REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 200 OF 2016 (CONSOLIDATED WITH CRIMINAL APPEAL NUMBERS 197/2016, 197/2016 AND 198/2016)

STEPHEN LIKUYANI MACHANJA.....1ST APPELLANT

JOSEPH WAFULA WASIKE.....2ND APPELLANT

JOSEPH MUNGONYE ONGACHO.....3RD APPELLANT

STEPHEN CZARS SIMIYU.....4TH APPELLANT

(From original conviction and sentence in Senior Principal Magistrate's Court at Kimilili Criminal Case No. 1084 of 2014, Hon. D.O. Onyango, SPM on 29th September, 2016).

JUDGEMENT

1. The 1st Appellant herein, **Stephen Likuyani Machanjo**, had been jointly charged with **Joseph Wafula Wasike**, **Joseph Mungonye Ongacho** and **Stephen Czars Simiyu** with the offence of robbery with violence contrary to section 296 (2) of the Penal Code (Cap 63 Laws of Kenya).

2. It was evident from the trial court's proceedings that the prosecution applied to consolidate case number **SPMCRC No 1084 of 2014 Republic vs Stephen Likuyani Machanjo, Moses Kimingichi Khaemba (formerly referred to as Samuel Shitemi Juma), Joseph Wafula Wasike, Joseph Mung'onye Ongacho & Stephen Czars Simiyu** with **PMCRC No. 389 of 2014 Republic vs. Samuel Shitemi Juma, Moses Kimingichi Khaemba, Joseph Wafula Wasike, Joseph Mung'onye Ongacho & Stephen Czars Simiyu** which application was allowed. The charges were once again read to the Appellants and their co- accused and they all pleaded not guilty to the new charges.

3. It was noted by the trial court that the 2nd accused, **Moses Kimingichi Khaemba,** had apparently been released by the High Court on circumstances which were not clear. The prosecution appears not to have amended the charge sheet to remove his name. The case duly proceeded as against the 1st, 3rd, 4th, 5th and 6th accused persons who were present throughout the trial.

4. The learned trial Magistrate, after a lengthy trial, convicted all the appellants and sentenced each of them to death as prescribed by the law.

5. A perusal of the charge sheet reveals the particulars of the offence as follows: -

> **"STEPHEN LIKUYANI MACHANJO, MOSES KIMINGICHI KHAEMBA (FORMERLY REFERRED TO AS SAMUEL SHITEMI JUMA), JOSPEH WAFULA WASIKE, JOSEPH MUNG'ONYE ONGACHO & STEPHEN CZARS SIMIYU** on the night of 22nd November, 2013 at about 10.00p.m at Sikulu village, Kiminini sub-location in Bungoma North District within Bungoma County jointly with others already before while armed with offensive weapons namely *rungus* and *pangas* robbed **DORCAS NABOYA MASAKHA** of 4 male suits, 38 shirts, 2 jackets, 1 sweater, 2 radios make Sonytec and National two solar lamps make Sunkin, 2 mobile phones make Tecno and Itel 2020, cash Kshs. 200/= and assorted documents all valued at Kshs. 80,000/= and at, immediately before and immediately after the said robbery killed **HENRY SHITEMI** the husband of the said **DORCAS NABOVA MASAKHA."**

6. Being dissatisfied with the said conviction and sentence, the 1st Appellant filed a Memorandum of Appeal and later amended with the following grounds: -

> **i. That the learned trial magistrate erred in both law and facts by convicting the appellant over substituted charge sheet, merging all the Appellants with different dates of arrests in contravention to section 214 (1) (I) of the CPC CAP 75 Laws of Kenya.**
>
> **ii. That the learned trial magistrate failed in both law and facts by convicting him on the prosecution's case which was full of**

contradictions.

iii. That the learned trial magistrate erred in both law and facts by failing to consider that P3 forms has doubtful authenticity.

iv. That the learned trial magistrate erred in both law and facts by convicting him without any alleged weapon recovered from him the 1st Appellant.

v. That the learned trial magistrate erred in both law and facts by not considering lack of comprehensive and confirmatory procedure of his identification by the prosecution witnesses.

vi. That the light intensity was not enough to aid any recognition and voice recognition does not suffice.

vii. That the mandatory death sentence is unconstitutional.

7. The 1st Appellant subsequently filed his supplementary grounds of appeal along with written submissions. He relied on the following grounds of appeal: -

i. That he relies on an extract copy of employment letter dated 30th May, 2013 from SHIVA CARRIERS LIMITED P.O BOX 90788, MOMBASA and telephone no. 0724147711, 0734363636.

ii. That, section 258 (1) of the Criminal Procedure Code stipulates that in dealing with an appeal from a subordinate Court, the High Court, if thinks additional evidence is necessary shall record its reasons.

iii. That the prosecution failed to comply with section 212 of the Criminal Procedure Code to call crucial evidence in rebuttal of appellant's defense hence they were biased.

iv. That the evidence of recognition by voice was unreliable and not credible as circumstances at the scene of crime were not favourable for positive identification.

v. That the prosecution witnesses were hostile and not credible.

vi. That the mandatory death sentence meted upon the Appellant is unconstitutional, harsh, excessive and inhuman.

vii. That circumstances of last seen cannot itself form basis for conviction.

8. The 2nd Appellant filed a memorandum of appeal where he raised the following grounds: -

i. That the learned trial magistrate erred in law by convicting him without any proof that the items that were found belongs to the complainant.

ii. That the complainant never identified the appellant in an identification parade or did mention him in her evidence in chief that she knew him.

iii. That the items that were produced before the court were not dusted to prove the Appellant's finger prints whether he handled the said items.

iv. That section 118 of the Criminal Procedure Code was not complied with by the trial court before delivering judgement against the Appellant.

v. The trial court relied upon allegation without concrete evidence linking him to the said offence as he was not photographed holding the said items.

9. The 3rd Appellant filed a memorandum of appeal and subsequently filed amended grounds of appeal along with written submissions wherein he raised the following grounds: -

i. That the evidence on record was manifestly insufficient, inconsistent, had glaring gaps and contradictory statements.

ii. That the prosecution witnesses were not credible and trustworthy.

iii. That the prosecution shifted the burden of proof to the 4th Appellant.

iv. That the trial magistrate erred in law and fact by relying on prosecution's case which was not proved beyond reasonable doubt.

v. That the light intensity at the alleged time of the offence (10pm) when it is dark none cannot identify or recognize somebody.

vi. That my rights to fair trial under Article 25 and 50 (2) of the Constitution were violated.

vii. That the trial magistrate erred in both law and fact by basing his conviction on defective charge sheet.

viii. That the prosecution failed to establish the elements of robbery.

ix. That he was not recognized or identified by any witness.

x. That the mandatory death sentence is unconstitutional.

10. The 4th Appellant filed a memorandum of appeal raising the following grounds of appeal: -

i. The learned trial magistrate erred in law or fact when he held that the prosecution had proved its case beyond reasonable doubt.

ii. The learned trial magistrate erred in law and or fact when he convicted the appellant on the basis of contradictory evidence on the part of the prosecution.

iii. The learned trial magistrate erred in law and fact when he totally overlooked the evidence of the appellant.

iv. The learned trial magistrate erred in law and or fact when he failed to hold that there were serious doubts in the prosecution's case and accord the benefit of doubt to the Appellant.

v. The learned trial magistrate erred in law and fact when he relied solely on the evidence of PW1 who allegedly recognized the Appellant without any other corroborating evidence.

vi. The learned trial magistrate erred in law and or fact when he failed to hold that there was no sufficient light to enable the complainant recognize the Appellant.

vii. The learned trial magistrate erred in law and or fact when he failed to acquit the appellant under section 215 of the Criminal Procedure Code.

viii. The learned trial magistrate erred in law and or fact when he illegally and or improperly convicted him based on insufficient evidence.

11. This being a first appeal, I am required to re-evaluate the evidence and reach my own conclusion. In doing so, I bear in mind that I have neither seen nor heard the witnesses testifying- **Okeno vs R (1972) EA 32** and **Joseph Njuguna Mwaura & 2 Others vs Republic [2013] eKLR**.

12. The prosecution called six witnesses. PW1 was **Dorcas Nabova Masakha**, who stated she was in the sitting room with her husband **Henry Shitemi** on **22/11/2013** when somebody hit the door and forced himself in, hit a solar lighting which subsequently broke. She stated that the intruder cut her and her husband on the head using a panga and picked her cellphone as well as that of her husband. She testified that the assailant shouted '*leta pesa'* and she informed him that they did not have money in the house to which he threatened to cut her if she did not give him Kshs. 50,000/= which he alleged had been paid to her husband for sale of some trees earlier in the day but she informed him that she only had cash 208/= and Kshs. 1,500/= in her M-pesa account. She added that the assailant also demanded for beans and demanded to know the person who had sold beans in their village. She went on to state that the assailant pushed her onto the sofa set and covered her head with a piece of cloth. She added that the assailant flashed a torch at her husband and from the lights of the torch, she saw two other men standing near the window just outside the house and whom she recognized as Mamai and Kimingichi who were both known to her before the incident as they were her neighbours. She further stated that the intruders continued to search the house for valuables including her bedroom. She testified that she heard noise in the bedroom made by the bed spring and heard one of the robbers claim that he had not recovered anything of value and she immediately recognized the voice to be that of Stephen Likuyani who was a nephew to her husband and who lived with them in the same house. She stated that she later heard Mamai urging Stephen Likuyani to continue searching the house to see if they could recover something. She stated that one of the robbers whom she could not identify passed the floor carrying things in a sack and then picked more items and stuffed them into the sack as he walked out and all this time threatening to kill her if she dared to scream. She stated that she was able to identify the intruders who were five in number and could see some of them in court. She later discovered that they had raped her niece one **Metrine Naliaka**. She identified the 1st Appellant in court as **Stephen Likuyani**, 4th appellant as Mamai. She also identified one Moses Kimingichi who is currently not in this appeal. She noted that the **1st, 4th appellants** and another who has since been released as her neighbours sons since the year 2000 and were well known to her.

On cross-examination by the **1st Appellant,** she testified that she first heard his voice as his was distinct and she immediately recognized him. She further reiterated that she had previously stayed with the **1st Appellant** and that her husband was a brother to his mother and was thus quite familiar with his voice.

On cross-examination by **Moses Kimingichi Khaemba**, who was a second accused but who is not party to this appeal, she reiterated that she knew him very well and saw him on the night in question.

On cross-examination by the **2nd Appellant**, she testified that she saw him in court for the first time and did not know his names.

On cross-examination by the **3rd Appellant,** she testified that she saw him for the first time in court.

On cross-examination by the **4th Appellant,** she reiterated that she saw him near the window and that she mentioned his name to the police. She added that she saw his face when his accomplice flashed a torch light at her husband before her face was covered. She insisted that she saw him well and heard him talk, and she even referred to him by the name they refer to him in the village as Mamai.

13. PW2, **Metrine Naliaka**, testified that on the 22nd November, 2013 at 10 pm while in the bedroom of her aunt's house sleeping, thugs invaded their house and two of them gained access to her bedroom where she was and who ordered her to remove her pant or they would kill her. She stated that they raped her in turns but that she could not identify them as the room she was sleeping in was dark.

On cross-examination by the **1st Appellant,** she reiterated that she did not identify the thugs as her bedroom was dark and also confirmed that she did not have a P3 form regarding the alleged rape.

On cross-examination by the **2nd Accused**, **Moses Kimingichi Khaemba**, who is not an appellant herein, she testified that she did not know him.

On cross-examination by the **2nd Appellant,** she testified that she did not know him.

On cross-examination by the **3rd Appellant**, she testified that she did not know him and that she did not know his names.

On cross-examination by the **4th Appellant**, she reiterated that she could not see properly as it was dark inside her bedroom.

14. PW3, **Sebastian Kamande,** a neighbor, recalled that on 22nd November, 2013 at around 11.30 pm while asleep in his house PW2 called and notified him that her uncle and aunt had been harmed by thugs. In the company of his wife, he responded to the distress call and assisted the complainant carry her injured husband to hospital. He later recorded a statement at Kapchange Police Station.

On cross-examination by the 1st **Appellant,** he reiterated that he was not present during the robbery incident and that he found the deceased in a critical condition in his house. He further stated that he was the first person to arrive at the scene of crime.

On cross-examination by the 2nd Accused, Moses Kimingichi Khaemba, who is not in this appeal, he reiterated that he only told the court what he saw.

On cross-examination by the **2nd Appellant,** he testified that he had never seen him before.

On cross-examination by the **3rd Appellant**, he testified that he had never met him before.

On cross-examination by the **4th Appellant**, he reiterated that when he arrived at the homestead of the complainant's deceased husband, he only spoke to the wife.

On cross-examination by the cour**t**, he testified that PW1 had informed him that one of the suspects was **''Style.''** (**1st appellant**). He maintained that he knew the 1st Appellant who used to stay with the family of the complainant and her late husband.

15. PW4 **Dr Gedfrey Obela** from Kitale District hospital produced the post mortem report of the deceased Henry Shitemi who was the husband of the complainant who was killed by the robbers on the night in question. He stated that upon observation he noted that the deceased died due to head injury.

On cross-examination by the 1st **Appellant,** he testified that he conducted the post mortem on 27th November, 2013 and had it signed the same date. He further reiterated that he was never told of those who had killed the deceased.

On cross-examination by the **2nd** Accused, Moses Kimingichi Khaemba, who is not an appellant herein, he reiterated that he did not know the person who caused the death of the deceased.

The 2nd appellant had no questions for the witness.

On cross-examination by the **3rd Appellant,** he testified that he found the body at the mortuary.

On cross-examination by the **4th Appellant,** he reiterated that, nobody gave him information on what exactly killed the deceased.

On re-examination by the prosecution counsel, he reiterated that he signed the postmortem form on 27th November, 2013 immediately after the postmortem.

16. PW5, **Jentrix Namaemba Barasa**, a clinical officer from Naitiri hospital produced a P3 filled by Micheal kumaruti, who was out of station for training, in respect of the complainant. He confirmed that complainant had a wound on the head that had been stitched. He stated that the P3 form was filled on 11th December, 2013.

On cross-examination by the 1st **Appellant,** he testified that from the records, the complainant had been treated at Ndalu Health Centre and that the injuries inflicted had been occasioned on 22nd November, 2013. The P3 form was filled after 20 hours and that treatment was sought on the same date. He added that the records further confirmed that, the injuries were caused by a sharp object and that the P3 form indicated the patient was well versed with the attacker.

On cross-examination by the 2nd Accused, Moses Kimingichi Khaemba who is not an appellant herein, she reiterated that they were never told about the person who caused the injuries.

On cross-examination by the **2nd Appellant**, she stated that it was not indicated the person who exactly assaulted the complainant.

On cross-examination by the **3rd Appellant**, she testified that from their records the patient was well aware of the attackers.

On cross-examination by the **4th Appellant/**, she reiterated that, from the records there were no X-rays and that the injury from the history was inflicted on 22nd November, 2013 and that the P3 form was filled after 20 hours and further that the injuries were caused by a sharp object.

17. The investigating officer, one **PC Wesley Korir** testified as PW6. He gave an account of how the appellants were apprehended. He produced a Sonitec Radio (Pexh 2) that was recovered from the appellants. He testified that the **2nd and 3rd Accused persons** were identified by PW 1 as Mamai, a son to her neighbor and Kimingichi respectively. He stated that the complainant also recognized voice of the **1st Appellant**. He stated that the complainant noted that the 1st Appellant had left her house on 22nd November, 2013 in the morning after informing her that he was returning to his home. On visiting the scene of crime, he pointed out that there were blood stains all over the house and that the two locks to the door were broken indicating that the premises were broken into by the attackers. He stated that after two months of searching for the suspects, they apprehended the **4th Appellant** and, upon his interrogation, he admitted that he was one of those who had attacked the complainant and the others and offered to lead the police to the others hideout where they found the 2nd and 3rd appellants plus another who is not an appellant herein in the same house. He added that **2nd appellant** was cooking ugali while the **3rd appellant** and another who is not in this appeal were lying on a mattress. He stated that they apprehended all the three of them and in the process recovered a radio which was identified by the complainant as part of the stolen items. He produced the radio make Sonytec in court as an exhibit (pexh.2). He testified that the 2nd, 3rd, 4th and another who is not in this appeal were later charged and the police circulated the name of the **1stappellant Stephen Likuyani,** who was later arrested near Matunda area and escorted to Matunda Police Station. Later they consolidated the charge of the **1st Appellant** with that of the **2nd, 3rd, 4th** appellants plus another who is not in this appeal**.**

On cross-examination by the 1st **Appellant,** he stated that the **1st Appellant** was identified by the complainant through his voice as he had stayed with her before the terrible incident and who was aware that the deceased had sold trees worth Kshs. 50,000/= He stated that he never took photographs of the scene of crime. He further testified that they had searched for the 1st Appellant using cell phones and that he gathered from Safaricom that the cellphone number was 0731740970 and 0700462194, and that the 1st appellant was using lost identity cards to register cell phone numbers. He noted that there was evidence that the 1st Appellant had asked the deceased for money as he had known that the deceased had sold a tree for Kshs. 50,000/-

Khaemba

On cross-examination by the 2nd Accused, Moses Kimingichi who is not in this appeal, he reiterated that he knew the accused as Kimingichi and that he recovered a radio from the house where he was with the 2nd and 3rd Appellants.

On cross-examination by the **2nd Appellant,** he testified that he was looking for about six persons and that it was the 4th appellant who led him to them. He found the radio in the house that the 2nd Appellant was in and that the tip off they received indicated that he could only be found late at night.

On cross-examination by the **3rd Appellant,** he reiterated that he was looking for Stephen, Kimingichi and anybody else mentioned by the 4th appellant. He also testified that he never established that it was the 3rd appellant who had leased the house from where they arrested him. He further testified that the 3rd appellant was the most hostile of all the apprehended suspects in the house. He stated that he never took a photo of the 3rd appellant with the radio and never conducted an identification parade as the complainant had not described a suspect in a manner that necessitated a parade.

On cross-examination by the **4th Appellant,** he testified that the complainant had named him and that the police were looking for him. He further testified that he was able to find the 4th appellant in possession of a mobile phone but on confirming with Safaricom it was established that the number was registered in the name of the deceased who had been killed in the robbery. He also added that it was the 4th appellant who led them to the hide out of the other suspects and that the torch that was used during the robbery helped the complainant identify him as it was being flashed around. He stated that the 4th appellant admitted to taking part in the offence though no confession was signed and that he was willing to help the police by leading them to the other suspects. He also maintained that that he established that Samuel Shitemi Juma had misled the High Court into releasing him before the hearing of the case commenced.

On re-examination by the prosecution, he testified that the 1ST Appellant was arrested by APS from Likuyani police post and handed over to Matunda Police Station where the investigators were notified. He further testified that the 2nd, 3rd appellants and another who is not in this appeal were arrested at Chepkoseskei after the 4th appellant person led them to their hide out. He clarified that he was the one who arrested the 4th appellant at his house after the complainant gave them his name.

18. At the close of the prosecution's case, the appellants were put on their defence. The **1st Appellant, Stephen Likuyani Machanjo** gave a sworn testimony in his defence. His defence was that he was a driver in Mombasa. He recalled that on 10th November, 2013 he got a call from his deceased uncle requesting to meet him. He stated that his deceased uncle wanted to discuss about a parcel of land that he was supposed to purchase. On 20th November, 2013 while still in Ndalu he got a call from his employer asking that he travels back to Nairobi. On arrival to Nairobi on 21st November, 2013 he called his uncle to notify him. On 23rd November, 2013 he got a call from his uncle's son notifying him that his uncle had been attacked and killed. Since he could not make it to the funeral due to work related emergency, he called his wife to let her know that he will attend the same. On 18th July, 2014 he secured leave to attend the funeral and he arrived on 20th July, 2014 to prepare for the funeral set to take place on the 21t of July, 2014. In the evening of 20th July, 2014 while in a bar at Likuyani he was apprehended by two men who identified themselves as policemen and he was taken to Likuyani AP camp. The next morning, he was transferred to Matunda Police Station where he remained until he was arraigned in court on 23rd July, 2014.

On cross-examination by the prosecution, he stated that in 2013 he used to stay in Mombasa and had a wife called Jane Likuyani. He stated that he never lived with his uncle and that he has nothing to show that his boss called him, and that he did not have his passport in court to show that he had gone to Kigali Rwanda. He further stated that his deceased uncle never informed him that he had some money and that he had heard about the cause of his death from doctors' evidence.

19. The **2nd Accused person**, **Moses Kimingichi**, who is not an Appellant in this appeal, gave his sworn testimony in his defence. His defence was that he stayed in Malimani in Ndalu and that he recalled on 19th March, 2014 he was in Eldoret where he was doing casual jobs when at 7pm policemen came and arrested him and later escorted him to Mukuyuni Police Station where he was later transferred to Kimilili Police Station. It was while in custody at Kimilili Police Station that he learnt of the death of one Shitemi and he denied the charge and still maintains his innocence.

20. The **2nd Appellant**, **Joseph Wafula Wasike**, gave a sworn testimony in his defence. His defence was that he was in Kimega preparing building bricks when an AP from Kimega came in the company of two other persons approached him and asked him to accompany them to the AP camp. He was transferred to Mukuyuni Police Station and on 21st March, 2014 he was arraigned in court over charges which he had had no idea about.

21. The **3rd Appellant**, **Joseph Mungonye Ongacho**, gave a sworn testimony in his defence. His defence is that he was employed by one Tirop in Eldoret and that on 19th March, 2014 he woke up and went to a nearby centre where his employer had sent him to Musoriot and he got back home at 7.30pm. He went back to the centre where he had left his phone battery to be charged and at 9.00pm he met men in plain clothes who questioned him and demanded to see his identity card. He informed them that his identity card was at home but they arrested him nonetheless and escorted him to a waiting car and later to the Mukuyuni police station. He was later arraigned in court and charged.

On cross-examination by the prosecution, he stated that Tirop was his witness with whom he had stayed with him for two years and that he was arrested in Eldoret and did not understand why he was being jointly charged with the 4th appellant and another who is not in this appeal whom he saw them for the first time in court.

22. The **4th Appellant**, **Stephen Czars Simiyu**, gave a sworn testimony in his defence. His defence is that he recalls on 16th February, 2014 while at home two men came and showed him a photo and enquired from him as to whether he knew whose photo it was. He stated that he informed them that he knew the man in the photo as Sammy. He was subsequently arrested and charged in court on 17th March, 2014 and he denied the charges. He further added that on 20th March, 2014 while in the cells he recalls the said Sammy was brought to the same cell where he was and on 21st March, 2014 they were escorted to court and charged. He maintained that he knows nothing about the charge.

On cross-examination by the prosecutor, he stated that he never led the police to the arrest of any person and that Samuel Shitemi alias Sammy used to trade in cereals. He maintained that he met the co-accused in court and that he has never known the deceased Shitemi.

23. At the close of the defence hearing, the trial court evaluated the evidence and found the four appellants guilty of the offence of robbery with violence. He subsequently convicted and sentenced each of them to death.

24. The trial court in its introductory judgement noted the fact that the 2nd accused person, **Moses Kimingichi Khaemba**, had apparently been released by the High Court in circumstances which were not clear and that the prosecution had not amended the chargesheet to remove his name.

25. The appeal was canvassed by way of written submissions. All the parties duly filed and exchanged submissions.

26. The **1st Appellant** acting in person submitted that the trial court rejected his alibi defense for no reason. He contended that on the same date the robbery occurred, he was on duty performing his normal duties and he relied on an annexed a copy of the employment letter which, on perusal of the court record, I could not find. He relied on section **358 (1) of the Criminal Procedure Code** and contended that the fact that the prosecution failed in its duty to call a crucial witness to rebut his alibi was contrary to section **212** of the **Criminal Procedure Code**. He relied on the case of **Samuel Kungu Kamau vs. Republic (2015) eKLR** and the case of **Republic vs. Ali Babitu Kololo (2017) eKLR**. He added that the trial court rejected his sworn alibi defence for no cogent reason.

He further submitted that the scene of crime was not favourable enough to provide a positive identification by PW1 hence the witness's face being covered clearly depicts that she was genuinely and honestly mistaken. He relied on the case of **Charles Maitanyi vs Republic (1986)2KLR 76.**

He further submitted that the court failed to take into consideration his mitigating factors and that the sentence of death is inhuman, degrading, harsh and arbitrary and amounts to psychological torture.

27. The **2nd Appellant**, **Joseph Wafula Wasike**, acting in person submitted that the complainant, who had been threatened, hurt, face covered and in pain as she alleged, could not have been able to identify and recognize him as there was no sufficient lighting to enable the same. On the ownership of the house, he submitted that, PW6 failed to establish the person who had leased the house where the appellants were arrested and hence it is possible that the person who leased and lodged in the house prior to the arrest might have been the owner of the property recovered.

28. The **3rd Appellant**, **Joseph Mungonye Ongacho,** acting in person submitted that the court PW1, PW2, & PW3 clearly pointed out that they did not know him nor recognize him and that should set him free. He submitted that the ingredients of robbery with violence; identification and recognition were not proved and this only proved that the prosecution did not prove its case beyond reasonable doubt as expected. He relied on the case of **Dinkerrai Khan Krishna Pandey vs. Republic (1957) EA 336 and Ahamed Dima Huka & 2 others vs. Republic in criminal appeals 117, 135 and 114 of 2003 at Court of Appeal Nyeri.**

29. The **4th Appellant, Stephen Czars Simiyu,** through his Counsel Mr. Kassim Sifuma submitted that there is a serious mix up in the proceedings which at times referred to his client as the 5th accused person and at times the 6th accused person which is enough to affect his client's evidence. He submitted that the evidence of PW1 was not properly dissected in that she said one of the accused persons pushed her onto a sofa set and picked a piece of cloth and covered her face and that she also stated that through the light from the flashing torch she was able to see two other men standing by the window just outside the house. Counsel argued that the lingering question is; how did PW1 see the person she named yet she was covered by the cloth? Counsel further submitted that, PW1 never mentioned anybody by the name of his client and that the trial court failed to hold that there are serious doubts in the prosecution's case. Counsel finally submitted that the trial court erred in law when it fully relied on the evidence of PW6 alleging that his client confessed to him of having committed the offence without receiving such confession properly as required by law. Counsel urged this court to allow this appeal and set aside both the conviction and sentence passed against the 4th Appellant.

30. The Respondent submitted in response to the **1st Appellant** that the trial court relied rightly on the evidence adduced by the prosecution witnesses and all corroborated each other. The Respondent also submitted that his defence was well considered.

The Respondent in response to the **2nd Appellant,** submitted that Out of Court Confessions Rules apply to the confession made to a person above the rank of Chief Inspector of Police and which are admissible in court. It was further submitted that the doctrine of recent possession in conviction was properly relied on by the court and that the identification of the 1st and 4th Appellants by PW1 was proper and was one of recognition as the flashing torch provided amble lighting.

The Respondent in response to the **3rd Appellant,** submitted that it was not paramount to prove ownership of the said house from where the 3rd Appellant was arrested together with two other suspects. On the identification aspect, the Respondent submitted that PW1 clearly stated the source of the light was a torch and was therefore capable of recognizing the robbers.

The Respondent in response to the **4th Appellant,** submitted that the prosecution did prove its case beyond reasonable doubt and it was well corroborated by all its six witnesses as they were very consistent. The Respondent further submitted that the 1st and 4th Appellants herein were identified by PW1 by way of recognition.

The Respondent finally submitted that the appeal herein lacks merit and urged the court to dismiss the appeal and uphold the convictions and sentences.

31. This being a first appeal, it was held by the Court of Appeal in **David Njuguna Wairimu vs. Republic (2010) eKLR** that; -

> **"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."**

Also, in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that: -

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial court afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

32. The central issues to be considered in this appeal are whether the offence of robbery with violence contrary to section **295** as read with section **296 (2)** was proved against the Appellants and whether the Appellant's were positively identified.

The said sections read;

> **S. 295- Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.**
>
> **S. 296 (2)- If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.**

33. The Court of Appeal in the case of **Odhiambo & Another v Republic (2005) 2 KLR 176** (Omolo, Githinji & Deverell JJA) explained the ingredients of the offence of robbery with violence as follows**:**

> **"The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc. the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295."**

34. There is no doubt that there was robbery on the night of 22nd November, 2013 at the complainant's home and that her husband, one, **Henry Shitemi** was killed in the process and another person **Metrine Naliaka** (PW2) was raped by two of the robbers.

35. PW1 stated that she was seated with her husband in their sitting room when they heard a violent knock on the door and immediately some people stormed in. One of the intruders lunged at her and cu her head using a panga. The intruder then cut the complainant's husband as well and snatched two cell phones while shouting ***"leta pesa"***. She stated that after the robbers had left, she took account of the situation and found out a number of items taken. The post mortem report, Sonitec radio and the P3 form were produced in evidence. The witness also identified the radio as hers. The injuries she sustained during the alleged robbery were confirmed by PW5, a clinical officer from Naitiri Hospital.

36. PW6 gave an account of the events leading to the arrest of the appellants. He testified that he first arrested the 4th Appellant who then led him to where the other appellants were. He further testified that he was led to Cheplaskei village where he found **Samuel Shitemi Juma, Joseph Wafula Wasike** and **Joseph Mung'onye Ongacho** in possession of the radio (Pexh 2).

37. The case before this court however revolves on whether the complainant was able to positively identify the perpetrators. The 1st and 4th Appellant submits that the conditions for positive identification were absent considering that the solar lamp had been broken, the time, being at 11.pm, meant it was dark and that the robbers had covered their face, and that with her face covered with a piece of cloth, the complainant was not in any position to positively identify anyone even if the torch was being flashed around. As regards the 2nd Appellant, the evidence on record is that the complainant recognized his voice. That there were two other intruders outside the window and she recognized them as Mamai (a neighbour's son) and Kimingichi.

38. It is evident that the conviction of the 1st, and 4th Appellant who in the trial court were 1st and 5th accused persons, was anchored on their identification by PW1 only. It is also evident that the conviction of the 2nd and 3rd appellants was based on the role of the 4th appellant in confessing and leading the police to them and also due to recovery of a stolen Sonitec radio that had been recently stolen following the robbery incident. Therefore, the main issue for consideration in this appeal is whether the identification of the Appellants by PW1 was safe to rely on and whether the recovery of the recently stolen Sonitec radio should be sufficient to point toward the guilt of the 2nd and 3rd appellants in the crime. In **Abdalla bin Wendo v R (1953) 20 EACA 166,** the former Eastern Africa Court of Appeal cautioned that:

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness…. The danger, is of course, greater when the only 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…."**

39. In **Anjononi v The Republic (1976-1980) KLR 1566**, Madan JA (as he then was) stated as follows:

> **"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in the possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification of the assailants; recognition of an assailants is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or the other."**

It is now law that identification of a perpetrator is so central to a criminal trial that any evidence short of positive identification free from any error or doubt should not be accepted.

40. It is necessary to test the evidence of a single witness as regards identification, and take great care and caution to ascertain whether the circumstances were ripe for positive identification. Some factors to be taken into account are the available light, time spent with the attacker, clothes worn and whether the accused was known to the complainant subject to sufficient collaboration. Caution however ought to be greatly exercised in the absence of corroboration.

41. The Court of Appeal in **Shadrack Shuatani Omwaka v Republic [2020] eKLR** while discussing identification of an assailant at night cited with approval the decision of the **Supreme Court of Uganda** in **Abdulla Nabulere and another – v - Uganda Cr. Appeal No. 9 of 1978 (un reported)** where the court held as follows:

> **"…. Apart from light during the incident, and familiarity of the assailant to the victim, other factors, such as distance between them, the length of time the victim had to observe and even the opportunity to hear the assailant are factors to look out for." ….**
>
> **"All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger. When the quality is good as for example, when the identification is made after a long period of observation, or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to support the identification evidence, provided the court adequately warns itself of the special need for caution."**

42. Similarly, in **Maitanyi -v- Republic, (1986) KLR 198** the Court of Appeal pronounced itself thus: -

> **"As the strength of the light improves to great brightness, so the chances of a true impression being received improves. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and it (sic) position relative to the suspect, are all important matters helping to test the evidence with the greatest care? It is not a careful test if none of these matters are known because they were not inquired into."**

43. In **Donald Atemia Sipendi v Republic (2019) eKLR** the court outlined a number of factors that may be taken into consideration when the assailant's identity is under consideration; -the lighting conditions, distance between perpetrator and witness, perpetrator's distinctive features and the period under observation among other factors.

The factors to be considered with respect to recognition as set out in the House of Lords decision in **R vs Turnbull & Others (1976) 3 ALL ER 549** must always be borne in mind when a court is dealing with the question of identification. The court in that case stated as follows:

> **"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

44. In regard to the 4th appellant who is sometimes referred to as the 6th accused in the proceedings, PW1 was able to recognize him as one of her neighbours who went by the name ''Mamai''. I wish to note that going through the trial court's records, it is clear that there was consolidation of criminal cases involving the appellants and another who is not in this appeal and that the consolidated chargesheet had six accused persons at the conclusion of the trial, it appeared that the 2nd accused namely Moses Kimingichi Khaemba who went by the name Samuel Shitemi Juma mysteriously was absent. The learned trial magistrate pointed out that anomaly and went ahead to write his judgement in respect of those present who comprise the appellants herein. The 4th appellant through his counsel has submitted that the trial court's proceedings appear confusing as the number of accused persons could not be ascertained in that the said 4th appellant is described as 5th accused and at times he is described as 6th accused. It was the view of learned counsel that this court should declare the case as a mistrial and proceed to acquit the 4th appellant forthwith. I have perused the record in Kimilili Pm's court criminal case number 389 of 2014 in which those charged are indicated as Samuel Shitemi Juma, Moses Kimingichi Khaemba, Joseph Wafula Wasike. After the consolidation of the charges the case proceeded in Kimilili Pm's criminal case number 1084 of 2014 wherein six names of accused persons were indicated as Stephen Likuyani Machanjo, Samuel Shitemi Juma, Moses Kimingichi Khaemba, Joseph Wafula Wasike, Joseph Mungonye Ongacho and Stephen Czars Simiyu. However, it seems the name of Samuel Shitemi Juma was removed as it turned out that the name referred to Moses Kimingichi Khaemba but the prosecution seems not to have amended the charges to reflect the changes and the same situation went on even when the said Moses Kimingichi Khaemba is reported to have moved to the High Court and managed to be released. Indeed, the trial magistrate raised his misgivings in the judgement. At the time of writing the judgement, the said Moses Kimingichi Khaemba had already been released by the High Court. That confusion notwithstanding, the remaining accused persons who comprised of the appellants herein fully participated in the trial and tendered their defence testimonies and even presented their mitigation upon conviction before they were subsequently sentenced. Despite the chargesheet not being amended by the prosecution, I find that the appellants suffered no prejudice at all since they were able to participate fully in the trial from start to finish and conducted their defence. Even if they stood in different positions as they reported their presence in court, that did not cause any prejudice to them since they were identified correctly by the witnesses and they conducted their defence without any confusion whatsoever as they introduced themselves in the names as captured in the chargesheet and that the trial court clearly enumerated the evidence adduced against each of the appellants as well as enumerating the defence evidence of the appellants. I find that if there was any irregularity in the chargesheet, the same is curable under section 382 of the Criminal Procedure Code since the irregularity complained of did not go to the root of the case but rather a procedural one. Hence, iam unable to accept the invitation by the appellants to declare the case as a mistrial. The issue of the circumstances leading to the release of Moses Kimingichi Khaemba alias Samuel Shitemi Juma or the circumstances leading to removal of the name of Samuel Shitemi Juma from the chargesheet will be left with the Director of Public Prosecution and investigative agencies to establish.

45. As regards the issue of whether the appellants were positively identified, the evidence of the complainant(Pw1) clearly placed the 1st and 4th appellants at the scene of crime based on her recognition of the said appellants as persons she had known previously. The area where the incident took place was well lit by the flashing torch which showed the face of the **4th Appellant**. The **4th Appellant** is a neighbor and PW1

was well versed with him since the year 2007. The 1st appellant who is a nephew of the complainant's husband had been living together in their home until early in the day before he sought to go to his home only to come back at night and committed robbery against his own relatives. The complainant was able to recognize the 1st appellant's voice by virtue of her frequent interaction with him as they lived together under one roof. The complainant gave out the names of the 1st and 4th appellant to the police immediately after the robbery incident and it was through the 4th appellant's cooperation that the other suspects were apprehended I am therefore unable to find any mystery in the manner in which the 1st and 4th Appellant were identified, and I find that the identification by recognition was safe. This ground of appeal must also fail. PW1 was also well versed with the voice of the 1st Appellant who was a nephew to the complainant's late husband and had lived with him for a while as the said 1st appellant left the complainant's home earlier in the day before the incident. Pw1 had become acquainted with the voice of the 1st appellant and as such she was not mistaken at all. It transpired that the said 1st appellant had earlier got wind that his uncle had received a sum of Kshs 50,000 from sale of some trees and he thus plotted the robbery earlier in the day. Iam satisfied that the 1st and 4th appellants were properly identified by the complainant as among the robbers who visited mayhem to her family on the night in question.

46. As regards the involvement of the 2nd and 3rd appellants, the complainant and her niece were categorical that they did not manage to identify them. Hence, their involvement in the crime must be viewed in light with the evidence of the arresting and investigating officer (Pw6). The said witness stated that upon arresting the 4th appellant, the said appellant led him to Cheplaskei area of Uasin Gishu County and to a certain house where they found the 2nd and 3rd appellant plus another who is not in this appeal and who were found in possession of the stolen Sonitec radio belonging to the complainant. The complainant did identify the said radio which was produced as an exhibit. The said appellants did not render a plausible explanation as to how they came to be in possession of the said item. The doctrine of recent possession must therefore apply in the circumstances. In any case the two and another who is not in this appeal were implicated by the 4th appellant who led the police to their hideout in Cheplaskei village and that the suspect who is not in this appeal namely Moses Kimingichi Khaemba was positively identified by the complainant at the scene of crime who readily gave out his name after the incident.

The Court of Appeal (**Makhandia, Ouko & M'inoti, JJ.A.)** had occasion to address itself on voice recognition in the case of **Safari Yaa Baya v Republic (2017) eKLR** where the learned judges held**; -**

> **"In relation to the identification by voice, care would obviously be necessary to ensure (a) that it was the accused person's voice (b) that the witness was familiar with it and recognized it and (c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it."**

Applying the above test to the instant appeal, and relying on the judgement of the trial court, PW1 positively identified the voice of the 1st appellant with whom she had been staying not long before the robbery. The defence alibi of the 1st Appellant was not convincing so as to displace the evidence of PW1 and, according to the trial court, it is very clear that the same was considered in the words of the trial magistrate thus; -

> **"…..I have considered his defence. I find that the defence of alibi by the 1st accused is not convincing in view of the fact that it was never alluded to during cross-examination. I found it unconvincing and dismiss the same as being unable to displace the evidence of PW1 which clearly implicates him with the charges herein…".**

Another important decision regarding the issue was discussed in **Kiilu & Another V. Republic [2005] 1 KLR 174** in which the court gave directions in dealing with the evidence of a single witness as follows:

> **"Subject to certain well-known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule 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 free from the probability of error."**

In **Hassan V. Republic [2005] 2 KLR 11**, the Court held as follows, regarding recently stolen goods:

> **"Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or a receiver."**

47. On the aspect of the 4th Appellant not signing a confession as he admitted to committing the crime and further leading the investigating officer to the others' hideout, section **25 A (1)** of the **Evidence Act** provides: -

> "**A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a Judge, a magistrate or before a police officer (other than the investing officer), being an officer not below the rank of Chief Inspector of police and a third party of the person's choice."**

Under **Section 32(1**) of the **Evidence Act**, a **confession made by one accused person which affects his co-accused person and the confession is proved, the court may take the confession into consideration as against the co-accused person and the accused person whose confession has been admitted.**

Analyzing the **Evidence (Out of Court Confessions) Rules, 2009** and section 29 of the Evidence Act, the 4th Appellant's confession had been taken within the rules and the Evidence Act. The confession was proper and I dismissed the 4th Appellant's contention that the same fails due to the fact that the investigating officer did not receive it properly as per law. In any case, the 4th appellant confirmed that he was not harassed in any way by the police and that he voluntarily led them to a house in Cheplaskei village where the other suspects were apprehended and the complainant's Sonitec radio was recovered.

48. I have read the judgment of the trial court and note that even though it failed to evaluate the evidence of identification in regards to the 1st and 4th Appellants, there is a possibility that there was some source of light, from the torch that was being flashed around, the time under which PW1 observed the 4th Appellant before her face was covered by a piece of cloth and was also able to recognize the voice of the 1st Appellant.

49. The identification of the **1st and 4th Appellants** was made by PW1, a single witness, under very difficult circumstances. The stolen radio which was positively identified was recovered from the hide out of the **2nd and 3rd Appellants** and which implicated the 2nd and 3rd Appellants with the offence. I find that the lower court properly direct itself on the facts and the law on the issue of identification. This court is satisfied that the evidence on record as regards the identification of the **1st** to the **4th Appellants** was positive and sufficient. There is no reason to disturb that finding.

50. Still on identification and recognition of the **2nd and 3rd Appellants**, according to PW6, the **2nd and 3rd Appellants** were well identified by the 4th Appellant who led him to their hideout where he found him lying on a mattress in possession of the radio which was positively identified by PW1 to be part of the items stolen from her. The link between the 1st to the 3rd Appellant's and the events of the day is the radio (Pexh 2). No explanation was given on how they came to be in possession of the radio during their defence and therefore the doctrine of recent possession has been proved against them. The doctrine of recent possession entitles this court to infer guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal summarized the essential elements of the doctrine of recent possession in the case of ***Eric*** **Otieno Arum v Republic (2006) eKLR**, where it was held;

> **"In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."**

51. Since the **2nd** and **3rd Appellants** did not give a plausible explanation as to how they came by the radio, this court finds that the trial magistrate's inference of guilt on their part was correct and ought not to be disturbed as the prosecution proved its case beyond the threshold of proof. It was the 4th appellant who led police officers to the hideout of the 2nd and 3rd appellants plus another who is not in this appeal where the complainant's stolen Sonitec radio was recovered. The fact that the other suspect who is not in this appeal namely Moses Kimingichi Khaemba had been positively identified by recognition by the complainant is sufficient corroboration of the evidence regarding the involvement of the appellants in the crime and that the circumstances cumulatively lead to an irrestible conclusion that all the appellants plus the one who is not in this appeal had plotted the robbery and executed it. I find that the respondent did prove its case beyond the requisite threshold of proof.

52. From the above reasons, the evidence of identification, and recent possession taken in totality is water-tight and free of error to support the conviction of the Appellants respectively.

In the case of **Isaac Nganga Kahiga alias Peter Nganga Kahiga Vs. Republic CA Nyeri Cr. Appeal No. 272 of 2005,** the Court of Appeal stated:

> **"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, secondly, that the property is positively proved. secondly, that the property is positively the property of the complainant, thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as was been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."**

53. In view of the foregoing observations, I come to the conclusion that the trial court's finding on conviction was safe and I see no reason to interfere with the same.

54. Upon conviction, the Appellants were sentenced to suffer death. That was the sentence prescribed by the law at that time. However, with the **Supreme Court's** decision in the case of **Francis Karioko Muruatetu & Another Vs Republic (2017) eKLR** which declared the mandatory death sentence unconstitutional, there is thus need to interfere with the sentence. The above question brings to the fore the constitutional debate of whether death sentence is as authorized by section **296(2)** of the **Penal Code** in a conviction for robbery with violence, unconstitutional and contrary to the general rules of International law and or Treaties and Conventions ratified by Kenya and if so, whether such mandatory death sentence offends the provisions of **Article 26 of the Constitution;** whether mandatory death sentence erodes the dignity of individuals and arbitrarily deprives accused persons of their inherent right to life and other fundamental rights and freedoms enshrined in **Articles 24, 26, 28 and 29 of the Constitution** and if so, whether such sentence is unconstitutional; whether mandatory death sentence deprives a court of law the discretion and right to consider mitigating circumstances in which an offence was committed, whether the court in convicting an offender in robbery with violence can lawfully pass a minimum sentence or any other lawful sentence other than a mandatory death sentence.

55. The Supreme Court in **Francis Karioko Muruatetu & Another V. Republic [2017] eKLR** quite recently so held, adopting the Court of Appeal decision in **Joseph Njuguna Mwaura & Others V Republic** that courts do not have discretion in respect of offence which attract a mandatory sentence. The Supreme Court further ordered that albeit the mandatory nature of the death sentence under section **204 of the Penal Code** (for murder) was declared unconstitutional and that, for avoidance of doubt, the order on constitutionality of a mandatory death sentence does not disturb the validity of the death sentence as contemplated under **Article 26(3) of the Constitution**.

56. In my humble view, therefore the above sentence and remarks by the trial magistrate are inconsistent with the findings and holding by the Supreme Court. This is so because the constitution is a living document and whether or not the Muruatetu Case was determined in 2017, December, therefore the trial magistrate is under a duty to examine the same for guidance on sentencing. On sentence, I find and hold that the sentence of death as pronounced by the trial court is too harsh and excessive in the circumstances. This court has the power to determine the appropriate sentence but I find that it would be proper to let the trial court handle the same so as not to stifle the appellants chain of appeal against any sentence to be imposed**.** I am inclined to remit the matter back to the trial court to consider mitigating submissions and impose an appropriate sentence.

57. In the result, the following orders are hereby made:

a) The appellants' appeal against conviction is dismissed.

b) The appellants are ordered to appear before the trial court at Kimilili on the 7th December, 2021 for purposes of presenting mitigation submissions and re-sentencing.

c) The County Criminal Investigations Officer Bungoma County s directed to establish the circumstances leading to the removal of the name of one of the suspects namely Samuel Shitemi Juma from the chargesheet as well as establish whether the said name is an alias name of Moses Kimingichi Khaemba who is reported to have been released in unclear circumstances.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 30TH NOVEMBER DAY OF NOVEMBER, 2021.

D. KEMEI

JUDGE

<u>In the presence of</u>:

Stephen Likuyani Machanja.....1st Appellant (virtually)

Joseph Wafula Wasike.....2nd Appellant (virtually)

Joseph Mungonye Ongacho.....3rd Appellant (virtually)

Stephen Czars Simiyu.....4th Appellant (virtually)

No appearance – Kassim Sifuna.....4th Appellant

Miss Omondi.....for Respondent

Kizito.....Court Assistant