



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 311 OF 2013

(CONSOLIDATED WITH CRIMINAL APPEAL NO. 309 OF 2013)

JOSHUA MUIA NZALU.....1ST APPELLANT

TITUS MUTHOKA MULENGA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the whole judgment and sentence of Honourable P.N. Gesora- SPM dated 20th November, 2013 in Machakos Criminal Case No. 261 of 2012)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

JOSHUA MUIA NZALU.....1ST ACCUSED

TITUS MUTHOKA MULENGA.....2ND ACCUSED

JUDGEMENT

1. The appellants, **Joshua Muia Nzalu** and **Titus Muthoka Mulenga**, were charged in the Chief Magistrate's Court at Machakos in Criminal Case No. 261 of 2012 with the offence of Robbery with Violence contrary to section 296(2) of the **Penal Code**. The particulars were that the appellants on the 4th day of February, 2012 at Senior Staff Estate, Athi River, within Machakos County, jointly with others not before Court, while armed with dangerous weapons namely Somali swords, robbed **Titus Musembi Musee**, Barclays ATM Card No. [xxxx], Barclays gold visa card No. [xxxx], Equity ATM Card No. [xxxx], United Kingdom driving licence No. AEZ[xxxx], Tuskeys reward card No. [xxxx], photocopy if ID card No. [xxxx], KCB ATM Card No. [xxxx] and mobile phone make nokia 6700c-all valued at Kshs 140000/-, and immediately after the time of such robbery killed the said **Titus Musembi Musee**.

2. After hearing the case, the Learned Trial Magistrate convicted the accused and proceeded to sentence them to death.

3. Aggrieved by the said decision the appellants have preferred this appeal based on the following grounds:

- 1. That the Learned Trial Magistrate failed to uphold the appellants' basic rights as enshrined in Article 49(1)(f) of the Constitution.**
- 2. That the Learned Trial Magistrate convicted them on the basis of a defective charge sheet.**
- 3. That the Learned Trial Magistrate failed to uphold the provisions of Article 50(2)(m) of the Constitution by failing to provide an interpreter.**

4. That the Learned Trial Magistrate failed to adhere to the provisions of section 214 of the Criminal Procedure Code.
5. That the Learned Trial Magistrate convicted them on the basis of inconsistent, uncorroborated and false evidence.
6. That the Learned Trial Magistrate failed to find that they were not properly identified as the perpetrators of the offence.
7. That the Learned Trial Magistrate failed to properly consider their defences and hence failed to adequately displace the same.
8. That the Learned Trial Magistrate relied on the evidences of identification by PW2 and accomplices of the appellant without considering that the same lacked merit in the absence of first report as confirmed in the OB.
9. That the alleged identification parade was conducted in contravention chapter 46 Force Standing Orders.
10. That the Learned Trial Magistrate relied on an alleged recovered wallet and some items without considering that nothing incriminating was found in their possession during their arrest to implicate them in the offence.
11. That section 107 of the Evidence Act and section 169(1) of the CPC were not complied with.
12. That the Learned Trial Magistrate based their conviction on the evidence which was not sufficiently and trustworthy to have been acted on.
13. That the Learned Trial Magistrate failed to observe that the prosecution case was not proved to the required standards.

4. At the trial, the prosecution called 9 witnesses.

5. According to PW1, **Alex Kivuva Ngumgi**, the Chief of Ilika Location, Yatta District, on 8th February, 2012, at 4.30pm he was in his office when he received a telephone call from one of the members of community policing who informed him that he had received a call from Nairobi that there was a murder suspect in Athi River. Accordingly, PW1 called Inspector Laboso and sought reinforcements. On 9th February, 2012 at 8.00 am AP officers led by **Cpl Munyithya**, PW3, went to his office and they proceeded to the home where the alleged suspect was where they spotted the 1st appellant taking tea. Upon noticing their presence, the 1st appellant started running away but was apprehended by **Cpl Ndema**, PW4. The mother of the 1st appellant was also arrested and upon conducting a search in the 1st appellant's house, the police recovered KCB, Barclays and Equity Banks ATM Cards and Tuskeys Reward Card, a mobile phone and 2 wallets all of which were marked for identification. According to PW1, the 1st appellant was not known to him before. According to the witness they also found a lady whom the 1st appellant claimed was his wife and her mother. PW1 testified that the AP Inspector called the Athi River DCIO who arrived at 6.00pm and they took the 1st appellant away.

6. In cross examination, he confirmed that it was the police who entered the house and recovered the bag containing the said items which items they did not show the lady and that the lady did not record her statement.

7. PW2, **Damaris Mulimi Musembi**, was at home on 2nd February, 2012 at 9.00am, when her husband, the deceased, received a telephone call and informed her that he was to meet a certain young man the following day, a Thursday. On Thursday, they woke up and went to Athi River and at 7.00 pm the said callers arrived. It was her evidence that they were three in number and she knew one of them the 1st appellant, **Joshua Muia Nzalu**, who was a son to the deceased's brother, having known him since her marriage in the home. According to her the 2nd appellant was also present though prior to this day, she did not know him.

8. According to PW2, the three sat with the deceased who informed her that they owed him Kshs 29,000/= and they were coming so that the 1st appellant could make a repayment proposal. It was her evidence that they sat there talking till 9.00 pm when they left. She disclosed that the deceased informed her that they wanted to spend the night in their house but the deceased declined as they were strangers and they were to bring the money the following Saturday at 3.00pm but failed to turn up at the appointed time. At 5.00pm they heard a knock on the main gate which was repeated shortly thereafter and the deceased went to see who it was. Upon peeping through the kitchen window, PW2 saw the 1st appellant followed by the 2nd appellant and two other persons. As her phone was ringing, PW2 entered the house to pick it up.

9. Upon going outside after 30 minutes, PW2 found blood on the floor of the extension to the kitchen where the deceased was seated with the three men. She also saw the 2nd appellant carrying a pail with water and upon asking him what was happening, he dropped the pail and walked towards her at which point PW2 locked the door after struggling with the 2nd appellant. After locking the door to the garage, PW2 went upstairs and started screaming during which time the three men ran away.

10. Upon going downstairs, she found 10 people including police officers from Athi River Police Station who photographed the scene and removed the deceased's body. Upon asking the police officer whether they had recovered anything from the deceased's pockets, the police said they had not. PW2 later recorded her statement at the police station and on 7th February, 2012 the deceased's body was taken to the mortuary where a post mortem was conducted after which the body was released for burial. PW2 identified the photographs which were taken of the scene which were marked for identification. She also identified the deceased's mobile phone, wallet, ATMs and photocopy of his identity card.

11. Later she heard over the radio that the 1st appellant had been arrested but since she was expectant, she did not go to the Police Station. It

was her evidence that since the 1st appellants was known to her, she never attended identification parade but had given the police his name.

12. In cross examination by the 1st appellant, PW2 stated that when they entered the compound, she entered the house and left them alone but the 1st appellant did not enter the house and 30 minutes later when she went out, she found the blood. She however heard any struggle. She disclosed that though there was another person at home, he had been sent by the deceased and came later. She however denied that she planned her husband's death though she admitted that she was aware that the deceased had another wife with whom she had never talked. She was however aware that the said wife too had recorded statements but was unaware of their contents.

13. It was her evidence that her screams brought the neighbours though out of fear they never recorded their statements but peeped from the side till the police arrived at 6.00 pm, an hour after the incident had occurred. According to her, the deceased had been robbed of his mobile phone, wallet and personal effects. According to her the deceased had informed her that the 1st appellant owed him money on account of land in Mumbuni which she confirmed having visited. It was her evidence that after the attack, the 1st appellant jumped through the fence behind the house and ran away. According to her at first she did not know whose blood it was and that she never entered the scene and never attended her husband's cremation as she proceeded to the maternity. She however stated that the recovered property was recovered from the 1st appellant.

14. In cross-examination by the 2nd appellant, PW2 insisted that she recognised the 2nd appellant having seen him at the scene on that day and that she recorded her statement while in her house but did not give the 2nd appellant's description. Due to the fact that she was in the maternity, she never went to identify the 2nd appellant at the police station. She admitted that no recovery was made from the 2nd appellant.

15. PW3, **Munyithya**, a police officer attached to Lower Yatta District received a report on 9th February, 2012 at 8.00 am from PW1 that there was a murder suspect who was hiding in one of the homes. Accompanied by **APC Ndema**, PW4 and **APC Lagat**, PW3, left and on approaching the homestead they divided themselves into two groups and using different directions they entered the homestead where they met an old lady and another lady said to be hiding the suspect, the 1st appellant herein, who was called **Susan Mbilo**. According to him the 1st appellant was seated behind the door with the old lady sitting besides him while the young lady was removing maize from the ceiling. PW3 then inquired from the 1st appellant who he was and ordered him to face and touch the wall for a search from which he recovered ATM Cards from Barclays, Equity and KCB, his mobile phone, wallet, sim cards, UK driving licence, photocopy of the deceased's ID Card and Tuskeys Reward Card. According to him all the said cards were in the names of the deceased. Upon searching the house where the 1st appellant was sleeping, they only recovered his clothes. They then took the 1st appellant to the District Headquarters where the other group found them. After recorded his statement, officers from Athi River Police Station took the 1st appellant away.

16. In cross-examination by the 1st appellant, PW3 stated that they arrived at the homestead at 8.00 am with **APC Ndema**, PW4 and found the 1st appellant seated inside the house. According to him the items were recovered from the 1st appellant's inside pockets and the recovery was witnessed by his colleagues. According to PW3, the 1st appellant was a guest in the home and since he was the one from whom the recovery was made, there was no need for the old lady to record her statement. According to him, though they went to the home where the 1st appellant was sleeping, the search was made by his colleagues who recovered the 1st appellant's clothes which were taken by the CID officers.

17. PW4, **APC Gilbert Ndemo**, was attached to Yatta District when on 9th February, 2012 while on duty, they got information from PW1 that there was a murder suspect within his area. In the company of PW3 and **APC Lagat**, they left for the place where they divided themselves. According to him, he was with PW3 while **APC Lagat** and PW1 remained behind. They then entered the kitchen where they heard people talking and found the 1st appellant, an old lady and the 1st appellant's girlfriend. PW3 then conducted a search and recovered ATM Cards, 2 mobile phone handset and a wallet which were marked. According to him the cards belonged to the deceased and the 1st appellant informed them that they belonged to his uncle. They also recovered safari car pouch and Tuskeys Reward Card. Upon searching where the 1st appellant was sleeping within the homestead, they found his bag which had clothes and also took it away. According to PW4, they arrested and took him to their post where they confined him till he was collected by CID officers from Athi River. Both the appellants were however strangers to PW4.

18. In cross examination, PW4 stated that though he recorded the cards in his statement, he did not mention the phones. It was his evidence that it was the 1st appellant who took them to the house where he was sleeping.

19. **PC Robinson Ekutu** testified as PW5. According to him on 11th February, 2012 he was in his office when the Assistant Chief for Makuyuni, **Muendo Musembi**, PW6, went and informed him that he had information that there was someone who was being looked for by the CID officers in connection with a robbery and murder in Athi River and that he had traced the suspect. In the company of his colleagues, the said Assistant Chief led them to the home where they entered the kitchen and PW6 pointed out the suspect, the 2nd appellant, whom they arrested and took to Mukuyuni Patrol Base from where he was transferred to Makueni Police Station where further action was taken. According to PW5, nothing was recovered from the 2nd appellant. According to him, the 2nd appellant was not known to him before.

20. In cross examination, PW5 stated that he was informed that the 2nd appellant had been hired to work in the home but had not stayed for long. It was however his evidence that the 2nd appellant was cooperative and did not resist the arrest.

21. PW6, **Simon Muendo Musembi**, the Assistant Chief, Mukuyuni testified that on 11th February, 2012 at about 7.00 pm he was at home when he received a telephone call from a member of the public that there was a boy who was at his home and sounded as if he was hiding and they wanted to verify the same. PW6 then went to Mukuyuni Police Base where he was assigned some officers including PW5 and together they went to **Newton Mwololo's** home in Muthini Village where they met him and they were shown the 2nd appellant whom the police arrested and took to the station. According to PW5, the appellant had no identification.

22. In cross examination, PW6 stated that the 2nd appellant was found inside a house and that he never resisted at the time. According to him, the 2nd appellant was suspected by members of the public due to his peculiar behaviours.

23. PW7, **Peter Klaa Mulu**, a church pastor with Neno Evangelical was in his house in Mlolongo, at 6 pm on 4th February, 2012 when he received a telephone call from PW2. According to PW7, he was married to the deceased's niece. PW2 asked him to go to their home in Athi River as her husband had been attacked. Upon going there, he found many people including PW2, who was crying, as well as police officers. Upon entering the deceased's house they found blood and the body inside the toilet with the deceased's neck cut. PW2 then informed him that three men had come there and she knew one of them. The body was then taken to Shalom Mortuary where it stayed for about 1 week and the post mortem revealed that the deceased had been strangled on the neck.

24. According to PW7, a foreign lady also appeared and claimed that the deceased was her husband and took away the body. PW7 identified the 1st appellant as his brother in law but disclosed that he had no grudge against him. He however identified the photographs as the ones of the scene and the deceased's body.

25. In cross-examination, PW7 stated that PW2 informed him that one of the attackers was the 1st appellant, his brother in law. According to him, PW2 was not aware whether her husband had died and that the deceased was attacked in his kitchen and his body dragged into the toilet.

26. PW8, **Dr Johanssen Oduor**, a pathologist attached to City Mortuary testified that on 11th December, 2012 at Shalom, Athi River, he conducted a post mortem on the body of the late **Titus Musee** who had been fatally stabbed by a person known to him. According to PW8, the deceased had blood stained white shirt a pair of jeans and shoes. His body was well preserved and he had a stab on the right side of the chest and a slash wound on the right side of the neck, a group of stab wound on the right neck covering 7x5 cm. There were also superficial wounds on the right chest covering 7x6 cm and haemorrhage on the left eye, bruise on the forehead and his upper incisor tooth was missing. Internally, there were multiple bruises and slash on the neck muscles and the right jugular vein and the right common artery had been cut. There was also a spinal injury cut C5 on the neck region.

27. According to PW8, the cause of death was bleeding due to trauma. He signed the post mortem report which he produced as exhibit.

28. In cross-examination, PW8 stated that the history was that the deceased had been stabbed by people known to him.

29. PW9, **Cpl Ahmed Haji**, testified that he was attached to Mlolongo CID Office but at the material time was attached to Athi River CID Office. On 4th February, 2012 he was in the office when he was called by the DCIO and was directed to commence investigations into a murder incident that occurred in an Estate within Athi River. He then set out with the duty officer, IP Ngaira for the Senior Staff Quarters, Athi River, where they found the dead body of a male adult named **Titus Musembi**, the owner of the residential house. According to him the deceased was living there with his wife, PW2, who was expectant. They then took the necessary action including taking of photos by the scenes of crime personnel and collected exhibits. He testified that at the scene they found a blood stained kitchen knife and collected blood stained clothes belonging to the deceased. They also found a cap next to the kitchen knife and they circulated the names of the suspects which they gathered from PW2 and other witnesses such as the guard/shamba boy, **John N. Katiku**. According to PW9, PW2 personally saw the three attackers who were there and the 1st appellant was one of them and he was a nephew to the deceased who was known to them.

30. On 9th February, 2012, PW9 testified that they were called to Kiusiyani AP Camp where the 1st appellant and a lady whom they later discovered was her girlfriend had been taken to. They found the 1st appellant in possession of the deceased's personal effects such as ATM Card, national Identity Card, 2 cell phones, wallets and other assorted items. PW9 testified that during the investigations, the 1st accused disclosed the identity of his accomplice, the 2nd appellant, who was arrested at Makueni area and they went for him. An identification parade was then conducted and PW2 positively identified the 2nd appellant and upon the completion of the investigations, the appellants were charged. According to PW9, the blood on the kitchen knife, the deceased's clothing and the 1st appellant's clothes which they recovered from his house in Makadara, Nairobi, were, according to the report from the government analyst, matching. PW9 then produced all the exhibits that had been marked.

31. According to his investigations, the deceased had been working in the UK for over 26 years and had returned home after retirement and bought a residential house and married a young lady. During his stay in the UK, the 1st appellant's father was the one managing his assets and upon his return, he took stock of his assets and took them over from his brother and this led to bad blood between them. According to PW9, the three are believed to have been hired by the 1st appellant's father to kill the deceased. It was PW9's evidence that before the material day, the 1st appellant knew several of the deceased's plans including a piece of land in Athi River that had been subdivided by a surveyor for sale and he pretended to assist the deceased with the 2nd appellant and another person who was at large.

32. According to PW9, when the guard informed the deceased of the presence of the guests at the gate, the deceased went out and met the 1st appellant and told the guard to let them in after which the guard went to buy a newspaper and upon his return found the three and the deceased in a lengthy conversation while PW2 was in the balcony. Though the guests, in the presence of the guard, requested the deceased to allow them spend the night in the house, the deceased refused. According to PW9, PW2 heard all this and it was when the guard left that they held and stabbed the deceased severally, killing him and dragged his body to the toilet. Thereafter, PW2 got out, notified the guard who raised the alarm and the police were called in. The deceased's body was cremated at Shalom Hospital, Athi River.

33. In cross examination, PW9 stated that the matter was circulated in the local vernacular station in which the 1st appellant was named as suspect and that the 1st appellant was found in possession of the deceased's personal effects. According to him the *shamba* boy was initially arrested but was arrested after PW2 recorded her statement. While the 1st appellant's bloodstained clothes were recovered from the 1st appellant's house, none of the 1st appellant's belongings were found at the scene. However, as the 1st appellant was well known there was no need to conduct an identification parade for him and he never explained how he came into possession of the deceased's personal effects.

34. According to PW9, the 2nd appellant was arrested in Makueni by the Assistant Chief after his names had been circulated after he was named by the 1st appellant. Upon his arrest an identification parade was conducted. However, as PW2 had seen the 2nd appellant at the time of his arrest the identification parade form was, according to PW9, of no evidentiary value.

35. In his sworn testimony, the 1st appellant testified that he was from Makueni County and was a tailor along Jogoo Road, Uhuru Market, Nairobi. In December, 2011 he got a business order to make bags which he did till 27th January, 2012. On 30th January, 2012 he headed for Kitui to deliver the same and he was to stay there for one week and also get some money. On 8th February, 2012, he met with the honey vendor who took him to his home in Ilika to get the same and for future contacts and he spent the night in his home. The following day, 9th February, 2012, he woke up at 7.30 am and asked him to get a *boda boda* rider to ferry him to the bus stage. However, as he waited for the *boda boda*, police officers appeared there and PW1, asked for a guest and he identified himself. Upon being asked what he was doing there he explained himself about the honey. However, they did not believe him, but arrested him and took him to Kiusia AP Camp where he stayed till evening when CID officers from Athi River collected him and took him to Athi River Police Station after which he was charged in this Court on 14th February, 2012. According to the 1st appellant he was a stranger to the charges herein.

36. The 2nd appellant also gave sworn testimony. According to him, he hailed from Makueni County, Engaro Sub location, and was working as a house boy. On 2nd February, 2012, he was employed in Mukuyuni where he worked till 11th February, 2012, when at about 5.00pm the area Assistant Chief in the company of police officers went and asked his employers about his whereabouts. He was then arrested and taken to Mukuyuni Police Post and later to Makueni Police Station and Athi River Police Station before being charged on 14th February, 2012. He however denied any wrongdoing.

37. In his judgement, the learned trial magistrate found that since the incident occurred in broad daylight, there was no question of mistaken identity since, according to PW2, the appellants had visited them on 2nd February, 2012, for a meeting which lasted till 9.00 pm and returned on 4th February, 2012 for a meeting which also took some time and that the 1st appellant was the deceased's cousin who was known to PW2. The Learned Trial Magistrate therefore found that PW2 was able to see and know the visitors which averment was not challenged by the appellants.

38. Upon the 1st appellant's arrest they recovered the deceased's personal effects hence proving that the said appellant was at the scene. The 2nd appellant on the other hand was arrested after the 1st appellant gave his identity and he was identified by PW2, from which the 2nd appellant did nothing to disengage. As regards the motive the Court found that their relationship had become sour after the deceased discovered that the 1st appellant's father had short changed him while he was away in the UK.

39. According to the Learned Trial Magistrate, the post mortem report clearly showed that the attackers had a pre-meditated mind to kill the deceased as the knife stabs were directed to the sensitive areas of the body.

40. The Court therefore found that the appellant's herein and another who was not before the Court, attacked, killed and robbed the deceased of his property and that all the ingredients of the charges had been sustained and proceeded to find them guilty and convicted accordingly.

41. It was submitted by the 1st appellant in this appeal that though he was arrested on 9th February, 2012, a Thursday but was arraigned in court on 14th February, 2012, a Tuesday, yet apart from Saturday and Sunday, the other days were normal working days. It was therefore submitted that the police did not observe and uphold his basic fundamental rights enshrined in Article 49 of the Constitution. In support of this position, the 1st appellant relied on Albanus Mwasia Mutua vs. Republic Criminal Appeal No. 120 of 2004, Anne Njogu & 5 Others vs. Republic HCMISC Application No. 551 of 2007 and Ndede vs. Republic [1991] KLR 567.

42. It was further submitted that the charge sheet was bad for duplicity since the 1st appellant was charged under section 295 as read with section 296(2) of the *Penal Code*. In this respect, the 1st appellant relied on *Black's Law Dictionary* and Joseph Njuguna Mwaura & 2 Others vs. Republic [2013] eKLR.

43. Based on Article 50(2)(m) of the Constitution, the 1st appellant submitted that the proceedings of 8th July, 2013 did not comply with this Article.

44. It was further submitted that whereas the particulars of the offence stated that the assailants were armed with a dangerous weapon namely Somali sword, the evidence adduced before the trial court did not disclose that a Somali sword was ever used against the deceased but what was recovered was a kitchen knife. Based on Erick Macharia Mugo & Another vs. Republic Criminal Appeal No. 32 of 2014 (Nyeri), George Omondi & Another vs. Republic. Criminal Appeal No. 5 of 2005 and Juma vs. Republic [2003] 2 EA 471, it was submitted that the charge sheet as framed was fatally defective within the meaning of the said authorities.

45. The appellants further submitted that though the prosecutor applied for the charge sheet to be amended, they were not asked if they would like to have PW1 who had testified recalled in violation of section 214 of the *Criminal Procedure Code*.

46. According to the appellants, the evidence that was adduced in court to prove the charge was largely inconsistent and uncorroborated. In this respect they referred to the fact that the person who called with the information that there was a suspect who had committed the offence was never called to testify; that **Inspector Laboso** was not called to testify and questioned why the authorities had to wait overnight to effect the 1st appellant's arrest; the inconsistencies in the manner in which the search was conducted; the date when the deceased was to meet with the 1st appellant; and when the 1st appellant was arrested, how the police were to know the 1st appellant without his description being given, where the deceased was killed. It was also submitted that without the government analyst coming to testify, and in the absence of his report, it was not possible to prove that the blood stains in the 1st appellant's clothes matched the deceased's.

47. According to the 1st appellant, he was not positively identified as the perpetrator of the crime that was committed. According to the 1st appellant not only is the identification at the parade required but victims should also give a description of their assailants at the first instance. In this case reference was made to **Wamunga vs. R [1989] KLR 424**. The 1st appellant also took issue with the fact that PW3 testified that the documents recovered were in the name of **Festus Musembi Musee**, a person different from the deceased.

48. It was the 1st appellant's submission that though his evidence was a sworn alibi, the trial court did not carefully evaluate his evidence.

49. The 2nd appellant also took issue with the fact that no description was given by PW2 and relied on **Juma Ngondia vs. Republic CrApp. No. 136 of 1983**. It was further submitted that the parade was conducted in contravention of Chapter 46, Force Standing Orders and relied on **Walter A. Amolo vs. Republic [1991] 2 KAR 254** and submitted that the evidence of parade identification lacked merit in the absence of a prompt first report.

50. As no evidence was found in his possession, the 2nd appellant submitted that this was a framed up case. It was his evidence that the trial court failed to consider his defence as to where he was at the time of the alleged incident as he was working in Makueni as a *shamba* boy. It was therefore his case that the prosecution failed to prove its case.

51. In response to the appellants' submissions, **Miss Mogoi**, Learned Prosecution Counsel, submitted that since the appellants did not raise the issue of the delay in them being brought to court during the trial, the said delay cannot lead to acquittal but may only lead to compensation. As regards the allegation of duplicity, it was submitted that there is no evidence that the appellants did not understand the charge and they in fact participated effectively in the trial. Reference was made to **Paul Katana Njuguna vs. Republic [2016] KLR**.

52. As regards the issue of interpretation, it was submitted that it was clear from the time of plea that proceedings were interpreted from English to Kiswahili then to Kamba and there were two Court Assistants doing the same. In any case the issue was never raised by the appellants. To the Respondent, the prosecution's evidence was consistent and the few inconsistencies did not go to the root of the matter or change the fact that the offence was committed by the appellants. To the Respondent there was corroboration since the evidence of PW2 was corroborated by the recovery of the personal effects of the deceased from the 1st appellant and the recovery of the blood stained clothes from the 1st appellant's house which blood stains matched the deceased's. The presence of the 2nd appellant was corroborated by the disclosure by the 1st appellant of the identity of the 2nd appellant. The court was therefore urged to uphold the decision of the trial court and consider the gravity of the offence taking into consideration that life was lost as a result.

Determinations

53. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; 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, see Peters vs. Sunday Post [1958] E.A 424.”

54. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

55. In **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. 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; 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.

56. As regards the evidence against the 2nd appellant, he was incriminated by PW2 and the 1st appellant. As regards the evidence of the 1st appellant, it is clear that this was evidence of an accomplice. The evidence presented in court did not however amount to acceptable incriminating accomplice evidence. In dealing with accomplice evidence, the Court of Appeal in Nguku vs. Republic [1985] eKLR, expressed itself as follows:

“We therefore turn to ground 4 and 7 of the appeal, which were argued together, Mr Menezes’ submission here was that the trial magistrate had ignored the first duty of a court dealing with accomplice evidence, which is that the court must first decide whether the accomplice, in this case the complainant, is a credible witness and then ascertain if there is any evidence corroborative of it before the accomplice’s evidence can be accepted. This proposition receives support from the passage which Mr Menezes cited from Republic v Ndara Kuruki [1945] 12 EACA,84, which was a case mainly concerned with the extent to which an accused’s statement can be used against his co-accused, and in which the court said, as regards accomplices, at page 86:

“A point which is sometimes lost sight of in considering accomplice evidence is that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence, feels that it cannot believe the accomplice it must reject his evidence, and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If, however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affect the accused by connecting or tending to connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case the court should record in its judgment whether or not it regards the accomplice as worthy of belief.”

It is also supported by the following extract from Lord Hailsham’s speech in Director of Public Prosecution v Kilbourne [1973] 1 AER, 440, a case concerning the corroboration by one group of young boys of the evidence of another group of young boys in relation to indecent assaults committed on them, in which he said at page 452

“In addition to the valuable direction to the jury, this summing-up appears to contain a proposition which is central to the nature of corroboration, but which does not appear to date to have been emphasized in any reported English decision until the opinion delivered in Director of Public Prosecutions v Hester by Lord Morris of Borth-y- Gest although it is implicit in them all. Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness’s testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witnesses’s testimony falls of its own inanity the question of his needing, or being capable of giving, corroboration does not arise.”

In the case of Director of Public Prosecutions v Hester [1972] 3 AER 1056, at page 1065, a case of an indecent assault on a girl, Lord Morris gave a similar direction as follows:-

“One of the elements supplied by corroborative evidence is that there are two witnesses rather than one. The weight of the evidence is for the jury. It is for the jury to decide whether witnesses are creditworthy. If a witness is not, then the testimony of the witness must be rejected. The essence of corroborative evidence is that one credit worthy witness confirms what another credit worthy witness has said.”

57. However, the Court proceeded to find that:

“The magistrate went on to say, again specifically, that he accepted the complainant’s evidence as to what took place after the complainant and the appellant left bar, as to the handing of the envelope containing the money by the complainant to the appellant, and the appellant putting it in his trouser pocket. He also accepted the complainant’s evidence that he and the appellant had prearranged the meeting at the bar. The magistrate did not say in so many words that he accepted the complainant’s evidence regarding the conversation at the nursing home, and as to the telephone conversation on the morning of January 21, but it is obvious that he did so...”

58. As regards the evidence of PW2, it is clear that prior to 3rd February, 2012, she did not know the 2nd appellant. In cross-examination by the 2nd appellant, PW2 insisted that she recognised the 2nd appellant having seen him at the scene on that day and that she recorded her statement while in her house but did not give the 2nd appellant’s description. Due to the fact that she was in the maternity, she never went to identify the 2nd appellant at the police station.

59. The importance of the first report in such circumstances was emphasised by the Court of Appeal in Tekerali s/o Korongozi & 4 Others -vs- Rep (1952) 19 EACA 259 where it was held that:

“Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”

60. And in the case of Rex vs. Shabani Bin Donaldi (1940) 7 EACA 60 it was held that:

“We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness evidence of the details of such reports (save such portions of it as may be inadmissible as being hearsay or the like) should always be given at the trial. Such evidence frequently proves most valuable, sometimes as corroboration of the evidence of the witness under Section 157 of the Evidence Act, and sometimes as showing that what he now swears is an afterthought, or that he is now purporting to identify a person whom he really did not recognize at the time, or an article which is not really his at all.”

61. In Maitanyi vs. Republic (1986) KLR 198 (*supra*), the Court held that:

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained.”

62. In the absence of the description by PW2 of the 2nd appellant, I find that the evidence that PW2 was the one who disclosed that the 2nd appellant was one of the assailants cannot stand. The totality of the evidence therefore leaves the court with inescapable conclusion that the evidence did not prove the 2nd appellant's guilt beyond reasonable doubt and the 2nd appellant ought to have been acquitted.

63. It was submitted by the 1st appellant in this appeal that though he was arrested on 9th February, 2012, a Thursday but was arraigned in court on 14th February, 2012, a Tuesday, yet apart from Saturday and Sunday, the other days were normal working days. It was therefore submitted that the police did not observe and uphold his basic fundamental rights enshrined in Article 49 of the Constitution. However, in Fappyton Mutuku Ngui vs. Republic [2012] eKLR it was held that:

“It is true that there is a delay of at least 4 days from the constitutionally-mandated 24-hours. However, while our previous jurisprudence on the issue was that the trial would be a nullity if the accused was detained beyond the time stipulated in the Constitution, this rigid rule has given way to a more flexible standard. In Julius Kamau Mbugua v Republic [2010] eKLR the Court of Appeal established the flexible rule that a violation of the constitutional provisions stipulating the time within which an accused must be produced in court does not give rise to an automatic acquittal - because one can be adequately compensated by way of monetary damages. David Njuguna Wairimu v Republic (2010) eKLR is in accord. Our law as it stands now, I believe, is that the Court will scrutinize the conduct of the State to determine if it acted flagrantly to frustrate the rights of fair trial of the accused person. Courts will not excuse a deliberate attempt to delay the presentment of an accused person to the Court with the conscious intention of suppressing his rights or prejudicing his ability to defend himself. Hence, where there is a long delay, the Prosecution has an affirmative duty to offer an explanation for the delay. Where such an explanation is not forthcoming, the Court is entitled to infer that there was a deliberate attempt to frustrate the accused person's right to free trial. However, this does not appear to be the case here. While I do not condone the violation of the Appellant's constitutional rights in light of the above, the violation of the Appellant's right to be produced in court within 24 hours will not automatically result in his acquittal. He is, however, at liberty to seek civil remedies for the violation of his constitutional rights.”

64. In Francis Muthee Mwangi vs. Republic [2016] eKLR the Court expressed itself as hereunder:

“As Justice Mutungi stated in the case of Ann Njogu & 5 others V Republic, whose sentiments I share:-

‘...the section is very clear and specific – that the applicants can only be kept in detention or the cells, for up to 24 hours. At the tick of the 60th minute of the 24th hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants...’

There is a litany of authorities in relation to the right of an accused person to be brought to court within a prescribed period of time. In the case of Albanus Mwasia Mutua vs Republic the court of appeal held that the appellant's constitutional rights guaranteed under section 72 (3) of the constitution had been grossly violated because he was taken before the trial magistrate some eight months from the date of his arrest and no explanation at all was offered for that delay. The court made the following pertinent remarks:

‘At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.’

It is worth noting however that an accused person is not automatically entitled to an acquittal where the prosecution has not been given a chance to offer an explanation for failing to bring him to court on time. In the case of Eliud Njeru Nyaga vs Republic stated

‘While we would reiterate the position that under the fair trial provisions of the constitution, an accused person must be brought to court within twenty four hours for non capital offences and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in automatic acquittal.’

In the case of *Paul Mwangi Murungu v/s Republic* the court of appeal observed:-

‘We do not accept the proposition that the burden is upon an accused person to complain to a Magistrate or a Judge about the lawful detention in custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person has been in custody for more than the twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. Under section 72 (3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the prosecution does not offer any explanation then the court as the ultimate enforcer of the provisions of the constitution must raise the issue.’

All the above cases point to the need for courts to strictly observe the fair trial provisions in our constitution. The law of the land has to be obeyed particularly by those entrusted to enforce it. The police should be in the forefront of obeying the law and enforcing it. If the supreme law of the land says that an accused person has to be brought before court within 24 hours in the event of a non-capital offence and 14 days for a capital one, that law must be strictly observed failing which the police have a burden cast on them to satisfy the court that the accused had been brought before court as soon as was reasonably practicable.

Even though the delay herein has not been explained, I note that the appellant was arraigned in court on the third day and considering the nature of the offence before the court and the evidence adduced, I hold the view that it would not be fair to exonerate the appellant on account of the aforesaid delay only.”

65. In this case the appellants did not raise the issue before the trial court. They have not disclosed the prejudice he suffered as a result of the said delay so as to enable the court determine the effect if any of the said delay. While this Court deprecates the failure to arraign suspects in court within the constitutionally prescribed time limits, each case must be determined on its own facts and at the end of the day, the court must determine the effect if any of the delay in arraigning the suspect in court. Where the delay is long and there is no explanation emanating from the prosecution and where the issue is raised at the earliest possible opportunity, the court will invariably find that the delay in doing so was a deliberate attempt to frustrate the accused person’s right to free trial. In this case I do not have sufficient material on the basis of which I can make such a determination at this stage of the proceedings.

66. It was further submitted that the charge sheet was bad for duplicity since the 1st appellant was charged under section 295 as read with section 296(2) of the *Penal Code*. It was further contended that whereas the particulars of the offence stated that the assailants were armed with a dangerous weapon namely Somali sword, the evidence adduced before the trial court did not disclose that a Somali sword was ever used against the deceased but what was recovered was a kitchen knife.

67. However, in *Paul Katana Njuguna vs. Republic [2016] eKLR*, it was held that:

“In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective. In this appeal, the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under Section 382 of the Criminal Procedure Code.”

68. Dealing with the framing of a criminal charge in the case of *Willie (William) Slaney vs. State of Madhya Pradesh, [A.I.R. 1956 Madras Weekly Notes 391]*, the Supreme Court of India held that:

“We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent...We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms that it must all be “explained to him”, so that he really understands...but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality...The essence of the matter is not a technical formula of words, but the reality. Was he told" Was it explained to him" Did he understand" Was it done in a fair way... Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.”

69. In *The State vs. Matlhogonolo Masole, 1982 (1) BLR 202 (HC)* the High Court of Botswana, citing with approval (*R vs. Greenfield, (1973) 57 Cr. App.Rep. 849*) while handling a similar situation, the court opined thus:

“... there is, however, one over-riding matter to be considered and that is whether or not the accused was prejudiced by the duplicity in the charge, as duplicity in a count is a matter of form, not a matter of evidence (*R v Greenfield, (1973) 57 Cr. App.Rep. 849*).”

70. In Isaac Nyoro Kimita & Another vs. Republic [2014] eKLR, it was held that:

“In this case, we have no doubt in our minds that the appellant knew that it was practically impossible for him and others to have “jointly” defiled the complainant. He therefore understood the charge against him to have been that on the material date, while together, with others, engaged in an illegal enterprise, they successively defiled the complainant. This is confirmed by the fact that in the trial, the appellant extensively cross-examined prosecution witnesses and defended himself. In the circumstances, we find that the defects in the charge were minor and did not prejudice the appellant. They did not occasion any miscarriage of justice or violate the appellants’ constitutional right to a fair trial.”

71. In this case there was no allegation of prejudice occasioned to the appellants. In the premises that ground fails.

72. The appellants further submitted that though the prosecutor applied for the charge sheet to be amended, they were not asked if they would like to have PW1 who had testified recalled in violation of section 214 of the *Criminal Procedure Code*. However, in Kababi vs. The Republic [1980] KLR 95, Trevelyan, J held that:

“[In] *Atito vs. The Republic [1975] EA 278*...the Court of Appeal held...that for very death there should be a separate count. However, the point was taken neither in the court below nor before me; and the fact that there was just one charge can have occasioned no possible failure of justice. Nor was the magistrate’s failure to comply with the provisions of section 214 do so. She should have called upon the appellant to plead to the amended charge and she should have inquired whether the defence wanted the witnesses recalled; but all that happened was that, by the time concerned, the third man had died. The appellant was represented in the court below by counsel who said that she had no objection to the amendment being made and nothing about needing to recall the witnesses for the purposes of his case. It was obviously in everybody’s mind that the amendment was insubstantial. I am unable to hold...that the mere failure to comply with the section is fatal. I think that whether it is fatal or not must depend on the circumstances of the particular case concerned. In the present case there could not have been, and there was not, any possibility of a miscarriage of justice; and in any event counsel should have raised the matter at the time.”

73. Accordingly, nothing turns on this ground.

74. According to the appellants, the evidence that was adduced in court to prove the charge was largely inconsistent and uncorroborated. While there might have been minor inconsistencies and contradictions in the prosecution case, that does not warrant interference with the decision of the trial court. This was the position in Willis Ochieng Odero vs. Republic [2006] eKLR, where the Court of Appeal held:

“As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of section 382 of the *Criminal Procedure Code*.”

75. In Aloise Onyango Odhiambo vs. Republic [2006] eKLR the Court expressed itself as follows:

“We have perused the judgment of the learned trial magistrate and are satisfied that after summarizing the evidence adduced before her, the learned magistrate analyzed and evaluated this evidence and gave reasons for the decision she reached. It may not have been a perfect analysis and evaluation but it does meet the basic requirements of Section 169(1) of the *Criminal Procedure Code*. In any event, this court as a first appellate court has a duty to analyze and evaluate afresh the entire evidence adduced before the trial court and draw its own conclusion to ensure that the Appellant is not prejudiced.”

76. In this case I have myself subjected the evidence adduced to fresh scrutiny and I am unable to find that the alleged inconsistencies were material enough to warrant interference with the decision. As was stated in John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:

“Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place and that one or both suffered from a defective memory.”

77. In my view the alleged inconsistencies were not so material as to justify interference with the ultimate decision.

78. According to the 1st appellant, he was not positively identified as the perpetrator of the crime that was committed. In his view, not only is the identification at the parade required but victims should also give a description of their assailants at the first instance. In this case however, the evidence of PW2 was that of recognition since PW2 testified and this was not contradicted that the deceased was the 1st appellant’s uncle and the accused was well known to PW2. In Stephen Karanja vs. Republic [2011] eKLR, the Court of Appeal held:

“The evidence of the complainant was that the robbery took place at about 8:00 a.m. hence in broad daylight. The appellant was known to the complainant prior to that day. This makes the evidence of identification, although by a single witness, free from any possibility of error as it was, indeed, evidence of recognition.”

79. It was the 1st appellant's submission that though his evidence was a sworn alibi, the trial court did not carefully evaluate his evidence. In Festo Androa Aseua vs. Uganda, Cr. App. No. 1 of 1998 the Court made the following:

“We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence.”

80. To my mind the evidence of the 1st appellant on the alibi taken together with the evidence on record was incredible. It was averred that the 1st appellant was found in possession of the deceased's documents. In his evidence he neither contradicted this evidence nor offered any reasonable explanation or at all as to how he came into possession of the same. His alibi, accordingly, must be treated as an afterthought.

81. As regards the issue of interpretation, it was submitted that it was clear from the time of plea that proceedings were interpreted from English to Kiswahili then to Kamba and there were two Court Assistants doing the same. I am however guided by the decision of the Court of Appeal in George Mbugua Thiongo vs. Republic, Criminal Appeal 302 of 2007. In that case the Court stated that:-

“For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial. That is not the case here. The appellant cross-examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to record the language occasioned a miscarriage of justice.”

82. In this case the issue of language was never raised by the appellants and from the record of the proceedings, it is clear that the appellants were able to follow the proceedings and did cross-examine the witnesses without any difficulty.

83. It is therefore my view that the 1st appellant was properly convicted.

84. As regards the sentence, the Supreme Court in Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015, (Muruatetu's case), held at para 69 as follows:

“47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.

[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

[49] With regard to murder convicts, mitigation is an important facet of fair trial. In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.

[50] We consider *Reyes* and *Woodson* persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.

[52] We are in agreement and affirm the Court of Appeal decision in *Mutiso* that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in *Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."

85. In arriving at its decision the Supreme Court relied on a number of foreign decisions and international instruments and in so doing expressed itself as hereunder:

"[31] On the international arena, however, most jurisdictions have declared not only the mandatory but also the discretionary death penalty unconstitutional. In *Roberts v. Louisiana*, 431 U.S. 633 (1977) a Louisiana statute provided for the mandatory imposition of the death sentence. Upon challenge, the US Supreme Court declared it unconstitutional since the statute allowed for no consideration of particularized mitigating factors in deciding whether the death sentence should be imposed. In *Reyes* (above), the Privy Council was of the view that a statutory provision that denied the offender an opportunity to persuade the Court why the death sentence should not be passed, denied such an offender his basic humanity. And in *Spence v The Queen; Hughes v the Queen (Spence & Hughes)* (unreported, 2 April 2001) where the constitutionality of the mandatory death sentence for the offence of murder was challenged, the Privy Council held that such sentence did not take into account that persons convicted of murder could have committed the crime with varying degrees of gravity and culpability. In the words of Byron CJ;

"In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty."

[32] Two Indian decisions also merit mention. In *Mithu v State of Punjab*, Criminal Appeal No. 745 of 1980, the Indian Supreme Court held that "a law that disallowed mitigation and denied a judicial officer discretion in sentencing was harsh, unfair and just" while in *Bachan Singh v The State of Punjab (Bachan Singh)* Criminal Appeal No. 273 of 1979 AIR (1980) SC 898, it was held that "It is only if the offense is of an exceptionally depraved and heinous character, and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the Court may impose the death sentence."

[33] The UN United Human Rights Committee has also had occasion to consider the mandatory death penalty. In case of *Eversley Thomson v St. Vincent*, Communication No. 806/ 1998U.N. Doc. CCPR/70/806/1998 (2000), it stated that such sentence constituted a violation of Article 26 of the Covenant, since the mandatory nature of the death sentence did not allow the judge to impose a lesser sentence taking into account any mitigating circumstances and denied the offender the most fundamental of right, the right to life, without considering whether this exceptional form of punishment was appropriate in the circumstances of his or her case.

.....

[39] The United Nations Commission on Human Rights has recommended the abolition of the death sentence as a mandatory sentence in *Human Rights Resolution 2005/59: "The Question of the Death Penalty"* dated 20 April 2005, E/CN.4/RES/2005/59. It urges all States that still maintain the death penalty:

'...*(d) Not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgment rendered by an independent and impartial competent court, and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence;*

...

(f) To ensure also that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults nor as a mandatory sentence.

86. The Court therefore concluded as follows:

[56] We are therefore, in agreement with the petitioners and amici curiae that Section 204 violates Article 50 (2) (g) of the Constitution as convicts under it are denied the right to have their sentence reviewed by a higher Court – their appeal is in essence limited to conviction only. There is no opportunity for a reviewing higher court to consider whether the death sentence was an appropriate punishment in the circumstances of the particular offense or offender. This also leads us to find that the right to justice is also fettered. Article 48 of the Constitution on access to justice provides that:

"*The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.*"

[57] The scope of access to justice as enshrined in Article 48 is very wide. Courts are enjoined to administer justice in

accordance with the principles laid down under Article 159 of the Constitution. Thus, with regards to access to justice and fair hearing, the State through the courts, ensures that all persons are able to ventilate their disputes. Access to justice includes the right to a fair trial. If a trial is unfair, one cannot be said to have accessed justice. In this respect, when a murder convict's sentence cannot be reviewed by a higher court he is denied access to justice which cannot be justified in light of Article 48 of the Constitution.

[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.

[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.”

87. The Court also found that:

“Article 27 of the Constitution provides for equality and freedom from discrimination since every person is equal before the law and has the right to equal protection and equal benefit of the law. Convicts sentenced pursuant to Section 204 are not accorded equal treatment to convicts who are sentenced under other Sections of the Penal Code that do not mandate a death sentence. Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law. Accordingly, Section 204 of the Penal Code violates Article 27 of the Constitution as well.

.....

[66] It is not in dispute that Article 26 (3) of the Constitution permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that Article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in Article 50 (1) of the Constitution must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.

.....

[69] Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty.”

88. In addition, the Supreme Court said at para 111 of the said judgment that:

“It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein ...”

89. Section 204 of the *Penal Code* provides that “Any person convicted for murder shall be sentenced to death.” Similarly section 296(2) of the *Penal Code* provides that the offender convicted for robbery with violence in circumstances stipulated therein “shall be sentenced to death.”

90. That the principles enunciated in the *Muruatetu Case* apply to the offence of Robbery with Violence was appreciated by the Court of Appeal in William Okungu Kittiny vs. Republic, Court of Appeal, Kisumu Criminal Appeal No. 56 of 2013 [2018] eKLR where it held that at paras 8 and 9 that:

[8] Robbery with violence as provided by Section 296 (2) and attempted robbery with violence as provided under Section 297 (2) respectively provide that the offender:-

“...shall be sentenced to death.”

The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27 (1) of the Constitution, every person has *inter alia*, the right to equal protection and equal benefit of the law. Although the *Muruatetu's* case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general.

.....

[9] From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies *mutatis mutandis* to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution.”

91. The effect of the said decisions in my view is and I hold that while the death penalty is not outlawed, but is still applicable as a discretionary maximum penalty for the offence of robbery with violence, section 296(2) of the *Penal Code* is however inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for the offence of robbery with violence. It therefore follows that the sentence of death imposed on the appellant ought to be revisited.

92. In **Rajab Iddi Mubarak vs. Republic [2018] eKLR** it was held that:

“Like Section 204, section 296(2) of the Penal Code that provides a mandatory death sentence, and therefore the principle enunciated by the Supreme Court would apply in this case. It is clear that the trial magistrate was of the view that the only lawful sentence for robbery with violence under section 296(2) of the Penal Code is death. This is a clear indication that the trial magistrate did not exercise her discretion in sentencing. Although the appellant did not say anything in mitigation, opting to maintain his innocence, he was treated as a first offender and therefore ought not to have been given the maximum penalty of death. This was a factor not considered by the first appellate court.”

93. This being the first appeal, this Court has jurisdiction to pass any appropriate sentence that the trial magistrate’s court could have lawfully passed. That jurisdiction, in my view, calls for a consideration of the circumstances under which it should be exercised so that it is exercised judicially rather than arbitrarily. As the Supreme Court appreciated in the **Muruatetu’s case** (supra) at paras 41-43:

“It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage too. Pursuant to Sections 216 and 329 of the Criminal Procedure Code, Chapter 75, Laws of Kenya, mitigation is a part of the trial process. Section 216 provides:

The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.

Section 329 of the Criminal Procedure Code provides:

The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency.”

94. The Court found that due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. At paragraph 71 of its judgement, the Supreme Court in the **Muruatetu’s case** (supra), while making it clear that it was not replacing judicial discretion, and in order to avoid a lacuna, advised the Courts to apply the guidelines set out hereinbelow with regard to mitigating factors in a re-hearing sentence for the conviction of a murder charge. In my view there is no reason why the same principles cannot apply to an appeal against a sentence for conviction of robbery with violence.

95. As regards the factors that ought to be considered in sentencing, the said Court held that:

“Although the appellant did not say anything in mitigation, opting to maintain his innocence, he was treated as a first offender and therefore ought not to have been given the maximum penalty of death. This was a factor not considered by the first appellate court. We find that in the circumstances of this case given the injuries suffered by the complainant and the items of which he was robbed, and the appellant being treated as a first offender, a term of fifteen (15) years imprisonment would be an appropriate sentence.”

96. As a guide in sentence re-hearing the Supreme Court in **Muruatetu Case** (supra) held that:

“[71] As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

97. As appreciated by the Supreme Court in *Muruatetu Case* (supra):

“Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR*, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

1. *Retribution: To punish the offender for his/her criminal conduct in a just manner.*
2. *Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.*
3. *Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.*
4. *Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.*
5. *Community protection: To protect the community by incapacitating the offender.*
6. *Denunciation: To communicate the community’s condemnation of the criminal conduct.”*

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.”

98. However, in the case of the first appeal and where the period spent in custody is not very long, the Court may well proceed to pass an appropriate sentence.

99. Although the Supreme Court did not outlaw the death sentence, I am of the view that in the circumstances of this case, the death sentence was not warranted. As was held in *Bachan Singh vs. The State of Punjab (Bachan Singh) Criminal Appeal No. 273 of 1979 AIR (1980) SC 898* a decision cited in the *Muruatetu’s case* (supra):

“It is only if the offense is of an exceptionally depraved and heinous character, and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the Court may impose the death sentence.”

100. Similarly cited was the decision of the Privy Council in *Spence vs. The Queen; Hughes vs. the Queen (Spence & Hughes)* (unreported, 2 April 2001) where Byron CJ was of the view that:

“In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty.”

101. Consequently, I am not satisfied that the case against the 2nd appellant was proved beyond reasonable doubt. His conviction is hereby set aside and the sentence imposed against him quashed. He is at liberty to be set free forthwith unless otherwise lawfully held.

102. As for the 1st appellant, I find no basis for interfering with the trial court's findings on his conviction which I hereby confirm.

103. Regarding the sentence, this was not just a case of robbery with violence, but the said robbery led to the death of the deceased. Although the 1st appellant was afforded an opportunity to mitigate, he chose to say nothing. He was however treated as a first offender. In my view, though the offence carries death sentence, the same ought not to have been meted against him. In the premises, the sentence of death imposed against him is hereby set aside and substituted therewith to a sentence of 20 years' imprisonment. The said sentence will take into account the period of his incarceration.

104. Orders accordingly.

Judgement read, signed and delivered in open court at Machakos this 26th day of February, 2019.

G V ODUNGA

JUDGE

In the presence of:

Appellants in person

Miss Mogoi for the Respondent

CA Josephine