REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.136 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr. No., 308 of 2013

by: Hon. D.K. MIKOYAN – P.M.)

MOHAMMED MBUGUA KAMAU.....1ST APPELLANT

SAMUEL MWANGI MWAI.....2ND APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

Mohammed Mbugua Kamau and **Samuel Mwangi Mwai,** the 1st and 2nd appellants (previously accused 1 & 2) respectively, were convicted on two counts of ***Robbery with violence Contrary to Section 296(2) of the Penal Code***.

The particulars of the charges were as follows:

> **Count I**:***That on 5/2/2013 at Nyahururu Ziwani Estate, within Laikipia County, jointly with others not before the court, while being armed with dangerous weapons namely, pangas, sword and clubs, robbed Cecilia Wambui Chege of one DVD make LG valued at Kshs.4,500/=, two mobile phones make Nokia 2220S valued Kshs.6,000/= and Nokia 12 valued at Kshs.2,000/= one Video Player make LG Valued at 4,500/=, one Iron Box make Philip valued at Kshs.1,500/= and cash money Kshs.840/= all to the total value of Kshs.19,440/= and immediately before or immediately after the time of such robbery stabbed the said Cecilia Wambui Chege (deceased) to death.***
>
> **Alternative Charge**: ***Handling stolen property contrary to section 322 of the Penal Code.***
>
> ***Particulars of the offence: On the 14th day of February, 2013, at Maina village within Laikipia County, otherwise than in the course of stealing, dishonestly retained one mobile phone make Nokia 2220 S S/No.3526904040771093 valued at Kshs.6,000/= having reason to believe it to be stolen goods the property of Cecilia Wambui Chege (deceased).***
>
> ***Count II*: *Particulars:* *On the 5th day of February, 2013, at Nyahururu Ziwani Estate within Laikipia County jointly with others not before court being armed with dangerous weapons Namel Panga, swords and clubs robbed T.N.K. of one mobile phone Techno S/No.864319012450341 and 864319012450358 valued at Kshs.3,500/= and immediately or immediately after the time of such robbery wounded the said T.N.K.***

The 2nd appellant also faced an alternative charge of handling stolen property in that he was found in possession of a mobile phone make Techno the property of **T.N.K**.

> ***Count III*:*The 1st appellant was also convicted of the 3rd count of defilement contrary to section 8(2) of the Sexual Offences Act.***
>
> ***The particulars of the charge are that on 5/2/2013, at Nyahururu Ziwani Estate, within Laikipia County intentionally and unlawfully caused his penis to penetrate the vagina of T.N.K., a girl aged 17 years old***.

The sentences on counts 2 and 3 were held in abeyance.

Both appellants are dissatisfied with the convictions and sentences which prompted them to file their respective appeals ***No.226/2015 Mohamed Mbugua v Republic*** and ***No.21/2016 Samuel Mwangi Mwai v Republic***. They were represented by Lawrence Mwangi Advocate who relied on the grounds filed by the appellants in person and the further amended grounds dated 18/5/2017.

The grounds are summarized as follows:

1. The learned trial magistrate erred in fact and the law by misapprehending the facts of the case and thereafter proceeding to apply the wrong principles in convicting and sentencing the appellant to death;

2. The learned trial magistrate erred in fact and the law in failing to establish that the identification parade was unprocedural, invalid, illegal ad inconsistent with the requirements of the law;

3. The learned trial magistrate erred in facts and the law in accepting and admitting hear say and irrelevant evidence from some police officers who are not experts in information communication technology rather than necessary and proper Safaricom Limited who were not called;

4. The alleged confession by the 2nd appellant was improper and should not have been admitted because the appellant was denied the right to counsel while under complex and intense police interrogations;

5. The appellants were disallowed substantive due process and exhibits were intermittently provided to them as the case progressed for a prolonged time;

6. T.N.K. (PW2) did not positively identify the 2nd appellant and often mixed him with 1st appellant, Mohammed Mbugua;

7. The failure to call Sheila Mukubwa and Serah was fatal to the prosecution's case and the trial magistrate should have disregarded any information touching the two;

8. The charge sheet was defective and the proceedings were flawed all through the trial;

9. The 2nd appellant's bill of rights were violated in that his guaranteed rights against self incrimination were ignored and that the appellants were not charged within 24 hours after arrest and the court never gave leave for the police to detain him in excess of 24 hours;

10. The prosecution was a mistrial and the prosecution kept filling gaps by recalling almost all of its witnesses which was generally unfair;

11. The trial court was not balanced or exhaustive in its analysis of facts and the issues for determination;

12. The burden of proof required by the law was not discharged by the prosecution that used substantial hearsay evidence in support of its case;

13. The 2nd appellant was framed by the police who asked his sim card to imply that use of it in one of the previously stolen phones;

14. That the court failed to consider the appellants' defences.

The appellants therefore pray that this court do allow their appeals, quash the convictions and set aside the sentences and set them at liberty forthwith.

The appeals were opposed by Mr. Mutembei, learned counsel for the State.

This is the first appeal against the judgment of the trial court and it behoves this court to re-examine all the evidence tendered in the trial court afresh, review and analyze it and arrive at its own determinations. See ***Okeno v Republic (1972) EA 32.*** This court should however bear in mind that it neither saw nor heard the witnesses, an advantage that the trial court had

The prosecution called a total of 10 witnesses while the appellants testified on oath in their defences.

The Prosecution Case:

PW1 David Karumba recalled that on 5/2/2013, he was in Rumuruti Area at about 9.00 p.m. and next morning at 6.00 a.m. he received a call from Nyahururu District Hospital requesting him to proceed there. He proceeded to the hospital and found his daughter, T.N.K. (PW2) admitted there with a fractured right foot. He was further informed that his wife Cecilia Wambui had succumbed to injuries inflicted on her. He saw his wife's body with a cut wound on the stomach. He proceeded to his house, found the house was disturbed and a video player was missing; he attended the postmortem of Cecilia and was later shown some suspects at the police station. At the police station, he was shown two phones which were allegedly found with the suspects and he recognized them.

PW2 T.N.K. recalled the 5/2/2013 at about 8.30 p.m.; that her mother Cecilia Wambui (the deceased), and brother had arrived home and the

deceased went to cook dinner while she cut vegetables. The deceased then went to feed the dog; PW2 heard a commotion and heard her mother ask who the people were. PW2 went to find out what was happening when she saw two men with the deceased; that one person hit the electricity bulb in the sitting room with a stick; PW2 and her brother ran back into the house and one person, short brown with thick lips and a scar above the right eye went to the bedroom and demanded that they open, which they did; that the 2nd appellant took her to the sitting room while another person was sitting with the deceased in the kitchen; another person came in but had covered his face; the deceased was asked for money which she gave and it was given to the 2nd appellant who was with her; they also took her mobile phone, Techno and the deceased's, Nokia slide phone. By then, all were in the sitting room; that the 2nd appellant went to another room and asked one to take PW2 there; she was taken to her bedroom and passed by the deceased's body. While in her bedroom, the 2nd appellant asked her to undress and he defiled her there. Though the room was dark, she had seen him on the corridor where there was light; that he then put on a bright torch, she got up dressed, was taken to the deceased's bedroom which he searched, took PW2 to the sitting room, took the DVD and video. He ordered her to go outside and while there, he defiled her again then took her back to the house. At that time, PW2 noticed her brother was under the bed. She went to the deceased's bedroom after a while and found her already dead. She ran out, jumped over the gate and fractured her leg in the process; that a motor cyclist came by and called the police and she was taken to Nyahururu Hospital where she was admitted. She attended an identification parade on 22/2/2013 where she identified the 2nd appellant as the person who defiled her. She was also shown two mobile phones which she identified as hers and the deceased's.

PW3 CPL David Nyamu of CID Nyandarua North received a robbery report. He went to the scene, found PW2 on the road side, injured on the right leg and crying. He broke the main gate of the house and entered, found the dead body of a lady with stab wounds and a boy hidden under the bed. He called scenes of crime to take photographs of the scene and lifted finger prints from the scene. He also found a panga and knife covered with a blanket and a log of wood.

PW3 said that PW2 described to him one of the robbers who defiled her as short, thick lips and had a scar on the face. PW3 said the 2nd appellant was arrested on 21/2/2013 and upon arrest, he made a confession which led to the arrest of the 1st appellant.

PW4 Dr. Frida Odera performed a post mortem on the deceased on 18/2/2013. The Doctor found that the deceased had sustained a wound on the left lower abdomen and part of the abdomen content was protruding, a lot of blood had collected in the abdominal cavity; cuts below the diaphragm and clear cut wound on the veins of the stomach. She formed the opinion that the cause of death was excessive blood loss.

PW5 CPL Paul Ndirangu of CID Headquarters attached to Finger Print Bureau and who has studied finger print technology recalled that on 29/11/2013, he received finger prints NYH3 2013 with photographs P.MFI.8(b) NYH 3/2012; right thumb dated 5/2/2013 and a photograph of right hand three fingers – fore finger, middle and ring fingers. P.MFI.1-8(c) NYH 3/2013 and three fingers lift No.2 dated 5/2/2013; that photographs accompanied finger prints of a suspect by name Mohammed Mbugua Kamau (1st appellant) and palm print C24. P.MFI.9(a) and the scene of crime report indicated that the 1st finger prints lift was from the glass door and 2nd lift was from a glass top table in the bedroom (Form-C46). He magnified the fingerprints which he compared with the suspects' finger prints in form C.24. The right thumb print lifted from the scene MFI(8)(1) was magnified and compared with the recorded right thumb print and PW5 drew points and found 16 characteristics in a sequence which is proof that the fingerprints match. He said that if the 16 character points are found in similar positions as the lift from the scene of crime, then they belong to the same person. He came to the conclusion that the lifted and recorded finger prints belong to one person, Mohamed Mbugua Kamau.

PW6 CIP Samuel Kombo told the court that he took a confession from the 2nd appellant on 22/2/2013; that the 2nd appellant opted to have his mother present and she was indeed present. The 2nd appellant told him that on 5/2/2013, together with Mohamed, Teitei, Vaite and another went to Manguo and attacked a home where there was a lady, girl and young boy and on entering a room where 1st appellant ordered him to enter, found the body of a lady lying motionless; that Mohamed (1st appellant) remained with the girl whom he believed wanted to rape her yet that was not the plan; that the 3 of them left for Maua while Mohamed remained behind. At the end of the statement, the 2nd appellant denied the contents of the confession but said he had no objection to its production in evidence.

PW7 PC Kennedy Onyango Otieno of CID Headquarters Nairobi was assigned to investigate a robbery case in Nyahururu on 9/2/2013 together with other officers. He was informed that two mobile phones had been stolen in a robbery and he liased with Safaricom and found that one phone was still in use. On 21/2/2013, he arrested Sheila Mukabura Omar using Safaricom data. Sheila claimed that that phone was sold to her by one Mwangi alias Mbota and led them to Kiamaina slums and called him out and he was arrested 2nd appellant. One woman Sheila, was also arrested as an accomplice; that the Nokia phone was found with one Serah MFI.4 who claimed to have been given the phone by Ngunjiri. She led them to a food processing plant where Ngunjiri, accused 3, was arrested. It is PW7 who collected the 1st appellant from the G.K. Prison where he had been held.

PW8 CPL Joel Koskey of scenes of crime Nyahururu, was called to a scene of robbery in Ziwani Area where he went in company of PW9 CPL Marube. He took several photographs of the house which was disturbed, the body of the deceased and also lifted finger prints from a glass wall unit, the table in the bedroom; PW8 prepared an exhibit memo form and forwarded the exhibits to CID Headquarters on Form C.46.

PW8 sent the suspect's name by name Mohamed Mbugua for purposes of comparison. He received a fingerprint report from the fingerprint analyst dated 29/11/2013 and processed the photographs at CID Headquarters which he produced in court as Exh.10(a)-(m).

PW9 Sgt. Mark Marube was the investigating officer in this case which was assigned to him by the OCS Ip. Ogolla who had already visited the scene and recovered: a panga, a knife, a blanket a piece of wood which he took possession of. Two mobile phones stolen during the robbery were recovered and the people found in possession pointed to the 2nd appellant and (3rd accused) but the ladies who led to arrest of the 2nd appellant and accused 3 were not willing to testify and disappeared from their residences. He visited the scene of crime on 7/2/.2013 and visited PW2 in hospital. PW2 informed him that she was defiled and he arranged an identification parade on 22/2/2013 where PW2 identified the 2nd appellant as the rapist.

Later PW9 received finger prints that were lifted from the scene and photographs of the scene. PW9 gave the fingerprints of the 1st appellant to criminal investigation division for further investigation and he received back a forensic report (Ex.13). He produced all the items he received as exhibits. PW9 further told the court that the sim card No.0712695299 found in the Techno phone (Ex.5) was forwarded to Safaricom to establish the registered owner and the result was that it was the 2nd appellant Samuel Mwangi of identity card no.23090375.

PW10 Dr. Joseph Karimi Kinyua of Nyahururu Hospital produced the P3 form filed by Doctor Cosmas after he examined the complainant (PW2). He found her clothes to be blood stained, was bleeding from the vagina, hymen was broken, right leg was swollen and X-Ray revealed the right leg was fractured between the heel and knee; that a light vaginal swab disclosed presence of spermatozoa.

Defence case:

When called upon to defend themselves, the 1st appellant, Mohamed Mbugua Kamau gave unsworn evidence and told the court that he was arrested on 12/2/2013 over a stolen phone and was charged in Nyahururu Court. He was taken to G.K. Prison on 18/4/2013. That he was called out on 22/4/2014 while in prison when he was frisked by a prison warder and a mobile Nokia E9 was taken from him; that others were arrested and taken to Maina Police Post; that he was taken to Ol joro rok Police Station, was put on a parade but was not identified; 2 other parades were conducted but he was not identified.

The second appellant also made unsworn statement in his defence; that on 21/8/2013, he was doing some casual work for some old man, weighing and loading; that at 6.50 p.m. he left work and passed by a place to watch news; that he was suddenly ordered to sit as others ran away. He was handed over to the police; that he found the investigating officer in this case who asked him to name his accomplices who took Kshs.150,000/= but he denied knowing anything about the money. At the police station, he was informed of the charges which were strange to him. In court, he met the other accused persons who were all strangers to him; that PW2 was as shown which one officer held and she identified it as her mother's.

I have considered the evidence on record, submissions by counsel, I think that the first issue I will deal with is the complaint raised by the appellants that the prosecution was a mistrial as the prosecution kept filling gaps in their case by recalling the witnesses. I do agree that except PW1, 4 and 6, virtually all the witnesses were recalled once or more times. Different reasons were recorded for the recall. For example, PW2 testified on 10/6/2013, but during cross examination, 2nd appellant sought to see the O.B. report respecting the first report made by PW2 and the case was put off to 4/10/2013. After PW2 finished testifying, the prosecutor sought to recall PW2 to identify the exhibits i.e. phones that were recovered. The court has no idea why the phones had not been availed in the first place. PW2 was further recalled on 25/2/2014 for further cross examination by 2nd appellant on the O.B. report.

After PW3 started testifying on 4/10/2013, he was stood down because the photographs he intended to produce had not been shown to the appellants. PW3 was further recalled on 13/4/2014. PW7 testified on 21/1/2014 but was recalled by the 2nd appellant for further cross examination on 19/6/2015. PW8 first testified on 7/4/2014 but was recalled by the 1st appellant and testified again on 11/12/2014.

As for PW9, the investigating officer, he testified for several days but was stepped down due to time. Having perused the file, I find that most of the time, witnesses were recalled upon request by the accused persons or when recalled to identify an exhibit. The appellants cannot now blame it on the trial court or the prosecution. I find no prejudice suffered by the appellants. That complaint has no basis.

Whether the confession allegedly made by the 2nd appellant was properly admitted in evidence;

In the instant case, PW6 CIP Kombo recorded the confession statement from the 2nd appellant. During the trial before the honourable court, the 2nd appellant was not represented by counsel and it was the duty of the court to ensure that the safeguards provided in the law regarding taking of confessions were complied with.

The law governing confessions provides several safeguards to a suspect or an accused person on the taking and admissibility of confessions.The said safeguards are contained in Article 49(1)(b), (d) and 50(2)(a) and 4 of the Constitution; Sections 25A, 26 and 32(1) of the Evidence Act and lastly, the Evidence (Out of Court Confession) Rules, 2009 under the Evidence Act. I will set out the said provisions:

Article 49 of the Constitution provides protection for an arrested person and it reads:-

> ***"49 (1) an arrested person has the right to:***
>
> ***(b) remain silent;***
>
> ***(d) not to be compelled to make any confession or admission that could be used in evidence against him.***

Article 50 of the Constitution provides protection for an accused person's right to fair hearing. Article 50 (2):-

> ***"Every accused person has the right to a fair trial which includes the right:-***
>
> ***(a) to be presumed innocent until the contrary is proved;***
>
> ***3. …***

4. Evidence obtained in a manner, that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice."

The evidence Act also provides protection to a suspect as follows:-

"S. 25A. (i) A confession or any admission of a fact tending to prove the guilt of an accused person is generally not admissible.

(ii) Only confessions and admissions made in Court before a Judge, a magistrate or made before a Police officer (not the investigating officer) of the rank higher than Chief Inspector and a third party of the accused person's choice are admissible."

Section 26 of the Evidence Act limits the admissibility of confessions and states:

"A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

Section 32 (1) of the Evidence Act deals with the effect of a confession to an accomplice. It reads:-

"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take the confession into consideration as against such other person as well as against the person who made the confession."

The last safeguards are found in **Rule 4 of the Evidence Act** (Out Of Court Confessions) Rules, 2009, for those who make confessions outside the court. It states:

"4(1). Where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person –

(a) has stated his preferred language of communication;

(b) is provided with an interpreter free of charge where he does not speak either Kiswahili or English;

(c) is not subjected to any form of coercion, duress, threat to shame or any other form of cruel, inhuman or degrading treatment or punishment'

(d) is informed of his right to have legal representation of his own choice;

(e) is not deprived of food, water or sleep;

(f) Has his duration, including date and time of arrest and detention in police custody, established and recorded;

(g) has his medical complaint, if any, adequately addressed;

(h) is awarded appropriate communication facilities; and

(i) communicates with the third party nominated by him under paragraph 3 prior to the caution to be recorded under Rule 5."

When PW6 started testifying as to having recorded a confession from the 2nd appellant, the 2nd appellant should have been asked whether or not he made a confession so that if he denied or alleged that threats were used or that he was tortured, a trial within trial would have been conducted. However, the court allowed PW6 to testify on the confession and the 2nd appellant only reacted to the confession when PW6 wanted to produce the statement in evidence. That was irregular.

I have seen PW6's testimony and in my view, it did not conform to Rule 4 of the Evidence Act (Out of Court Confession Rules) 2009. PW6 did not indicate whether the 2nd appellant told him the language he preferred to communicate in; PW6 did not tell the court whether he enquired whether the 2nd appellant had been tortured or not, or whether he had been accorded adequate medical attention or required legal representation. PW6 told the court that the 2nd appellant nominated his mother to attend the session pursuant to Rule 4(3) PW6 was required to record the mother's particulars and relationship with the 2nd appellant. PW6 admitted that he did not record the particulars of the 2nd appellant's mother as was required of him. Most importantly PW6 did not tell the court the manner in which he cautioned the 2nd appellant.

In my considered view, the confession allegedly obtained from the 2nd appellant did not accord with a confession envisaged under Rule 4 of the Evidence Act (Out of Court Confession Rules 2009). The alleged confession falls far below what is required of a confession and is of no evidential value.

In the said confession, the 2nd appellant purported to name the 1st appellant as his accomplice in the commission of the offence. However, a confession can only be used to corroborate other independent evidence against a co-accused. In ***Justus Odumo Munyole v Republic CRA.97/985 KLR*** the Court of Appeal held as follows:

> ***"Even if admissible, the statement could not form the basis of a case against the appellant as a co-accused; but it could supplement evidence which narrowly fell short of proof beyond reasonable doubt. The proper approach was stated in Gopa & others v the Queen (1953) E.A.CA 318 as follows:***
>
> ***'The confession of a co-accused is intended to be used to corroborate and even to supplement the evidence in those exceptional cases in which without its aid, the other evidence falls short by a very narrow margin of that standard of proof which is requisite for a conviction. ….there must be a basis of substantial evidence to which a confession or statement may be added. If there is substantial evidence against the accused and there remains some lingering doubt, the confession may be taken into account to set that little doubt rest."***

The trial magistrate relied on the confession as corroboration for the evidence adduced against the 1st appellant. However, resulting from my findings on the confession, it does not amount to corroboration.

The offences herein were committed at night. The only identifying witness is PW2. This case therefore turns on identification and circumstantial evidence. Being night, the conditions were not favourable to identification and the court had to warn itself of the dangers of relying on such evidence. In the case of ***Kiarie v Republic 1984 KLR 739***; the Court of Appeal said "***it is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justifying a conviction."***

There is now a host of authorities on the question of identification. In ***Maitanyi v Republic (1986) KLR 198 of 2001***, the Court of Appeal said:

> ***"It must be emphasized that what is being tested is purely the impression received by the single witness at the time of the incident, of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness".***

See also ***Obwana & others v Uganda (2009) 2 EA 333***, Court of Appeal of Uganda said:

> ***"It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. The rationale for this is that a witness may be honest and prepared to tell the truth, but he might as well be mistaken. This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence."***

During the robbery, PW2's mother was murdered while PW2 was defiled and some phones and money stolen. The P3 form in relation to PW2 was produced by PW10 on behalf of Dr. Cosmas who examined PW2 on 6/2/2013. The doctor found PW2's clothes to be blood stained, she was bleeding from the vagina, had a broken hymen, fresh injuries to the vagina and vaginal swab revealed presence of spermatozoa.

There is no doubt that PW2 had taken part in a recent sexual activity, which involved penetration. I have no doubt that PW2 was defiled.

The question is who committed this offence and therefore placed him at the scene of crime. The 1st appellant was convicted for the offence of defilement (3rd count). In its judgment, the trial court observed that the 1st appellant never cross examined PW2. However, in her testimony, PW2 had not mentioned the 1st appellant as the culprit at all. In asking that question, the trial court seemed to be shifting the burden of proof on the first appellant. I believe the only reason why the trial court may have found the 1st appellant guilty of defilement of PW2 was the confession that had been made by the 2nd appellant implicating the 1st appellant. I have found earlier on in this judgment that the confession by the 2nd appellant did not meet the standards of taking a confession and is therefore of no evidential value. It follows that the trial court erred by relying on the said confession to convict the 1st appellant for the offence of defilement.

PW2 identified the 2nd appellant with help of electric lights from the verandah and corridor towards the bathroom, as the person who defiled her, and that he had an exchange with other robbers. She said that the robber who was with the deceased hit the bulb in the kitchen and it broke; that the 2nd appellant took her from the sitting room where lights were still on. PW2 also told the court that she came into close contact with the 2nd appellant and saw the scar on his face and that she described him to her father PW1 and PW3, the first police officer to arrive at the scene.

PW2 also described the 2nd appellant as having been shorter than the others with thick lips. Although PW2 maintained that it is the 2nd appellant who defiled her, he was never charged with the offence of defilement but instead, the 1st appellant was. Although it is the first appellant who was charged with defiling PW2, PW2 maintained in her testimony that it is the 2nd appellant who defiled her and whom she described in detail. I will find that although it was at night and conditions were not favourable to identification, PW2 was with the 2nd appellant for long. PW2 told the court where lights were in her house and PW3 who visited the scene on same night confirmed it. I am satisfied that PW2 identified the 2nd appellant as one of the robbers who attacked them on the fateful night. There was ample light and she was in close proximity with the robbers cum defiler.

It is the 2nd appellant who was the first to be arrested after PW7 an investigator used Safaricom services to trace the phones stolen during the robbery. Unfortunately, the ladies who were found with the two phones were not called as witnesses. The court was told that the witnesses went underground and could not be found to come and testify. The evidence of the two was crucial as they were said to have been in possession of the two phones stolen during the robbery. The absence of the witnesses notwithstanding, PW7 received a report from Safaricom which showed that the 2nd appellant's phone No.0712695299 was used in Nokia Phone IMEI No.352694040771090 on 8/2/2013 and 10/2/2013. The said phone was stolen during the robbery and was identified by PW2 (P.Ex.No.7). The use of the Safaricom data is what led to the arrest of the lady Serah who then led to accused 3 then to the 2nd appellant. The Safaricom data was produced as evidence. When it was produced the appellants never objected to it and cannot do so at this stage.

The (P.Exh.5) Techno phone was found with Sheila Mukabura Omar, who then led to the 2nd appellant. PW2 identified the two recovered phones. The Techno 531 being hers and the Nokia for her late mother. The box in which the Techno mobile was bought was produced in court Exno.6 which bore the Serial Number of the phone 864319012450341. PW2 also confirmed and showed to the court the interface on the mobile as ***"I am blessed of the Lord***". I am satisfied that PW2 positively identified her phone after its recovery. Though the person found with it disappeared and did not testify, yet it led to the arrest of the 2nd appellant whom PW2 identified as one of the robbers. PW2 identified her phone before she identified the appellant on a parade. The recovery of the Nokia phone in constructive possession of the 2nd appellant further placed him at the scene of crime and the recovery of the phone corroborates PW2's evidence that she identified the 2nd appellant as one of the robbers.

PW6, 7 and 9 told the court that it is the 2nd appellant who mentioned the 1st appellant as his accomplice. I have found PW6's testimony to be worthless as regards taking of a confession from the 2nd appellant. The 1st appellant was arrested at the Nyahururu Remand Home where he had been remanded having been arrested in a different case all together. The 1st appellant's fingerprints were taken for comparison with the fingerprints lifted from the scene of crime by PW8 Cpl. Koskey of Scenes of Crime.

In its judgment, the trial court found that the finger prints lifted from the scene of crime were those of the 1st appellant. The question therefore is whether the 1st appellant was properly identified through the fingerprints' evidence. In the case of ***Mutonyi v Republic (1983) KLR 455*** the court stated:

> ***"…….an expert witness who hopes to carry weight in a court of law must before giving expert opinion;***
>
> ***(1) Establish by evidence that he is especially skilled in his science or art.***
>
> ***(2) Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also from its own independence opinion by applying this criteria to the facts proved.***
>
> ***(3) Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness. We are satisfied that the evidence of the finger prints expert (PW9) was satisfactory if judged by the aforementioned standards."***

As far back as 1911, the Supreme Court of Illinois in the USA delivered a landmark decision in the ***People v Jennings 252 (I) 534, 96 N.E. 1077 (1911)*** in which the court accepted fingerprint evidence as a means of legally identifying individuals in the following words.

> ***"We are disposed to hold from the evidence of the four witnesses who testified and from the writings we have referred to on this subject, that there is a scientific basis for the system of finger print. Identification and that the courts cannot refuse to take judicial cognizance of it."***

Back home in ***Nazir Ahmed S/O Rehmat Ali v Republic (1962) EA 345***, the former East African Court of Appeal upheld the conviction of an appellant for theft of a motor vehicle on the basis of his finger and palm prints that were found on the stolen motor vehicle soon after the theft.

At the time of hearing this appeal, this court was not able to trace most of the exhibits including P.Ex.13 which was the forensic analysis report produced by PW5 on his findings on the fingerprints. I noted from the court record that at one time, the appellants had applied for a copy of the said report. It was unclear whether they were given or not. Despite several adjournments, to be given a copy by the maker of the report, none was availed. This court cannot tell under what circumstances the exhibits left the file or who is to blame for the removal. The court will therefore go by the evidence on record. PW5 described himself as having studied finger print technology, with 28 years experience in the field. PW5 received from the investigations officer, finger prints lift from a glass door at the scene and 2nd lift was from glass table top in the bedroom on Form C46. Ex.8(1) (b) & (c). He also received the 1st appellant's recorded fingerprints on Form 124 Ex.9(a) and (b). He magnified them and mounted them on Form (33B) and he drew points of examining and he found 16 characteristics in 9 sequences which was proof that the prints matched. PW5 went in detail to demonstrate to the court the 16 characteristics found and he concluded that both the lifts and recorded finger prints belonged to Mohamed Mbugua Kamau, the 1st appellant. I am satisfied that the evidence of the expert (PW5) fitted the standards set in **Mutonyi case**.

The evidence of the finger print expert is circumstantial evidence and I am guided by the principles enunciated in the case of ***Abang'a alias Anyango v Republic Criminal Appeal No.32 of 1990*** where the court laid down the principles which should guide the court in reception of circumstantial evidence when it stated as follows:

> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:***
>
> ***(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***
>
> ***(ii) These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;***
>
> ***(iii) The circumstances taken cumulatively should form a complete chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else."***

In my view the identification of the 1st appellant through fingerprints was safe to found a conviction. The fingerprints were lifted at the scene of robbery a few hours after the robbery – may be less than 2 hours. The fingerprints were found in the places where the robbers visited, that is, the wall unit where a video player was stolen from and the bedroom where Cecilia was murdered. I am satisfied that the evidence irresistibly placed the 1st appellant at the scene of the robbery. The 1st appellant had alleged that his finger prints may have been taken when he was at the police station which allegation was refuted.

The 1st appellant's defence was a bare denial which I dismiss as such. The 1st appellant had been arrested on 12/2/2013 for another offence and was in custody but at the time this offence was committed, on 5/2/2013 he was still free. In the end, I find that the finger print evidence did place the 1st appellant at the scene of crime and he was one of those who robbed the deceased, Cecilia and PW2 and the conviction on the two counts of robbery with violence contrary to Section 296(2) of the Penal Code was well founded. I however acquit 1st appellant of the 3rd count of defilement.

Similarly, the 2nd appellant's defence is a bare denial. It generally talks of the arrest. I have found that the 2nd appellant was properly identified by PW2 at the scene of crime and he was found to be in constructive possession of a phone stolen during the robbery. I find that the convictions of the two counts of Robbery with Violence Contrary to Section 296(2) of the Penal Code are well founded and I hereby confirm them.

The two appellants had been sentenced to suffer death. However, in the Supreme Court case of ***Francis Karioko Muruatetu and others v Republic Pet.15/2015***, this court has discretion to vary the sentence.

I hereby review the sentence from death to life imprisonment on each count. The sentences to run concurrently.

Dated and **Signed** at ***NYAHURURU*** this ***20th*** day of ***July***, **2018**.

.....

R.P.V. Wendoh

JUDGE

Present:

Ms. Rugut - State Counsel

N/A – for appellants

Soi - Court Assistant

Present - 1st appellant

Present - 2nd appellant