



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBERS 128, 129 AND 130 OF 2017

(CONSOLIDATED)

BETWEEN

MARTIN KINNYUA KIMATHI.....1ST APPELLANT

DAVID GITONGA.....2ND APPELLANT

JOSEPHAT KIRUGI.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal arising from the Judgment delivered by Hon. J. Irura, Senior Resident Magistrate in Nkubu PMCCR. Case No. 1522 of 2015 on 9th day of October, 2017)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGEMENT

Introduction

1. The three appellants were originally the second, third and fourth accused persons in Nkubu PMCCR. Case No. 1522 of 2015. They had been charged alongside one Anthony Muthaura Kaburu who escaped from custody during the course of the hearing of the case. The said Anthony was the first accused person in the case. The fifth accused person was Geoffrey Muriuki who was acquitted for lack of evidence. In the amended charged sheet after Anthony Muthaura escaped, the three appellants were first, second and third accused persons respectively.
2. The three appellants were charged with two counts of robbery contrary to section 296 (2) of the Penal Code and one count of unlawful destruction of a building contrary to section 85 of the Penal Code.
3. In Count I, the particulars of the robbery charge are that on the 24th November, 2015 at Mitunguu Township in Imenti South District within Meru County jointly with others not before court while armed with dangerous weapons namely pangas and clubs, they robbed Doreen Mwendwa of cash Kshs 20,000/= and a mobile phone make ITEL valued at Kshs 5,000/= all valued at Kshs 25,000/= and at the time of such robbery beat the said Doreen Mwendwa.
4. In Count II, the particulars of the charge are that on the 24th November, 2015 at Mitunguu Township in Imenti South District within Meru County jointly with others not before the court while armed with dangerous weapons namely pangas and clubs robbed WINROSE WANJIKU NJUE of her mobile phone make TECHNO valued at Kshs 3,800/= and cash Kshs 400/= all valued at Kshs 4,200/=, and at the time of such robbery beat the said WINROSE WANJIKU NJUE.
5. In Count III, the appellants were charged with unlawful destruction of a building by persons riotously assembled contrary to section 85 of the Penal Code, the particulars thereof being that on the 24th day of November, 2015 at Makandune area in Imenti Central District within Meru County jointly with others not before the court, being unlawfully assembled, destroyed a building namely the dwelling house of DOROTHY CIATHENKE by pulling it down.

6. All the three appellants together with their co-accused pleaded not guilty to all the charges. The case then proceeded to full hearing during which the prosecution called 7 witnesses in support of all the three counts.

7. Each of the appellants gave sworn evidence in which they denied committing any of the three offences. The first appellant called two witnesses, but the second and third appellants did not call any witnesses.

Judgment of The Leaned Trial Court

8. After carefully considering all the evidence adduced in court by the prosecution as well as the defence plus the submissions filed in court as well as the law the Learned Trial Magistrate was satisfied that the prosecution had proved all the three counts against the appellants beyond reasonable doubt. He found each one of them guilty as charged and accordingly convicted each one of them under section 215 of the Criminal Procedure Code. After receiving the previous criminal history of the appellants whose previous records the prosecutor did not have and after hearing their respective submissions on mitigation each of the appellants was sentenced to suffer death for the offence of robbery contrary to section 296 (2) of the Penal Code. Though no sentence was pronounced in respect of Count III. The Trial Court rightly suspended the sentences in Counts II and III, for a man can die only once, and once dead, he cannot be punished for other offences which he may have committed before he died and of which he has been convicted.

The Appeal

9. Being satisfied by the whole of the said Judgment, the appellants filed their separate appeals. The appeals were consolidated and proceeded under file number 128 of 2017. The initial petitions of appeal comprised many grounds of appeal but at the hearing of the appeal each of the appellants filed amended grounds of appeal together with their respective written submissions.

10. The first appellant, Martin Kinyua Kimathi set out the following grounds of appeal:-

- 1. THAT, the Trial Magistrate erred in law and in fact, [in] finding prosecution to have proved the charge under section 296 (2) where the rest of subsection following quality what comes before c/se. 137 (a) (iii) CPC Cap 75.***
- 2. THAT, the Trial Magistrate erred in law and in facts, [in] finding prosecution proved case beyond all reasonable doubt that appellant was part of mob that assaulted PW2 and PW3 failing to note and consider there was no reasonable evidence tendered but only conflicting evidence leading evidence lost credit.***
- 3. THAT, the Trial Magistrate erred in law and in fact [in] not finding that, giving more particulars of the charge, embarrassed the conduct of defense of appellant with resultant possible failure of justice and was unfairly tried, and was discriminated.***
- 4. THAT, the Trial Magistrate erred in law and in fact, denied improperly appellant right under section 200 (3) CPC Cap 75.***
- 5. THAT, the Trial Court erred in law and in fact, not resolving reasonable doubts in favour of appellant and find defense meritorious and deserved credit taking into account PW2 and PW3 may hadn't reached Thingithu River.***
- 6. REASONS wherefore the appellant prays for success of the appeal, quashing of conviction and setting aside of the death sentence.***

11. The second appellant's amended grounds of appeal are:-

- 1. That, the Learned Trial Magistrate erred in both matters of law and facts by not observing that the circumstances surrounding were not favourable to warrant a positive identification by recognition.***
- 2. That, the Learned Trial Magistrate erred in both matters of law and facts by not observing that mandatory death sentence imposed against the appellant was unconstitutional.***
- 3. That, the Learned Trial Magistrate erred in both matters of law and facts by not observing that section 200 of the CPC was not complied with by the succeeding magistrate.***
- 4. That, the Trial Magistrate faulted in law and facts by not observing that the investigations which were carried out in this case were shoddy.***
- 5. That, the Trial Magistrate erred in law and facts by rejecting the appellant's defence without giving cogent reasons.***

12. The third appellant, Josephat Kirugu listed the following amended grounds of appeal:-

- 1. THAT, the Learned Trial Magistrate erred in both matters of law and facts by failing to note that the circumstances surrounding the scene were not favourable to warrant a positive recognition by identification (sic).***
- 2. THAT, the Trial Magistrate erred in law and facts by failing to comply with section 200 of the CPC.***
- 3. THAT, the death sentence meted upon the appellant is unconstitutional.***

4. **THAT, the appellant's defence was rejected without giving cogent reasons.**

5. **THAT, the Learned Trial Magistrate erred in law and facts by failing to note the prosecution case was [not] proved beyond reasonable doubts.**

13. In summary the appellants' complaints are that none of them was positively identified during the alleged robbery. Secondly that the succeeding magistrate during the trial failed to comply with the provisions the section 200 of the Criminal Procedure Code and thirdly that the Learned Trial Court imposed an unconstitutional sentence. Each of the appellants has also complained that their respective defences were rejected without proper reasons being given for the rejection. On the basis of the above complaints the appellants pray that the appeals be allowed, convictions quashed and the sentence of death set aside.

14. This is a first appeal and I need not belabour the point that this court is under a duty to reconsider and evaluate the whole evidence placed before the trial court with a view to reaching its own conclusions in the matter, only bearing in mind the fact that it has not opportunity of seeing and hearing the witnesses who testified during the trial. Allowance needs to be made for that fact so that any of the trial court's conclusions based on demeanor of witnesses are not disturbed unless there are outright compelling reasons for such disturbance. Cases such as **Pandya -vs- Rex [1957] EA 336 Mwangi -vs- Republic (2006) KLR 28 and Koech & another -vs- Republic [2004] eKLR 322** speak into the issue of the duty of a first appellate court. In the **Koech case** (above), the Court of Appeal expressed itself thus: **"As this was a first appeal the High Court was mandated to look at the evidence adduced before the trial court afresh, re-evaluate and re-assess it and reach its own independent decision on whether or not to uphold the conviction of the appellants. The court had to bear in mind the fact that it did not see the witnesses as they testified and therefore it could not be expected to make any findings as to the demeanor of the witnesses. The court is further mandated to consider the grounds of appeal put forward by the appellant."**

The Prosecution Case

15. From the record, Doreen Mwendwa, PW2 (Doreen) and Winrose Wanjiku Njue, PW3 (Winrose) were employees of Agnes Mwendwa, PW4 (Agnes) at Monaco Bar. Doreen and Winrose were tenants of Dorothy Cianitheke, PW6 (Dorothy) in Dorothy's house at Makandune. Doreen testified that on 24th November, 2015 at about 10.00 a.m. she was on duty at Monaco Bar when Anthony Muthaura (Muthaura) whom she knew entered the bar and started shouting that Doreen and Winrose had stolen a motorbike belonging to one of the boda boda operators. Muthaura was accompanied by about 50 other boda boda riders. Muthaura who was armed with a panga went straight to the counter where Doreen was and told her to either surrender to them or get killed. Before she could respond, Doreen was grabbed and pulled out of the bar. She was carried shoulder high by the mob and placed on a motorcycle which Muthaura rode upto Darfur stage. At Darfur area, Doreen was assaulted with pangas and sticks. Doreen was able to recognize the first, second and third appellants herein among the people who were assaulting her indiscriminately. In the process of the assault her hair was set ablaze using a match stick.

16. Doreen was then undressed completely. In the meantime a group of other unruly boda bodas still led by Muthaura went back to Monaco bar and fetched Winrose and drove her to Darfur area as well. Once at Darfur area, Winrose was also undressed and assaulted in equal measure as Doreen. The two of them were then put on motorbikes and driven towards Thingithu River in a convoy. Doreen and Winrose were informed they were going to be burnt alive, but along the way the motorcycle convoy came across some police officers who stopped them. In that moment, Doreen managed to escape and ran to the nearby house where she sought some shelter. Later that same morning Doreen was rescued by police officers and taken to a clinic in Mitunguu where she was admitted for 10 days. On that same day the appellants, alongside their co-accused were arrested. Doreen also stated during cross examination that before she was dragged and pulled out of from under the Monaco Bar counter, she tried to call Agnes to inform her of what was happening at the bar. She also testified that some Kshs 20,000/= which was at the counter was found missing when Agnes went to the bar and took stock.

17. Winrose also testified of the events of that dreadful morning on 24th November, 2015, when while on duty, a group of boda bodas descended on Monaco Bar and took away Doreen at the command of Muthaura. She also saw Muthaura slapping Doreen with a panga. The reason for the attack was theft of a motorcycle which Muthaura alleged had been stolen by Doreen and herself. A little while after Doreen had been taken away Muthaura returned to Monaco Bar with a group of other boda boda riders and also took her away to Darfur area where she found Doreen seated under a tree, stark naked. Before they took her away Muthaura slapped Winrose twice on the back with a panga.

18. When Winrose got to Darfur area the first appellant herein shouted at her to produce the motorcycle. The beating continued and eventually, the two of them were put on a motor bike and taken to a school field and there again both of them were thoroughly beaten. While they were undergoing the beating a police vehicle approached and two police officers alighted from there. On seeing the police officers, the boda bodas sped towards Mitunguu but along the way they came upon a police road block. At that point, the second appellant herein who was carrying Winrose on his motor bike made a u-turn, Winrose fell off the motorbike and lost consciousness. When she came to, she found herself at Mitunguu Medical Centre where she was admitted for one week and her leg plastered. She recorded her statement while at the hospital. All in all, Winrose remained in hospital for one month during which period she was operated on and implants put in her right leg which was fractured. She also sustained a fracture of the left hand as well as bruises on various parts of the body.

19. Agnes testified and confirmed that both Doreen and Winrose were her employees at Monaco Bar and that on 24th November, 2015 at about 8.00 a.m. Doreen telephoned her and informed her of the attack at the bar. She immediately rushed to the scene and found a shouting group of about 20 people standing outside the bar.

20. As soon as Agnes entered the bar, she saw Doreen being dragged away by Muthaura whom she knew well as a person who lived in the same compound where Monaco Bar was situated. About 30 minutes after Doreen had been taken away Muthaura returned to the bar and rode away with Winrose. Agnes also testified that she saw the third appellant who was riding another motorcycle and together with Muthaura, they sped off with Winrose towards Kamachege. On seeing what was happening to her employees, Agnes rushed to Mitunguu police station and reported the matter.

21. Number 64292 PC Elias Mwaniki, of Mitunguu police station testified as PW5. He stated that on 24th November, 2015 at about 11.30 a.m. he was on normal patrol duties when he received information concerning the robbery at Monaco Bar and what had befallen. Doreen and

Winrose. Together with other police officers, PC Mwaniki laid an ambush near Nyagiene Secondary School the motor cyclists approached while screaming and shouting. They stopped them and that is when they rescued one of the ladies who was stark naked. They also arrested Muthaura and took him to the police station while the lady was taken to the hospital.

22. PW7 was number 235773 IP Tom Onyancha, the in charge of crime at Mitunguu police station. He stated that on 24th November, 2015 at about 11.00 a.m., he was attending a meeting at the OCPD's office when he received a call that two ladies had been undressed at Mitunguu. He abandoned the meeting and rushed to Mitunguu but before he got to Mitunguu, he met with a group of boda boda operators who were demonstrating while alleging that a motor cycle belonging to one of them had been stolen by the two ladies who had been undressed. He eventually found Doreen and Winrose who were seriously injured. PW7 established that the reason for the demonstration was the arrest of Muthaura.

23. When PW7 visited Doreen and Winrose at Mitunguu hospital, they narrated to him what had befallen them at the hands of the three appellants and other boda boda riders. It was also during that interrogation that PW7 was informed about the demolition of Dorothy's house on allegations that Doreen and Winrose had hidden the stolen motor bike therein. He was also informed that Winrose had been pushed off a moving motorbike when the boda bodas met the police.

24. After recording statements by Doreen and Winrose, PW7 issued them with p3 forms which were duly filled at Kanyakine Hospital. The photographs of Dorothy's demolished house were produced as Pexhibits 3A – C. According to PW7 the cash and mobile phones stolen during the robbery were never recovered. PW7 further testified that of, the three appellants, he knew only Martin Kinyua Kimathi, the first appellant herein.

The Defence Case

25. At the close of the prosecution case the appellants were found to have a case to answer and were accordingly put on their defence. Before they testified, the trial court explained the provisions of section 211 of the Criminal Procedure Code to them whereupon all the appellants elected to give sworn evidence. The first appellant indicated he would call two witnesses while the second and third appellants indicated they would each call one witness. The defence hearing was slated for 7th September, 2017. On that day Wamache advocate for the first appellant informed the court that the defence would call two witnesses. He reiterated the appellants earlier statements to give sworn evidence.

26. The first appellant, Martin Kinyua Kimathi stated that on the material day he received a report that a motor cycle belonging to Anthony Muthaura Kaburu had been stolen. While he was at the stage where he normally operated from as a boda boda rider he saw a number of motorcycles coming from the direction of Nkubu. The riders dropped a lady near where he was. Members of the public started gathering at the scene and on seeing what was happening he and his colleagues closed their businesses. A few minutes later, police officers arrived at the scene and rescued the lady who had been dropped. On 28th November, 2015 at about 1.00 p.m. he was arrested and escorted to the police station where he was charged with offences he knew nothing about. He alleged that the charges against him were a frame-up.

27. The first appellant called George Magaju as his witness. George Magaju testified as DW2 and stated that on the day in question he saw the first appellant at his (first appellant's) place of work and together with the first appellant they rode their motor bikes towards Pillars area where a lady who had allegedly stolen Mamruki's motorbike was. The police rescued the lady who was alleged to have stolen the motor bike.

28. Another witness was Julius Muteithia who testified as DW3. He testified that he was not only a friend but was a brother of the first appellant. His evidence was in tandem with what the first appellant had stated.

29. The second appellant, David Gitonga testified as DW4. He testified that he was the one who ferried Anthony Muthaura and some lady to the Darfur area. It was only later on that day he learnt of the boda boda demonstration within Mitunguu area. About 3 days later, he was taken to the police station by one Kennedy Njeru Mutua whom he allegedly owed Kshs 2,000/=. It was while he was at the police station with the Kennedy Njeru that he heard Njeru telling the officers that he (second appellant) was one of the boda boda riders who were demonstrating.

30. The third appellant, Josephat Kirugi testified as DW5. His evidence was that on 24th November, 2015, he was at his place of work where he operates as a boda boda rider on 28th November, 2015, he was arrested while at Mitunguu and taken to Mitunguu police station and charged with an offence he knew nothing about.

Submissions

31. Each of the three appellants filed their respective written submissions together with the amended grounds of appeal. I have carefully read through these submissions and also considered the additional oral submissions by the first appellant.

32. The appeals were opposed. Prosecution Counsel, Mr. Patrick Namiti submitted that the issue of identification of the appellants, which formed the focal point of their arguments against the judgment of the Learned Trial Magistrate was settled as the offence was committed between 3-6 hours on a bright morning. It was counsel's submission that during that entire period the appellants were engaged in constant conversation with Doreen and Winrose and that there is no chance that there could have been mistaken identity.

33. As to whether or not the offence of robbery under section 296 (2) of the Penal Code was proved counsel submitted that there was no doubt about this issue, the reasons being that one of the appellants was armed with a panga which he used to slap the complainants. Secondly that the complainants were seriously injured during the robbery in addition to the theft of money and mobile phones. Counsel also submitted that the defence offered by each of the appellants did not shake the prosecution case in any way.

34. Finally, counsel submitted that the fact that the appellants, and especially the first appellant was not arrested on the date of alleged offence was immaterial since there is no limit as to the time to be taken for any suspect to be arrested in connection with the commission of an offence. Counsel urged the court to uphold the trial court's judgment on both conviction and sentence and to dismiss the appeals in their entirety.

35. In reply the first appellant submitted that Doreen and Winrose did not give his full description in their first report to the police and secondly that the case of robbery with violence against him was not proved to the required standard.

Issues for Determination

36. From an analysis of the evidence, the submissions, the grounds of appeal, the law as well as the Judgment of the Learned Trial Court the issues that lend themselves for determination are the following:-

a. Whether a robbery under section 296 (2) of the Penal Code was proved, and

b. Whether all or any of the appellants were properly identified as the robbers.

c. Whether the sentence imposed by the Trial Court was unconstitutional.

Analysis and Determination

37. The evidence on record shows that the incident complained of took place in the morning on 24th November, 2015. According to Doreen and Winrose, they were on duty at Monaco Bar between 8.00 a.m. and 10.00 a.m. when a contingent of boda boda riders led by Anthony Muthaura Kaburu who was first accused shouting and alleging Doreen and Winrose had stolen his (Muthaura's) motor cycle. Doreen testified that she knew the said, Anthony Muthaura Kaburu because he used to live in the same compound at Monaco Bar where she worked as a bar maid and at the time of the attack he was armed with a panga. Doreen stated further that Muthaura gave her an ultimatum to surrender to the group or be killed right where she was. As fate would have it, Doreen had no time to answer, because Muthaura went into the counter grabbed her and pulled her out then she was carried shoulder high and placed on a motorcycle Muthaura rode to the place called Darfur, as other boda boda riders rode their motorbikes behind him with his "luggage", Doreen.

38. Doreen also stated that when they reached Darfur, she recognized the second accused Martin Kinyua Kimathi (first appellant), David Gitonga, 3rd accused (2nd appellant) Josephat Kirugi, 4th accused (3rd appellant) and Geoffrey Muriuki, 5th accused as they all assaulted her using pangas and sticks. In the course of the attack Kshs 20,000/= was stolen from the counter and Doreen as well as Winrose later lost their phones.

39. Later, Winrose underwent a similar ordeal as Doreen's at the hands of the boda boda riders led by the same person.

40. From the above evidence, I am satisfied that a robbery took place at Monaco Bar on the morning of 24th November, 2015. Section 296 (2) of the Penal Code provides that **"If the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more other person or persons, or if at or immediately before or immediately after the time of robbery he wounds, beats or strikes or uses any other personal violence to any person, he shall be sentenced to death."** There is no doubt that the people who attacked Doreen and Winrose at Monaco Bar on the day in question were armed with pangas and rungas (or sticks at Doreen refers to the rungas). They were many in number and both before and during the attack, Doreen and Winrose were assaulted. In fact according to the evidence Winrose was pushed off the motorbike when David Gitonga whose motorbike Winrose was being carried on came face to face with police. She fell on the tarmac road and lost consciousness, and only came to while at Mitunguu medical clinic.

41. The fact of the robbery was confirmed by Agnes who on getting the information, rushed to the bar and found it under siege on allegations that her two bar attendants Doreen and Winrose had stolen a motorbike belonging to Muthaura . In the course of the trial, the Muthaura escaped from lawful custody. The charge sheet was accordingly amended with the three appellants and one Geoffrey Muriuki as Accused 1-4. Geoffrey Muriuki was acquitted for lack of evidence. It is to be noted that after the charge sheet was amended, the case proceeded from where it had reached.

42. Though the prosecution was under a duty to prove only one of the circumstances under section 296 (2) of the Penal Code to warrant a conviction – see **Oluoch -vs- Republic (1985) IKLR 549** – the prosecution in this instant case proved all the circumstances. I find and hold that the appellants', allegation that what was reported was an assault and not a robbery does not hold water in the face of overwhelming prosecution evidence against each of the appellants in support of the offence of robbery under Section 296 (2) of the Penal Code.

43. The next issue for determination is whether the appellants were properly identified during the robbery. It is worth nothing that the identification of the appellants in the instant case was during daytime, and although the appellants were not previously known to both Doreen and Winrose each of the two victims described how they had recognized each of the appellants. In my considered view the appellants and each of them were properly identified during the robbery and was stated by **Lord Widgery CJ in Rex -vs- Turnbull (1976) 3 All ER 549** a case whose principles have become principles of general application in our jurisdiction, **"Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."** Bearing the above guidelines in mind, there is no doubt that the attack in this case took place in the morning and involved between 20-50 boda boda riders, so care has to be taken to ensure that those who claimed to have recognized the appellants had no doubt in their minds as to the person(s) they recognized.

44. From the evidence on record, I am satisfied that the appellants were properly identified by Doreen and Winrose. In her evidence during question time by the first appellant, Doreen stated **"I did not know you before.....On the material day, I saw you riding a**

motor bike. You were dressed in a green apron. I saw you and recognized you at Thingithu river when people were undressing me.....You assaulted me..... I know you are a mechanic. You came to us with Ciiku during the pendency of this case. You came to us to withdraw the complaint that is when you introduced yourself as a mechanic. You offered us Kshs 1,000/= each, we declined.”

45. When cross examined by the 2nd appellant, Doreen stated the following: **“I saw you for the first time on the day you assaulted me. I first saw you with the first accused in the bar where you removed me from. You were in a green T-shirt. You had a red jacket on top. You had no helmet on.”**

46. When the third appellant put questions to Doreen, this is what she said, **“I do not know you by name.....You were among those who assaulted me. I do not know your name but I memorized your appearance.”**

47. From the above, Doreen could clearly remember and describe each of the appellants on the day of the attack, including what clothes they were wearing and as she indicated to the third appellant, she memorized their appearances although she did not know them by name. In answer to a question by Geoffrey Muriuki who was acquitted, Doreen had the following to say, **“I mentioned your names to the police when I recorded my statement.”**

48. With regard to Winrose, her evidence on identification of the appellants was that apart from Geoffrey Muriuki who was acquitted she knew all the other accused persons of whom the appellants herein were the 2nd, 3rd and 4th accused in that order. Then she stated **“They sped to Darfur near Kamachage.....It is here that I saw 2nd accused (first appellant) who shouted at me that I must produce the motorcycle.....At Thingithu (river) I saw the 3rd accused. (2nd appellant) I noted that he was the one riding the motorcycle I was carried on. The mob undressed us. The person who undressed me is the 2nd accused. They put us on motorcycles. I was on the 3rd accused’s motorcycle.....Shortly before reaching Mitunguu, I saw a police road block. The 3rd accused made a u-turn and I fell from the motorcycle..... I saw the 4th accused (third appellant) at Darfur.....The 4th accused pricked my hair and plucked it off.”**

49. In cross examination, Winrose told the first appellant this: **“The time was about 8.30 a.m. I saw the 2nd accused in the mob for the first time at Darfur. I saw him shouting at me that I should tell them who had stolen the motorcycle” and to the 2nd appellant she said, “I did not have time to read the registration (number) of the motorcycle you were riding but I rode on your motorcycle from Darfur to Thingithu River.”** When the 3rd appellant cross-examined her, she told him, **“I saw you very well. It is me who gave your name to the police. I used to know you. You are one of those who beat me and plucked off my hair. You were arrested at Darfur market.”**

50. It is thus clear from the testimonies above that each of the appellants was identified and their roles spelt out by both Doreen and Winrose. I am satisfied that there was no mistake in the trial court’s finding that each of the appellants were part of the gang that attacked Monaco Bar, removed and drove away Doreen and Winrose and subsequently subjected the two to the most inhuman treatment before the police came onto the scene and rescued them.

51. It is also on record that this incident took a long time and the two complainants therefore had sufficient time with the appellants for proper identification.

52. Inspector Tom Onyancha who investigated the case testified that the second and third appellants were identified to the police by the complainants. With regard to the first appellant Inspector Onyancha stated that he was also in the group which was assaulting the complainants. He also added that it was the second appellant’s motorcycle that carried Winrose. The appeal on conviction is accordingly dismissed.

53. Finally is the issue of sentence. Before the appellants were sentenced, each of them was invited to give their mitigation after the prosecution informed the court that each of them could be treated as a first offender. The court, while noting the mitigation, observed that the offence was very serious and sentenced each of them to suffer death as by law established in respect of Count I. The sentence on Counts II and III were left in abeyance.

54. I have myself reconsidered the issue of sentence in light of the Supreme Court decision in **Muruatetu & another -vs- Republic (2017) eKLR** in which the Supreme Court stated clearly that the death sentence need not be the only sentence to be imposed against an accused person upon conviction for a capital offence. However, in the instant case, I am of the view that the actions of the appellants were so abhorrent that I do not think they deserve pity. They ought to be kept away from society for as long as possible. In this regard, I set aside the death sentence and in lieu thereof, I sentence each of the appellant to fifty (50) years in jail with effect from 9th October, 2017.

55. Right of appeal to Court of Appeal within 14 days from the date of this Judgment.

Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Meru on this 21st November, 2018

F. GIKONYO

JUDGE

In the Presence of

..... for 1st Appellant

.....for 2nd Appellant

.....for 3rd Appellant

Namiti for State

Mwenda - Court Assistant