REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: HON. R. MWONGO, J.

CRIMINAL APPEAL NO. 38 OF 2019

FRANCIS MAINA MACHARIA.....1ST APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 37 OF 2019

SIMON WAMBUGU NDUNGU.....1ST APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and sentence of Hon. K. Bidali (CM) in Naivasha CMCR No. 512 of 2017 delivered on 23rd September, 2019)

JUDGMENT

Background

1. The two appellants here appealed in separate appeals against the judgment dated 23rd September, 2019 of Hon. K. Bidali in CMCR No. 512 of 2017. They were charged jointly with Wilson Ngugi Wambui and Hezron Kiarie Mbugua and others not before court, with robbery with violence contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. The 1st Appellant, Francis Maina Macharia was the 4th Accused, and the 2nd Appellant Simon Wambugu Ndungu, was the 2nd Accused in the lower court. They were both convicted with two counts of robbery with violence and sentenced to death. The two other accused persons Wilson Ngugi Wambui (1st Accused) and Hezron Kiarie Mbugua (3rd Accused) are not parties to the appeals herein.

2. The particulars of the charges against the appellants were that on 7th March, 2017 at around 20.00 hours at Kileleshwa Estate in Mai Mahiu with two others before the court, and others not before the court, and being armed with dangerous weapons namely metal bars and pangas. They committed the following offences:

> - Robbed PN, the 1st complainant one motor vehicle Registration Number KCB […] Toyota Fielder valued of Kshs 800,000/=; one mobile phone make Alcatel valued at Kshs 7,000/=; Lenovo Laptop valued at Kshs 45,000/=; Sony Camera valued at Kshs 15,000/= and cash Kshs 5,000/= all valued at Kshs 872,000/=, and immediately before such robbery used physical violence on PNN.
>
> - Robbed VWK, the 2nd complainant, of one 13 kilogram gas cylinder valued at Kshs 10,000/=, DVD valued at Kshs 5,000/=, Zuku decoder valued at Kshs 5,000/= a Techno mobile phone valued at Kshs 7,000/= and cash of Kshs 5,000/= all totaling Kshs 32,000/=; and immediately before such robbery used physical violence on VWK.

3. The convictions followed a hearing in which nine prosecution witnesses testified and four accused persons gave their defences. Accused 2 gave sworn testimony and accused 4 gave an unsworn statement.

4. Due to the fact that the grounds of appeal in each of the appeals were so similar, and the fact that the two appeals emanated from the same

incident and the same lower court judgment, and were argued together, I have consolidated the appeals for convenience.

5. Both appellants filed amended grounds of appeal, the grounds of which are almost identical. They also filed written submissions. The issues raised in the appeals are summarized as follows:

a) That the charge sheet was defective as a duplicitous charge sheet.

b) Whether there was proper identification of the appellants and whether the identification parade was procedurally and effectively conducted.

c) That the trial magistrate failed to properly analyse the accused persons defences.

d) Whether there was legal propriety in the trial magistrate meting a mandatory death sentence.

6. The duty of this court as the first appellate court is to analyse, re-examine and re-evaluate the evidence upon which the appellants were convicted and arrive at our own independent conclusion, bearing in mind that this court did not see and hear the witnesses testify and thus give allowance for that. (**Okeno v Republic [1972] EA 32**).

Facts

7. The 1st and 2nd complainants are husband and wife. They testified in the lower court as PW1 and PW2 respectively. PW1 had just driven into home in his car on 7th March, 2017. It was about 8.00pm. Suddenly, about ten men armed with pangas and other weapons accosted him. The security lights were on in the compound. As he raised an alarm one of the attackers struck him on the head, cutting him. They then forced him into his house. The lights in the house were on and he could see his assailants' faces. He testified that once in the house, he clearly saw both the 2nd appellant and the 1st accused from the lights of the house.

8. His wife was in the house and the 1st accused took her to the bedroom and forced her to remove her clothes after cutting her trouser. The robbers demanded money and ordered the family to lie down. That included his wife and two minor children, N and F, who were now screaming. Their hands were tied and PW1 and PW2 were frog marched to the vehicle.

9. At the gate, another of the robbers boarded the vehicle. PW1 was forced to sit next to the 2nd Appellant. The vehicle was driven off by one of the assailants towards Narok road, and turned into a thicket near Hotspring Girls Secondary School. The 2nd Appellant told PW1 he would rape his wife, who was by now naked as her clothes had been torn off, but his wife said she was on her period. Soon the vehicle ran out of fuel. The robbers made some calls. Soon thereafter, a man on a motor cycle brought some fuel, and they were joined by two other men.

10. After a while, the robbers disappeared into the night with the vehicle. PW2 was able to untie herself and she untied PW1, her husband, who gave her his trouser to wear. They walked towards the main road and came across a police road block where they reported to the police. They were helped to get treatment at a clinic and later reported at Naivasha Police Station.

11. PW2 testified that she was in the house preparing dinner at about 8.00pm when she heard commotion at the door. She went to the door and as she opened it, the 1st accused burst in followed by her husband escorted by the 2nd appellant. The 1st accused hit her with the flat side of a panga, demanded money, and led her to the bedroom. There, she gave him Kshs 5,000/= as he tore at her trouser and underwear with his panga. Four other robbers joined them in the house and started ransacking the house. The thugs hit and broke the sitting room bulb which had been on for some five or so minutes.

12. The thugs then frog marched PW2 and PW1 to PW1's car and drove off. After about thirty minutes they reached a bush and the car ran out of fuel. They sent a boda boda man to buy fuel. At about this time one of the assailants wanted to rape PW2 but she claimed she had her periods. He sexually assaulted her with his fingers but did not rape her. This went on for about two hours and the robbers even exchanged guard duties.

13. Finally, all the robbers left them tied up in the bush but PW2 was able to untie herself and her husband. They then walked to a tarmac road where they found sand dealers who escorted them to a police road block where they reported the robbery. The police flying squad were called in from Naivasha. They had already recovered the car as the complainants' children had contacted neighbours who alerted police.

14. On 21st April, 2017, PW2 was called for two identification parades where two of the robbers were on parade, including the 2nd Appellant (Accused 2) who led her husband into the house. She identified the 2nd Appellant.

15. In cross-examination by the 2nd Appellant she said she recalled his face as he was the one who escorted PW1 into the house.

16. PW3 Susan Wambui Kimani testified that she was the owner of a motor bike KMDA 799P which she had left in the hands of Hezron Kiarie Mbugua. He was later charged as one of the robbers. Her evidence did not touch on the 1st and 2nd Appellants.

17. PW4, Ben Kuria who was attached to Naivasha Referral Hospital, testified on behalf of Tabitha Ndungu who filled in the P3 Form for PW1. He produced the P3 Form as Exhibit 2. It showed that PW1 had cut wounds on the head and right leg; and his head was swollen. This testimony did not directly touch on the appellants, but corroborates the fact of injuries inflicted during the occurrence of the robbery.

18. PW5 Paul Njuguna Kariuki testified that he lived in Maai Mahiu near the house of PW1 at the time of the robbery. He was headed home

at 8.00pm on 7th March, 2017 when he saw PW1's car arrive and enter the gate to the compound. After a while, he saw a passenger he knew as Kamau board the vehicle at the main road and the vehicle was driven towards the quarry. Kamau was his customer when he operated a taxi. He identified Kamau as the 4th Accused. Later, he heard people who had milled around at PW1's gate saying PW1 had been abducted during a robbery. He told them he had seen the vehicle, and that it was driven towards the quarry. The next day he reported to the police. He reported that he recognized the passenger when he saw him.

19. When cross-examined by the 1st Appellant (4th Accused), PW5 said he knew the 1st Appellant well; that he was merely 30 metres away when he entered PW1's car; that there was moonlight by which he recognized 1st Appellant; that he had no grudge with 1st Appellant as they had lived together for long without grudges; that in Maai Mahiu the 1st Appellant is known as Kamau; that he is the one who made a report to police; and that he called 1st Appellant to meet him in Maai Mahiu thus enabling the police to arrest him.

20. PW6 Corporal James Kimwetich was attached to DCI Naivasha at the material time. He was instructed to accompany the DCI, PC Kimathi, and others to arrest some known robbers. Through informers they arrested the 2nd Appellant (Accused 2) who they found at his house in Limuru with another accused person. After they searched the house they did not recover any stolen items. In cross-examination by Accused 2, he said he handed Accused 2 over to the Investigating Officer.

21. PW7 Corporal Boniface Musau was based at Naivasha at the material time. On 7th March 2017 whilst in Longonot area he received a report of a complainant who was robbed of vehicle Registration Number KCB […] Toyota Fielder. He drove towards Maai Mahiu and saw the car being driven towards Maai Mahiu from Naivasha. They pursued the vehicle. At Maili Mbili area of Karagita they found the car parked by the road side with a motor bike next to the car. As the police alighted, the car sped off. As they arrived near Kihoto Stadium they found the car with a motor bike next to it. The men took off and escaped in the dark after being pursued. The police towed the car in which they found a gas cylinder, DVD and Zuku decoder. The next day the complainant came to the station and identified his car.

22. Further, PW6 testified that investigations commenced and accused 1 and 2 were arrested. The two were also identified in a later identification parade conducted by Inspector Matora on 21st April, 2017.

23. PW8 Chief Inspector Alvin Matora, was at the material time the In-charge Crime at Naivasha Police Station. On 21st April, 2017, he was requested by CPL Mwanga and PC Kiere to conduct an Identification Parade. He did two separate Identification Parades. PW8 stated that he explained the rights and procedures of the parade to the Appellants. The 2nd Appellant signed and wrote his name. The parade had 8 people and PW1 was able to identify the 2nd Appellant Simon Wambugu Ndungu who was in between number 5 and 6. PW2 also positively identified the 2nd Appellant who was at this time standing between positions 7 and 8. He testified that PW2 also wanted to hear their voices and all the parade members were asked to say *'lala chini'* and the Appellant was again identified with his voice.

24. In cross-examination by the 2nd Appellant, PW8 stated that he was requested by the Investigating Officer to carry out the Identification Parade; that he only requested for the witnesses; that PW1 and PW2 did not meet one another as PW1 was at the Customer Care desk when the PW2 was called during the Identification Parade; that all parade members were requested to say one word, *'lala chini'*.

25. PW9 IC Peterson Njue was at the time attached to the Crime Division, Naivasha Police Station and his duties included documentation of scenes and photographing, among others. He stated that on 8th March, 2018 he took photos of a vehicle Registration Number KCB […] Toyota Fielder. It had been intercepted at Kihoto in Naivasha. Inside the vehicle were a gas cylinder, decoder and shoes. He produced the Exhibits (MFI 14a, b, and c) in court. He also produced as certificate MFI 15. Both the Appellants did not cross-examine PW9.

26. In his defence Accused 4 (1st appellant) gave an unsworn statement. He said he lived in Maai Mahiu. On 22nd June, 2017, he woke up early and went to work; that PW5 owed the appellant Kshs 1,000/=; that PW5 refused to pick the 1st Appellant's calls so when PW5 called him on the same day at 1.00pm, he thought he wanted to pay him his money so went to meet PW5 and he was arrested and charged.

27. The 2nd Appellant Simon Wambugu Ndungu gave evidence that he lived in Limuru and was a hawker. On 20th April, 2017 at 12.10pm he was at home when his friend Wilson went to Appellant's house to pay a debt; that at 12.17pm three police officers knocked on his door, searched his house and later took him to Naivasha Police Station. The appellant said he had another Criminal Case 1279 of 2014; that the police told him he had hidden for long. On 21st April, 2017, he participated in a parade, he was positively identified and was charged in court. The appellant added that he had another Criminal Case 420 of 2017 before Court 2 and he pleaded the files to be tied together with Criminal Case 1279 of 2014.

Analysis and Determination

Defective Charge Sheet

28. The prosecution argued that the alleged defect in the charge sheet was that the charge indicated that it was under "**Section 295** as read with **Section 296 (2)** of the **Penal Code**." The DPP cited the case of **Paul Katana Njuguna v Republic [2016] eKLR** where the Court of Appeal held that a defect under **Section 296 (2)** of the **Penal Code** is not fatal stating:

> ***"Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the Penal Code. We observe that the offence under Section 295 and 296 (2) were not framed in the alternative. So, following the decision in Cherere s/o Gakuli -v- R (supra) Laban Koti -v- R. (supra) and Dickson Muchino Mahero v R. (supra), the defect in the charge herein is not necessarily fatal."***

29. I adopt the above position. The appellants knew exactly what case they were answering. There was therefore no failure of justice. As a result, this ground of appeal fails.

Identification

30. The 1st Appellant argued that it was improper for the trial magistrate to rely only on the evidence of PW5 to identify him. He argued that the trial court improperly relied on alleged recognition evidence of one person only, in stating:

> ***"It is important to note that the 4th Accused was not identified by PW5 but recognized"***

Further the 1st Appellant argued that the trial magistrate was wrong in finding that PW5 was in close proximity of the 1st Appellant. As such, he argued, the evidence of PW5 does not prove the elements of the crime of robbery with violence.

31. The 1st Appellant's argument is further that the witness who allegedly saw him was not a witness to the crime under **Section 296 (2)** of the **Penal Code** as he did not witness him commit the robbery. As I understand it, the 1st Appellant's real submission is that the evidence of PW5 alone is insufficient to convict him of robbery with violence.

32. The 1st Appellant Francis Macharia (4th Accused) was identified by PW5 Paul Kariuki. PW5 said he knew 1st Appellant as Kamau, and that that is the name he was known by in Maai Mahiu. 1st Appellant was a customer of PW5, who he, PW5, saw entering PW1's vehicle in the bright moonlight, before he drove off towards the quarry.

33. The DPP submitted that the evidence of PW5 corroborated the evidence of PW1 and PW2 who said that the vehicle stopped to pick up one of the other attackers. At this point the 1st Appellant was merely 30 metres away from PW5 when it picked the 1st Appellant. The DPP argued that this being a case of recognition, such evidence is safer than evidence of mere identification.

34. The trial magistrate found that PW5 linked the 1st Appellant to the robbery as he boarded the abduction-and-escape vehicle at the time of the robbery. The trial magistrate cited **Abdalla Wendo v Republic [1953] 20 EAC 166** where the Court of Appeal for Eastern Africa held:

> ***"Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but 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. In such circumstances what is needed is other evidence whether it be circumstantial or/direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as a free from the possibility of error."***

35. The trial magistrate also relied on **Roria v Republic [1967] EA 573,** where the same court held:

> ***"A conviction resting entirely on identify invariably causes a degree of uneasiness that danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."***

36. The learned trial magistrate properly concluded that PW5 recognized the 1st Appellant who he personally knew very well prior to the incident; that PW5 placed the 1st appellant at the scene of the robbery at the time it was committed, and that he, the 1st appellant, boarded PW1's vehicle as it drove off.

37. This evidence of the vehicle stopping to pick up one of the robbers was corroborated by PW1 who said *"the car stopped and someone else joined in"*, but that he did not see his face, and PW2 who said "they drove for a short distance and another man joined in". What is the effect of corroboration? In **Republic v Baskerville [1916] 2KB C 58**, it was held as follows:

> ***"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it."***

38. To the extent that the trial magistrate connected the presence of the 1st appellant to the scene of the robbery at the very time the robbery was committed, the trial magistrate cannot be impugned. It was held by the Court of Appeal in **Stephen M'Ruingi & 3 Others v Republic [1983] eKLR** that:

> ***"Corroboration need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connection with the crime and we agree that it must be independent testimony which affects the accused by connection or tending to connect him with the crime. In other words it must be evidence which implicates him."*** (Emphasis added)

39. Clearly, the 1st Appellant's argument that every ingredient of crime of robbery with violence must be proved against him is incorrect. What is required to be proved as the key ingredients of robbery where it is evident that there were many participants to the robbery are:

i) that the offenders or any of them, was armed with dangerous or offensive weapon.

ii) that the offender was in company with others.

iii) That the offender, or any of them, at or immediately before or after the time of the robbery he wounds, beats, strikes or uses any other personal violence to any person.

40. PW5 saw the 1st appellant enter the vehicle which left the premises with the two abductees PW1 and PW2. His entry into the car at the scene shows that he had common intention in respect of the robbery, or that the 1st Appellant was either an accomplice or a conspirator to the robbery, or that he aided or abetted the crime that was committed, or was a party to the theft and abduction of PW1 and PW2.

41. I therefore see no basis to impugn the conclusions of the trial court with regard to his finding that the 1st Appellant was a participant in the robbery. This ground of appeal fails in respect of the 1st Appellant.

42. With regard to the identification of the 2nd Appellant (2nd Accused), the evidence of both PW1 and PW2 clearly identified him and placed him at the centre of the robbery outside and inside the house. PW1 saw him by the bright light of the bulb in the room. He also said he saw him for over ten minutes in the house. PW2 said she saw the 2nd Appellant as he led her husband to enter into the house.

43. The 2nd Appellant challenged the identification parade for the reason that PW2 requested that he should speak some words at the parade. He thus protested in the parade form:

"I am not satisfied because I am the only one she (PW2) has asked to say the words 'lala chini'.

44. The 2nd Appellant complains that the purpose of the identification is supposed to be visual not voice. He cites **Karani v Republic [1985] KLR 290** where the Court of Appeal held as follows:

"Identification by voice nearly always amounts to identification by recognition. Yet here, as in any other cases, care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions existing favouring safe identification."

45. The 2nd Appellant also complains that the parade officer failed to not the 1st appellant's dissatisfaction with the parade procedure yet went on to tell him to sign the parade form.

46. I have perused the parade form for the 2nd Appellant. It is clear that the parade officer took him through the procedures in Part B which he signed. He has not stated that he was coerced or forced to sign that part of the form. It is also on record that he complained that he was the only one told to say the words *"lala chini"*. On this, the Identification Parade Procedure at Paragraph 6 (iv) (h) allows for a suspect to be asked to speak, but also that all others in the parade must equally be asked to speak. The provision states:

"(h) If the witness desires to see the accused/suspected person walk, hear him speak see him with his hat on or off, this should be done, but in this event the whole parade should be asked to do likewise." (Emphasis supplied)

47. In his evidence, Chief Inspector Alvin Matora PW8, however testified:

"The second witness Veronica Wambui identified hin [2nd Appellant] also when the accused was between 7 and 8. She was able to identify him. The suspect did not think the parade was fair because the witness also wanted to hear the voice. All the parade members were asked to say 'lala chini'. The witness identified him using voice and facial features. (Emphasis supplied)

48. During cross-examination by the 2nd Accused (2nd Appellant) no issue was raised as to why the parade officer required only the 2nd accused to say "lala chini", and not the other members of the parade. Nor was there any cross-examination that tended to suggest bias against the 2nd Appellant.

49. I note that there is no record in the Parade Form that the other parade members were asked to speak. The failure of the Chief Inspector to record the fact that all members of the parade for the 2nd Appellant were asked to say *"lala chinni"* may be explained by the fact that the standard Parade Form does not have a portion or section in it where the parade officer can record such a fact. Ideally, such a place would be in Section E of the Parade Form.

50. Thus, there is the written evidence of the accused stating that he alone was asked to say *"lala chini"*, and the opposite evidence of PW8 Chief Inspector Matora to the effect that all parade members were also asked to say *'lala chini'*. PW8 also testified that PW2 identified the 2nd Appellant by facial features and also using his voice. I have no reason to believe that the 2nd Appellant was the only one in the parade who asked to say "lala chini'. To that extent, and given that PW1 also separately identified the 2nd Appellant, I am satisfied that the identification process resulted in the correct identification of the 2nd Appellant, and was properly done.

51. This ground of appeal therefore fails in respect of both appellants.

Mandatory Sentence

52. Both appellants relied on the **Francis Karioko Muruatetu & another v Republic [2017] eKLR** case to found their challenge on the sentence meted by the trial court. They argue that **Muruatetu** established the death sentence as the maximum discretionary sentence, and does not countenance blind application of the death sentence.

53. The appellants complain that the trial magistrate meted the mandatory death sentence upon the appellants without exercising his judicial discretion and taking mitigational circumstances into account in the matter. In the trial court proceedings the Honourable Magistrate recorded the 1st and 2nd appellants' mitigation (4th and 2nd Accused respectively) as follows:

> ***"Accused 2 - I pray for leniency. I have a young child aged 10 years and in class 4. I am the bread winner. I am aware of the conviction in Criminal Case 1279 of 2014…….***
>
> ***Accused 4 - I pray that I be a first offender."***

54. The trial magistrate then proceeded:

> ***"I have considered the mitigation and the facts that the 1st, 3rd and 4th are 1st offender; the offence is prevalent. A stiff sentence would act as a deterrent. I have also taken into account the circumstances under which the offence was committed."***

55. The DPP opposed review of the sentence on the grounds that the crimes were aggravated in nature; the appellants terrorized their victims; they did not give any serious mitigation or show any remorse or rehabilitation. The DPP sought that a harsh sentence be meted.

56. In my view, the central object of the **Muruatetu case** is to ensure that an accused person gets a fair hearing that takes into account his mitigating circumstances to enable a trial court to exercise discretion at the time of sentencing notwithstanding the existence of a mandatory sentence. The **Muruatetu case** does not outlaw the death sentence but requires that it should not be slavishly imposed. Where a trial court shows that mitigational circumstances have been duly taken into account by the court, there is nothing to bar the court from meting the death sentence.

57. In light of the above, I am satisfied that the trial court took into account the mitigation as presented and even noted that the 1st Appellant was a 1st offender and 2nd Appellant had a previous conviction. Thereafter the court issued the sentence of death. In so doing, and as evidence of his exercise of discretion, the trial magistrate also took the following circumstances into account: that the offence is prevalent; that a stiff sentence would act as a deterrent; and that he took into account the circumstances under which the offence was committed. I therefore see no basis to impugn the trial court's determination on sentence.

Failure of trial court to consider the Appellants' Defences

58. The 1st Appellant's complaint was that the trial court did not consider that he had given PW5 a loan of Kshs 1,000/= which he declined to repay. PW5 had effected the arrest of the 1st Appellant despite him being involved in the offence.

59. The 2nd Appellant argued that the prosecution evidence did not meet the required standard of proof; that he had an alibi which it was the prosecution's duty to rebut.

60. The DPP submitted that the defences were properly considered by the trial court, which found that they did not exculpate them form the charges.

61. From the proceedings, the trial magistrate summed up the evidence of, each of the accused persons at page 6 and 7 of the proceedings. He then analysed it and made his determination.

62. When looking at the defence, as when considering prosecution evidence, the court starts on the footing that an accused person is innocent until proven guilty. But the evidence is considered in a holistic manner. With regard to the 1st Appellant, the trial court found that his evidence corroborated the evidence of recognition and of his presence at the scene of the crime. The 1st Appellant's evidence of a loan to PW5 further cemented the fact that PW5 knew 1st Accused personally and hence gave credence to PW5's evidence.

63. With regard to the 2nd Appellant's evidence of alibi, the proceedings show that when he was cross-examined, he could not recall where he was on the material day, 7th March, 2017. That fact unravels the alleged alibi, and also failed to respond to the complaint and evidence that he was at the scene of the robbery. All in all, I do not see anything suggesting that the 2nd Appellant's defence was not properly taken into account. This ground of appeal therefore fails in respect of both appellants' appeals.

Disposition

64. In conclusion each of the grounds of appeal of both appellants fail, and there is no basis laid to enable me to interfere with the trial court's decision.

65. The convictions and sentences of both 1st and 2nd Appellants are therefore hereby affirmed and the appeal of each of the appellants is dismissed.

Administrative directions

66. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

67. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

68. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 16th Day of December, 2020.

_____

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the DPP

2. Francis Maina Macharia - Appellant in person - present in Naivasha Maximum Prison

3. Simon Wambugu Ndungu - Appellant in person - present in Naivasha Maximum Prison

4. Court Assistant - Quinter Ogutu