Case Number:	Criminal Appeal 94 of 2011
Date Delivered:	30 Oct 2014
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	David Kenani Maraga, Festus Azangalala, Sankale ole Kantai
Citation:	George Morara Achoki v Republic [2014] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	HCCRA 255 OF 2009
Case Outcome:	Appeal dismissed.
History County:	Kisii
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 94 OF 2011

BETWEEN

GEORGE MORARA ACHOKI ..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisii

(Makhandia & Sitati, JJ) dated 10th March, 2011

in

HCCRA NO. 255 OF 2009)

****

JUDGEMENT OF THE COURT

The jurisdiction donated to this Court by Section 361 (1) (a) Criminal Procedure Code in a second appeal like this one is to consider only issues of law raised in the appeal. We must avoid the temptation to deal with matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court unless it is shown that there has been misdirection on the treatment of facts or the findings of fact are not based on evidence. This statement of the law has received judicial pronouncements in various decisions that have come forth from this Court such as **Thiongo v Republic [2004] 1EA 333** and **Aggrey Ochieng Aguch & Anor v Republic (Kisumu) Criminal Appeal No. 367 of 2008 (ur).** In **Gacheru v Republic [2005] KLR 688** this court re-stated that position in the following words:

".... as a second appeal only points of law may be raised since the Court will not disturb concurrent findings of facts made by the two Courts below unless these findings are shown to be based on no evidence..."

The factual position laid out in this judgment is for the purposes of establishing what evidence, if any, was placed before the trial court, how that evidence was treated by that court and once the appellant was convicted, how the first appellate court carried out its legal duty of re-evaluation of the evidence to come to its own conclusion in the matter.

Two accused persons were charged before the trial court but because the appellant's co-accused was acquitted at the trial we shall only look at the case that the appellant was faced with.

The appellant, ***George Morara Achoki***, was the first accused when the charges were read out by the Senior Resident Magistrate, Nyamira.The first count was that of robbery with violence contrary to Section 296 (2) of the Penal Code where it was alleged that on 18th day of November, 2008 at Nyamira Township in Nyamira, the appellant, with others not before the court, and while armed with offensive weapons namely somali sword and an iron bar, robbed J M O of 2 television sets make Sony and LG, a mobile phone, a radio cassette, a VCD player, two speakers, an iron box , foodstuff, shoes, assorted clothing, text books and cash Kshs. 2,400/= all valued at Kshs. 75,000/= and that immediately before or immediately after the time of such robbery they threatened to use actual violence against the said person.

The appellant was charged in count two with the offence of rape contrary to Section 3 (1) (a) of the Sexual Offences Act No. 3 of 2006 particulars being that on the said day at the said place he unlawfully and intentionally caused his genital organ namely his penis to penetrate the vagina of A O without her consent. This count was accompanied by an alternative charge which appears not to have been properly framed but its particulars were that the appellant unlawfully indecently assaulted the said A O by touching her private parts namely her vagina.

In the third count the appellant was charged with having suspected stolen property contrary to Section 323 of the Penal Code and the particulars thereof were that on the 22nd day of November, 2008 at Nyamira Township the appellant, having been detained by **No. 81932 P. C. David Uka** and **No. 45880 P. C. Joseph Ndungu** using powers donated to them by Section 26 of the Criminal Procedure Code, had in his possession a crank shaft, a water metre, a radio cassette make cyber, a fire extinguisher make Zenith, 4 mobile phones make Nokia, Motorolla, Siemens and Ericson, a remote control make Super Sunny and an electric cable wire which were all suspected to be stolen goods.

The prosecution called six witnesses and the learned trial magistrate (L. Komingoi) having found that the appellant had a case to answer heard the sworn testimony of the appellant and the appellants' witness. In the judgment delivered on 11th December, 2009 the appellant was convicted on the three main counts but the conviction on the first count was on the reduced charge of robbery contrary to Section 296 (1) of the Penal Code. There was no finding on the alternative charge. Sentences were imposed of ten years imprisonment for robbery; ten years imprisonment for rape and twelve months for handling suspected stolen goods, and it was ordered that the sentences were to run concurrently.

The appellant was dissatisfied with those findings and appealed to the High Court of Kenya at Kisii. There he found a clouded horizon because he was warned both by that court and by the counsel for the State that should he pursue the appeal he would run the danger of having the sentence on count one being changed to that of death for robbery with violence as originally charged. The appellant soldiered on and the High Court, after finding the appeal to have no merit, and true to its warning, imposed a death sentence. We shall come to this later in this judgement.

Let us look at the case that was before the trial court and which was reviewed by the High Court as we resolve the issues before us in this appeal.

At 2:00 a.m on 18th November, 2008 **J M O (PW1) (M),** a nurse at [particulars withheld] District Hospital, while sleeping in her house with her children and her niece **A O (PW2) (A),** was disturbed by a commotion in the house which woke her up with a start. Thinking it was A who was up and about she called out to her but there was no response. She instead saw sharp torch light advance towards her bed and was shocked to see five men in her bedroom one of who ordered her to keep quiet as the men ***"were at work."*** They were armed with somali swords. One of them placed his hand on her neck and ordered her to surrender her phone, money and other items. She complied. They spoke in English,

Kiswahili and Ekegusii, 3 languages she understood very well. They took many items from her bedroom where they remained for 30 -40 minutes during which they were flashing their torches even at each other making it possible for her to identify the appellant, a person she used to see in Nyamira town. They also moved to other rooms and one of them told her to co-operate lest they rape her the way they were raping A. Meanwhile A had equally been awoken by the commotion and found five men in the bedroom she shared with Ms' children. Three of the men got to her bed, pulled away the blanket she covered herself with and started fondling her. They ordered her to remove her clothes but she flatly refused. They threatened her with swords which quietened her and they roughly removed the clothes as they flashed torches in the room, even to each other. Two men held her legs and hands while the third one raped her. When he was finished the second man took over, did the same and when he was done the third man had his turn. During this ordeal A observed that the second rapist was a light skinned man of middle weight and height who had long hair and nails. He used the long nails to scratch her on the neck and thighs to stop her pleas to him to stop molesting her.

Upon the men leaving with stolen items M raised an alarm as she attended to A. Neighbours came and the matter was reported to police at Nyamira Police Station where both M and A reported that they had identified one of the attackers. A was attended to at [particulars withheld] District Hospital.

At noon on 20th November, 2008, some two days after the incident, M was at a bus stage in Nyamira when she saw the appellant. She rushed to Nyamira Police Station where she fetched police but upon return to the stage the appellant had vanished.

On 22nd November, 2008 the appellant was arrested by No. 81932 **PC David Uka (PW4)** and other officers including **No. 85205 Ag. I. P. Harrison Mutua (PW5)** and **No. 3614 PC Mary Dayo (PW6)** all of Nyamira Police Station who had received information, visited the appellant's house and recovered the items set out in count 3 of the charge. These items were not claimed by M or A and we shall revert to them later in this judgement.

Angeline attended an identification parade arranged by **PC Mary Dayo (PW6)** and supervised by **Ag. I. P. Harrison Mutua (PW5)** where she pointed out the appellant as one of the persons who attacked and raped her.

James Maina Bogonko (PW3) (the Clinical Officer) of Nyamira District Hospital had on 18th November, 2008 received and attended to Angeline about 5 hours after her ordeal. He formed the opinion that she had been raped brutally.

That was the case that the prosecution presented before the trial magistrate who found that he had a case to answer and put the him on his defence. In a sworn statement the appellant stated that on the material night he was at home throughout and could therefore not have committed the offences. He stated that he knew both M and A very well and had no reason to attack them. On items recovered from his house he claimed some as his own as he named owners of others. He denied attending an identification parade.

Peter Moinde Oanga testified as a witness for the appellant. Not only was he the appellant's landlord but he claimed ownership of some of the items taken by police from the appellant such as the water meter and a cable which he said the police had refused to return to him.

As already stated the appellant was convicted and sentenced on all the three main counts, the first one being converted to a charge of robbery contrary to Section 296 (1) of the Penal Code. The learned trial magistrate did not assign any specific reason for reducing the charge in Count 1 to simple robbery

only stating in the said judgment that :

"....The evidence adduced with respect to the first count confirms an offence of simple Robbery. PW1 told the court that she was not injured on (sic) the attack. The evidence against the accused person is overwhelming …."

Thus conviction for simple robbery and a ten years imprisonment sentence. Never mind that it had been proved that the attackers were more than one, they were armed with dangerous weapons and that they had repeatedly threatened M as they carted away her goods.

The elements of an offence under Section 296 (2) of the Penal Code are fully satisfied if, as we stated in **Ganzi & 2 others v Republic [2005] 1 KLR 52 when :**

(a) the offender is armed with any dangerous or offensive weapon or instruments; or

(b) the offender is in the company with one or more other persons; or

c. **at or immediately before or immediately after the time of such robbery the offender wounds, beats, strikes, or uses other personal violence to any other person.**

This court held in **Ajode v Republic [2004] 2 KLR 81** that:

".... injury of the victim itself is not the only ingredient of the offence under Section 296 (2) of the Penal Code."

In the earlier case of **Opoya v Uganda [1967] EA 752** which was cited with approval by this Court in **Maneningu Mbao Mwangi v Republic [2006] e KLR** it was held that:

"...It will be noticed that the particulars of the indictment contain the word "robbed." That word is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use or threats of use of actual violence to any person or property...."

The offence of capital robbery with violence is therefore proved if any of the elements of the same is established in evidence beyond reasonable doubt.

The High Court was clearly alive to this legal position hence the warning given to the appellant that should he pursue the (first) appeal he risked being convicted for capital robbery and be sentenced to death. That, again, later.

Mr. Onyango Jamsumbah, learned counsel for the appellant, in his address to us urged the six grounds in the Supplementary Memorandum of Appeal drawn by him and filed in Court on 10th March, 2014. It is stated in the first ground that the first appellate court erred in law and fact in upholding the conviction of the appellant when the prosecution evidence did not prove the charges beyond reasonable doubt; in the second ground the identification of the appellant is faulted; in the third ground it was claimed that the learned Judges did not re-evaluate the evidence as required; and in the fourth that the judges should have noted that a plea was not taken.

In the penultimate ground the appellant claimed that the learned judges erred in quashing the conviction of the appellant under Sections 296 (1) of **"...the Criminal Procedure Code..." (sic)** and substituting thereof a conviction under Section 296 (2) of the said Code (this is the Penal Code) and in enhancing the sentence to one of death when there was no cross appeal. The complaint in the last ground is that the learned judges erred by failing to put weight to the appellants evidence.

The matters of law raised in the appeal for our determination appear to be:-

i. **whether the appellant was properly identified as the robber and rapist in the case**

ii. **whether the first appellate court carried out its duty of re-evaluating the evidence as required in law**

iii. **whether the High Court was entitled to reverse the conviction of the appellant for simple robbery and substituting thereof a conviction for aggravated robbery.**

iv. **Whether it necessary for the State to file a cross – appeal to entitle the High Court to do what it did.**

Mr. Jamsumbah, learned counsel for the appellant, submitted that as the attack took place at night circumstances for a positive identification were difficult and were made worse, according to counsel, by torches that were flashed about probably blinding the complainants. Counsel was also of the view that As' ordeal could not allow for positive identification of the appellant. Counsel further submitted that it was wrong for the two lower courts to convict the appellant for handling suspected stolen goods that had not been claimed by the complainants at all.

On the High Court quashing a conviction and substituting thereof its own conviction counsel thought it was wrong for that court to do so when there was no cross appeal.

Mr. L. K. Sirtuy, learned Principal Prosecution Counsel in opposing the appeal submitted that the charges had been proved beyond reasonable doubt and that there was no need for a cross appeal for the High Court to quash a conviction and substitute thereof its own.

Let us first deal with the complaints made in this appeal as relating to the treatment of the evidence on record by the trial court and its re-evaluation thereof by the first appellate court and whether it met the threshold for conviction of the offences charged.

On the third count – having suspected stolen property – the appellant was convicted and sentenced to serve twelve months imprisonment. It was alleged that the two police officers named in the charge sheet, one of who testified at the trial, found the items we have already set out in this judgment in the appellants house and because he could not account for them the police suspected them to be stolen and hence the handling charge.

David Uka, who testified as PW4, stated that when he visited the appellants house in the company of other police officers they found a crankshaft, a radio, a fire extinguisher, a wire, a remote control and other mobile phone covers, and a water meter. He said they took the items because:

"... the accused is neither a mechanic, phone repairer electrician or worked with the water Department...."

He said in cross examination that nobody had visited the police station to claim the items.

The appellant, as part of his sworn defence, named one Daniel Manyara as the owner of the crankshaft and named his landlord Peter Moinde Oanga as the owner of the water meter and cable. Peter Moinde Oanga testified to the same effect. The appellant claimed the radio as his own. The trial magistrate held on this aspect of the matter:

".... PW.4 Confirmed that he recovered the items listed on the third count from the accused house. They were produced as exhibit No. 2 -8 respectively. The accused was not able to prove that they were his and that they belonged to his friends. I find that they were stolen goods...."

In the first appeal, while dealing with that aspect, the High Court held that:

"We have also carefully reconsidered and evaluated the prosecution's evidence on count 3 and the appellant's statement in defence and submissions made on his behalf before us. Our humble view of the matter is that the prosecution evidence was water tight and unshaken by the defence. DW1 who alleged that he owned some of the items recovered from the appellant's house did not produce documentary proof of the same."

It was held as long ago as 1972 - in **Okeno v Republic [1972] EA 32** that it is the duty of the first appellate court to re-evaluate the evidence and reach its own conclusions on the matter before it on first appeal. It is not enough for the first appellate court to merely pick the findings of a trial court and substitute them as its own. It must form its own opinion of course always remembering that it has not heard the witnesses or observed their demeanour.

The facts before the trial court, which should have been carefully re-evaluated on first appeal were that items were recovered from the appellants house which the police suspected to be stolen goods. Neither M nor A, nor any other prosecution witness, laid claim to any of the goods. The goods were instead claimed by the appellant and his landlord who testified accordingly and a crankshaft was said to belong to a named person who, for unstated reasons, was not called to testify. We are satisfied, on the material before both courts, that had the first appellate court properly carried out its duty of re-evaluation of this evidence, it would have found the obvious fault on the part of the trial court which appeared to shift the burden of proof to the appellant, who, with his witness, explained the appellants possession of those items. On this the learned judges were clearly in error and the conviction on count 3 cannot stand. The same is accordingly quashed and the sentence of twelve months imprisonment is set aside.

In respect of the conviction for rape the trial court was satisfied that Angeline had identified the appellant during the rape ordeal and later identified him at an identification parade mounted by Ag. I. P. Harrison Mutua. A had immediately after her ordeal informed her auntie M, and also the police, that she could identify one of the rapists. M had also informed police, immediately after the attack, that she knew one of the attackers, a person she used to see in Nyamira town. The person the two witnesses referred to turned out to be the appellant. The first appellate court, in a fairly detailed analysis on this aspect of the case stated this in its judgement:

"We are ourselves satisfied that from the above evidence, the appellant was clearly and

positively identified by both PW1 and PW2 on the night of the attack and that the appellant was also positively identified by PW2 on the identification parade on the 20th November, 2008. We are aware of the decision in Karanja & another v Republic [2004] 2 KLR 140, which is to the effect that where a case revolves around identification and recognition evidence in circumstances where there is possibility of difficulty in identification or recognition, then the court has to test such evidence with great care and to be aware of the dangers of convicting only on that evidence.

In the instant case, we have subjected the evidence of both PW1 and PW2 to careful scrutiny and we are satisfied that it is safe for us to conclude that the appellant was clearly and positively identified. In the case of PW1, she stated that she regularly saw the appellant in Nyamira town, so hers was evidence of recognition using the intense light that emanated from the sharp spotlights which the thieves had with them and which they flashed all over the bedroom where PW1 was as they looked for money. There is no evidence that PW1's face was covered. It was only a hand that was put on her neck, but she also had the chance to get up from the bed to pick the handbag in order to give money to the thieves.

As for PW2, she lay flat on the bed, with both legs and both hands stretched out and held on the bed. She also testified of the strong lights from the spotlights which the thieves shone on each other as they put on the condoms. PW2 gave a vivid description of the appellant whom she easily picked out on the identification parade."

We are satisfied that the first appellate court re-evaluated the evidence recorded by the trial court and came to its own conclusion that the appellant was indeed one of the rapists who subjected A to the harrowing ordeal she underwent that night.There is no merit on the complaint in respect of that conviction and the sentence of ten years was properly awarded to the appellant .

As repeatedly stated in this judgement the appellant was charged on the first count with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The trial court, however, found him guilty of simple robbery contrary to Section 296 (1) of the said Code and sentenced him to serve ten years imprisonment.

As we have shown elsewhere in this judgement , because the robbers were more than one, they were armed with dangerous weapons and they threatened M and inflicted injuries on A, those facts established the more serious offence of capital robbery.

When the appellant appeared in the High Court for the first appeal and at the commencement of the hearing the record shows that the appellant's Counsel addressed the court as follows:

"Mongare: I have perused the record of proceedings. I entertain fears that should this appeal fail, the court may be enclined (sic) to enhance the sentence to one of capital robbery. I need time to consult the appellant further. I seek adjournment."

The appeal was then adjourned and came up again on 22nd July, 2010 when the state Counsel addressed the Court thus:

"Mutai: I had warned the appellant earlier that if he proceeded with the appeal and was unsuccessfully (sic) I will be minded to ask for the enhancement of the sentence to one of capital robbery. I am still of the same view."

Counsel for the appellant then responded as follows:

“Mongare: After agonizing over the matter with the apepllant, we have reached the decision that we prosecute the appeal, the warning notwithstanding.”

That being so it was ordered that the appeal be heard by a bench of two judges.

On 19th January, 2011 the appeal came up for hearing before M. A. Makhandia, J (as he then was) and R. Sitati, J who stated:

“Court: the appellant and his counsel is reminded of the earlier warning by the state counsel that in the event that the appeal is unsuccessful, the state will be seeking to enhance the sentence to one of capital robbery.”

To which counsel for the appellant responded:

“Mongare: I am aware of the intentions of the state. However, my instructions are to prosecute the appeal the warning and possible outcome of the appeal notwithstanding.”

The appeal then proceeded to hearing where counsel for the appellant and counsel for the Republic made submissions and judgement was reserved and was delivered on 10th March, 2011 where it was held in respect of Count 1:

“ The upshot of what we have said above is that there was sufficient evidence before the trial court on which to base a conviction on the charge of robbery with violence under Section 296 (2) of the Penal Code. There was also sufficient evidence to support both counts 2 and 3 of the charge. We are satisfied that the trial court's findings on counts 2 and 3 were safe.

In the premises, we find no merit in the appellant's appeal. The same is dismissed in its entirety. We however quash the conviction and set aside the sentence of ten (10) years' imprisonment on the robbery charge under Section 296 (1) of the Penal Code and in its place, find the appellant guilty of the offence of robbery with violence under Section 296 (2) of the Penal Code, for which the appellant shall suffer death as by law ordained.

We confirm the convictions on counts 2 and 3 save that the sentences of ten (10) years and twelve (12) months imposed upon the appellant on account of counts 2 and 3 shall remain in abeyance.”

Mr. Jamsumbah, counsel for the appellant before us, submitted in the main that although the High Court had jurisdiction to increase or decrease sentence it was wrong for the High Court to increase sentence from one of ten years imprisonment and substitute thereof a sentence of death when the State had not filed a cross appeal to the appeal.

Section 354 Criminal Procedure Code states (in so far as it relates to this appeal):

“(1) __

(2) __

(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss

the appeal or may

(i) ___

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

(b) __"

In the case of **JJW v Republic (Kisumu) Criminal Appeal No. 11 of 2011 (ur)** where the appellant had been sentenced to seven years imprisonment but which sentence was enhanced on appeal to a sentence of ten years without notice we held that:

"It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

In another case of **Stanley Nkunja v Republic Criminal Appeal No. 280 of 2012** this court observed that:

"While it is prudent, and fair, to warn the appellant and give him a notice of enhancement, we are of the view that such a notice is not required in respect of an illegal sentence. This is because by virtue of the provisions of Section 347 (2) of the Criminal Procedure Code, appeals to the High Court may be on matters of facts and law. Illegality to a sentence is a matter of law and therefore, the learned Judge was correct in enhancing the sentence to life imprisonment."

In **Kingsley Chukwu v Republic Criminal Appeal No. 257 of 2007** this court on a second appeal enhanced sentence despite the fact that no notice of enhancement of sentence had been given and there was no cross – appeal.

In the case of **Hosea Otieno Wetete v Republic (Kisumu) Criminal Appeal No. 326 of 2010 (ur)** we faulted the High Court for enhancing sentence when there had been no warning of any sort to the appellant. We said:

"Lastly on that aspect of sentence, the record shows that after the appellant had pleaded for leniency on sentence, the learned Judge recorded that he warned the appellant that the sentence could be enhanced. With respect that was not of any effect. The warning should have been

done before the full hearing started and the appellant should have been asked if he understood the warning and should have been given a chance to choose his next action on the matter in view of the warning. All this was not done and thus the recorded warning after the appellant had addressed the court was a lip service to the course of justice."

The position was the same in the case of **John Otieno Mumbo v Republic Criminal Appeal No. 85 of 2011 (ur)** where a twenty years imprisonment was enhanced on first appeal to imprisonment for life. We said:

".... The remaining complaint relates to sentence. A complaint against severity of sentence is, by dint of the provisions of *section 361 (1) (a)* of the Criminal Procedure Code, one of fact and ordinarily would not be for our consideration. However, the appellant's complaint, is not one of mere severity of sentence. The record shows that he was sentenced to 20 years imprisonment by the learned trial magistrate and when he appealed to the High Court, the same was set aside and substituted by a sentence of life imprisonment. The record does not show that the learned Judge ever warned the appellant that in the event of his appeal failing, the sentence which had been imposed upon him by the trial court would be enhanced to life imprisonment. In our view, the appellant was entitled to the warning for him to consider his options which would probably have included preparation to specifically address the issue and the eventuality. He was unfortunately not afforded that opportunity...."

As will therefore be seen although there is no legal requirement for the State to file a cross – appeal an appellant must be informed at the earliest opportunity, at the commencement of hearing of his appeal, that there is a real danger that should the appeal be heard and fail a lesser sentence could be enhanced by the High Court in terms of the said Section 354 of the Criminal Procedure Code.

In the present appeal the appellant, who was represented by counsel throughout the hearing of the first appeal, was warned at the earliest opportunity that the appellant risked substitution of the conviction of simple robbery with aggravatedrobbery and enhancement of the sentence if this appeal failed.

Counsel for the appellant even applied for adjournment, which was granted, to enable him and the appellant to consider and internalize the warning that had been given by the State counsel and which was reinforced by the Court that the sentence could be enhanced if the appeal proceeded and failed. At the resumption of the hearing of the appeal, and the warning being repeated, the counsel for the appellant stated that he and the appellant had considered the position and had opted to soldier on. The appeal was heard in full and the High Court held, rightly, in our view that the evidence on record proved the offence of capital robbery and the learned trial magistrate erred in reducing it to simple robbery.

The High Court duly then quashed the appellants' conviction on the offence of simple robbery and substituted with a conviction on capital robbery with the consequent death sentence. We can see no error in the way the High Court exercised its discretion under that provision of law and we agree that the appellant deserved a conviction for aggravated robbery. The upshot of our findings is that save for the part where we have set aside the findings of the lower courts in respect of count 3, this appeal lacks merit and we dismiss it accordingly.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF OCTOBER, 2014.

D. K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL