

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**  
**CRIMINAL APPEAL NO. 69 OF 2017**

**MICHAEL ONYANGO OWALA.....APPELLANT**

**VERSUS**

**REPUBLIC .....**  
**RESPONDENT**

***(An appeal from the conviction and sentence of Hon. G. Adhiambo (SRM) at Ukwala SRM's Court Criminal Case No. 351 of 2016 dated 26<sup>th</sup> July 2016).***

**JUDGMENT**

1. The appeal arises from the conviction and sentence of Hon. G. Adhiambo dated 26<sup>th</sup> July 2016 vide Ukwala SRM's Court Criminal Case No. 351 of 2016 wherein the Appellant who faced a charge of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code was convicted and sentenced to death.
2. The Appellant herein Michael Onyango Owala was aggrieved by the aforesaid conviction and sentence and duly filed his

Petition of Appeal dated 1/8/2017 wherein he raised the following grounds of appeal:

- i) That the learned trial magistrate erred in law in convicting the Appellant for the offence of robbery with violence contrary to Section 296(2) of the Penal Code when there was insufficient evidence to support the same.
- ii) That the learned trial magistrate failed to give due consideration to the fact that the Appellant's name was not recorded at Ukwala Police Station OB in relation to the alleged robbery.
- iii) That the learned trial magistrate erred in law when she made a finding that the Appellant had dealt mainly on the evidence of his arrest when the Appellant had indeed challenged the entire prosecution's evidence in cross examination.
- iv) That the conduct of the Appellant between the date of the alleged offence and his arrest is that of an innocent man.
- v) That the defence of alibi raised by the Appellant was not considered at all by the trial magistrate.
- vi) That the conviction of the Appellant was against the weight of the evidence on record.

The Appellant also filed supplementary grounds of appeal dated 14/8/2025 which are as follows:

- i) That the trial court erred in law and in fact in not making a finding that the identifying witnesses did not

give the description or the name of the Appellant in their first report.

- ii) The trial court erred in law and in fact in accepting the evidence of identification of the prosecution witnesses without considering the circumstances under which they came to be made.
- iii) That the trial court erred in law and in fact in not weighing the contradictions, discrepancies and inconsistencies that were inconsequential to conviction.
- iv) That the trial court erred in law and in fact in not making a finding that lack of properly organized identification parade to PW3 and PW4 was fatal to their identification.
- v) That the trial court erred in law and in fact in not making a finding that the doctrine of recent possession was not proved against the Appellant beyond a reasonable standard.
- vi) That the trial court erred in law and in fact in admitting the evidence that was not admissible.
- vii) That the trial court erred in law and in fact in denying the Appellant his absolute right to a least prescribed sentence pursuant to Article 25(c) and 50 (2) (p) of the Constitution of Kenya 2010.

The Appellant therefore prayed that the appeal be allowed and the conviction quashed and sentence of death be set aside and he be set at liberty unless otherwise lawfully held.

3. This being the first appellate court, its duty is to subject the evidence as a whole to a fresh and exhaustive examination so as to arrive at its own decision and that it must weigh the evidence and draw its own conclusions and findings while making due allowance for the fact that only the trial court had the advantage of hearing and seeing the witnesses. See **Okeno vs R [1972] EA 32.**
4. The Appellant herein faced a charge of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars were that on 26<sup>th</sup> October 2014 at Rang'ala Area in Ugunja District within Siaya County jointly with others not before the court while armed with a dangerous weapon namely a firearm, robbed Joseph Makau Mwangangi of a motor vehicle registration number KCA 160J FRR Isuzu Canter while loaded with 700 nets of onions all valued at Kshs4 millions and immediately at the time of such robbery used actual violence to the said Joseph Makau Mwangangi.
5. The Appellant pleaded not guilty to the charge and thus the hearing commenced in earnest on 22/7/2016.
6. **Joseph Makau Mwangangi (PW1)** testified that he was in Mombasa when he was requested by the registered owner of the lorry registration KCA 160J make FRR Isuzu Canter to drive the same to Sudan to deliver some goods belonging to one of her customers who had sought to supply goods to Sudan. That he started the journey from Nairobi on

19/10/2014 in company of the husband to the owner of the goods and on reaching Kericho, the husband of the owner alighted after giving him Kshs65,000/= for accommodation and service of the lorry as it went to Sudan and back. That on reaching Kisumu, he felt sleepy and that the owner of the goods took over as he went to sleep. That he was later woken up by gunshots and that he saw a saloon car had blocked their way. That two occupants emerged from the saloon car and ordered them to open the lorry door. That the robbers managed to get in and started assaulting the owner of the luggage whom they frog matched him to the saloon car where they were ordered to surrender all phones and STM cards. That the robbers drove them for a long distance before they tied their hands and legs and bundled them in the boot of the car and then drove them to a certain sugar cane plantation where they dumped them there. That he was able to identify the Appellant as he mastered his face quite well by the use of the lorry's headlights and that they had engaged on a conversation with him regarding the condition of the lorry. That they were abandoned at the sugar plantation around 7.00 am - 7.30 am. That they later managed to untie themselves and sought help from good Samaritans. It was then that they learnt that they had been dumped at Chemelil area. That that were assisted to Chemelil Police Station where they reported the incident. That he managed to alert his employer and warned her not to send money via Mpesa as his phone had been stolen by the robbers. That the lorry was later tracked and found to be

moving from Uganda and heading towards Funyula route and had stopped a few kilometres from Siaya town. That they went to Siaya police station where police officers accompanied them in the search of the lorry and later stumbled upon it parked inside a certain compound and that the registration plates had been changed. That his employer used a spare key to reopen the lorry. That he drove the lorry which now had been given number KBJ 765X to Siaya police station. That he later led police officers to the scene at Rangala area. That he was later called to visit Siaya police station where he positively identified the Appellant herein in an identification parade as he had mastered his face and had seen him quite well when he had assisted him to get out of the boot of the saloon car at the sugarcane plantation at around 7.00 am - 7.15am.

On cross examination, he stated that as soon as he entered the identification parade room of twelve people, he recognized the Appellant and went ahead to touch him.

- 7. Lucas Aluoch Dala (PW2)** testified that the Appellant herein called him on 21/10/2014 and requested him to help keep his lorry for him as he was running away from persons who had given him a loan to purchase the lorry and was worried that they could seize the vehicle if it was left at his (Appellant's) home. That he later linked him with one Musa to assist in keeping the lorry. That he was later alerted by Musa that police officers had visited his compound in hot

pursuit of the stolen lorry and that he relayed the turn of events to the Appellant so that he could shed light on the issue of the lorry. That the Appellant who is a cousin took him in circles and declined to go himself to the police over the lorry until he was compelled to team up with Musa and went to Ukwala police station where they recorded statements over what they knew and that he was treated as a witness against the Appellant.

On cross examination, he stated inter alia; that the Appellant called him on 21/10/2014 and who later avoided him; that the lorry was at Musa's compound for only 30 minutes before the police turned up and collected it; that he was not present when the police collected the lorry.

8. **Moses Odhiambo Omwari (PW3)** testified that on 21/10/2014 Lucas Aluoch (PW2) called him and informed him that there was a cousin of theirs who had bought a lorry by way of loan and that the persons who had loaned him now wanted to take back the lorry and hence he wanted a place to keep it. That he enquired from Lucas that he trusted that the same would not pose problems to him to which he assured him. That he gave the alleged owner of the lorry directions to his home in Boro. That he later waited for the lorry and that the Appellant herein turned up and introduced himself as a cousin to Lucas Aluoch (PW2). That he saw the lorry with registration number KBJ 765X. That he showed the Appellant where to park the lorry and who gave him

Ksh500/= through his lady companion and drove away in a saloon car with Ugandan registration number plates. That he was later shocked to find police officers had descended his parents' home. That he tried to contact the Appellant and Lucas Oluoch but their phones remained switched off. That he was forced to go into hiding until relatives assured him to go and record a statement and be made a witness.

On cross examination, he stated inter alia; that he identified the Appellant at Ukwala police station but did not participate in the identification parade; that he had not known the accused before; that he met the Appellant when he brought the lorry to his parents' compound.

9. **Walter Kamigona Ojoni (PW4)** stated that he joined the driver of the lorry registration number KCA 160J together with the conductor in Nairobi on 19/10/2014 and that on reaching Kisumu the driver requested him to drive the lorry as he was tired and sleepy. That on reaching Rangala area, a saloon car blocked the lorry and that the occupants in the saloon car came out while firing gunshots. That the three persons forcefully entered the lorry and yanked him off from the lorry and frog matched him to the back seat of the saloon car. That the driver was also flushed out from the lorry and who joined him in the saloon car. That he handed over Ksh80,000/= which was meant for fuel to the robbers. That the robbers also stole their mobile phones and ATM

cards. That the robbers later tied them and bundled them into the boot of the saloon car and drove them on a long journey until morning when they reached a sugar cane plantation. That they were dumped there around 7.00 am. That they later managed to untie themselves and later learnt that they were in Muhoroni area. That they were assisted by a good Samaritan to Muhoroni police station where they recorded statements. That he was later called to participate in an identification parade at Siaya Police station where he positively identified the Appellant herein who was the one who terrorized him while armed with a gun and who removed his neck chain and wedding ring.

On cross examination, he stated inter alia; that he saw the faces of the robbers; that the cut on the Appellant had enabled him to master him; that the Appellant was in a parade of ten people of different facial and height appearances.

10. **Jeniffer Ayuer Omwari (PW5)** testifies that on 21/10/2014 she left the farm at 2.00 pm and while at home she heard the sound of a lorry and later saw a white lorry heading to her home. That the man who brought the lorry left and promised to come back later to collect it. That as soon as Musa (PW3), left three police officers who were armed arrived and harassed her. That the true owner of the lorry also arrived and had the lorry driven away. That the police also drove away her family car. That the man who brought the lorry had the appearance of Owala's children as

they have two lines at the back of their necks. That she was able to identify the Appellant in the dock as the one who brought the lorry to her home. That she had earlier attended the funeral of his sister and had known him and that at the time she got married, his mother had not been married.

On cross examination, she stated that she saw the Appellant's front side as he entered her home and that he could not engage him as he had a female companion who was urging him to leave in haste.

11. **Margaret Auma Otieno (PW6)** testified that she was in Eldoret on 18/10/2014 when she released her lorry registration KCA 160J FRR Isuzu canter to Nairobi to pick some luggage which was picked on 19/10/2014. That the driver arrived at Awasi at 10.00 pm and she directed them to proceed with the journey. That the following morning at 6.00 am she received a call from a strange number and learnt from the driver that they had been car jacked at Rangala Girls area. That she later joined the drive and recorded statements and thereafter commenced the task of tracking the stolen lorry. That they later managed to track it in Siaya County. That she accompanied police officers to a certain home within Alego where she found her lorry which had been fitted with a different registration numbers namely KBJ 765X FRR.

12. **No. 235604 CIP David Wanjala (PW7)** testified that while attached at Siaya Police station, he was requested to

conduct an identification parade involving the Appellant herein. That he managed to get nine parade members and that the Appellant chose to take position between member 7 and 8. That he called the first witness Walter Kamigona Ojoni (PW4) who identified the Appellant by touching him and in which the Appellant indicated that he did not agree with the witness but nevertheless signed the parade form just like the witness. He produced the parade form as exhibit 4. That he had placed the witness at a private place where he could not have seen the suspect before the parade.

On cross examination, he stated inter alia; that the members of the parade composed of inmates and members of public that if the parade rules are not followed it will not be a proper parade.

13. **No. 67215 CPL Benson Ndambuki (PW8)** testified that he is the DCI Ugunja. He stated that on 20/10/2014 at 9.00 am he was at Ukwala police station when he was alerted by Chemelil police station that a robbery incident had taken place at Rangala area involving motor vehicle KCA 160J Isuzu Canter and that victims of the robbery had been dumped in a sugarcane plantation. That they began patrols within the areas and that on 21/10/2014 at 5.00 pm they received a tip off that the stolen lorry had been parked at a certain home in Alego Usonga. That they rushed there and found a canter bearing registration number KBJ 765X. That the lady of the house claimed that two men and one woman

had placed it there. That the owner of the lorry availed a duplicate key which was used and the vehicle was removed. That the alleged registration plates KBS 765X belonged to a Toyota station wagon belonging to Equity Bank Ltd and one Yoroba Solomon. That the Appellant was arrested on 28/5/2016 and an identification parade conducted on 8/6/2016 and 9/6/2016 in which the Appellant was positively identified by the occupants of motor vehicle registration KCA 160J Isuzu canter. That the Appellant was arrested on 28/5/2016 and an identification parade conducted on 8/6/2016 and 9/6/2016 in which the Appellant was positively identified by the occupants of motor vehicle KCA 160 J Isuzu canter. That he produced the two number plates of motor vehicle KBS 765X Toyota station Wagon and KCA 160J Isuzu Canter as exhibits.

On cross examination, he stated inter alia; that he was given the name of Appellant by Mosses Odhiambo Omwari (PW3) and Lucas Aluoch Dala (PW2) who were cousins to the Appellant; that no dusting of finger prints took place because they were dealing with a known person; that the occupants of the lorry (PW1 and PW4) were able to identify the Appellant.

14. **No 86640 Pc Douglas Wamalwa (PW9)** testified that he was instructed by the investigating officer (PW8) to take photographs of the recovered lorry which by then had been fitted with number plates KBS 765X. That he was engaged in the restoration of the correct registration numbers of the

lorry. He produced the photographs certificate and restoration report as exhibits

On cross examination, he stated that he did not conduct a search of records of the motor vehicle KCA 160J and KBS 765X.

15. **No. 231711 CIP Mark Rop Sirora (PW10)** testified that he was requested by the Investigating officer Benson Ndambuki (PW8) to conduct an identification parade for a suspect in custody named Michael Onyango Owala who was then in custody. That he briefed the Appellant about the identification parade exercise and that the Appellant would invite Musa Omondi Onyango to be present during the exercise. That he had eight members of the parade who at least resembled the suspect in height, age, general appearance. That the Appellant chose to stand between members 7 and 8. That the witnesses picked the Appellant by touching him. That the Appellant later claimed that he was not satisfied because CID officers had taken a photograph of him and might have shown the same to the witness. That no such photograph was brought to his attention. He produced the parade form as exhibit.

On cross examination, he stated inter alia; that Moses Omondi Onyango was present during the parade as requested by the Appellant; that the said Moses Omondi Onyango did not sign the parade form as there is no place for such signature. That the parade was conducted above board.

16. The prosecution closed its case. The trial court later ruled that a prima facie case had been established against the Appellant who was thus placed on his defence. He opted to give a sworn testimony and called two witnesses.

17. **Michael Onyango Owala (DW1)** testified that he had travelled to his parents' home on 20/10/2014 to celebrate Mashujaa day with them and left for his business place at Busia on 21/10/2014. That he was not at the scene of crime as alleged. That he was arrested on 25/5/2016 after two years by persons who knew him and who had been with him all that time in Ukwala which he used to attend court over it yet those people did not bother to arrest him if at all he was linked to the alleged crime. That the identification parade was not properly conducted as he was not allowed to avail his advocate or relative and that photographs of him had already been shared to the witnesses prior to the parade. That the persons who alleged that he had requested them to keep the lorry for him were his cousins who had a family grudge against him and thus framed him up. That no call data was availed to prove that he had communicated with his cousins. That he was not found in possession of the alleged stolen property.

On cross-examination, he stated inter alia; that he does not know the complainant herein (PW1); that the family dispute had been in existence before he was born; that his cousins were jealous of his progress as he was able to support his family financially.

18. **Peter Omondi Odhiambo (DW2)** testified that the Appellant called him and later visited him at this place where they stayed together upto 8.00 pm before moving to Siaya where they entertained themselves at a certain hotel up to 2.00 am when they retired back to his place and that they parted ways the following day after lunch.

On cross examination, he stated that he was not aware that the Appellant was involved in a robbery incident. That the Appellant is his friend.

19. The appeal was canvassed by way of written submissions. However, it is only the Appellant who complied.

20. Vide submissions dated 14/8/2025, the Appellant submitted that the witnesses who purported to have identified him did not give a description of the robbers in their first report and hence the possibility of mistaken identity during the identification parade. That the two parades were not conducted with scrupulous fairness. It was also submitted that the evidence was full of inconsistencies. That the doctrine of recent possession was not proved against the Appellant beyond reasonable doubt. It was finally submitted that the sentence imposed was excessive and ought to be substituted with the least severe sentence and that the period spent in custody be considered.

21. I have considered the record of appeal and the submissions tendered. I find the issue for determination is whether the Respondent proved its case against the Appellant beyond any reasonable doubt.

22. This being a criminal case, the burden of proof lay upon the Respondent to discharge. In **Miller Vs. Minister of Pensions [1947] 2 ALL ER 372**, Lord Denning MR. held as follows:

***“The degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”***

23. It is noted that the Appellant was charged with an offence of robbery with violence contrary to Section 295 as read with Section 296 of the Penal Code. The two provide as follows:

***S. 295 - Any person who steals anything and at or immediately before or***

***immediately for 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 it being stolen or retained is guilty of the felony termed robbery.***

***S. 296(2)- 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 after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person, he shall be sentenced to death.***

24. I have noted that the testimony of the two eye witnesses is consistent in terms of what allegedly happened between the night of 19.10.2014 and 20.10.2014. Both PW1 and PW4 stated that they witnessed the alleged incident of robbery with violence. The Appellant has challenged the issue of his identification by the two witnesses and maintained that he has been framed up due to a family dispute between his family and that of PW2, PW3 and PW3. As regards the Appellant's identification, the key witnesses are PW1 and PW4 and hence the issue now for consideration is whether the visual identification evidence of PW1 and PW4 can be

relied upon. In the celebrated case of **R vs Turnbull & others (1973) 3 ALL ER 549** the court stated that some of the factors to be considered before determining or whether or not to rely on the visual identification evidence of a single eye witness are as follows: whether the viewer viewed the suspect from a close position, under sufficient lighting and there was nothing which could have impeded his proper identification, whether the viewer had ample time to view the offender and that it was not just a fleeting glance, whether the viewer was sober, whether there was any difference between how the viewer described the suspect and the actual appearance of the suspect, whether much time had lapsed between the time the viewer initially saw the suspect and the time the viewer identified the suspect to the police. The court further drew a distinction between recognition evidence and identification of a stranger when the court stated that recognition evidence is more reliable than identification of a stranger and further that 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.

The Court of Appeal in **Wamunga Vs Republic [1989] KLR 426** held as follows:

**“ 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.”**

Also in **Nzaro Vs Republic [1991] KAR 212** the Court of Appeal held that the evidence of identification recognition at night must be absolutely watertight to justify a conviction.

25. Flowing from the foregoing authorities, it emerges that visual identification evidence if not carefully analyzed may in some occasions result to miscarriage of justice and that it is possible that witnesses though honest may sometimes be mistaken on their visual identification. Hence, the issue for determination is whether PW1's and PW4's alleged visual identification or the circumstances under which PW1 and PW4 viewed the persons who allegedly robbed them meet the threshold set out in the aforesaid authorities.

26. It is noted that the testimony of PW1 and PW4 relates to what transpired from 19.10.2014 to the 20.10.2014 the period when the alleged incident of robbery with violence took place. Both PW1 and PW4 told the court in their respective testimonies that on 19.10.2014 they left Markiti market in Nairobi aboard a lorry registration number KCA 160J FRR Isuzu canter which was carrying onions belonging to PW4 and that they were traveling to Juba. Both PW1 and PW4 told the court that they travelled and stopped at Awasi where they met the owner of the lorry (PW6) ate supper and

embarked on their journey. PW1, PW6 and PW4 stated that even though the said lorry needed to be serviced, PW4 insisted that they would not sleep in Awasi but that the lorry would be serviced at Busia boarder as they waited for clearance at the Boarder. It is the testimony of PW1 and PW4 that they left Awasi at around 10.00p.m and just after they passed Kisumu town, PW1 informed PW4 that he was tired and felling sleepy. Both PW1 and PW4 told the court that PW1 asked PW4 if he knew how to drive a lorry and that PW4 answered in the affirmative. PW1 stated that he had a chance to view the driving licence of PW4 and was satisfied that PW4 could drive the lorry. Both PW1 and PW4 in their respective testimonies told this court that PW1 left PW4 to drive the lorry as PW1 slept on a bed behind the driver's seat. PW4's testimony is that when he reached the Rangala area, he realized that a small vehicle that is a Toyota NZE was trailing them. He stated that he crossed the first bump and when he was about to cross the second bump he heard gun shots. He stated that the said small vehicle moved towards the lorry and tried to block it. He stated that in a bid to avoid a collision with the small vehicle, he swerved by moving towards the edge of the road and that is when two men alighted from the small vehicle. PW1 stated that he was awaken by the gun shots and that he also witnessed three men leaving a small car which had blocked their lorry. Both PW1 and PW4 told the court that one man stood on the door next to the driver's seat while another man stood at the door next to the turn boy's seat. Both PW1 and PW4 told

the court that at that time they thought they were dealing with police officers. Both PW1 and PW4 stated that PW4 was ordered to open the door of the lorry and he complied. They stated that while the engine lorry was still running, the men pulled PW4 off the lorry and went with him towards the vehicle which was in front of the lorry. PW1 stated that at that time the head lamp of the lorry was on and the lights from the head lamp were bright such that one could see 30 metres ahead. It is the testimony of PW1 that the three robbers held PW4 by the neck and the collar and stood with him five metres away from the lorry but in front of the lorry. He stated that at that time he had a good opportunity to see the robbers. He said that he saw the Appellant among the three robbers who were harassing PW4 as the robbers were five metres from the head lamp and that the light from the head lamp was shining on to the said robbers. It is the testimony of PW1 and PW4 that at that time the rear wheel of the lorry was on the bump and since the lorry was carrying a heavy luggage it started moving down the bump thus forcing PW1 to pull the hand break to prevent the lorry from running over PW4 and the robbers as well as the small vehicle. PW1 stated that he pulled the hand brake to avert an accident when the robbers realized that somebody else had been left in the lorry. It is at that point that PW4 was taken to the small car and made to lie on the rear seat while facing down then PW1 was pulled out of the lorry and taken to the small car where he was made lie on top of PW4. It is the testimony of PW1 that since he was the one who was

lying on top of PW4, he had a better view of what was happening inside the vehicle. PW4 also stated that since he could understand the Dholuo dialect, he was able to understand better what the robbers were talking about because the robbers were talking in Dholuo language

27. PW1 who lay on top of PW4 stated that the Appellant, who was the tallest of all the robbers, sat on the co-driver's seat. It is noted that PW1 was more elaborate in his testimony than PW4. He explained what the Appellant was telling him throughout the incident and what the other robbers were doing. PW1 stated that the Appellant asked him if the lorry had a cut out and what amount of fuel was in the lorry. It is the testimony of PW1 and PW4 that the Appellant sat in the co-driver's seat, and the other robber kept guarding them on the rear seat while the other robber drove off the small car. PW4 stated that as the small car drove off into a rough road, he could hear the Appellant and the other robber asking where the people who left with the lorry had reached meaning that according to PW1 and PW4 the robbery was not only committed by the three robbers in the small vehicle but also the others who left white lorry. Both PW1 and PW4 told the court in their respective testimonies that it is the Appellant who asked whether his accomplices had pliers. They stated that the Appellant demanded to know what would be used to tie them and even suggested that they should stop and cut a wire which they would use but the robber who was guarding them refused and claimed that the

barbed wire would injure the victims and proposed that they use the victims' waist belts. The two were thus ordered to undress and their clothes were taken away from them. At that point, their hands were tied backwards and they were placed on the boot of the small car and were driven for a long distance and at some point they realized that dawn was breaking on the morning of 20.10.2014. They both stated that what made them to realize that it had dawned was because they could see natural light infiltrating into the boot. PW1 stated that at some point the robbers stopped on the way and had a chat with some women then the vehicle continued moving. PW1 and PW4 stated that eventually the vehicle stopped and the boot was opened. Both PW1 and PW4 stated that at that time it had already dawned and it was around 7.00a.m and further that they could clearly see the robbers. PW1 and PW4 in their respective testimony told this court that their hands were untied and they were ordered out of the boot. That PW4 was the first to be removed from the boot and to be escorted into the sugarcane plantation. Both PW1 and PW4 told the court that during that incident it is the Appellant herein who was armed with a rifle. PW1's narration of the incident that happened once the vehicle stopped into the sugar plantation shows that he had ample time to view the Appellant as he explained that when his hands were untied and ordered to leave the boot, it is the Appellant who ordered him to leave the boot. He explained that in broad day light he viewed the Appellant for a substantially long time and even had a

conversation with him such as when he told him to leave the boot but he was unable to do so on his own because he had sustained a dislocation on his right leg. He added that he requested the Appellant to assist him out of the boot as his companion had escorted PW4 into the sugar cane plantation. He stated that he told the Appellant that he could not alight from the boot on his own because he had sustained an injury on his leg and that the Appellant told him that he would kill him in the vehicle if he (PW1) could not alight so that he could be killed in the sugarcane plantation. He stated that he begged the Appellant not to kill him but to assist him to alight and that the accused while facing down held his (PW1's) shirt by the collar and told him to alight. He stated that after that he alighted the Appellant told him to hold onto the Appellant's shoulder for support. He stated that the Appellant escorted him to the sugarcane plantation where he joined PW4 who was then being guarded by the other robber.

PW1 further added that the Appellant ordered them to face the bushy area and close their eyes, then the other robber who had escorted PW4 urged the Appellant not to kill them even though the Appellant wanted to kill them since he felt that if he left them alive then they would create problems to them. That the Appellant's accomplice warned him that it was not good to add sin onto another.

28. The testimony of PW1 was further corroborated by PW4 who stated that he was the first one to be removed from the boot

and that the robbers told him that they were going to kill him and the driver (PW1) in the sugarcane plantation. He confirmed that by then it was in broad day light and that it was around 7.00 AM. The two sated that the Appellant was the one who had a gun and who kept on insisting that he was going to kill them even though they kept pleading with him to spare their lives. That after they were abandoned by the robbers they managed to untie themselves and sought help.

29. From the evidence of PW1 and PW4, it is evident that they not only saw the robbers with the help of the headlamp and moonlight at night but also in broad day light when they were in the sugarcane plantation. It is also evident from PW1 and PW4's testimony that none of the robbers head worn a mask and that neither PW1 nor PW4 was blind folded. It therefore means that they had ample time to view the robbers and that it was not just a fleeting glance. It is clear that PW1 and PW4 identified the Appellant at the various scenes and which was established during the identification parade as one of the robbers. I find that the witnesses were not mistaken because they were able to identify him while he was terrorizing them from the road at Rangala Girls area all the way to a sugar cane plantation and that at the time it was already daylight and were able to identify him as they even talked and further they were able to identify the Appellant through the identification parade convened by different police officers (PW7, PW8 and PW10)

on different dates which in my view were conducted properly.

30. No.235604 Chief Inspector David Wanjala (PW7) confirmed that he was the one who conducted an identification parade through which Walter Kamiguna Ojowi (PW4) identified the Appellant by touching him as the person who was engaged in robbing him.

31. No.231711 Chief Inspector Mark Rop Sirora (PW10) of Siaya DCIO confirmed in his testimony that on 09.06.2016 he conducted an identification parade through which Joseph Makau Mwangangi (PW1) identified the Appellant herein by touching him as one of the persons who were involved in robbing him. From the evidence of PW7 and PW10, it is evident that the said officers who conducted the identification parade on 08.06.2016 and 09.06.2016, respectively, followed the procedures for conducting the parade. They told the court that their respective witnesses were not allowed to see the Appellant prior to the identification parade being conducted and that the persons who were members of the parade were of the same height, age, complexion and standard of living as that of the Appellant and further that the Appellant was given an opportunity to call a friend or a solicitor to be present at the time the identification parade was being conducted. Further, that the Appellant was informed on the reason as to why the identification parade was being conducted and that he

willfully participated in the identification parade. That the Appellant was asked whether or not he was satisfied with the manner in which the identification parade was conducted and instances where he gave reason, the reasons were indicated and that the Appellant was given an opportunity to stand wherever he wanted at the parade and that he chose to stand between number 7 and 8 and that the witnesses identified him by touching him.

32. It is noted that PW7 confirmed that when he conducted an identification parade through which PW4 identified the Appellant as the person who was engaged in robbing him, the Appellant stated that he was not satisfied. It is noted that the Appellant did not indicate why he was not satisfied with the manner the identification parade was conducted. During cross examination of PW7, the defence counsel indicated that the Appellant was not asked why he was not satisfied with the manner the identification parade was conducted. This could be true and even though he might have not been asked why he was not satisfied with the manner the identification parade was conducted, he ought to have stated why he was not satisfied with the manner PW7 conducted the identification parade in his defence, something which he failed to do. When PW7 was cross examined, several issues were raised. One of the issues was that it was not possible to get many people in the police cells who were of the same height, complexion and age of the Appellant. PW7 stated that some members of the

parade were from police cells while others were members of the public. I have analyzed the identification parade form and note that there is no provision for stating where one finds the members of the parade on their ages and as such failure to indicate the age and where the members come from on the face of the identification parade is in my view not fatal and cannot nullify an identification parade that was properly conducted. If the Appellant could have felt that the members of the parade did not resemble him in height, complexion and were not of similar age as him, he ought to have raised at the time he alleged that he was not satisfied with the manner the identification parade was conducted so as to enable the parade officer to dismantle the parade members and reconstitute another one. It is my view that the fact that some members or most members of the parade were persons in remand strengthens the credibility of the outcome of the parade because it means that the people who were in the parade as members were of the same standard of life as the Appellant who by then was also in remand and must have been comfortable with them. If it had been that the members of the parade were all smartly dressed and were not in remand, another issue would have been raised that the difference in their standards of living made it easier for the witnesses to identify the Appellant and which could have raised some suspicion. Indeed, the Appellant indicated that one of the persons he wished to call as a third party happened to be one of those in the parade and which meant that he was okay with the exercise. It is

noted that PW4 did not record a further statement after identifying the Appellant in the parade which is an omission on the part of the investigating officer. Though the omission existed, it is noted that the Appellant did not dispute that the said identification parade was conducted and that he even appended his signature on the said identification parade form.

33. In relation to the identification parade conducted by PW10, he confirmed that the Appellant requested that a friend by the name Moses Onyango be present at the time of the identification parade and that the said friend was availed. It is observed that even then, the parade form does not indicate that the Appellant never indicated that the friend he requested to be present was not called. The defence counsel argued that the friend did not sign in the parade form but PW10 confirmed to the court a fact which is correct that in the identification parade form there is no provision for a friend or a solicitor to sign once they have interest as an identification parade is being conducted. He stated that if one observed the Appellant, they would see that the Appellant was apparently not below twenty years but he appeared to be in his thirty's and that they picked people who appeared to be in their thirty's in terms of age to be present during the identification parade. He explained that the Appellant claimed that he was not satisfied with the manner the identification parade was conducted because he suspected that one of the witnesses (PW1) was shown his

photograph before the identification parade was conducted. It was thus quite difficult for the court to rely on mere suspicious which could not be proved to challenge an otherwise properly conducted identification parade. An issue was further raised that none of the witnesses herein (PW1 and PW4) described the suspects before one of them was arrested. It is my view that the mere fact that a witness did not describe a suspect does not in itself materially affect the outcome of a properly conducted identification parade especially where witnesses state that if they see the suspect, they could easily recognize the suspects.

34. In **Nathan Kamau Mugwe vs Republic Criminal Appeal No. 63 of 2008** the court expressed itself as follows;

**...As to the complaint in ground one that the witness had not given to the police the description of the appellant before the parade, do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in Gabriels case, supra, the court did not go so far as to say that a witness must be asked to give a description of the person to be put on the identification parade. All the court said was that the witness 'SHOULD' be asked, that is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of the offence, yet, if**

he (witness) saw that person again he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again the police themselves, may through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him. In either of the two cases, the parade cannot be then held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to be put on the evidence regarding the identification parade. We reject the contention that because James had not given the police the description of the appellant his evidence with regard to the identification parade ought to have been rejected.”

Also in **John Mwangi Kamau Vs Republic [2014] Eklr** it was held that the essence of identification parades are meant to test the correctness of a witness' identification of a suspect.

35. It is noted that PW1 and PW4 stated that they could recognize the offenders if they saw them. Their testimony

clearly shows that they were able to clearly see the offenders. The identification parades conducted by PW7 and PW10 were proper and that I see no reason to doubt the same. I therefore find that the visual identification evidence of PW1 & PW4 to be reliable. Consequently, I am satisfied that the Appellant was placed at the scene of crime as one of the robbers.

36. It is noted that other than the identification parade in which the Appellant was positively identified as one of the robbers, the evidence of the Appellant's relatives PW2, PW3 and PW5 squarely placed the Appellant at the scene of crime. The said PW3 and PW5 in their respective testimonies confirmed that a lorry bearing registration No. KBS 765X was indeed found at their home in Ojwando B. sub-location, Siwende village. Both PW3 and PW5 in their respective evidence stated that it is the Appellant who took the lorry to the aforesaid home and requested that the lorry be kept for him and that he would collect the lorry later. PW3 and PW5 told the court that shortly after the Appellant left the said lorry at their home, police officer arrived at their home and informed them that the said lorry had been robbed from some other persons. PW3 and PW5 confirmed that it is PW3 who went to the road and came back with the Appellant and the lorry and that the Appellant was in the company of a lady. Both PW3 and PW5 stated that it is the Appellant who addressed PW3 in relation to the lorry and claimed that he had brought the lorry which was to be kept at their home and that he was

going to Kisumu then he would come back and collect it. PW5 confirmed that it was not her first time to see the Appellant. She even stated that there was a time she went to the home of the Appellant's parents to attend the burial of the sister of the Appellant. Both PW3 and PW5 identified the photo of the lorry that was taken to their home by the Appellant as PMFI 1a, 1b and 1c which photos were that of a white lorry bearing the number plate KBS 765X on the front and rear side and that it was an Isuzu FRR lorry. It is the same lorry which PW1 and PW4 identified to be the one they were robbed off while carrying nets of onion and which PW6 stated was owned by herself at the time of the said robbery. PW5 stated that PW3 informed him that it was his cousin (PW2) who had connected him to the Appellant and requested him to keep the lorry for the Appellant. PW2 confirmed to this court that PW5 is his sister and that PW3 is the son of PW5 hence his relatives. PW2's testimony is that on 21.10.2014 he was doing his masonry work in Busia when the Appellant called and informed him that he had acquired a lorry through a loan and that he had defaulted in paying the loan. He stated that the Appellant then requested him to keep the lorry for him as he was aware that the financial institution which had given him the loan was searching for the lorry and repossess it. PW2 stated that the Appellant informed him on phone that he wanted the lorry to be kept for him as he sorted out the issue of payment of the loan. It is the testimony of PW2 that he informed the Appellant that he was far and that the kind of work he was doing was such

that he could not leave it midway. PW2 further stated that he told the accused that keeping the lorry for him at his home would not serve any purpose as the persons who were looking for the lorry would still find him because his home is close to that of the Appellant. PW2 stated that at that time the Appellant told him that since he had not lived in their home area for long he should find out another relative who could keep the lorry for him and that that is when PW2 decided to engage PW3 and asked him to keep the lorry for the Appellant only to learn later that the lorry had been stolen through a robbery. It is noted that the investigating officer did not find it necessary to avail the call data showing that indeed PW2 communicated with the Appellant on that 21.10.2014 and to avail proof of the conversation PW2 had with the Appellant and conversation that PW2 held with PW3. It is noted that the said PW2, PW3 and PW5 did not participate in the identification parade to identify the person who communicated to them on phone and the person who took a stolen lorry to the home of PW5 on 21.10.2017. I have however observed that the Appellant while defending himself did not dispute that he was well known to PW2, PW3 and PW5. He in fact stated that the said PW2, PW3 were his cousins who were jealous of him and who mentioned him in this case because they were jealous of him as he was doing a lot of developments in their home. He therefore meant that he was not disputing that PW2, PW3 and PW5 were persons who knew him well. Hence, i find that the failure to participate in the identification parade on the part of PW2,

PW3 and PW5 did not water down their testimonies as they, particularly PW3 and PW5, identified a person they recognized and not a stranger. The testimony of PW2, PW3 and PW5 also corroborates the visual identification evidence of PW1 and PW4 who were victims of the robbery with violence incident and who also witnessed the incident. The evidence of PW1, PW2, PW3, PW4 and PW5 forms a complete chain in that it enabled the court to know the persons who participated in the robbery and who made efforts to hide the property that was robbed from PW1 and PW4. I have observed that PW3 and PW5 at the time the lorry was kept at their home viewed the Appellant from a close position, in broad day light that is under sufficient lighting and that they had ample time to view the Appellant and that it was not a fleeting glance as they identified a person they recognized and not stranger. I am of the view that there was nothing which could have impeded their proper identification and recognition. PW3 according to his testimony picked the Appellant from the road and directed him and another woman to their home where the lorry was driven and that he even talked to the Appellant. The Appellant admits that PW3 is his cousin and it therefore means that he did not mistakenly identify the Appellant as he identified a person he recognized. Despite the aforesaid loopholes in the manner the investigating officer conducted his investigations, I find that the testimony and evidence of PW2, PW3 and PW5 is reliable. I find that the same corroborates the evidence of PW1 nor PW4 that the robber

they had identified was the same person who later turned out to be a relative of PW2, PW3 and PW5. I am not persuaded by the Appellant's claim that he had been framed up by his relatives namely PW2, PW3 and PW5 over a family land dispute and jealousy. I find the Appellant's defence did not shake the evidence of the prosecution which was quite overwhelming against him. Further, his defence evidence consisted of a mere denial. He said that he was arrested two years after the incident and he alleged that the police officers who arrested him knew him well and that he wondered why they had to take two years to arrest him and yet he had another case in Ukwala and that he used to attend court. He stated that he refused to participate in the identification parade because photos of him had been taken before the parade and that he suspected that they had been shown to the witnesses. I find these claims in my view to be mere allegations which the Appellant could not prove. He also alleged that he wanted a relative to be present but that he was told to get a fellow inmate which in my view are allegations which are an after thought because if that was the case, the said issue could have been indicated in the identification parade form. He stated that the members of the parade were not resembling him. That again is an afterthought which was raised at the last minute during defence hearing. He claimed that his cousins who identified him as the person who went to keep the lorry had a grudge against him. This is also an afterthought which could not be substantiated. He made the said allegations for the first

time while defending himself and did not even raise such an issue while cross examining PW2, PW3 and PW5. Even though the call data was not availed, the testimony of the prosecution in totality points to the Appellant as one of the persons who was involved in the robbery. PW6 explained that the documents for the lorry given at the weighbridge were stolen from the lorry in the course of the robbery and as such she could not avail them. It is my view that the defence of the Appellant did not shake the testimony of the prosecution witnesses in any way.

37. The Appellant's witness (DW2) tendered an alibi defence for the Appellant and went ahead to address the court in relation to a date he did not state. He confirmed that he had no idea as to what offence the Appellant had been charged with. He just stated that that day he was with the Appellant. He did not state which date, which month and which year. He just appeared to be a friend of the Appellant who came to testify and to defend him in relation to an incident that occurred on a date he has no idea about. He stated that he was with the Appellant at Sitatunga. He did not state what Sitatunga is but it appears he meant it to be a restaurant. He stated that he was with the Appellant at Sitatunga from 8.00 PM to 2.00 AM and that he went with the Appellant to his home where they slept until the following morning at 11.00 AM. It is noted that this court was not told the date he was talking about and it cannot be left to speculation as to what date DW2 was referring to even if it was to be assumed

that he was talking about 20.10.2014 or 19.10.2014. I find the defence of alibi was not even corroborated by the Appellant. The Appellant himself did not state that he was at Sitatunga with DW2. A defence of alibi may be reflected as an afterthought if it is not raised at the earliest opportune time as was stated in the case of **Kossam Okiru Vs R [2014] eKLR** where the Court of Appeal held that a defence of alibi may be reflected as an afterthought when it is not raised at the earliest opportunity and when weighed against all other evidence. Guided by the aforesaid authority, I find that the defence of alibi raised by DW2 did not shake the testimony of the prosecution witnesses in any way. It was not raised at the earliest opportune time to enable the person tasked with investigating the case to weigh its truthfulness and correctness. Since this was not done, I find that the defence of alibi raised by DW2 cannot be relied on by the court and that the same was properly rejected by the trial court.

38. PW6, the owner of the lorry registration No. KCA 160J FRR Isuzu lorry white in colour with an open body availed proof that she indeed owned the said lorry. This she did by availing the copy of the log book of the aforesaid lorry and which was marked as PMFI
39. PW6 did not witness the incident but her testimony is crucial in that her narration of what PW1 and PW4 told her on the phone shortly after they had been freed was consistent with the testimony of PW1 and PW4 made before the court.

She confirmed that with the help of Family Bank (personnel) with whom she jointly owned the lorry, they managed to track the stolen lorry at the home of PW3 and PW5. PW6's testimony is that at the time the lorry was recovered, its number plate had been changed from KCA 160J to KBS 765X. She identified the fake number plates that had been placed on the lorry at the time the lorry was recovered and which were marked as PMFI 2a and 2b. She confirmed that at the time the lorry was recovered at the home of PW3 and PW5 its number plates had been changed to read KBS 765X. In a bid to preserve that evidence, PW8 engaged a scenes of crime personnel who took photos of the lorry aforesaid as well as the photos of the number plates appended on the lorry. He did not stop at that as he also availed records from the Registrar of motor vehicles for motor vehicle registration No. KBS 765X which he produced as exhibit 5 and which showed that as at 22.10.2014 the said motor vehicle being a Toyota station wagon was owned by Equity Bank Limited and one Kirumba Solomon. He did further investigations with a view to find out the whereabouts of the said motor vehicle KBJ 765X and that he found out that the said vehicle was reported to have been stolen and a complaint lodged at the Kilimani Police Station. Those findings of the investigations confirmed that indeed the number plate appearing on the photos of the lorry as the number plates of the lorry were indeed not the number plates of the lorry but of a Toyota station wagon. He produced the photos of the lorry showing that the lorry had the number plates of the

Toyota Station Wagon as P Exhibit 1a, 1b and 1c and produced the said two number plates for KBJ 765X as P Exhibit 2c and 2b respectively. It is evident that the robbers wanted to hide the identity of the lorry and to permanently deprive the owner of her lorry. In a bid to prove the existence of the lorry registration No. KCA 160J Isuzu canter and further to prove that indeed PW6 was the owner of the lorry, PW8 the investigating officer availed the certified copy of log book of motor vehicle registration No. KCA 160J Isuzu FRR indicating the owner of the said motor vehicle to be Family Bank Limited and Margaret Auma Otieno which log book is dated 10.09.2014 as P Exhibit 3. PW8 confirmed that he arrested the Appellant after the people to whom the Appellant took the lorry gave him the name of the Appellant and that the said witnesses were cousins of the Appellant whom the Appellant in his defence confirmed were his cousins.

40. In the final analysis, it is my finding that the finding on conviction by the trial court was quite proper and must be upheld.

41. As regards sentence, it is noted that the Appellant was sentenced to death. Indeed, under Section 296 (2) of the Penal Code, a conviction thereon attracts such a sentence. The trial court did receive mitigating circumstances of the Appellant but nevertheless went ahead to sentence him to

death. Going by the nature of the offence, it is obvious that the court's hands were tied with regard to the sentence since it was under obligation to impose the sentence already provided for by the statute. Pursuant to the decision of the Supreme Court, in **Francis Karioko Muruatetu & Another Vs the Republic Supreme Court Petition No. 16 of 2015 [2017] eKLR**, it was held that death sentence was not mandatory and that the Court is entitled to receive mitigating circumstances from offenders before imposing the appropriate sentence. As noted from the lower court record, the Appellant presented his mitigation wherein he stated inter alia; that he assists his parents; that he separated with his wife who left with their children who rely on him; that he would leave the matter to the court to decide. I find that indeed the Appellant was given the opportunity to mitigate despite the fact that the sentence prescribed was mandatory. That being the position, I find that it is not necessary for the Appellant to appear before this court and mitigate again so that he can be resentenced. I am satisfied with the mitigation he presented before the lower court which I hereby adopt. It is noted that the offence committed by the Appellant was serious and which calls for a deterrent sentence. It is also noted that the stolen lorry was recovered however the cargo was not recovered. Since death sentence is now not mandatory and that sentencing is in the discretion of the court, I have taken into account the sentencing guidelines as well as the circumstances of the offence and the Appellant's mitigation.

I find that the Appellant deserves a deterrent sentence to keep him away from the society. Even though the death sentence imposed upon the Appellant is still lawful, I however exercise discretion and substitute the death sentence and proceed to resentence the Appellant to serve life imprisonment.

**Dated and delivered at Siaya this 16<sup>th</sup> day of April 2026.**

**D. KEMEI  
JUDGE**

**In the presence of:**

**Michael Onyango Owala.....Appellant.**

**M/s Kauma.....for Respondent.**

**Maurine.....Court Assistant.**