REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 8 OF 2018

MARIUS CHERUIYOT RONO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Magistrate's Court at Kapsabet (Hon. M.C. Kesse, SRM) delivered on the 15th day of February 2018 in Kapsabet Senior Resident Magistrate's Court Criminal Case No. 3591 of 2016)

JUDGMENT

[1] This appeal was filed herein on **20 February 2018** by **Marius Cheruiyot Rono**, the Appellant. He appealed against his conviction and sentence recorded on **15 February 2018** by the Senior Resident Magistrate at Kapsabet Law Courts in **Kapsabet Criminal Case No. 3591 of 2016: Republic vs. Marius Cheruiyot Rono**. The Appellant had been charged before the lower court with the offence of robbery with violence, contrary to **Section 296(2)** of the **Penal Code, Chapter 63** of the **Laws of Kenya.**The particulars of the charge were that on the **15 October 2016** at Kaptel Village, Kaptel Location within Nandi County, jointly with others not before the court, and while armed with dangerous weapons, namely pangas and rungus, he robbed **Risper Chemai** of two mobile phones and **Kshs. 5,300/=** in cash, all valued at **Kshs. 30,300/=;** and that at or immediately before or immediately after the time of such robbery they used actual violence on **Risper Chemai.**

[2] The Appellant denied that charge and in proof thereof the Prosecution called 4 witnesses. The Appellant was also afforded an opportunity to defend himself against the aforementioned accusations. He opted to give a sworn statement. Having heard both sides, the Learned Trial Magistrate, in a considered Judgment that was delivered on **15 February 2018**, found the Appellant guilty and convicted him of the offence of robbery with violence as charged, and sentenced him to life imprisonment. Being aggrieved by that decision, the Appellant lodged this appeal on **20 February 2018**.

[3] By way of Grounds of Appeal, it was the contention of the Appellant that the Learned Trial Magistrate erred in both law and fact by convicting him yet the prosecution case was not proved beyond reasonable doubt; by applying the doctrine of recent possession and yet failing to appreciate that the exhibit was recovered while he was already in custody; and by failing to appreciate that the ownership of the recovered cell phone had not been proved by the Complainant as by law required. He also faulted the fact that the Safaricom transcript was not certified and was therefore produced by a witness who was not competent to do so. The Appellant also complained that the Learned Trial Magistrate dismissed his defence without cogent reasons, in effect shifting the burden of proof from the Prosecution to him.

[4] The Advocates for the Appellant, **M/s Wambua Kigamwa & Co. Advocates**, thereafter filed an Amended Petition of Appeal, with leave of the Court, in which the following grounds were raised:

> **[a]** That the Learned Magistrate erred both in law and fact in failing to find that the complaint was never duly admitted by the court as the Appellant was never brought before the Magistrate as required by **Section 89(1)** of the **Criminal Procedure Code, Chapter 75 of the Laws of Kenya,** granted the contradictory evidence adduced by the Prosecution as to his date of arrest.
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> **[b]** That the Learned Magistrate erred in law and fact in failing to find that the procedure for plea-taking under **Section 207** of the **Criminal Procedure Code** was never followed as the record indicates that the Appellant was absent when the plea was taken.
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> **[c]** That the Learned Magistrate erred in law and fact in proceeding with the trial in the absence of the Advocate for the Appellant thus denying the Appellant the right to be represented by an Advocate of his choice as provided for in **Article 50(2)(g)** of the **Constitution of Kenya, 2010.**
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> **[d]** That the Learned Magistrate erred in law and fact in failing to find that an identification parade ought to have been conducted.

[e] That the Learned Magistrate erred in law and fact in failing to find that no evidence was tendered in court on the first report made to the police regarding the description and features of the assailants.

[f] That the Learned Magistrate erred in law and fact in failing to find that the evidence on record was contradictory as to the date of the crime, with some witnesses indicating that it was on **15 October 2016,** while others indicated it was on **15 January 2016**.

[g] That the Learned Magistrate erred in law and fact in improperly analyzing the evidence and arriving at an erroneous conclusion that the Complainant was attacked by 3 hooded men while the evidence of the Complainant was to the contrary.

[h] That the Learned Magistrate erred in law and fact in failing to find that the doctrine of recent possession was inapplicable in the case as the mobile phone was not recovered in the presence of the Appellant, in his actual possession or at a clearly identified place that was established to be in the exclusive control of the Appellant.

[i] That the Learned Magistrate erred in law and fact in failing to find that no photographic crime scene report was produced to clearly show where the mobile phone was recovered in order to establish a nexus with the Appellant, more so there being a doubt as to whether the place was a hotel or a workshop.

[j] That the Learned Magistrate erred in law and fact by failing to find that the Safaricom data record was not valid documentary evidence, and was produced by a person who was not duly authorized in tandem with **Section 106B** of the **Evidence Act, Chapter 80** of the **Laws of Kenya.**

[k] That the Learned Magistrate erred in law and fact in failing to find that the evidence of the Safaricom data record was obtained without following due process and in breach of the rights of the Appellant to privacy under **Article 31(d)** of the **Constitution of Kenya, 2010** as the Appellant did not voluntarily give authority for the Police to obtain the data on his calls from Safaricom Ltd and no court order to obtain the data on his calls from Safaricom Ltd was given regarding the Appellant; thus the evidence ought to have been excluded in tandem with **Article 50(4) of the Constitution of Kenya.**

[l] That the Learned Magistrate erred in law and fact in failing to comply with **Section 211** of the **Criminal Procedure Code** by not explaining to the Appellant the rights contained therein, including the right to call witnesses if any.

[m] That the Learned Magistrate erred in law and fact in failing to inform and observe the Appellant's right to tender submissions as provided for in **Section 213** of the **Criminal Procedure Code**.

[n] That the Learned Magistrate erred in law and fact in failing to draw an adverse inference against the Prosecution for failing to avail witnesses from Safaricom Ltd, the Area Chief and PC Kapanda.

[o] That the Learned Magistrate erred in law and fact in failing to find that the Charge was not proved beyond reasonable doubt and in failing to accord the benefit of doubt to the Appellant.

[p] That the Learned Magistrate erred in law and fact in failing to comply with the Sentencing Policy Guidelines in imposing the life imprisonment.

Consequently, Learned Counsel for the Appellant prayed that his appeal be allowed, the conviction and sentence set aside, and that the Appellant be set at liberty unless otherwise lawfully held.

[5] The appeal was urged, on behalf of the Appellant, by **Mr**. **Kigamwa**. He argued Grounds 4 and 5 together and submitted that the identification is a mandatory requirement in cases of this nature; and that given the evidence of the Complainant that he was robbed by three people, it was imperative for an identification parade to be conducted, without which the conviction is unsafe. He also pointed out that no description of the features of the offenders were reported to the Police at the time the first report was made, which was also a serious omission in his view.

[6] Regarding Grounds 8 and 9, it was the submission of **Mr. Kigamwa** that the doctrine of recent that was relied on by the Learned Trial Magistrate to found the conviction against the Appellant was inapplicable for the reason that when the items were recovered the Appellant was already in custody. According to him, it could not be said in the circumstances that the items were found in his possession when there was no evidence to show that the Appellant had any connection with the place where the items were found.

[7] In respect of Grounds 9 and 10, **Mr. Kigamwa** was of the view that the transcripts found at pages 15-18 of the Record of Appeal do not meet the test of **Section 106B** of the **Evidence Act**, especially **Subsection (4)** thereof. He stressed the point that a Certificate was required in connection with the transcripts; and that the Investigating Officer was not the proper person to produce the documents for purposes of **Section 106B** of the **Evidence Act**. He additionally raised the issue of invasion of the privacy of the subscriber, granted that there was no court order sanctioning the collection of the transcripts.

[8] Mr. Kigamwa also urged the Court to draw an adverse conclusion from the fact that the Prosecution failed to call some of the witnesses, notably the Area Chief and a witness from Safaricom. The rest of **Mr. Kigamwa's** arguments target what he perceived to be procedural infractions by the Learned Trial Magistrate; contending for instance that, according to the record, the Appellant was not present during plea-taking; and further that in the course of the trial, the Appellant was constrained to proceed without his Advocate, in breach of his right to legal representation by a lawyer of his choice. Hence, **Mr. Kigamwa** urged for the appeal to be allowed, for the conviction and sentence to be set aside, and for his client, the Appellant, to be set at liberty forthwith.

[9] On behalf of the State, **Ms. Oduor** was of the view that the Appellant was linked to the offence; and that although the Complainant was unable to identify the Appellant, he was linked to the offence by operation of the doctrine of recent possession. She also directed the Court's attention to the transcripts which show that the Appellant used one of the Complainant's stolen cell phones between **14 November 2016** and **23 November 2016;** which cell phone was recovered from his possession. **Ms. Oduor** urged the Court to note that no explanation was tendered by the Appellant as to how he ended up having the Complainant's phone; and that in the absence of an explanation, the lower court was at liberty to draw the inference that he was one of the three people who robbed the Complainant.

[10] Ms. Oduor conceded that at page 19 of the record, the indication is that plea was taken in the absence of the Appellant. She however submitted that this was a typographical error, noting that **Mr. Sagasi** was in attendance as Counsel for the Accused; and that the language that the court used to communicate with the Accused was also stated. According to her, it was impossible, in the circumstances, for the matter to proceed in the presence of Counsel without the participation of the Appellant.

[11] Ms. Oduor further conceded that no Certificate was availed before the lower court to accompany the transcripts as by law required, but urged that this is a technical omission that the Court should ignore; particularly in the light of the credible evidence adduced by the Prosecution. She also posited that the Court is vested with powers to do justice, including the power to make an order for re-trial on account of that anomaly.

[12] In **Section 295** of **the Penal Code,** the law provides that any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery. On the other hand, **Section 296(2) of the Penal Code**, the provision pursuant to which the Appellant was charged, 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 the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

[13] Hence, the Prosecution was under obligation to prove any of the following key ingredients of the charge:

> **[a]** That the Appellant was armed with a dangerous or offensive weapon or instrument; or
>
> **[b]** That he was accompanied by one or more other person or persons; or
>
> **[c]** That immediately before or immediately after the time of the robbery, he wounded, struck or used any other personal violence against the Complainant;

[14] Before the lower court, evidence was adduced by the Complainant, **Risper Chemai (PW1)**, to the effect that she was at home on **15 October 2016** at 7.30 p.m. when she was attacked by three people, all male, who demanded for money from her. That one of the men got hold of her and started strangling her before she was hit by another using a dry thorny branch. She was then frog-matched from the kitchen to her bedroom in the main house where she was covered with a blanket as the beating continued; while the others were ransacking the bedroom in search of money. It was not until her gardener, **Nelson Tarus (PW2)**, called out in search of her that the attackers panicked and fled, having taken her two mobile phones and money in cash in the sum of **Kshs. 5,300/=.**

[15] It was further the evidence of **PW1** that she suffered serious injuries for which she was immediately taken to hospital for treatment. She was later to be notified by the Police that one of her mobile cell phones, **Tecno** for line **No. 0721...725,** had been recovered and a suspect, the Appellant herein, arrested. She went to the Police Station and identified her recovered cell phone and was also shown the Appellant. She testified that she did not know the Appellant before; and that she only got to learn later that he is a neighbour.

[16] PW2 augmented the evidence of **PW1** and confirmed that he was her employee; and that on the night in question, he was awoken from sleep by the barking of the dogs. He then proceeded to **PW1's** kitchen where the lights had been put off. Using a spotlight to light his way, he saw a knife at the door step and blood on the floor. He got alarmed about the safety of the Complainant. He then stepped out in search of **PW1** and went round the house calling out for her but there was no response. As he was entering the main house, he met one person with a torch and a panga. At that point he ran out, raising alarm to alert the neighbours of the incident.

[17] PW3, **Patrick Kirui**, told the lower court that, as a Clinical Officer based at Kapsabet County Referral Hospital, he examined the Complainant on **25 October 2016**; and that she presented a history of having been strangled and hit on the right lower limb by some people. Upon examining her, he noted that she had scratches on the neck region as well as a cut wound on the right tibia/fibula region. He accordingly filled the P3 Form that was presented to him by the Complainant and assessed the degree of injury as harm. It was marked before the lower court as Exhibit No. 3 for the Prosecution. He pointed out that he had earlier attended to the Complainant on **15 October 2016** and used the treatment notes that he had written for purposes of filling the P3 Form.

[18] The Prosecution's last witness was the Investigating Officer, PC **Omondi Tulla (PW4).** He was then based at Kapsabet Police Station and was on night duty when a robbery was reported to the station from Kaptel area. His evidence was that he immediately proceeded to the scene with other officers and made his observations. He thereafter visited the Complainant at the hospital and noted that she was injured and traumatized. He later contacted Safaricom and obtained data for one of the stolen mobile phones, namely **Tecno No. 1721...725**. Upon analyzing the data he established that the Appellant had been using the stolen phone between **14 November 2016** to **23 November 2016**. Accordingly, he arrested the Appellant and caused him to be charged with the offence of robbery with violence. They later recovered the Tecno mobile phone itself from the Appellant's hotel at Kimondi, and had it produced as an exhibit before the lower court, along with the Appellant's sim cards, identity card and the Safaricom data sheets.

[19] On his part, the Appellant narrated on oath how he was arrested on **5 December 2016** and taken to Kapsabet Police Station where he

was charged with the offence of robbery with violence against the Complainant herein, which was alleged to have been committed on **15 October 2016**. He stated that while in custody, he was informed that the Complainant's stolen mobile phone had been recovered from his hotel. He denied these allegations and explained that the Investigating Officer caused him to surrender his mobile phone and identity card upon arrest and that he used the same to scheme and fabricate this case against him. According to him, the charge was trumped up.

[20] From the foregoing summary, there is no dispute that the Complainant was attacked at about 7.30 p.m. on the **15 October 2016** as alleged. She was in her kitchen when three people attacked and assaulted her, demanding money from her. The Complainant's evidence that she was beaten up as the robbers ransacked her house was uncontroverted. The Complainant told the lower court that her house was ransacked and some **Kshs. 5,300/=** stolen from her handbag which was in her bedroom. Also stolen were her two mobile phones **Tecno IMEI 860176025065080** and **LG touch screen.** This evidence was uncontroverted.

[21] PW1 also testified that, as she was bleeding profusely, she was promptly taken to Kapsabet County Referral Hospital for treatment. In this respect, her gardener **PW2** also offered corroborative evidence as to what transpired that night. Additionally, **PW3**, the Clinical Officer who attended to the Complainant at Kapsabet Hospital, also testified in that regard and produced treatment notes and the P3 Form that he filled upon examining the Complainant. The P3 Form confirms that the Complainant suffered actual bodily harm. There is similarly no denying that the offenders were armed with dangerous weapons, namely, pangas and rungus, with which they wounded the Complainant. Credible evidence therefore was placed before the lower court to show that the violence used on the Complainant was specifically applied in order to obtain or retain the mobile phones and the **Kshs. 5,300/=** that the Complainant was robbed of on that night.

[22] Clearly therefore key ingredients of the offence of Robbery with Violence were proved before the lower court, noting that proof of any one of the ingredients set out in **Section 296(2)** of the **Penal Code** would have sufficed.(See **Suleiman KamauNyambura vs. Republic [2015] eKLR)**. It was shown that the offenders were armed with a dangerous or offensive weapon or instrument; that they were three persons in number and that immediately before the time of the robbery, they assaulted and wounded the Complainant, thereby causing heractual bodily harm in the nature of bruises on the neck and cut wound on the right tibia and fibula region, measuring 3 cm. Hence, the only issue to consider herein is whether the Appellant was one of the three people who committed the offence, which I will come to shortly. I propose to first deal with the alleged procedural infractions pointed out by the Appellant's Counsel; the first of which was in connection with the date of the Appellant's arrest.

[23] Counsel for the Appellant drew attention to the apparent contradiction in the Prosecution evidence as to the date of arrest and subsequent arraignment of the Appellant before the lower court. Thus he argued that the complaint was never duly admitted by the court as the Appellant was never brought before the Magistrate as required by **Section 89(1)** of the **Criminal Procedure Code, Chapter 75 of the Laws of Kenya.** In particular, Counsel submitted that the evidence variously indicated that the Appellant was arrested on **4 December 2016, 8 December 2016,** and **28 December 2017**. Needless to say that arrest and arraignment are matters of fact which can be verified from the record of the lower court. That record shows that the Appellant's plea was taken by the lower court on **7 December 2016** and that this was done in the presence of his Counsel, **Mr. Sagasi**. The Charge Sheet also confirms that the date when the Appellant's apprehension was reported to court was on **7 December 2016,** and that his arrest took place on **5 December 2016**. Hence, notwithstanding the discrepancies that emerged in the evidence of the Investigating Officer, I have no hesitation in holding that, going by the court record, the complaint was properly lodged and plea taken in accordance with **Section 89(1)** of the **Criminal Procedure Code** in that, a formal charge was presented before the court in respect of which the Appellant was called upon to plead.

[24] Counsel further took issue with the manner in which the plea-taking was handled by the lower court. He pointed out that since the Record of Appeal shows that the Appellant was absent, the process was flawed from the standpoint of **Section 207** of the **Criminal Procedure Code;** and that this flaw therefore vitiated the ensuing trial, conviction and sentence. I have accordingly perused the Record of Appeal, and confirmed that it indicates, at page19, line 12, that the Appellant was absent when the plea was taken on **7 December 2016**. Obviously, that would amount to a breach of not only **Article 50(2)(b)** of the **Constitution of Kenya, 2010,** but also **Section 207 of the Criminal Procedure Code.** Therefore, to ascertain what transpired on the **7 December 2016,** I counter-checked the typed record against the original handwritten record of the proceedings of the lower court.

[25] The handwritten record reveals that the plea sheet was a typed sheet with options for the Trial Magistrate to strike out what was inapplicable between "present" and "absent"; as well as the language. It further shows that the Trial Magistrate struck out "absent". Hence, the original record does confirm that the Appellant was indeed present and therefore participated in the plea-taking process. Evidently therefore, the typed Record of Appeal did not accurately capture what transpired on the **7 December 2016.** As pointed out by **Ms. Oduor**, it is improbable that **Mr. Sagasi**, **Advocate**, who was then on record for the Appellant, would participate in the plea-taking process in the absence of his client. There is clearly no merit in the argument that plea was taken in the absence of the Appellant.

[26] I similarly do not find any merit in the submission by Learned Counsel that, in proceeding with the trial in the absence of the Advocate for the Appellant, the Appellant was, in effect, denied the right to be represented by an Advocate of his choice as provided for in **Article 50(2)(g)** of the **Constitution of Kenya, 2010.** The record is clear, that the Appellant engaged an advocate of his own choice; and the advocate was in attendance right from the inception of the case. He appears to have fallen off the matter for reasons that are not altogether clear from the court record. Whatever, the case, at no time did the Appellant request for time to engage another advocate. Instead he urged the lower court to proceed with the trial, even asking for the expeditious disposal of the matter.

[27] The Appellant's Counsel also faulted the lower court for its failure to ensure compliance with **Section 211** of the **Criminal Procedure Code** by not explaining to the Appellant the rights entailed thereby, including the right to call witnesses if any. It is imperative that upon making a finding that an accused person has a case to answer, compliance be had with **Section 211** of the **Criminal Procedure Code** by the trial magistrate; and that such compliance be clearly recorded in the record of proceedings. (see **Hawo Ibrahim vs. Republic [2016] eKLR).**

[28] In this instance, the record shows that, the Appellant chose to give sworn evidence and that his choice was put down in the record at page 44 of the Record of Appeal. Although the Learned Trial Magistrate did not specifically note, as should have been done, that there was compliance with **Section 211** of the Criminal Procedure Code, the response of the Appellant does show that this was done. Accordingly, no prejudice was occasioned to the Appellant in this regard. (see **John Waweru Njoka vs. Republic [2001] eKLR).** In similar vein, I find spurious the argument that the Appellant was prejudiced in that he was not informed of his right to tender submissions for the lower court

record is explicit that, after the close of the Prosecution case, the Trial Magistrate adjourned the matter to **23 November 2017** for submissions by both parties; and that the Appellant did make his submissions on no case to answer.

[29] Counsel for the Appellant also pointed out what he considered to be contradictions and inconsistencies in the Prosecution evidence. In particular, he submitted that the evidence on record was contradictory as to the date of the crime with some witnesses indicating that it was on **15 October 2016** while others indicated it was on **15 January 2016**. The date of **15 January 2016** is attributed to **PW2** (see page 32 of the Record of Appeal). However, it is manifest that in the original record, **PW2** was specific and to the point in his evidence, clearly stating the date to be **15 October 2016**. Again, this is a case of the officers who were charged with the duty of typing and proof reading the typed proceedings not taking their duties seriously; thereby occasioning needless confusion. In effect therefore, from the lower court record there is no confusion as to the date when the incident took place. I would thus find no merit in the Appellant's arguments in this regard. In any case, in **Joseph Maina Mwangi –Vs- Republic Criminal Appeal No. 73 of 1992**, the Court of Appeal expressed the view that:

> **"An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence".**

[30] Similarly, in ***Philip NzakaWatu vs. R*** **[2016] eKLR** the Court of Appeal held that:

> ***"...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

[31] Turning now to the merits of the appeal, having given careful consideration to the Grounds of Appeal and the submissions made herein by Learned Counsel for the Appellant and the State, the key issues that present themselves for determination are as follows:

> **[a]** The identification of the Appellant;
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> **[b]** The doctrine of recent possession and its place in the proceedings before the lower court;
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> **[c]** A comment on the Sentence passed by the lower court.

[a] On the Evidence of Identification:

[32] In **R. vs. Turnbull & Others [1973] 3 AllER 549,** it was held that:

> **"...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?**

[33] Similarly, in **Wamunga vs. Republic [1989] KLR 426**, the same principle was restated thus:

> **"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."**

[34] It is therefore imperative that where an offence occurred at night and in difficult circumstances, a thorough examination and careful testing of the evidence adduced, especially of identification, must be manifest from a perusal of the record; that is why the Court of Appeal in **the Wamunga Case** stressed this aspect thus:

> ***"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."***

[35] The evidence adduced before the lower court reveals that the incident occurred at 7.30 p.m. at night when it was already dark, and although the Complainant had her lights on in the kitchen, she told the lower court that the same were switched off by her attackers, a fact that was confirmed by **PW2**. Hence, the pertinent question is whether the Complainant was able to identify the Appellant, or indeed any of the offenders. Whereas at page 13 of the Record of Appeal the Complainant is recorded to have told the lower court that the Appellant was the one who strangled her and thereafter escorted her to the main house, the truth of the matter, from the totality of her evidence is that she did not see any of the three people well enough to be able to identify any of them, granted that the lights had been switched off.

Consequently, she frankly told the lower court that:

> **"...It was dark. At the bedroom they covered me with a heavy blanket. The 2 were masked, they were inside the house. I would not identify them...I did not know Marius before..."**

[36] In cross-examination, she reiterated her contention that she could not recognize the assailant who strangled her. Similarly, **PW2** admitted that though he was confronted by one of the assailants at the doorstep of the Complainant's house and noted that he was carrying a panga, he was unable to identify that person. In the circumstances, it would have been inconsequential for an identification parade be conducted. Indeed, in his Judgment, the Learned Trial Magistrate observed that:

> **"On identification the complainant without a doubt couldn't identify the attackers."**

Accordingly the Appellant's contention that the Learned Magistrate erred in law and fact in failing to find that an identification parade ought to have been conducted; or that a description of the features of the assailants ought to have been made to the Police in the first report are, in my view, pointless.

[b] <u>On the Doctrine of Recent Possession</u>:

[37] It is manifest that the Appellant's conviction was largely hinged on the Prosecution contention that one of the Complainant's stolen phones was found in the possession of the Appellant. In this regard, the Learned Trial Magistrate expressed himself thus:

> **"...On the doctrine of recent possession of stolen property, which is largely part of the principles of circumstantial evidence and is manifest to prove *mens rea* of the offence...In applying this to the Kenya jurisdiction, the court infers the interest to be that when one is found with recently stolen property and offers no explanation of his possession or the explanation is unbelievable, then it follows that such an accused knows that the property was stolen and are therefore liable for the offence...In the instant case, the accused has offered no tangible explanation as to how the complainant's phone came into his possession. I find this evidence proves beyond a shadow of doubt that the accused committed this offence against the complainant given the foregoing, the prosecution have discharged the burden of proof, the accused is found guilty as charged for the offence of robbery with violence."**

[38] However, according to the Appellant's Counsel, the doctrine of recent possession was inapplicable to the case as the mobile cell phone was not recovered in the presence of the Appellant, in his actual possession or at a clearly identified place that was established to be in the exclusive control of the Appellant. What then was the Prosecution required to prove in connection with the doctrine of recent possession? In **<u>Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Cr. Appl No. 282 of 2005 (UR)</u>** the Court the elements were set out thus:

> **"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;**
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> **i). that the property was found with the suspect;**
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> **ii). that the property is positively the property of the complainant;**
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> **iii). that the property was stolen from the complainant;**
>
> **iv). that the property was recently stolen from the complainant**
>
> **The proof as to the time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."**

[39] Whereas there seems to be no doubt that the recovered Tecno phone belongs to the Complainant; and that it was one of the items that the Complainant had been recently robbed of, the evidence about its recovery from the Appellant was a bit shaky. **PW4** conceded that the recovery took place after the Appellant had been arrested on **8 December 2016**. The date of recovery is however not explicit in the evidence of **PW4**. Similarly, although it was the contention of **PW4** that the mobile phone was recovered from a hotel operated by the Appellant, there was no supporting evidence to show which shop, or exactly where in the shop the mobile phone was found, or who was present at the time of recovery as no inventory was taken or exhibited before the lower court in relation to the recovery.

[40] Although the Prosecution was content to rely on the Safaricom data sheets marked **Exhibit 7(b)** before the lower court to establish the nexus between the Appellant and the stolen phone, as conceded by **Ms. Oduor** for the State**,** the said computer generated data was not certified as required by **Section 106A** and **106B** of the **Evidence Act, Chapter 80** of the **Laws of Kenya. Section 106B(4)** is explicit that:

> **"In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following--**
>
> **(a) identifying the electronic record containing the statement and describing the manner in which it was produced;**
>
> **(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the**

purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it."

[41] In the premises, it was mandatory for a certificate to be furnished to vouch for the credibility of the documents. This, no doubt, is because computer generated data is manipulable. Hence, in **Republic vs. BarisaWayu Matuguda [2011] eKLR**, for instance, it was held that:

"...Section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in the provisions are satisfied...The provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of section 106B(4). Such certificate must be signed by a person holding a responsible position with respect to the management of the device...without the required certificate this CD is inadmissible as evidence."

[42] Hence, failure by the Prosecution to avail such a certificate, duly signed by a person occupying a responsible position at Safaricom was, in my view, fatal to the Prosecution case. In the same vein, the inexplicable failure by the Prosecution to call the responsible person at Safaricom as well as the persons who were present when the mobile phone was allegedly recovered would naturally attract the presumption that had they been called their evidence would have been adverse to the Prosecution.

[c] On the Sentence passed by the lower court:

[43] Although it was the contention of the Appellant's Counsel that the Learned Magistrate erred in law and fact in failing to comply with the Sentencing Policy Guidelines in imposing the life imprisonment, it is noteworthy that the Appellant was, pursuant to **Section 296(2)** of the Penal Code, liable to suffer death for the offence. However, in its discretion the Court passed life sentence, as it was entitled to. **Mr. Kigamwa** did not spell out in what manner the lower court erred; and so given the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR,** the lower court cannot be faulted for the sentence it passed. Here is what the Supreme Court had to say:

[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.

[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.

[44] The Supreme Court added, at paragraph 69 of its Judgment that

"...For the avoidance of doubt*, this decision does not outlaw the death penalty*, which is still applicable as a discretionary maximum punishment."

Needless to say that the observations apply *mutatis mutandis* to the offence of robbery with violence under **Section 296(2)** of the Penal Code. Accordingly, in **William Okungu Kittiny vs. Republic [2018] eKLR**, the Court of Appeal held that:

"The appellant was sentence to death for robbery with violence under Section 296(2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296(2) and 297(2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence3 for murder, the decision broadly considered the constitutionality of the death sentence in general. In the Mutiso Case which was affirmed by the Supreme Court, the Court of Appeal said obiter that the arguments set out in that case 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 111 referred to similar mandatory death sentences. From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296(2) and 297(2) of the Penal Code. Thus, the sentence of death under Section 206(2) and 297(2) of the Penal Code is a discretionary maximum punishment..."

In the premises, I would have upheld the sentence had I been satisfied that the Appellant's conviction was predicated on sound evidence.

[45] In the light of the foregoing, the last question to grapple with is whether to order for a retrial. In conceding that the Prosecution was at fault in not complying with **Section 106B** of the Evidence Act, **Ms. Oduor** for the State urged that a retrial be ordered to correct the anomaly and meet the ends of justice in the matter. In such a scenario, the Court is mandated to give particular consideration to the interests of justice and whether the same would be served by ordering a retrial. Hence, in **Muiruri vs. Republic [2000] KLR 552** it was held that:

"3. Generally whether a retrial should be conducted or not must depend on the circumstances of the case.

4. It will only be made where the interest of justice required it and it is unlikely to cause injustice to the appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to quashing of the conviction were entirely of the prosecution making or not..."

[46] This is a serious matter of robbery with violence in which the Complainant was subjected to a harrowing experience, including actual bodily harm. It was on that account that the Learned Trial Magistrate found it apt to sentence the Appellant to life imprisonment. The appeal has succeeded on the basis of irregularities in connection with the production of the Safaricom data. Accordingly, I take the view that the justice of the case would be in favour of a retrial, noting that the matter was concluded on **15 February 2018**, and therefore there can be no question about the availability of the Prosecution witnesses. I note too that in **Samwel Ngare Kayaa & Another vs. Republic [2014] eKLR**, a retrial was ordered on **28 March 2014** after a period of 10 years. Accordingly, no prejudice would be visited on the Appellant herein.

[47] In the result, I find merit in the Appellant's appeal against conviction and sentence and would accordingly quash the said conviction and set aside the sentence imposed therefor. It is further hereby ordered that there be a retrial of the Appellant by a different magistrate at Kapsabet Law Courts other than **Hon. M.C. Kesse, SRM;** and that the Appellant shall remain in custody until his presentation before the lower court on **3 December 2018** for further orders.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF NOVEMBER, 2018

OLGA SEWE

JUDGE