REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

(ROBBERY WITH VIOLENCE)

H.C. CR. A. CASE NO. 113 OF 2016

DAVID OCHIENG OWUOR...........................APPLICANT

VERSUS

STATE...RESPONDENT

(*Being an appeal against both the conviction and the sentence*

dated 8.9.2016 in Criminal Case No. 119 of 2015 in Siaya

Principal Magistrate's Courtbefore Hon. H. Wandere – PM)

JUDGMENT

1. The Appellant herein, **DAVID OCHIENG OWUOR** was charged before the Principal Magistrate's Court at Siaya, vide Siaya Principal Magistrate's Court Criminal Case No. 119/2015, with the offence of Robbery with Violence contrary to **Section 296 (2) of the Penal Code.** Particulars of the offence are that on the 20th day of February 2015, at Mur Ngiya Sub-Location in Siaya District within Siaya County, the Appellant robbed **GEOFFREY ODUOR NDWARA** of his mobile phone make Nokia Model 105 black in colour, four hundred and fifty shillings and 9 Safaricom cell line all valued at three thousand one hundred and fifty Shillings and immediately before the time of robbery, he wounded the said Geoffrey Oduor Ndwara by striking him.

2. The Appellant pleaded not guilty to the charge and the case proceeded to full trial before Hon. H. Wandere, Principal Magistrate who found the Appellant guilty of the offence of Robbery with Violence and sentenced him to death as prescribed by law. This was on 8.9.2016.

3. On 15.9.2016 the Appellant being dissatisfied with the conviction and sentence meted out on him filed a Petition of Appeal prose setting out five grounds of appeal namely:

> ***(1) That the trial Magistrate erred in law and fact by convicting the Appellant despite the questionable evidence of recent possession.***
>
> ***(2) That the learned trial Magistrate erred in law and fact by convicting and sentencing in a case that was not conclusively investigated and the Prosecutor's evidence was shoddy and unreliable.***
>
> ***(3) That the learned trial Magistrate erred in law and fact by failing to consider the Appellant's sincere defence.***
>
> ***(4) That the learned trial Magistrate relied on single evidence of PW2 to convict and sentence the Appellant without warning herself of the dangers thereof.***
>
> ***(5) That the Appellant cannot recall all that transpired during the trial hence he prays that the trial proceedings to enable him adduce sufficient grounds hence he prays for habeas corpus.***

4. The Appellant urged the Court to set aside the harsh sentence, quash the conviction and set him free and/or make any other order that is fit and expedient for the fair hearing of this matter.

5. The appeal was admitted to hearing and the hearing conducted on 16.5.2018 by myself. In support of the appeal, the Appellant who was

self-represented and who appeared in Court stated that he relied on his written submissions on record to canvas his appeal and the Court adopted the Appellant's handwritten submissions as filed on record as canvassing the appeal.

6. There are two sets of submissions filed on record by the Appellant which are both undated. The Appellant has categorized his grounds as follows in both submissions:

(1) Identification.

(2) Recent possession.

(3) Section 329 of the CPC and contradictory evidence relied on.

7. On the ground of **identification,** the Appellant submitted that the evidence on record during the trial clearly shows that Prosecution witnesses PW1, PW2 and PW3 all alleged to have identified and recognized the Appellant at the scene of crime and the trial Magistrate held so in his findings. However, it was submitted that the alleged recognition is insufficient in law as a basis of conviction.

8. It was submitted that PW1's evidence clearly shows that PW1 was attacked by a person when he came from a bar on 20.2.2015 at a time that is not indicated, and that he was hit on the head and fell down.

9. Further, that later on 21.2.2015 the PW1 claimed that he was told that it was the Appellant who had a phone offering for sale and that he was told that Ochieng was the person who was found with his (PW1's phone).

10. According to the Appellant, the above evidence shows that PW1 did not know the Appellant hence there was need for an identification parade to be held yet no such identification parade was held.

11. It was further submitted that when PW1 reported to Ngiya Police Station that he had been robbed, he did not name the Appellant as having attacked him and that therefore PW1 was not sure of his attackers.

12. In addition, it was submitted that PW3 who assisted PW1 never recorded in his statement that he knew those who attacked the Complainant.

13. It was further submitted that PW5 stated that on 21.2.2015 at 10.00 a.m. an old man reported to the Patrol Base that he was going home from a bar then suddenly, someone emerged from a bush and assaulted him. It was contended that PW5 did not state that PW1 told him of who assaulted him.

14. Further that in any event, PW5 said that the Complainant's son told them that there was someone selling the phone. Reliance was paced on the case of **Simiyu and Another Vs. Republic (2005) KLR 1921** where the Court of Appeal held that there was need for the complainant who says that he previously knew his other attackers to mention their names to the Police, and that the omission on the part of the complainant to mention the attackers to the Police goes to show that the complainants were not sure of the attacker's identity.

15. On the second ground that the trial Magistrate erred in law and fact in convicting the Appellant on the basis of **Recent Possession Doctrine**, it was submitted that the trial Magistrate failed to observe that the Doctrine Recent Possession does not measure to the required standard.

16. It was submitted that albeit the trial Magistrate believed the Prosecution's evidence as adduced by PW5 that they chased the Appellant and arrested him with a phone in his hands, that evidence should not have been used as a basis for convicting the appellant because the Complainant's son who told PW5 that the father's phone was being sold by the Appellant was never called to testify to corroborate PW5's testimony on the issue of recovery of the phone.

17. It was also submitted that no independent witness testified as to the recovery of the said phone. Reliance was placed on the case of **Isaac Nganga Kahiga Vs. Republic Cr. Appeal No. 82/2004** where the Court of Appeal held that before a Court of law can rely on the Doctrine of Recent Possession as a basis of conviction in criminal cases, the possession must be positive proof, first that the property was found with the Accused; that the property is positively the property of the Complainant and lastly that the property was recently stolen from the Complainant, and that in order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property.

18. In this case, it was submitted by the Appellant that PW5 could not prove that they were to arrest the suspect, search him and recover the alleged phone and that there was no inventory list to support the same.

19. Further, that there was no recovery form to support the recovery and that failure to adduce that evidence vitiated the reliance on the doctrine of recent possession relied upon by the trial Court.

20. The Appellant further submitted that the trial Magistrate erroneously convicted him on a **contradictory evidence of the Prosecution witnesses.** On this ground, the appellant singled out PW1 who testified that he knew the Appellant very well by Appearance since there was full moonlight, whereas PW2 stated that the attack was sudden so he lit the torch. Further, that PW1 stated that the person ran away when PW2 raised an alarm whereas PW2 stated that he fled in fear.

21. The Appellant submitted that the trial Magistrate rejected the Appellant's sworn defence without considering it. He urged the Court to

carry out a fresh evaluation of the evidence on record and come up with an independent conclusion free from that of the trial Court, quash the conviction and set aside the sentence.

22. In response the Appellant's submissions, Miss. Odumba, Prosecution Counsel submitted that from her perusal of the proceedings, she was of the view that the case ought to have been one of assault and not Robbery with Violence. She submitted that if the Court agrees with her then it should substitute the charge of Robbery with Violence with that of Assault. She also submitted that there was no identification parade.

Evaluation of Evidence in the trial Court and determination.

23. This being the first Appellate Court, it is imperative that I must examine and analyze all the evidence adduced in the trial Court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including **Kiilu & Another V. Republic [2005] 1 KLR 174** where the Court of Appeal held that:

> ***"An Appellant in a first Appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1st Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not function of the 1st Appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions, only then can it decide whether the Magistrate's finding 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. …."***

24. Therefore, before I analyze the evidence, it is necessary that I summarize the evidence that was adduced in the trial Court.

25. The Complainant, **Geoffrey Oduwo Ndwala,** PW1 testified that he was a farmer from Masundu Uradi Village, Alego Sub-County, and was on 20.2.2013 at a bar with one John Odhiambo. The two decided to leave and on reaching at the Obama Posho Mill, a person emerged and hit him on the head at the right side with an Iron Bar. He fell down and the person strangled him and pulled off the Complainant's clothes. John Odhiambo questioned the person why he was assaulting the Complainant but the person pulled off the Complainant's trouser and shoes. In his trouser, the Complainant had Nokia 105 phone black in colour and KShs.450/-. The phone which was valued at Shs.25000/= had a sim card line No.0728******. The person ran away when John raised an alarm and one Fred, who lived close to the place of the incident went to the scene. The assailant also ran away with the complainant's trouser and shoes. The Complainant was assisted to go home by Fred and later he went to Siaya Hospital and reported the matter at Ngiya, that he had been robbed. The Police issued him with a P3 form which he identified in court.

26. According to the Complainant, the person who assaulted him had been with them at the bar and that he knew him very well by appearance and that he often saw him at the bar.

27. The Complainant further stated that there was full moonlight, and that he saw the assailant approach him and John but that the Complainant did not expect the Assailant to assault him. He identified the Assailant (Appellant in Court).

28. Later on 21.2.2015 the Complainant was informed that the Appellant had a phone which he was offering for sale along the highway. The complainant informed the Police after learning that the Assailant was Ochieng so he went back to the Police at Ngiya. The Police proceeded to the place where the Assailant was said to be offering the phone for sale and arrested him with the phone together with the sim line still inside. He also recognized and identified the phone. He identified the Appellant who was placed in cells and charged with the offence.

29. In cross-examination by the Appellant, the Complainant maintained that it was the Appellant who attacked him and that he emerged from the left side of the road and was dressed in a shirt printed on it "Kangoli" which the Assailant had been wearing at the bar.

30. **John Odhiambo Mafulo** PW2 testified on oath that on 20.2.2015 he was drinking with Oduor Henry and Geoffrey Oduori at about 10 pm when he left the bar with Geoffrey Oduori Ndwara, walking towards home. There was moonlight and close to a Posho Mill called Obama, they suddenly saw someone emerge. As it was sudden, PW2 lit his phone which had a torch and saw that it was David Ochieng. The latter hit the complainant with an iron bar on the head and that PW2 inquired why he was doing so. That he knew the Appellant very well and that the assailant/appellant had been drinking with Pw1 and PW2 at the bar. PW2 fled in fear leaving the Appellant lying on top of the Complainant strangling the latter. Later PW2 learnt that the Appellant had robbed PW1 of his money, phone, clothes and shoes. PW2 identified the Appellant in Court.

31. The following, day the Complainant asked PW2 to accompany him to the Police to record a statement and that he told PW2 that he had been assaulted on his way home and robbed of his trousers, phone and KShs.400/= that night. In cross-examination, PW2 maintained that he saw the Appellant very well as he was dressed in a T-Shirt printed on it Kangoli which was the same that he had on in the bar earlier.

32. PW3 Fredrick Ouma Akello from Uradi testified that on 20.2.2015 he was from his work with a motor cycle when he passed Ochieng near PW3's home and as he, PW3 entered his homestead, he heard someone screaming at the road. He returned to the place and saw David Ochieng, the Appellant herein running away when he saw PW3. PW3 saw someone on the ground with a shirt only. He knew the person and that Ochieng and the person who was on the ground were neighbours so PW3 went to call the Complainant's wife and son. By that time, David (Appellant had escaped.)

33. He saw the Complainant with an injury on the head and bleeding and saying that his attacker had robbed him of his mobile phone and trouser and money. He then escorted PW1 to his home and later took him to hospital. PW3 further stated that on 21.2.2015 he went to Ngiya Patrol Base and that because "they" all knew who the attacker was, they led the Police to arrest the Appellant who was drunk that morning but had the Nokia Phone belonging to the Complainant. The appellant was arrested. PW3 identified the Appellant in Court.

PW3 stated that PW1 was his fellow Villager and that they grew up together.

34. In cross-examination, PW3 stated that his home is close to the road and that he had seen the Appellant as he,PW3 entered his home and soon thereafter, the Appellant attacked the Complainant.

35. PW4 **Sila Oluoch** is a Clinical Officer attached to Siaya County Referral Hospital produced P3 form for PW1 issued by Simon Onderi on 22.2.2015 to patient No. 41000143 claiming that he had been assaulted on 20.2.2015 at 10,30 a.m. by a person well known to him. The Complainant had a tender swelling on his left side of the head and neck. The injury was one day old and the probable weapon used was blunt. The injury was classified as harm. The Medical Report made by Simon Ondieki and signed was produced as P. Ex. No. 1. PW4 stated that Simon Ondieki was away for further studies, in Kisii University and that they had worked together for less than 7 years hence PW4 was familiar with his handwriting.

36. PW5 No. 5050458 **Sergeant Michael Kebere** of Kogelo Police Station testified that on 21.2.2015 an old man went to the Patrol Base at 10 a.m. to report that the previous day at 10 p.m. he was on his way home from a bar when suddenly someone emerged from the bush and assaulted him. PW5 together with his colleague Norman Cherotich accompanied the Complainant and his son. That the Complainant's son told PW5 that there was someone selling a phone close to the road and that his father had been robbed of a phone. The PW5 was shown the Accused person from a distance. He was with 2 accomplices and when they saw the Police, they fled. PW5 gave chase and arrested only the Appellant who was in possession of a Nokia phone. He was searched and found to be in possession of another Nokia phone. The phones were shown to the Complainant who identified one of them, black in colour to be his phone and which he alleged he had been robbed of when he was attacked and that it was in his trouser which the attacker pulled from the complainant and filed with the trouser and phone inside, along with Shs.400/=. PW5 stated that the complainant recognized the Appellant who was his neighbor. The Police then charged the Appellant with robbery with violence. PW5 identified the Appellant as the arrestee and in cross-examination, PW5 stated that the complainant pointed the Appellant to the Police from a distance.

37. When called upon to defend himself, the Appellant gave a sworn testimony and stated that all the charges against him were false and that on 21.2.2015 he was arrested and escorted to Ngiya Police Station then Siaya Court. He denied any knowledge of the charges.

38. The trial Magistrate in her judgment found and held that all the ingredients of robbery with violence were proved by the Prosecution against the Appellant and that the Accused was identified, that he was armed with a dangerous offensive weapon – an iron bar, that immediately before or immediately after the time of robbery he threatened the use of violence and did in fact use violence on the complainant; that the Appellant was well known to the Complainant as they lived in the same neighborhood; that the mode of identification was by recognition and that the accused could not explain how he came into possession of the Complainant's phone, which possession was recent hence the defence by the Appellant was found to be as mere denial. The Appellant was accordingly found guilty and convicted accordingly and sentenced to suffer death.

Determination

39. I have carefully considered grounds in the petition of appeal, the evidence tendered before the trial Court, the findings and decision by the trial Magistrate and the Submissions as filed by the Appellant and the oral response by the Prosecution Counsel. As earlier stated, this being the first Appellate Court, this Court is enjoined to consider and it has indeed considered the entire evidence evaluated it and I must reach my own independent conclusion as to whether I should uphold the conviction and sentence meted out on the Appellant, bearing in mind that I did not hear or see the witnesses as they testified. (**see Okeno V. Republic [1972] EA 32**). In that regard, I have outlined as above the material facts concerning the incident as they emerged at the trial.

40. In the Appellant's Appeal he claims that he was not positively identified by the Complainant and his witnesses; that the Prosecution's case was riddled with material contradictions; that there was no proof of his recent possession of the property (phone) allegedly stolen from the Complainant; and that the investigations into the offence were not conclusive.

41. Having evaluated the evidence as a whole, I find and hold that the essential elements of robbery with violence were proved by the Prosecution. I find that indeed the Complainant was accosted on his way back home from a drinking spree when he was in the company of PW2. He was hit by a person who was armed with an iron rod. He was wrestled to the ground and his trousers pulled off and a Nokia Phone 105 black in colour, KShs.450/= and a Safaricom line all valued at KShs.3,3150/= taken away. The Assailant is said to have fled with the Complainant's trouser and shoes as well when the Complainant screamed and PW3 came to his rescue. and that PW2 fled in fear.

42. I find that the Complainant in the process of being robbed, violence was applied on him by the lone Assailant who was armed with an iron bar which was used to hit the Complainant. PW2 corroborated the testimony of PW1. He stated that he was with the Complainant at the material time and that both had come from the bar on their way home when suddenly they were accosted by a person whom he identified as David Ochieng armed with an Iron Bar and that the said Ochieng had been with the PW1 and PW2 at the bar drinking. That the Appellant then assaulted the Complainant with the iron bar on the head. At that moment PW2 fled in fear and left the Appellant lying on top of the Complainant strangling him.

43. PW3 heard the screams on the road after he had first passed on the Appellant. He rushed back and saw someone on the ground with only a shirt on. He saw the Appellant fleeing from the scene. He found the Complainant injured on the head and he was bleeding, and saying the attacker had robbed him of his mobile phone, trouser and money. PW3 took the Complainant's home.

44. On the aspect of identification of the Appellant as the Assailant and Robber, the evidence of the Prosecution witnesses PW1 and PW2 was clear that albeit it was at 10.00 p.m. at night, there was full moonlight and that in addition, PW2 lit his phone which had a torch and saw the Assailant whom they were drinking together at the bar. The Appellant was still wearing the T-Shirt printed on Kangoli, the same that he had earlier on in the bar. The Appellant was not a stranger to the PW1 and PW2, albeit PW1 was not sure of his name but PW2 knew him very well by his two names as David Ochieng. The Appellant and PW1 and PW2 were neighbours who lived in the same area. What therefore emerges from the above evidence is recognition of the Appellant by PW1 and PW2 and for that reason, this Court does not buy in

the contention by the Appellant that there was no identification parade. An identification parade would have been necessary only where the prosecution witnesses merely identified the accused and not where they were sure that they knew the assailant .

45. PW3 too identified the Appellant by recognizing him. The PW3 had met the Appellant on the way home and shortly thereafter he heard screams from the same place. He returned and saw the Appellant running away after seeing PW3. The PW3 found the Complainant bleeding and lying on the ground and in a shirt only. His trousers were gone. PW1 explained to PW3 what had happened to him and as to who had robbed and injured him.

46. Albeit the Appellant claims that the evidence on identification was wanting, I am satisfied that the trial Magistrate correctly applied her mind on the evidence adduced by the three Prosecution witnesses PW1, PW2 and PW3 and arrived at the correct finding that the evidence was that of recognition as the Appellant was well known to the three witnesses and that the appellant had been drinking with PW1 and PW2 the same evening prior to the attack. The Appellant was not a stranger to the Complainant, PW2 and PW3 hence there was no need for an identification parade in a case of recognition.

47. I have no doubt in my mind that on the evidence adduced by the prosecution witnesses PW1, PW2 and PW3, the Appellant was the Assailant who attacked, injured PW1 and stole from him his Nokia 105 black phone, cash and other items as listed in the charge sheet. I am satisfied that the conditions under which the Appellant was recognized by his victim, PW2 and PW3 in full moonlight and as PW2 had a phone with a torch were favourable and eliminated the possibility of mistaken identity as was held in **Abdalla Bin Wendo V. R [1953] 20 EACA 166** and **Samuel Gichuru Matu Vs. Republic CA NRB Cr. Appeal No. 88 of 2000 (UR).** As the three witnesses knew the Assailant, an identification parade would have served no purpose as the evidence of recognition was sufficient to implicate the Appellant and connect him to the robbery incident.

48. Even if the above evidence of recognition of the Appellant as the Complainant's assailant was to be insufficient, there is further evidence of Recent Possession of the Complaint's stolen Nokia 105 Black phone and sim line which was found in possession of the Appellant and recovered on 21.2.2015 from the Appellant, which was the following morning after the previous night's robbery.In the case of **Isaac Nganga Kahiga alias Peter Nganga Kahiga Vs. Republic CA Nyeri Cr. Appeal No. 272 of 2005,** the Court of Appeal stated:

> ***"It is trite that before a Court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, secondly, that the property is positively proved. secondly, that the property is positively the property of the complainant, thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as was been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."***

49. Upon evaluation of evidence on record, I am satisfied that PW1 identified his Nokia 105 Black in colour which had been stolen from him. PW5 who was in the company of PW1 and PW1's son and Norman Cherotich a Police Officer were shown the Appellant who was close to the road. The Appellant had been spotted negotiating to sell a phone and when the Appellant saw PW1, his son and the two Police Officers from a distance, him and his accomplices ran away but the Police gave chase and arrested him because he had been shown to the Police. They arrested him in possession of the stolen phone. He was holding it in his hands and albeit a search on him revealed that he had another Nokia Phone, the Complainant recognized his Nokia 105 Phone which was produced as an exhibit.

50. Albeit PW1's son did not testify, PW1 was with the Police when they spotted the Appellant and the Appellant taking off on noticing them. PW1 was also present when the Police gave chase, arrested the Appellant and brought him where the Complainant was and at that time he had the PW1's stolen phone which PW1 positively identified, with its sim card still ***insitu.***

51. The Appellant claimed in his petition of appeal and submissions that the trial Magistrate relied on evidence of PW2 a single identifying witness to convict him without warning herself of the dangers thereof. However, the evidence on record shows that besides PW2 who knew the Appellant as a neighbour and who saw the Appellant assault the Complainant, PW3 who had passed on the Appellant on hearing the screams behind him minutes later ran back and when the Appellant saw him, he fled from the scene where PW3 found PW1 lying on the ground, with a shirt only and injured on the head and bleeding. PW1 told PW3 that the Appellant had attacked him. In my humble view, this piece of evidence is watertight on the recognition of the Appellant's Assailant. I therefore find and hold that the contention by the Appellant that the trial court erred in relying on a evidence of PW2 a single witness without warning herself of the dangers of doing so, farfetched.

52. The Appellant further claims that the case against him was not conclusively investigated and that the Prosecution's evidence was shoddy and unreliable. Having evaluated the entire evidence on record, I am satisfied that the testimonies of Prosecution's witnesses were not shaken even in cross-examination and were not contradictory in material particulars. The evidence was cogent and proved to the required standard of beyond reasonable doubt that it was the Appellant who, while armed with an iron rod, attacked the Complainant, injured him on the head and stole from the Complainant the identified items stated in the charge sheet, among others. I find that the testimony of the PW1 and of PW5 on how the Appellant was arrested and found in possession of the Complainant's phone which had been stolen from him the previous night was sufficient to establish the manner of arrest and recovery of the stolen phone and that no other investigations would have conclusively arrived at a different result.

53. The Appellant further claimed that upon his arrest and search, no inventory form was filled on the items recovered from him. As was held in **Leonard Odhiambo Ouma & Another V. R. C.A. Nakuru Cr. Appeal No. 176 of 2009 (UR)** the question of inventory of items recovered and produced is a procedural issue failure to carry out an inventory is therefore not fatal to the trial process. In this regard, am fortified by the Court of Appeal which stated:

> ***"The failure to compile an inventory as contended in ground 5, is in our view, a procedural step which in the circumstances, did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial."***

54. On whether PW1's son who was present during the arrest of the Appellant and recovery from him of the stolen phone should have testified, **Section 143 of the Evidence Act** is clear in its stipulation that:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact."***

55. Accordingly, it is not necessary that all or any particular witness must be called especially where such witness is not material and where, in the opinion of the Court, having regard to all the circumstances of the case such witness testimony would, if admitted, not have been adverse to the Prosecution's case. This is as was held in **Bukenyas & Others VS. Uganda [1972] EA 549** where the Court held that where essential witnesses were not called, the Court was not entitled to draw an inference that if their evidence had been called, it would have been adverse to the Prosecution's case.

56. In the instant case the evidence of the Appellant having been arrested with recently stolen property was proved by PW1 the Complainant and PW5 the Arresting Officer. There was no suggestion at the trial that had PW1's son been called to testify on how the phone was recovered, he would have given exculpatory testimony. Such evidence, in my humble view, would not add or subtract anything from the Prosecution's case which was watertight.

57. This Court is satisfied on the evaluation of the entire evidence that the Appellant was found in possession of recently stolen property namely, the Complainant's Nokia 105 Black and a sim card line insitu, which items were stolen from the Complainant the previous night by the Appellant, a person well known to the Complainant and by means of violent robbery wherein the Complainant was injured on the head when the Appellant/Assailant struck the Complainant with an iron rod. In **Hassan V. Republic [2005] 2 KLR 11**, the Court held as follows, regarding Recently Stolen Goods:

> ***"Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or a receiver."***

58. The Appellant upon being arrested with the Complainant's phone which was positively identified by the complainant, the appellant never laid any claim to the said phone or even to the sim card. In his defence he testified on oath that all the charges against him were false and that on 21.2.2015 he was arrested and escorted to Ngiya police Station then to Siaya Court. He knew nothing about the charges facing him.

59. In my humble view, the evidence on record as adduced by the Prosecution sufficiently proved beyond reasonable doubt that the Appellant was found in Recent Possession of the Complainant's phone Nokia 105 Black and Sim card I find and hold that all the ingredients of recent possession were proved as set out in the case of **Erick Otieno Arum CR A 85/2005** where the Court Stated:

> ***"To invoke the doctrine of recent possession, the Prosecution must prove beyond reasonable doubt each of the following:***
>
> ***(i) That the property was stolen,***
>
> ***(ii) That the stolen property was found in the exclusive possession of the accused;***
>
> ***(iii) That the property was positively identified as the property of the complainant;***
>
> ***and***
>
> ***(iv) Possession was sufficient and record after the robbery."***

60. As has been held time and again, what constitutes Recent Possession is a question of fact that depends on the circumstances of each case including the kind of property, the amount or volume of the stolen property; the ease or difficulty with which the said property may be assimilated into legitimate trade channels and the character of the property.

61. In the instant case, the Appellant was found in possession of the stolen phone the morning after the robbery incident. He was negotiating to dispose it and has not even laid claim to owning the subject phone or how he came to possess it.

62. Albeit the burden of proof in Criminal cases entirely lies with the Prosecution to prove their case against the Accused throughout the trial and the burden does not shift to the Accused, nonetheless the Court of Appeal has made it clears in **Paul Mwita Robi VS. Republic CR. A 200/2008** that ***in a case where one is found in possession of a recently stolen property like in this case, the evidential burden shifts to him to explain his possession. That explanation only needs to be a plausible one but he needs to put it forward for the Court's consideration."***

63. In this case, the Appellant having been found in possession of the Complainant's phone and sim card, the Appellant had a duty to give a reasonable explanation but he gave no explanation as to how he came by the Complainant's phone and sim card. There was no other contrary evidence that the phone and Sim card belonged to the Complainant who had been robbed of it the previous night. The Appellant's defence accordingly and as found by the trial Magistrate, was a bare denial which could not dislodge the Complainant's testimony.

64. The Complainant's report to the police was clear as to what he had lost and he identified the recovered phone as one of the items that he had lost during the robbery, the previous night.

65. Albeit the Appellant contended that the Complainant did not know or identify his assailant, the testimony of PW3 is clear that PW1 went to the Patrol base and reported on how he had been robbed the previous night and how he had learnt that the person who had robbed him was now negotiating to sell the phone stolen from the Complainant.

66. It was at that moment that the Police were shown the Appellant who on noticing them took to his heels but was arrested and the stolen phone found in his possession and identified by the Complainant as his. Accordingly, the submission by the Appellant is misplaced. This Court believes the evidence tendered by the Prosecution as being cogent and not contradictory.

67. The Appellant in his defence of denial of knowledge of the charges facing him never raised the defence of alibi for the Prosecution to have an opportunity to rebut it as was held in **Karanja V. Republic (1983) KLR 501 CA**. I find, in the end, having analyzed and evaluated all the evidence on record, the grounds of appeal and submission and case law relied on, that the Prosecution tendered sufficient evidence to find and sustain a conviction and therefore the conviction of the Appellant by the trial Magistrate of the offence of Robbery and Violence is well founded. I hereby confirm the said conviction, and dismiss the appeal against conviction of the Appellant.

68. The only question is whether this Court can interfere with the Mandatory Death Sentence imposed on the Appellant by the trial Court upon his conviction for Robbery with Violence.

69. The above question brings to the fore the Constitutional debate of whether death sentence is as authorized by **Section 296(2) of the Penal Code** in a conviction for Robbery with violence, unconstitutional and contrary to the general rules of International Law and or Treaties and Conventions ratified by Kenya and if so, whether such Mandatory Death sentence offends the provisions of **Article 26 of the Constitution;** whether Mandatory death sentence erodes the dignity of individuals and arbitrarily deprives Accused persons of his inherent right to life and other fundamental rights and freedoms enshrined in **Articles 24, 26, 28 and 29 of the Constitution** and if so, whether such sentence is unconstitutional; whether mandatory death sentence deprives a Court of Law the discretion and right to consider mitigating circumstances in which an offence was committed, whether the Court in convicting an offender in Robbery with Violence can lawfully pass a minimum sentence or any other lawful sentence other than a mandatory death sentence.

70. The Court of Appeal in **Joseph Njuguna Mwaura V. R.** held that:

> ***"A look at all the provision of the law that impose the death sentence shows that these are couched in mandatory terms using the word "shall". It is not for the Judiciary to usurp the Mandate of Parliament and outlaw a sentence that has been put in place by Kenyans, or purports to impose Kenyans or purports to impose provided in law."***

71. In other words, the court was saying that Courts have no jurisdiction to alter the death sentence and purport to impose another sentence that is not provided for in law.

72. **Article 26 (3) of the Constitution** provides that where the death sentence is provided under any other law, it shall not amount to the deprivation of the right to life. The Supreme Court in **Francis Karioko Muruatetu & Another V. Republic [2017] eKLR** quite recently so held, adopting the Court of Appeal decision in **Joseph Njuguna Mwaura & Others V Reppublic** that Courts do not have discretion in respect of offence which attract a mandatory sentence. The Supreme Court further ordered that albeit the mandatory nature of the death sentence **204 of the Penal Code** (for Murder) was declared unconstitutional, for avoidance of doubt, the order on Constitutionality of a Mandatory death sentence does not disturb the validity of the death sentence as contemplated under **Article 26(3) of the Constitution**.

73. In **William Okungu Kitony Vs. R. [2018] eKLR**, the Court of Appeal **E.M Githinji Hanna Okwengu & J Mohammed JJA In CA Cr. Appeal No. 56 of 2013,** where the C.A. considered the Petition by the Appellants who had challenged the **Constitutionality of Section 204, 296 (2) and 297 92) of the Penal Code.** The C.A. relied on the **Francis Karioko Muruatetu [Supra]** Supreme Court Case where the Supreme Court held inter alia, that ***Section 204 of the Penal Code deprives the Court of the use of Judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. That the Mandatory nature deprives the Court of their legitimate jurisdiction to exercise discretion not to impose a death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trials that accrue to accused persons under Article 23 of the Constitution, an absolute right."***

74. The Supreme Court further held, relying the **Court of Appeal decision in the Mutiso [supra] case** that:

> ***"We are in agreement and affirm the Court of Appeal decision in Geoffrey Ngotho Mutiso Vs. [Republic CRA 17/2008] that whilst the Constitution recognizes the death Penalty as being lawful, It does not prove that when a conviction for Murder is recorded, only the death sentence shall be imposed."***
>
> The Supreme Court further stated at Paragraph 69:
>
> "***Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides the mandatory death sentence for murder. For avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment."***

75. Robbery with Violence as provided by **Section 296(2) of the Penal Code is 9** provides that where a person is found guilty of Robbery with Violence, the offender shall be sentenced to death.

76. The Appellant in this case was sentenced to death for robbery with violence under **Section 296 (2) of the Penal Code. Since Article 27 (1) of the Constitution** provides that every person has inter alia, the right to equal protection of the law, albeit the Muruatetu's case specifically delt with the death sentence for murder, the decision broadly considered the Constitutionality of the Mandatory death sentence.

77. Even in the **Mutiso case the Supreme Court affirment the Court of Appeal's** Orbiter holding that the arguments in respect of **Section 203 as read with Section 204 of the Penal Code** might apply to Other Capital Offences. Moreover, the Supreme Court in **Paragraph III** referred to similar Mandatory death sentences.

78. For the foregoing, I hold that the findings and holding of the Supreme Court at **Paragraph 69 of the Muruatetu Case applies Mutatis Mutandis to Section 296 (2) of the Penal Code. Accordingly, the sentence of death under section 296 (2) of the Penal Code is a** discretionary maximum punishment and therefore the trial Magistrate's hands were not tied at all by the law to impose the maximum mandatory death sentence.

79. According to the sentencing remarks of the trial Magistrate, although the Accused/Appellant herein was a first offender, a more serious crime would have been committed had the witnesses herein especially PW3 not come to the rescue of the Complainant.

80. She stated:

> ***"My hands are tied by the law which provides for the death sentence where an accused is found guilty under Section 296(2) of the Penal Code.***
>
> ***Sentence:***
>
> ***Accused person herein will suffer death as prescribed by law."***

81. The above judgment was delivered on 8th September 2016. In my humble view, therefore the above sentence and remarks by the trial Magistrate are inconsistent with the findings and holding by the Supreme Court This is so because the Constitution is a living document and whether or not the Muruatetu Case was determined in 2017, December, the Geoffrey Mutiso Case had been determined much earlier and therefore the trial Magistrate was under a duty to examine the same for guidance on sentencing. This is not to say that the death sentence is outlawed as it is not.

82. The Court of Appeal has also made it clear that by **Article 163 (7) of the Constitution**, the decision of the Supreme Court has immediate and binding effect on all other Courts. Further, that the decision of the Supreme Court opened the door for review of death sentences even in finalized cases. The Court of Appeal held that as such, the learned Judge (Chemitei – J.) should have ordered for sentence re-hearing, and it allowed the appeal to that extent. The Court of Appeal ordered that the matter be remitted to the Chief Magistrate's Court, Kisumu, for sentence re-hearing and sentencing only by the Chief Magistrate.

83. In the instant case however, this Court observes that the trial Magistrate H. Wandere P.M. no longer serves in the Siaya Principal Magistrate's Court Station, where she was based as at the time of the trial and sentence on 8.9.2016. This being the first Appellate Court, and noting that this Court has Jurisdiction to assume the role of the trial Court in re-assessing and re-evaluating the record and evidence and arriving at its own independent conclusion, bearing in mind the fact that it neither heard nor saw the witnesses and Accused persons as they testified. I would proceed to exercise the Jurisdiction to re-sentence the Appellant to serve such lawful sentence under the Law, bearing in mind the circumstances under which the offence was committed, the minor injury suffered by the Complainant who, according to the P3 form produced as an exhibit, sustained harm.

84. As stated by the Supreme Court in the Muruatetu Case, the trial Court has discretion to mete out any other Lawful lesser sentence where the maximum sentence provided by Law is death, however mandatory the language of the statute may be.

85. For the above reasons, I uphold the appellant's conviction by the trial magistrate. On sentence, I find and hold that the sentence of death as pronounced by the trial Court is too harsh and excessive in the circumstances. The same is hereby set aside, in its place, I hereby substitute death sentence with a custodial sentence for the following reasons:

> ***(1) The Appellant was a first offender. There was no record showing that despite being a first offender, he was a serious threat to the society. He may have been driven by alcohol abuse.***
>
> ***(2) On the material date of the offence, he had been drinking with the Complainant and comes from the same locality as the Complainant.***
>
> ***(3) The injury sustained by the Complainant was minor including tenderness on the left side of the head and neck that is the reason that the Complainant, after the attack, went to his home and slept until the following morning when he went to report to the Police and then to hospital for medical attention.***
>
> ***(4) The Appellant has served 19 months in prison.***
>
> ***(5) "The stolen phone was recovered.***
>
> ***(6) Considering his age of 28 years at the time of Commission of the offence in 2015, the Appellant is now about 31 years of age and from his appearance in Court I am persuaded that he can be rehabilitated in the society to live as more meaningful and productive life.***
>
> ***(7) The Court appreciates the seriousness of the offence of robbery with violence. However, in the resentencing the Appellant, this Court is guided by several decisions including Muoki V. Republic [1985] KLR 323 where the Court of Appeal in approving***

sentence of 3 ½ years of imprisonment for manslaughter as not having been manifestly excessive as to warrant interference by the Court of Appeal, also approved the practice of the Court's taking into account the period that the Accused had been in remand in considering what term of imprisonment to impose. This is what Section 333(2) of the Criminal Procedure Code provides that "provided that where the person sentenced under Section (1) was prior to such sentence, been held in custody, the sentence shall take into account of the period spent in custody."

(8) The Appellant could not be released on bond in the trial Court because he abused alcohol, he was said to be irresponsible and that is why his wife left him for another man. It was reported by the Probation Officer Elizabeth Sundeh on 1.4.2015 in her pre-bail report on the appellant that no one was willing to stand surely for the Appellant because he was likely to abscond as he had no dependants or family who would make him stay around and adhere to the bail and bond terms as he was violent whenever under the influence of alcohol. The Appellant therefore remained in custody as he had weak community ties. He also has disabled hands which this Court was able to observe when he attended the hearing of his appeal. He was therefore held in remand during the trial from 20.2.2015 until his conviction and sentence on 8.9.2016 which was 1 year and 7 months. He has now served 19 months in prison.

(9) **For the reasons set out above, the Appellant is hereby sentenced to serve a Probation sentence for a period of one (1) year under the supervision and direction of the Probation Officer, Siaya County.**

Signed, Dated and Delivered at Siaya this 11th day of June, 2018.

R. E. ABURILI

JUDGE

In the presence of:

Miss Odumba Prosecution Counsel for State

Appellant in person Present in custody

Court Assistants: Brenda Ochieng and Laban Odhiambo