REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. E016 OF 2021

BENARD OMONDI MUMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the judgement and sentence delivered by the Hon. J.P. Nandi in Bondo

Criminal Case No. 692B of 2019 on 30th June, 2021)

JUDGMENT

1. The appellant herein **BERNARD OMONDI MUMBO** and 3 others not before court were jointly charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code.

2. The particulars of the offence were that on the night of 11th and 12th March 2019 at Usenge market, in Usenge sub-location, Bondo sub-county within Siaya County, the appellant and his co-accused robbed one Janet Adhiambo Ogutu of one television set make LG of 32 inch, two mobile phones make Huawei and Itel, 2 blankets and one hoofer all valued at Kshs. 48,000 and at the time of such robbery killed the said Janet Adhiambo Ogutu.

3. The appellant and his co-accused also faced the alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code. The appellant pleaded not guilty to both the main charge and the alternative charge. The matter proceeded to hearing and the trial magistrate Hon. J.P. Nandi after considering the evidence of the prosecution witnesses against the evidence by the accused and his witnesses found that the prosecution had proved its case against the appellant alone as the sole person who committed the offence of robbery with violence and sentenced the appellant to serve life in prison.

4. Aggrieved by the conviction and sentence imposed on him, the appellant filed this appeal on 9th July 2021 setting out the following grounds:

a) That the trial court failed to observe that the sentence imposed is/was manifestly harsh due to its mandatory nature.

b) That the trial court failed to consider that my fundamental constitutional rights was/were violated and thus no ample time was the appellant given to defend himself.

c) That the trial court did not consider that the appellant had already applied to withdraw the case before Hon. Nandi for lack of not having faith with the same court due to prejudice it occasioned on the trial process.

d) That the trial court failed to reconsider that the appellant was not given time for cross-examination.

e) That the appellant hereby beseeches the superior court to indulge into the same and thus order for a retrial due to lack of constitutional crisis.

f) That I wish to be present at the hearing of this appeal.

5. The appeal was canvassed by way of written submissions. The appellant who was unrepresented filed his written submissions from prison where he is serving life sentence.

The Appellant's Submissions

6. It was submitted that the sentence imposed on the appellant was manifestly harsh due to its mandatory nature as the appellant was a young Kenyan who enjoyed the right and freedom not to be subjected to torture and cruel inhuman degrading treatment and as such the court should exercise its discretion and alter the sentence meted out on him

7. It was submitted by the appellant that the trial magistrate erred by arriving at his decision without giving the appellant sufficient time to challenge the evidence that had been adduced thus contravening his constitutional right to defend himself.

8. The appellant submitted that his right to a fair trial was violated as despite his indication that he lacked faith in the court as the court had previously convicted him in another case, the plea was ignored by the trial magistrate.

9. It was submitted that the trial court failed to consider that the appellant was not given time for cross-examination as provided for under section 302 of the Criminal Procedure Code and section 146 of the Evidence Act specifically denying the appellant the opportunity to cross-examine critical witnesses presented by the prosecution, specifically PW7, 8 and 9.

10. The Respondent did not file any submissions.

Analysis & Determination

11. This being a first appeal, this court is obliged by law to carefully examine and analyse afresh the evidence adduced before the trial court and reach its own conclusion on the same but always observe that the trial court had the advantage of seeing and hearing the witnesses and observing their demeanor and therefore must give allowance of the same. This was well put in the well-known case of **Okeno v Republic [1972] EA 32** where the court stated as follows:

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala -V- R. (1975) EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

12. The evidence adduced before the trial court was as follows: PW1 Albert Ochieng Opiyo testified that he was a fisherman who worked with the deceased. He stated that on the 12.3.2019 he and his colleague Rose Michael reported to work at Usenge Beach but that the deceased did not and so they decided to go to her house after trying to call her in vain. He stated that they knocked on her door but there was no response so they called the deceased's brother who told them that he had not seen her as well. Her mother also came and said that she had not seen the deceased.

13. PW1 testified that they then returned to the deceased's house where they found her door open, with no one in the house and clothes scattered on the bed. He further testified that the deceased's sister informed them that the woofer and TV were missing from the house. He testified that police officers were called and then PW1 and his colleague left for work. PW1 testified that later, Adhiambo called him and informed him that the deceased's body had been found in a pit latrine lake hole. In cross-examination by the appellant herein, the 1st accused and the 4th accused, PW1 stated that he did not know them.

14. PW2 Kevin Otieno Ogutu, the deceased's brother and a fisherman at Usenge Beach testified and corroborated PW1'S testimony and stated that on the 12.3.2019 while at work, he received PW1's call inquiring of the deceased's whereabouts which he also did not know so he went and informed his mother and together with PW1, they proceeded to the deceased's house where they found the door open and the TV and other devices missing. It was his testimony that they reported the matter at Usenge Police Station and also at the DCIO Bondo. He further testified that his friend, Otis, called him and told him that the deceased's body had been found in a ditch so they rushed to the scene where the police came and retrieved it and took it to the mortuary.

15. PW2 testified that on the 8.8.2019 he was called by a CID officer and informed that they had received some items specifically a Huawei touch phone and an Itel phone which he was able to identify as belonging to the deceased. This witness was not cross examined.

16. PW3, Lazarus Ochieng Ogot, the deceased's boyfriend testified that on 11.3.2019 at 5pm, he left work and talked to the deceased and informed her to take to him some medicine. He stated that by 10pm the deceased had not yet arrived and that he tried to call her at various intervals but her phone was not going through and further that he sent her a text message but she did not reply.

17. He testified that at 1am, he proceeded to the deceased's house but found it locked with a padlock so he went to search for her at a certain funeral but did not find her. He went to sleep. He testified that the following morning at 6am he passed by the deceased's house on his way to the beach but did not check on her and that at 7am he went to her house and found the door open with the TV, woofer and suitcase with clothes missing. It was his testimony that Joshua informed him that he had seen the deceased at 11pm. He testified that they searched for her and the deceased was found having been killed and her body dumped in a pit hole. He stated that he received a call from a DCIO Officer in Bondo where he went and was able to identify the deceased's two phones. On cross-examination by the appellant he stated that he went to the deceased's house at 1am as she was his girlfriend.

18. PW4 Michael Juma Oningo, a computer repairer from Bondo testified that on the 28.3.2019 at 8pm, he was in Dinga Club when he received a call from his employer who wanted to send photos of deposit slips to his phone. That he was approached by the 3rd accused, Joseph Mulongo who had two phones. He testified that he informed the 3rd accused that he wanted to send photos of receipts but that he did not have a smart phone after which the 3rd accused gave him a Huawei black phone which PW4 used to send the receipts and told him to use the same till he gets the receipts.

19. PW4 testified that he continued using the phone until July 2019 when his girlfriend called saying that he was needed at Bondo Police Station where he went and was interrogated as to where he got the Huawei phone which he revealed to the police. He stated that the 3rd accused was arrested and the police informed him that the owner of the phone had been murdered. On being cross-examined by the appellant, PW4 stated that he did not buy the phone and did not know its serial number.

20. PW5 Yvonne Akinyi Oloo testified that she was a pharmacist from Bondo and that on 29.7.2019 she was at work when CID officers went and took her to Bondo Police Station where they interrogated her about a certain Safaricom number which she informed them belonged to her boyfriend PW4 whom she called. She testified that PW4 had used her line to transact as he had a fuliza in his line. She stated that the line was inserted in a Huawei phone which PW4 was given by the 3rd accused in her presence at Dinga Club. She further testified that at the time of his arrest, PW4 had the Huawei phone. On cross-examination by the appellant, PW5 denied knowing him and further stated that PW4 had the phone for less than a month.

21. PW6 Stephen Otieno Ojwang, a mason from Akoko village testified that on the 11.3.2019 he was arrested by a CID officer over an Itel phone which he was informed that its owner had been killed and that one Tobias Odhiambo who was using the phone alleged that he, PW6, was the one who gave him the phone.

22. He admitted giving Tobias the phone but stated that he had got it from his girlfriend Mary and that the phone's mouthpiece had a problem. He stated that he did not know where Mary got the phone from. He identified the phone in court as MFI P2(b).

23. PW7, Tobias Odhiambo Nyamungu testified that in March 2019, he was given an Itel phone by one Steve from Asembo with whom they were staying in Akoko as his phone had gotten lost. It was his testimony that he used the phone from March to August when he was arrested at Akoko.

24. PW7 further testified that the police officers from Bondo Police Station asked him where he got the phone and he took them to Steve who was arrested. He identified the phone in court(MFI P2(b).

25. On cross-examination by the 4th accused, PW7 stated that he knew him as the son of his uncle and that the 4th accused did not give him the phone.

26. PW8 Dr. Rita Opondo who worked at Bondo sub-county hospital testified and produced the postmortem report dated 13.3.2019 of Janet Adhiambo Ogutu done by Dr. Willis Ochieng who had since left employment at Bondo Sub county Hospital for Migori as Exhibit 1.

27. It was her testimony that on examination by Dr. Willis Ochieng, the body was well preserved and that on external examination, there was massive hematoma on the forehead. She testified that on the right supra orbital region, there was abrasion on the cheek bone, a soiled wound right arm and an indication of blunt trauma on the abdomen. She further testified that there was soiled knee joint with bruises, massive lacerations on the upper thin layer of buttocks but no evidence of sexual intercourse and no skull fractures.

28. She stated that there was a massive subdural haematoma indicative of severe head injury and that as a result of the examination, the cause of death was found to be acute cardiorespiratory fracture due to severe head injury due to blunt head trauma. It was her testimony that death certificate No. 93432 was issued.

29. PW9 No. 63517 CPC Evans Karanja who was the investigating officer testified that on the 12.3.2019 they received a report that the deceased had gone missing and had not reported to work which was unusual and that some things were missing from her rental house. He further testified that they contacted the deceased's boyfriend who took them to the deceased's house where he stated that an LG TV and blankets were missing.

30. PW9 testified that on 12.3.2019 at about 7pm, the deceased's body was found in a pit latrine and that there were no visible injuries on it at the time that they could note. He testified that the deceased owned two mobile phones namely Itel and Huawei which were missing and were switched off. It was his testimony that they made a request to Safaricom to provide them with the IMEI numbers of phone numbers 079xxxx and 079xxxx as well as the phone call data and current users of the phones vide a letter dated 14.3.2019 which he produced as PExhibit 3 without any objection from the appellant and his co accused. PW9 testified that they received call data for phone number 079xxxx which bore the names of Janet Odhiambo Ogutu whereas data from Phone number 079xxxx indicated that another person, the 2nd accused, was using the phone. He produced the two data as Exhibit 4a and 4b respectively.

31. PW9 testified that from the phone data, on the 17.3.2019 the number 071xxxx used the deceased's Huawei number phone and that on the 24.7.2019 they obtained data which indicated that one Hellen Wamani was the registered owner of the number. He produced the same as Exhibit 4c. He further testified that they received data that showed that Yvonne was the one, at the time, using the Huawei phone and on tracing her, she directed them to her boyfriend Michael Owingo whom they arrested and who stated that he had been given the phone by his friend Joseph Mulongo.

32. PW9 testified that they arrested Joseph Mulongo who stated that his wife got the phone from one Omondi Mumbo. He further testified that they later arrested the appellant, Bernard Omondi Mumbo who was the brother in law to Joseph Mulongo and who was mentioned by his co-accused. On cross-examination by the 2nd accused, PW9 stated that they found him in the house but did not recover anything. In response to cross-examination by the 3rd accused, PW9 stated that he had said it was his brother in law who gave his wife the phone.

33. Placed on his defence, the appellant stated that he wanted the case to be transferred to another court but the trial court declined this noting that the accused was employing a delaying tactic. The appellant who was on bond during the trial then left the courtroom in protest and the trial court proceeded to hear the defence offered by the appellant's co-accused.

34. The 2nd accused, Hellen Atieno Wamani testified that she received the subject phone allegedly belonging to the deceased from her brother, Omondi, the appellant herein sometime in March 2019 and that she attempted to use the phone but she was not successful. She stated that she did not know that the phone was stolen and that the appellant left the phone with her children in her absence at a time when she was pregnant. In cross-examination by the prosecution, she reiterated that it was the appellant who took the phone to her house and that she requested him before she used it.

35. The 3rd accused, Joseph Mulongo Nambacha testified that in March 2019, the appellant visited the 3rd accused person's home and left the phone in the house and that his wife then requested the appellant if she could use the phone but she was unable to use it after inserting the sim card. He testified that he then gave the phone to one Michael Juma until August 2019. He further testified that Michael called him to go to the police station where he learned that the phone' owner had been killed after which he revealed to the police that it was the appellant who had brought the phone to his house.

36. The 4th accused Elias Oduor Odhiambo testified that on the 31.7.2019 at 8.30pm, he was at his home resting and smoking bhang when the police knocked on his door and arrested him and subsequently charged him with this offence. DW5, Brendah Achieng and DW6, Farida Sheba, both children of the 2nd and 3rd accused testified that the appellant is the one who took the phone to their house sometime in March 2019.

Determination

37. I have considered the petition of appeal herein as well as the trial court record and the submissions by the appellant. I find the following the issues for determination:

a) ***Whether the appellant was denied a fair trial;***

b) ***Whether the case against the appellant was proved beyond reasonable doubt;***

c) ***Whether the life imprisonment imposed on the appellant was manifestly harsh and should be interfered with; and***

d) ***Whether the court should order a retrial***

On the appellant's right to a fair trial

38. It is the appellant's case that he was denied a fair trial as the trial magistrate failed to give the appellant sufficient time to challenge the evidence that had been adduced thus contravening his constitutional right to defend himself. The appellant further stated that the magistrate failed to recuse himself after he had expressed that he lacked faith in the trial court.

39. On the appellant's claim that the trial magistrate failed to recuse himself from the case yet the appellant had no faith in the trial magistrate, in cases where allegations of bias or lack of impartiality are made against a presiding officer of a court, the proper test to ascertain the same was laid out by the Supreme Court in **Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others [2013] eKLR** where the Supreme Court stated as follows:

> ***"[T]he test for establishing a Judge's impartiality is the perception of a reasonable person, this being a "well-informed, thoughtful observer who understands all the facts", and who has "examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice" will not suffice."***

40. Ibrahim Mohammed, SCJ, in a concurring opinion clarified the test further in the following words:

> ***"Lord Justice Edmund Davis in Metropolitan Properties Co. (FGC) Ltd. Vs Lannon [1969] 1 QB 577 stated that disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias. Acker LJ in R vs Liverpool City Justices, ex parte Topping [1983] 1 WLR 119 elaborated on the test applicable. The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.***
>
> ***In an article by a writer, Holly Stout (11 KBW) on the subject of "Bias', the author states:***
>
> ***"... The test to be applied by a judge who recognizes a possible apparent bias is thus a "double real possibility" test; the question he/she must ask him/herself is whether or not there is a real possibility that fair-minded and informed observer might think that there was a real possibility of bias." (referred to Porter –V- Magill (2002) 2 AC 357)."***

41. This is the same test found in the ***Commentaries on the Bangalore Principles of Judicial Conduct***, which, at paragraph 81 which postulates that:

> ***"The generally accepted criterion for disqualification is the reasonable apprehension of bias. Different formulas have been applied to determine whether there is an apprehension of bias or prejudgment. These have ranged from "a high probability" of bias to "a real likelihood", "a substantial possibility", and "a reasonable suspicion" of bias. The apprehension of bias must be a***

reasonable one, held by reasonable, fair minded and informed persons, who apply themselves to the question and obtain the required information. The test is "what would such a person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would such person think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly."

42. The question in this appeal therefore is whether, applying the test aforementioned, one can fairly say that the apprehension by the appellant that the trial magistrate in the case before him would not be impartial is a reasonable one.

43. From the Supreme Court's decision cited above, it is noteworthy that the apprehension of bias must be a reasonable one, held by reasonable, fair minded and informed persons who, apply themselves to the question and obtain the required information. Can this be said to the case here?

44. In the instant case, the excuse advanced by the appellant for want of the trial magistrate to recuse himself was that the trial magistrate had previously convicted him in a different matter.

45. This, in my humble opinion was not a valid reason that can be held by a reasonable, fair minded man to warrant recusal of the trial court. Indeed, the trial magistrate noted as much when the appellant raised the issue of recusal. The appellant was asking the trial magistrate to recuse himself on account of having carried out his mandated judicial duties. This was not justified. A judicial officer is not mandated to acquit or to convict. They are mandated to hear and determine cases based on evidence and the law and in doing so they must be fair and just. Furthermore, out of the four accused persons, only the appellant herein demanded the trial magistrate to recuse himself from hearing the case. The question is whether the accused wanted the trial court to split the case involving all the four accused persons so that he is tried by a different magistrate while the other three accused persons who had not been previously convicted by the trial magistrate and had no issues with the court be tried by the trial magistrate Hon J.P Nandi.

46. Accordingly, I find that the appellant was merely window shopping and forum shopping for a court of his own choice to try him. I find and hold that the appellant's constitutional right to a fair trial was not infringed by the failure of the trial magistrate to recuse himself.

47. This court observes from the trial court record that after the trial magistrate declined to recuse himself from hearing the case against the accused, the appellant walked out of court and failed to proceed with his defense. At that moment, it must be noted that the prosecution was yet to call two more witnesses, PW8, the doctor who produced the deceased's post-mortem report as well as testifying on the same and PW9, the investigating officer.

48. Article 50 (2) (k) provides that:

"Every accused person has the right to a fair trial, which includes the right to adduce and challenge evidence."

49. The facts of this case speak for themselves. If the accused had made an application for recusal of the trial magistrate, which application was declined, he had the option of challenging that decision to the High Court and seeking stay of those proceedings, instead of walking out on the trial court and therefore electing not to participate in his trial. The fact that the trial magistrate failed to recuse himself was not reason enough for the appellant to abandon his case. The appellant cannot have his cake and eat it. He cannot abandon his case then turn around and claim that he was denied a chance to defend himself.

50. In the circumstances I am persuaded that the appellant's right to adduce and challenge evidence and his right to a fair trial was not infringed.

Whether the case against the appellant was proved beyond reasonable doubt

51. The appellant and his co-accused were charged with the offence of robbery with violence. What constitutes the offence of robbery with violence was well captured in the case of **Oluoch v Republic (1985) KLR** where the Court of Appeal stated as follows:

"…Robbery with violence is committed in any of the following circumstances:

The offender is armed with any dangerous and offensive weapon or instrument; or

The offender is in company with one or more person or persons; or

At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."

52. In the case of **Dima Denge Dima & Others vs Republic, Criminal Appeal No. 300 of 2007**, it was stated that:

"…The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

53. In the instant case, the evidence adduced before the trial court irresistibly pointed to the appellant as the one who gave the 2nd & 3rd accused persons the deceased's phone which was reported as part of the deceased's stolen items. In their defence, the 2nd accused, who is the appellant's sister stated that it was the appellant who gave her the deceased's phone. This testimony by the 2nd accused was corroborated by

the 3rd accused.

54. The fact of the deceased's death was confirmed by PW8 who performed an autopsy on th4e deceased's body and testified that the cause of her death was found to be acute cardiorespiratory failure due to severe head injury due to blunt head trauma.

55. Accordingly, two elements of the offence of robbery with violence were proved by the prosecution beyond reasonable doubt. Therefore, the trial court did not err in finding find the appellant guilty of the offence of robbery with violence as charged.

Whether the sentence was manifestly harsh and should be interfered with

56. The appellant pleaded and submitted that the sentence imposed on him was manifestly harsh due to its mandatory nature.

57. Upon conviction, the trial court sentenced the appellant to life imprisonment. The punishment for robbery with violence is provided for in section 296(2) of the Penal Code that upon conviction the offender shall be sentenced to death.

58. In the case of **Joseph Ochieng Osuga v Republic [2021] eKLR** this court stated that the power to interfere with a sentence imposed by the trial court is limited by precedent except where certain conditions are met. This court cited the Court of Appeal in **Bernard Kimani Gacheru v Republic [2002] eKLR** where it was stated that:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."***

59. The Supreme Court in the the case of **Francis Karioko Muruatetu & another vs Republic [2017] eKLR** while dealing with the mandatory nature of the death penalty in Murder cases under Section 204 of the Penal Code held that the mandatory nature of the death penalty was unconstitutional. The Court clarified in the said judgement that the death penalty itself remains lawful and constitutional.

60. The reasoning in Muruatetu Case in respect of Section 204 of the Penal Code (the penalty section for murder), had been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases in the case of **William Okungu Kittiny v R [2018] eKLR** cited by the appellant herein.

61. However, on the 6th of July 2021, the Supreme Court in **Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR** issued directions to the effect that Muruatetu 2017 as it stands now is inapplicable to other offences that carry mandatory sentences other than under *Section 204* of the *Penal Code*, for the offence of Murder.

62. Accordingly, the sentence of death as provided for in section 296(2) of the Penal Code remains legal and constitutional.

63. In the instant case, the appellant was, upon conviction for the offence of robbery with violence where the victim of the robbery was killed, sentenced to life imprisonment. The victim of the appellant's violent robbery sustained severe fatal injuries and after killing her, her body was dumped in a pit latrine.

64. The appellant was extremely cruel to the deceased who was a young woman aged just 21 years. If he wanted to steal from her, did he have to kill her and dump her body into a pit latrine? Which humane treatment and dignity does the appellant then deserve, having treated the deceased the way he did even after violently robbing and taking her life away? Furthermore, the appellant is not a first offender as he had been convicted in other cases of similar nature as this case, as per his own admission in this case where he was afraid that if the trial magistrate heard and concluded his case, then he might as well convict him. One cannot prove innocence by forum shopping a place of trial where his criminal conduct is not known, yet that is what the appellant herein was doing in this case. I find that the trial court exercised leniency in sentencing the appellant to life imprisonment as the mandatory sentence is death. I refuse to interfere with that sentence which the prosecution did not seek to enhance and which is nonetheless already discounted.

Whether the court should order a retrial

65. The law as to when a retrial should be ordered has long been settled. In the renowned case of **Opicho v Republic [2009] KLR 369,** the Court of Appeal held that:

> ***"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a trial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."***

66. In **Muiruri v R [2003] KLR 552**, the Court held that:-

> ***"It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial.*** *(See Zedekiah Ojuondo Manyala Vs Republic (Criminal Appeal No. 57 of 1980);* ***the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."***

67. Applying these principles to this appeal, I find that this is not a case fit to warrant a retrial. There was nothing illegal or defective in the proceedings or judgment before the trial court and further it is also not in the interest of justice to order for a retrial. Furthermore, the appellant was sentenced to a discretionary life imprisonment instead of mandatory death sentence. The victim of the offence of robbery with violence died in the process of being robbed by the appellant. As earlier stated, as the prosecution did not apply for enhancement of that sentence, I shall not interfere. I uphold it.

68. In the circumstances, I find this appeal against conviction and sentence to be devoid of merit. I uphold the conviction and sentence imposed on the appellant by the trial court and dismiss the appeal. File closed.

69. Orders Accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 24TH DAY OF JANUARY, 2022

R.E. ABURILI

JUDGE