Appeal No. 87 & 88 of 2006 the Court added that the use of the words "shall inform the accused person of that right" in section 200(3) (supra) was clearly meant to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial magistrate and the burden to inform an accused person of the right to have the previous witnesses re-summoned and reheard is placed on the magistrate in mandatory terms…In the light of the above principles the learned succeeding judge's failure to inform the appellant of his rights under section 200 (3) of the Criminal Procedure Code as was mandatorily required of him vitiated the appellant's trial as well."

[36] The rationale for the strict stance was well explained in **Ndegwa vs. Republic [1985] KLR 534** thus:

> **"1. The provisions of section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.**
>
> **2. The provisions of section 200 should not be invoked where the part heard trial is a short one and could be conveniently started de novo. Furthermore, it should not be invoked where witnesses are still available locally and the passage of times was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution.**
>
> **3. No rule of natural justice, statutory protection, evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration.**
>
> **4. The statutory and time honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained.**
>
> **5. A magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanour of all the witnesses."**

[37] In the light of the foregoing, the conviction of the Appellant is untenable. Accordingly, I would allow this appeal, quash the Appellants' conviction, and set aside the death sentence imposed on the by the lower court. Having done so, the the question to pose, then, is whether it would be in the interest of justice to order a retrial herein pursuant to **Section 200(4)** of the **Criminal Procedure Code**.

[38] In **Rwaru Mwangi vs. Republic, Criminal Appea No. 18 of 2006**, the Court of Appeal was of the view that:

> **"Ordinarily a retrial will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not…It is also necessary to consider whether on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result from a retrial…"**

[39] In this matter, the Appellants were arrested on **18 April 2014**. The offence, though aggravated in nature, involved a sum of **Kshs. 2,000/=;** and the injuries were assessed to amount to harm as shown in the P3 Form produced before the lower court. In the premises, I would take the view that the Appellants would be prejudiced by a retrial. Thus, it is hereby ordered that the Appellant be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF OCTOBER, 2019

OLGA SEWE

JUDGE