IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: WAKI, NAMBUYE & MUSINGA, JJ.A]

CRIMINAL APPEAL NO. 307 & 308 OF 2005

BETWEEN

JOHNSTONE BARASA MULONGO.....1ST APPELLANT

JOSHUA AMADI JUMBA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi

(Makhandia & Kimaru, JJ) dated 29th January, 2004

in

H.C.CRA. NOs. 1458 & 1459 of 2000)

****

JUDGMENT OF THE COURT

This is an appeal arising from the judgment of the High Court **(Makhandia** & **Kimaru, JJ.)** dated 29th January 2004, on a first appeal, dismissing the appellants' appeals against their convictions and sentences.

The background to the appeal is that, the appellants were charged with the offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code. The particulars of the offence were that, on the 14th day of November 1998 at Doundu Estate in Kiambu , jointly with others not before Court, while armed with dangerous weapons namely *pangas* and *rungus*, they robbed **Joseph Kimani Kang'ethe** of Kshs**. 90,000/=** and immediately before and after attacked him causing grievous harm. The appellants denied the charge prompting a trial in which the prosecution called six (6) witnesses in support of the charge, while the appellants gave unsworn evidence in their respective defences.

It was the prosecution's case that on 14th November 1998 at around 8.00 pm, **Joseph Kimani Kang'ethe,** (P.W.1), while in the company of **Stephen Njoroge, Duncan Irungu and Amos,** was attacked by robbers who badly injured and robbed him of Kshs. 90,000/. He identified the 1st appellant as one of those who robbed him when the hood the 1st appellant allegedly wore fell off in the course of the struggle with PW1. There was moonlight and PW1 knew the 1st appellant before the robbery as his customer for close to eight years. He named him to police when filing the report of robbery and thereafter led the police to his home from where he was arrested and charged with the offence.

The 2nd appellant on the other hand, was arrested on suspicion of having been involved in the robbery; firstly because, PW2 named him as one of those who were involved in the conspiracy to rob PW1 prior to the incident. Secondly, for conspicuously spending beyond his means shortly after the said robbery. Thirdly, he thereafter wrote a statement under inquiry admitting involvement in the said robbery and also received a share of the proceeds of the said robbery. Subsequently repudiated the confession but it was admitted in evidence after a trial within a trial.

When put to their defences, both appellants denied the offence, with the 1st appellant alleging that he did not know why PW1 led police to his house, while the 2nd appellant alleged fabrication of the charge against him by PW1, over an alleged disagreement over a debt he allegedly owed PW1.

After assessing and analyzing the evidence, the trial magistrate was satisfied that the first appellant was recognized by PW1 with the help of moonlight as one of the robbers who attacked him on the material night, when the hood he was wearing fell off in the course of the struggle with PW1; that PW1's evidence that he had known the 1st appellant for eight years was credible as he named him when he filed the report of the robbery with the police, and thereafter led the police to his house where he was arrested.

Turning to the evidence tendered against the 2nd appellant, the trial magistrate was satisfied that the 2nd appellant's recanted statement under inquiry was a true account of his involvement in the commission of the robbery against PW1; that the same had been sufficiently corroborated by the evidence of PW2, 4 and 5 and on that account found both appellants guilty of the offence charged, convicted and sentenced them to suffer death in the manner provided for in law.

Being dissatisfied with the said decision the appellants appealed to the High Court raising various grounds of appeal. The first appellate court, after re- evaluating and re-analyzing the record, and after warning themselves of the dangers of acting on the evidence of a single identifying witness for conviction, were satisfied that it was safe to act on the evidence of PW1 to affirm the 1st appellant's conviction. They considered that P.W.1 named the 1st appellant to police as one of the assailants when he filed the report of the robbery; he also pointed out his home to police from where he was arrested; and the prevailing circumstances at the scene of the robbery were favouable for a positive recognition of the 1st appellant.

Turning to the evidence against the 2nd appellant, the Judges found the testimony of P.W. 2 that the 2nd appellant was involved in the conspiracy to rob PW1 credible as he was found with new items which he could not have purchased with his meagre funds and that the 2nd appellant's retracted statement was also sufficiently corroborated by the prosecution evidence.

On account of the above reasoning, the Judges dismissed the appellants' appeals and confirmed the convictions and sentences handed down against them by the trial court.

Undeterred, the appellants are now before this Court on a second appeal. The 1st appellant relied on two grounds of appeal namely that the learned Judges erred in law when:

(i) They confirmed the appellants' conviction without considering that this was a case of unfair trial;

(ii) They upheld the appellants' conviction without observing that crucial witnesses were not availed in court to testify.

The 2nd appellant on the other hand also raised two grounds of appeal namely, that the learned Judges erred in law when:

(i) They failed to consider that the prosecution had failed to prove all the ingredients of the offence of robbery with violence against him;

(ii) They shifted the burden of proof of showing where the

items found on him originated from.

The appeal was canvassed by way of oral submissions. Learned counsel **Mr. Njenga Marube** and **Gregory Nyauchi,** appeared for the 1st and 2nd appellants respectively, while the learned Senior Assistant Director of Public Prosecution (S.A.D.P.P.), **Mr. O'Mirera Moses** appeared for the State.

Arguing the two grounds together, **Mr. Marube** submitted that the circumstances prevailing at the scene of the robbery were not conducive to positive recognition of the 1st appellant as the attack was sudden and vicious. P.W.1. could not therefore have identified the 1st appellant as one of the robbers in the circumstances. Counsel also urged us to fault the High court Judges for warning themselves of the danger of acting on the evidence of a single identifying witness, after they had already formed an impression on the said evidence. In counsels' view, the warning should have been administered before appraising and forming an opinion on the evidence. Counsel also took issue with the lack of evidence on the intensity or the brightness of the moonlight, which allegedly enabled PW1 to recognize the 1st appellant, a matter which in counsel's view, had not been addressed by the two courts below.

To buttress the above submissions, counsel cited the case of **John Nduati Ngure Vs. Republic [2016] eKLR, John Muriithi Nyagah Vs. Republic [2014] eKLR; Lesarau Vs. Republic [1988] KLR 783** and **Joseph Ngumbao Nzaro [1991] 2KAR 212** for the reiteration of the principles that guide the Court when admitting and acting on the evidence of identification as a basis for a conviction.

Mr. Nyauchi on the other hand submitted that the charge sheet was defective; that the threshold for establishing the ingredients for the offence of robbery with violence against the 2nd appellant were absent; that P.W.2 was an accomplice and urged us to fault the two courts below for the failure to call for corroboration of his evidence before acting on it in support of the charge against the 2nd appellant. In light of the above submissions, counsel urged us to find that the prosecution case against the 2nd appellant stood vitiated; and that the finding of newly purchased items on the 2nd appellant *per se* did not amount to proof of the prosecution's case against him beyond reasonable doubt as these were not part of the items stolen from P.W. 1.

Counsel cited the case of **Anthony Muchai Kibuika Vs. Republic [2013] eKLR; Karanja & Another Vs. Republic [1990] eKLR; Bonface Mugendi Kinyua vs. Republic [2013] eKLR; Kanini Muli vs. Republic [2014] eKLR** and **Peter Ngure Mwangi vs. Republic [2014] eKLR,** in support of the submission that, the doctrine of common intention cannot be invoked to bind the 2nd appellant to the alleged

joint perpetration of the robbery against PW1; that PW2 being an accomplice, his evidence should not have been used against the 2nd appellant in the absence of corroboration; that the item stolen from PW1 was money and not the items recovered from the 2nd appellant's house; and lastly, that the two courts below should be faulted for improperly admitting and acting on the retracted statement of the 2nd appellant to support his conviction.

As for an appropriate sentence, should we affirm the appellants' convictions, both learned counsel urged us to be guided by the principle in the Supreme Court case of **Francis Karioko Muruatetu & another verus Republic** [2017] eKLR.

Opposing the 1st appellant's appeal, **Mr. O'Mirera** submitted that the case against the 1st appellant was one of recognition; that the two courts below properly applied the threshold in the case of **Anjononi vs. R. [1980]** KLR 59 when they acted on the testimony of P.W.1 that he recognized and registered the appearance of the 1st appellant through sufficient moonlight as the assailant he struggled with when the hood the 1st appellant was wearing fell off; that although the two courts below made no mention of the intensity of the moonlight, the circumstances prevailing at the scene of the robbery were conducive for positive recognition of the 1st appellant. That is why PW1 mentioned his name to the police when filing the report of the robbery against him, and also thereafter led police to his house from where he was arrested. In counsel's view, the evidence on recognition was therefore reliable.

On the alleged lack of proof of the ingredients for the offence of robbery with violence, counsel submitted that these were proved; that PW2 was not an accomplice although his evidence was sufficiently corroborated by the testimony of P.W. 4 and 5; that requiring the 2nd appellant to explain the sudden change of his fortunes and lifestyle did not amount to a shifting of the burden of proof on to him to prove his innocence; that the 2nd appellant's complaint that the charge was defective should be rejected as it was not only raised belatedly from the bar and on a second appeal, but was also inconsequential to the appellant's convictions as no prejudice was suffered by either of the appellants. The minor defects pointed out to court by counsel, in view, were curable under **section 382** of the CPC.

On the 2nd appellant's retracted confessionary statement, counsel submitted that it was properly taken from him in compliance with the Judges' Rules; tested in a trial within a trial and properly admitted in evidence.

As for the appropriate sentence, should we affirm the appellants' convictions, counsel left the matter to Court.

This is a second appeal and that being so by dint of the provisions of **Section 361(1)** of the Criminal Procedure Code, only points of law fall for our consideration. See **Karingo -vs- R, (1982) KLR 213,** wherein at **p.** *219* the Court stated as follows:-

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R, (1956) 17 EACA 146)".***

We have given due consideration to the above restrictive mandate in light of the rival submissions as well as principles of law relied upon by the parties in support of their opposing positions as highlighted above. In our view, the issues that fall for our determination are the same as those raised in the two sets of the grounds of appeal, put forth by the appellants.

Starting with those raised by the 1st appellant, the 1st complaint is an attack on the basis upon which the first appellate court Judges affirmed the 1st appellant's conviction and sentence. The principles that guide the Court on the admission and acting on evidence of identification of an accused person in connection with the commission of an offence were reiterated by the Court in **John Nduati Ngure versus Republic** (supra), **John Muriithi Nyagah Vs. Republic** (supra) and **Joseph Ngumbao Nzao** (supra).

In summary, these are that:

> ***(i) evidence of visual identification in criminal cases can bring about a miscarriage of justice and that it is of vital importance that such evidence is examined carefully to minimize this danger;***
>
> ***(ii) that whenever the case against an accused person depends wholly or to a great extent to the circumstances of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting an accused person in reliance on the correctness of the identification;***
>
> ***(iii) that although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care, the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult;***
>
> ***(iv) that when testing the evidence of a single witness, a careful inquiry ought to be made into the nature of the light available, conditions and whether the witness was able to make a true impression and description of the assailants;***
>
> ***(v) that the warning on the dangers of acting on the evidence of a single witness to convict must be administered when the evidence is being considered and not after a decision has been made;***
>
> ***(vi) that in a case depending solely on identification by a single witness, there is an obligation on the part of the trial court to asses and analyze the evidence of identification with meticulous care;***
>
> ***(vii) that the factors that a court analyzing evidence on identification needs to take into consideration include but are not limited***

to consideration of the condition prevailing at the time of the identification, the length of time for which the witness had the accused person under observation and the need to exclude the possibility of error are all essential factors for consideration."

Applying the above threshold to the rival positions herein on this issue, it is our finding as did the two courts below that, the 1st appellant was known to PW1 for close to eight years, a position the 1st appellant never disputed notwithstanding, that he had no obligation to do so. In light of the above observation, it is our view that the possibility of PW1 recognizing him in conducive circumstances favouring such a recognition could not be ruled out. The concurrent position held by the two courts below is that, the 1st appellant was recognized by P.W.1 with the help of moonlight; that it was on the basis of the above recognition that P.W. 1 named him to police when he filed the report of the robbery against him; and also led police to his house from where he was arrested.

It is appreciated as did the 1st appellate court that PW1 was a single indenting witness. Although the trial court never warned itself of the dangers of acting on the evidence of a single identifying witness as a basis for the 1st appellants' conviction, the first appellate court corrected that error by warning itself of the dangers of acting on the evidence of PW1 as a single identifying witness, and considering that evidence in totality with the prosecution case, came to the conclusion that, the evidence of recognition against the 1st appellant was sound.

It is appreciated that both courts below did not address their minds to the intensity of the moon light, but that failure notwithstanding, we have no doubt the intensity of the moonlight was sufficient to enable PW1 recognize a familiar face. That is why he named the 1st appellant in his report to police and also led police to arrest him. There was also no reason for PW1 to falsely implicate the 1st appellant in the commission of the robbery. We therefore find as did the two courts below that the circumstances prevailing at the scene of the robbery were conducive to positive identification. The 1st appellant's conviction is therefore safe. We affirm the same.

As for the 1st appellants' second complaint of the prosecution's failure to call crucial witnesses, **Section 143** of the Evidence Act Cap 80 Laws of Kenya, makes provision that no number of witnesses is required to prove any fact. The predecessor of the Court in **Bukenya and others versus Uganda [1972] EA 549**, stated clearly that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent. Second, that the Court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case. Thirdly, that where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.

In **Keter versus Republic [2007] 1EA135,** the Court was categorical that:-

"The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

Apart from submitting that crucial witnesses were not called, counsel did not give particulars of the witnesses allegedly not called. The above finding notwithstanding, we reiterate and affirm the view taken above, that the first appellant was positively recognized by PW1 as one of the assailants who robbed him on the material night. It therefore follows that the failure of the prosecution to call the unnamed witnesses was not prejudicial to the prosecution case in so far as PW1's recognition of the 1st appellant in connection with the commission of the robbery against him was concerned. On that account, we reject this complaint as being unfounded.

Turning to the complaints raised by the 2nd appellant, the issue of a defective charge has been raised from the bar as it is not part of the two grounds the 2nd appellant put forth as his grievances against the 1st appellate Court's decision to affirm both his conviction and sentence. By dint of the provision of Rule **104(a)** of the Rules of the Court, our jurisdiction is limited to matters that were canvassed and determined by the two courts below. It provides:

"(a) ***No party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that Court or specified in a notice given under rule 93 or rule 94".***

In light of the above reasoning and as fortified by the provision of **rule 104(a)** of the Rules of the Court, this complaint is rejected, notwithstanding, that what was pointed out to us were minor discrepancies curable under **section 382** of the CPC and were as such not prejudicial to the prosecution case.

With regard to the 2nd complaint, section **296** of the Penal Code states as follows:

"(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other 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"

In **Johana Ndung'u -vs- Republic [Criminal Appeal No. 116 of 1995] UR**, the Court succinctly set out the ingredients of the offence of robbery with violence as opposed to that of simple robbery as follows:

"In order to appreciate properly as to what acts constitute an offence under Section 296 (2), one must consider the sub-section in conjunction with Section 295 of the Penal Code. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore described ingredients constituting robbery are pre-supplied in the three sets of circumstances

prescribed in Section 296

> ***(2) which we give below and any one of which if proved will constitute the offence under the sub-section:***
>
> ***1. If the offender is armed with any dangerous or offensive weapon or instrument, or***
>
> ***2. If he is in company with one or more other person or persons, or***
>
> ***3. If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person".***
>
> ***1. Whether the High Court Judges subjected the entire evidence to fresh scrutiny and analysis.***

Applying the above threshold to the record herein, there is no doubt in our minds that a robbery was committed against PW1 as his testimony that, he was robbed of money by robbers who were more than one and who also injured him in the course of the robbery was uncontroverted. The two courts below found him a credible witness. We find no basis to differ with that finding. We therefore affirm the findings of the two courts below, that the evidence on the record supported the commission of the offence of robbery with violence against PW1.

As regards the burden of proof of the 2nd appellant's involvement in the said robbery, the position in law is that, the burden of proof in criminal cases is always on the prosecution as was reiterated by the court in **Ajwang Vs. Republic** [1983] KLR 337. The accused cannot be called upon to prove his innocence, save on matters specially within his knowledge. The observations of the 1st appellate court which gave rise to the 2nd appellant's complaint that, the burden of proof was shifted to him to prove his innocence were as follows:

"The 1st appellant could not possibly have got funds to purchase all the said items with his meager income. Once this evidence was adduced, the burden shifted to the first appellant to prove that he actually lawfully purchased the said items and further that he could account for the said source of the said funds. It was a coincidence that the first appellant came into funds immediately after the robbery. His lifestyle, from the evidence adduced in the lower court changed."

It is not disputed that the 2nd appellant was not identified at the scene of the robbery. His conviction was therefore based on the evidence of PW2, linking him to the conspiracy to commit the robbery against PW1 and the admission of his involvement in the said robbery to PW4, the village headman, the sudden change in his lifestyle and the retracted confessionary statement recorded from him by IP **Rufus Ndegwa** (PW6) on 6/12/98.

Although the two courts below found the evidence of PW2 linking the 2nd appellant to the conspiracy to rob PW1 credible, this evidence alone was not sufficient to prove beyond doubt, that the 2nd appellant carried through that conspiracy. That is why the two courts below had to fall back on the evidence of the retracted statement. It is not in dispute that the 2nd appellant objected to the production of the said statement, disowning both the content and the signature appended thereon. A trial within a trial was held by the trial court to determine the admissibility of the said statement. Efforts to procure the services of a handwriting expert to confirm the authenticity of both the hand writing and the signature on the retracted statement bore no fruits. When the 2nd appellant took the witness stand in the trial within the trial, he maintained his earlier stand and disowned both the contents and the signatures on the said retracted statement. At the conclusion of the trial within the trial, the trial Magistrates gave a ruling thereon as follows:

> ***"Having duly gone through the evidence by the prosecution and the defences, in the trial within a trial. I hold that the statement is admissible in evidence having been obtained in accordance with the Judges Rules."***

On the assessment of the evidentiary value of the retracted statement, the trial Magistrate ruled as follows:-

> ***"His confession that he was abducted and later given Kshs.9000/= for him to keep quiet about the robbery because he knew about it but refused to co-operate has no merits at all just like his defence."***

On account of the above observation and reasoning, the trial Magistrate found it safe to act on the 2nd appellant's retracted statement and convicted him as charged.

On 1st appeal, the first appellate Court had this to say with regard to the admissibility of the retracted statement:

> ***"Further the said appellant gave a statement under inquiry which was admitted in evidence after a trial within a trial. What is stated in the statement corroborated the evidence that was adduced by the prosecution against the first appellant."***

On the basis of the above observations and reasoning, the 1st appellate Court also found it safe to act on the 2nd appellant's retracted statement and affirmed his conviction.

In **Njuguna S/O Kimani and 3 others versus Reginam [1954] 21 EACA, 316,** the predecessor of this Court laid down guide lines for admission and acting on retracted confessionary statement as basis for a conviction as follows:-

> ***"(1) that it is the duty of every Judge and magistrate to examine with closest care and attention all the circumstances in which a***

confession has been obtained from an accused person.

(2) The onus is upon the prosecution to prove affirmatively that a confession has been voluntarily made and not obtained by improper or unlawful questioning or other improper methods and that any inducements to make the same had ceased to operate on the mind of the maker at the time of making.

(3) A trial Judge has a discretion to exclude a statement which has been obtained by improper questioning or other improper means.....".

In the case of **Tuwamoi -Vs- Uganda [1967] EA 84 p. 88,** the following was added:

"… a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to retract, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that the statement was not a voluntary one."

In **Komora–Vs- Republic (1983)KLR 583,** the Court held *inter alia* as follows:

1. ***"There is no rule of law or practice that requires corroboration of a retracted confession before it can be acted upon, but it is improper to act upon it in the absence of corroboration in material particulars; unless the Court is satisfied of its truth after a full consideration of the material facts and surrounding circumstances.***

The thread running through all the above highlighted case law is that, courts have to exercise care and caution before acting on a retracted statement either in support of a conviction in the first instance or affirming such a conviction in the second instance.

We have considered the reasons the two courts below gave both for basing and affirming the 2nd appellant's conviction on the retracted statement, in light of the above guidelines. We find nothing either in the ruling and observations made thereon by the trial court, nor the 1st appellate court to suggest that the two courts below exercised the necessary care and caution before accepting and acting on the 2nd appellant's retracted statement as basis both for conviction and affirming his conviction. Our reason for finding so is that, it is evident from the record that the two courts below failed to appreciate that the prosecution failed to tender evidence through a document examiner to prove that the 2nd appellant either wrote and signed the retracted statement or alternatively signed the same after it had been recorded on his behalf by PW6. In the absence of production of such proof, there was no basis upon which the authenticity of the retracted statement could have been pinned on the 2nd appellant in order for it to be used as a basis both for finding and affirming his conviction.

Once the content of the retracted confessionary statement is discounted, what the prosecution was left with to support the conviction against the 2nd appellant was the evidence of PW2 which centered on the conspiracy to commit the robbery and which in our view, as already observed above, could not stand alone to support the 2nd appellant's subsequent possible participation in the robbery.

The above finding leads us to consider the issue of the oral confession to PW4 and PW5. The position in law then was that, for a confession to be sustained, it had to be taken down or received in accordance with the Judges Rules guidelines, which obviously PW4 and 5 did not apply before receiving the alleged oral admission of the 2nd appellant's involvement in the commission of the offence against PW1. Once the alleged confession to PW4 and 5 also faulters, what the prosecution was left with was the change in the life style and the newly purchased items. Evidence on how the 2nd appellant came to be in possession of those items, is what was contained in the retracted statement. Once that retracted statement was rejected, there is nothing to link those items to the proceeds of the robbery, save for suspicion that the change in the life style was as a result of benefiting from the proceeds of the robbery committed against PW1. The position in law is that, suspicion however strong can never support a conviction. See **Sawe versus Republic** [2003] KLR 364, for the holding, *inter alia* that:-

"Suspicion, however strong, cannot provide basis of informing guilt which must be proved by evidence beyond reasonable doubt"

The above being the position, we find that there was no basis for the finding by the two courts below that the charge against the 2nd appellant was proved to the required standard. He should have been given the benefit of doubt, which we hereby do. It is accordingly reversed and set aside. He is ordered to be set at liberty forthwith unless otherwise lawfully held.

Having confirmed the 1st appellant's conviction, we now proceed to reconsider an appropriate sentence in light of the guidelines given in the case of ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***, given after the Supreme Court examined comparative jurisprudence on consequential orders and in the end stated thus:

"Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing."

This Court has already expressed itself on the mode of procedure with regard to compliance with the above Supreme Court guidelines on resentencing in circumstances where the Court has affirmed the conviction, but found it prudent to temper with the sentence handed down against an appellant by a trial court, and affirmed by a first appellate Court, in instances where the death penalty is the only lawful sentence for the offence such an appellant was convicted of.

In **Juma Anthony Kakai Vs. Republic [2018] eKLR**, where there was mitigation and the appellant was a first offender, the Court re-

sentenced the appellant and substituted the death sentence with a sentence of twenty (20) years imprisonment from the date of conviction. In **Peter Mwania Munywoki & Anor. Vs. R. Criminal Appeal No. 256 of 2007**, in which the appellant had been incarcerated for eighteen (18) years, the Court was of the view that remitting the matter back to the High Court or the trial court to reconsider the sentence would, in the Court's view, cause further delay in the matter and add to the back log of cases. As the mitigation was already on record, the Court found it fit and in the interests of justice to set aside the sentence handed down against the appellant by the trial court, and affirmed by the 1st appellate court and substituted therefore a sentence of imprisonment for twenty five (25) years, to run from the date of the appellant's first conviction on 4th October, 2001. In **Bernad Mulwa Musyoka Vs. R. Criminal Appeal No. 25 of 2016**, the Court intimated that it has jurisdiction to direct a sentence re-hearing by the court (s) below or pass any appropriate sentence that the trial court could have lawfully passed. In **Mohammed Hussein Mohammed Vs. Republic -Criminal Appeal No. 126 of 2015,** the Court after taking into consideration the sentencing guidelines as enunciated in the **Muruatetu case** (Supra), deemed it fit to interfere with the death sentence meted out against the appellant with respect to the offence of robbery with violence and substituted the same with a sentence of 20 years' imprisonment which the Court deemed as commensurate to the circumstances of the case and the appellant's culpability**.** Lastly, in **Criminal Appeal No. 6 of 2009-Yohana Hamisi Kyando Vs. R.,** the Court remitted the matter back to the High Court for rehearing on sentencing only, consistent with the guidelines pronounced by the Supreme Court in the **Muruatetu case**.

From the above survey of the trend in the Courts' pronouncement on the issue of re-sentencing, it is evident that the determining factor in deciding either to remit the matter to the trial court for resentencing or for the court to assume that role and proceed with the resentencing exercise depends on the peculiar circumstances of each case. In the instant appeal, the appellant was arrested on 5th February, 1998 about twenty (20) years and slightly over two (2) months ago. He was convicted and sentenced on 6th December, 2000, which is now a period of eighteen (18) years and slightly over two months. In light of the above, and since there is mitigation on record, it is our view that the ends of justice will be met herein, if we were to temper with the sentence instead of remitting the 1st appellant to the trial Court for resentencing. Considering that PW1 lost a substantial amount of money and he was also injured in the course of the robbery, a sentence of thirty (30) years imprisonment would serve the ends of justice herein.

In the result we set aside the death sentence handed down against the 1st appellant by the trial court and affirmed by the 1st appellate court, and substitute it with one of thirty years imprisonment from the date of conviction and sentence.

We so order.

Dated & Delivered at Nairobi this 8th day of March, 2019.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.