



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 1 OF 2017

ISAAC MUSYOKI MUOKI

ISAAC MUKULA MWEI.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(From original Judgement, conviction and sentence in Machakos Chief Magistrate's

Court Criminal Case No. 432 of 2015, Hon. L Simiyu, SRM on 30th December, 2016)

BETWEEN

REPUBLIC.....PROSECUTOR

AND

ISAAC MUSYOKI MUOKI

ISAAC MUKULA MWEI.....ACCUSED

JUDGEMENT

1. The appellants herein, **Isaac Musyoki Muoki** and **Isaac Mukula Mwei** were charged before the Chief Magistrate's Court, Machakos in Criminal Case No. 432 of 2015 with the offence of robbery with violence contrary to section 296(2) of the **Penal Code**. The particulars of the offence were that on the 11th day of March, 2015 at around 02.00 am at Miwani area in Sub County, jointly with others not before the court, while armed with dangerous offensive weapons, namely bolt cutter, spanner and iron rod robbed **Francis Waweru Gatoto** one motor cycle make Boxer Registration number KMDD 456T colour blue valued at Kshs 80,000.00 and at or immediately before or immediately after the time of such robbery used actual violence to the said **Francis Waweru Gatoto**.

2. After hearing the case, the Learned Trial Magistrate convicted the appellants herein and proceeded to sentence them to what in his view was the mandatory death sentence.

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

1. The Learned Trial Magistrate erred grossly in law and fact when he convicted the appellants yet failed to find that the alleged mode of arrest was not clearly proved as evidence adduced remained incredible.

2. The Learned Trial Magistrate erred grossly in law and fact when he convicted the appellants yet failed to find that the recovery of the alleged motor bike exonerated them from its possession.

3. **The Learned Trial Magistrate erred grossly in law and fact when he convicted the appellants yet failed to find that the charges preferred amounted to a duplex charge.**
4. **The Learned Trial Magistrate erred grossly in law and fact when he convicted the appellants yet failed to find that crucial witnesses didn't testify.**
5. **The High Court (sic) erred in law in failing to observe that the provision of section 169(1) of the Criminal Procedure Code was contravened in dismissing their defence.**
6. **The Learned Trial Magistrate erred grossly in law and fact when he relied on evidence of chase and arrest, yet failed to find that the same wasn't consistent and sound.**
7. **The Learned Trial Magistrate erred grossly in law and fact when he relied on claims of recovery of the allegedly stolen motor cycle to apply the doctrine of recent possession.**
8. **The Learned Trial Magistrate erred grossly in law and fact when he convicted on unfair trial in violation of Article 50(2) (h) of the Constitution.**
9. **The Learned Trial Magistrate erred grossly in law and fact when he convicted the appellants yet failed to find that the most crucial witness did not testify contrary to section 150 of the Criminal Procedure Code.**
10. **The Learned Trial Magistrate erred grossly in law and fact when he dismissed their plausible defence and failed to consider their mitigation.**

4. At the trial, the prosecution called 6 witnesses.

5. According to the complainant, **Francis Waweru Gatoto**, he was a *bodaboda* rider employed by Nicholas Kiambi and was using motor cycle registration no. KMDD 456T, blue in colour. On 10th March, 2015 at 8.00pm he went home and parked his motor cycle at Kwa Ndungú plot and went to sleep. However his lights were still on as well as the security lights outside when at midnight he was woken by a loud bang at the main gate and upon peeping through the window he was a hand opening the padlock. Two men then entered and cut the chain using a red clipper scissors and the gate fell open. It was his evidence that in total there were four men. They jumped on his motor cycle and pushed it out and when his wife screamed she was ordered to be silent. Later the complainant went out and screamed but to no avail. The next morning, he reported the matter to the police and was told that a motor cycle had been recovered though the one he was shown had no number plate. The plate was however shown to him and he identified both in court.

6. It was his evidence that the invaders had covered their faces using handkerchief/pieces of clothes hence he could not recognise them. They were strangers to him and the first time he saw the appellants was at the police station. It was his evidence that the gate had two doors and the small one had a padlock that was opened and two men entered.

7. PW2, **Johnson Kimeu Nzioki**, a driver at Machakos Funeral Home was on 10th March, 2015 asleep when at about 1.00 am he heard the gate being knocked. Upon waking and peeping out he saw a man push a hand into the gate and try to open it. Through the small entry point at the main gate a man entered and three others followed. They then struggled with the main gate and when PW2 screamed, he was ordered to remain silent or he would be shot. Accordingly, he went silent as the men cut the chain and opened the big gate. One brown tall man with a brown trouser ran to the motor cycle, pushed it towards the big gate and ran away. The witness then called out the neighbours and they pushed back the gate and returned to their houses. He subsequently reported the incident. In court he identified the said motor cycle as well as the clipper. It was his evidence that the man who rushed to pick the motor cycle had partially covered his face but he saw the face when he turned the bike near his window. He identified him as the 1st appellant whom he had known previously. Though his lights were out, he stated that the security lights were on

8. PW3, **Nicholas Mwirigi Kiambi**, testified that he owned motor cycle registration no. KMDD 456T which he bought on 7th December, 2013 and was issued with a receipt and Logbook by Makindu Motors. He had however not transferred the same into his name. He however produced the log book, transfer form, ID, Insurance Certificate, Receipt and Delivery Note as exhibits.

9. On the morning of 10th March, 2014, he was called by his rider, PW1 at 2.00 am and was informed that burglars had broken into PW1's home and stolen the motor cycle. PW1 informed him that he had woken up to pursue the motor cycle by he advised him not to risk his life in the process but instead report the matter to the police. The next morning, PW3 reported the matter to the police where he was informed that the motor cycle had been recovered and upon being shown the same he identified it. He was also shown a bag and the number plate recovered from some suspects. He identified the motor cycle and the number plate in court. The said arrested suspects were however strangers to him.

10. PW4, **Cpl Willy Chepkonga**, was on 11th March, 2015 at 6.00 am in the office when he was called by a member of the public who reported that there were two suspicious people pushing a motor cycle in town and that each had a bag but the motor cycle had no number plate. He rushed to the scene and saw a group of people and two men with a motor cycle. The two men tried to flee but members of the public gave a chase and they were apprehended. In his evidence he rescued the said men from being lynched by firing two shots in the air to disperse the big crowd. Two civilians then assisted him to push the bike back to the station where he searched the bags and did an inventory. According to him, the 1st appellant had a black bag, black scarf, blue muffin, black jacket and bolt cutter while the 2nd appellant had a jungle green bag containing a number plate KMDD 456t, air pump, two small torches, pliers, spanner, red radio, scarf, muffin and black jacket. He produced the same as exhibits. He handed over the appellants to the DCIO.

11. PW5, **Boniface Kiio Munyao**, a shop keeper and *boda boda* rider was on 11th March, 2015 at 6.00 am opening his shop to take out his bike when he saw a suspicious motor cycle being pushed without a number plate. He proceeded to alert some civilians and left his wife at the shop while he followed the two men in the company of other riders. When they met the two men, each was carrying a bag and when the two men saw then closing down on them, they threw down the bags and the bike and fled. In the course of their attempt to flee the 2nd appellant was knocked down by a motor cycle and was captured by the riders who apprehended the appellants after which the two men showed them the hidden bike and the bags. Fearing that the appellants would be lynched, PW5 ran to the police to report. According to him, his suspicions were aroused by the fact that the bike had no number plates and it was blue boxer model which was unique at that time. PW5 proceeded to identify the appellants. Though he had not seen the 1st appellant previously, it was his evidence that he clearly saw him because it was daylight and he followed him up to the station. According to him, when the police opened the bag he saw a pliers, a big scissors and number plate. He testified that when the 1st appellant was arrested he still had the black bag.

12. PW6, **PC James Kalama Nzui**, the investigating officer testified that on 11th March, 2015 he was at the CID offices Machakos when at 9.00 am Flying Squad officers went to the office with two suspects. He was then detailed by the DCIO to investigate the matter. He interviewed the witnesses and the appellants and collected the evidence which were produced as exhibits. In his evidence, no identification parade was conducted.

13. Upon being placed on their defence, the 1st appellant testified that he was at his place of work at a Kyumbi hotel when he was called by a police officer who pointed out someone standing outside the hotel and inquired from him if he knew them. Upon denying knowing them he was arrested at taken to Kyumbi Police Station and was later charged with the offence. According to him, he was arrested at work and knew nothing about the complainant or the offence. According to him, on the night of 10th and 11th he was at his house where he lived alone.

14. On his part, the 2nd appellants testified that he was selling clothes and on 11th March, 2015, he woke up at 6.00 am and left for his work. He then met a police officer with some civilians who arrested him and took him to Kyumbi Police Station where he was charged with the offence he knew nothing about.

15. In his judgement, the learned trial magistrate found that based both on the identification of the appellants and the doctrine of recent possession the appellants committed the offence.

16. In this appeal, the appellants submit that since there was a break between the time the persons pushing the motor cycle was seen and the time the appellants were arrested the possibility of mistaken arrest cannot be ruled out. It was further submitted that the failure to inform the appellants of their rights to legal counsel rendered the whole process unfair. It was submitted that the appellants were arrested on mere suspicion and that their plausible defences were never accorded adequate consideration.

Determinations

17. This being a first appeal, the court is expected to analyse and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it 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.”

18. 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.”

19. 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.

20. In this case, the complainant's case in summary was that on the night of 10th March, 2015, he was sleeping in house having parked PW3's motor cycle outside the house when four people broke into the compound and spirited his said bike away. When his wife screamed he was silenced by the said assailant. Due to the camouflage by the attackers he was unable to identify them. PW2 was asleep in the same compound when he was awoken by a commotion and upon peeping outside saw people force themselves into the compound and one of them, the 1st appellant push the said motor cycle away. PW5 was the following morning opening his shop when he saw two people pushing a motor cycle without a number plate. Being suspicious he alerted members of the public and upon chasing the said persons, they abandoned the motor cycle in the bush together with the bags they had and tried to flee but were apprehended by the members of the public. The arrested persons were the appellants herein. Based on the report made by PW2, PW3 went to the scene, saw the appellants and a mob and then saw the appellants attempt to flee but were apprehended by the mob. He then rescued the appellants from being lynched.

21. It is clear that the people who raided the complainant's compound were strangers to him and they camouflaged their identities hence he never identified them. PW2 testified that he was able to identify the 1st appellant as someone he knew. Accordingly, his evidence as against the 1st appellant was that of recognition as opposed to identification. In Anjononi & Others vs. The Republic [1980] KLR 59, it was held that:-

"...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

22. It was however the evidence of PW2 that he was already asleep at the time he was woken up by the commotion. He only fleetingly saw the person who took the motor cycle when the person turned his face. He did not indicate for how long he observed the partly covered face of the person. Though his evidence as regards the 1st appellant was that of recognition, it was noted in R vs. Turnbull (1976) 3 All E.R 549 that:

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

23. It was therefore held by the Court of Appeal in Peter Musau Mwanzia vs. Republic [2008] eKLR, as follows:

"...for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident."

24. In Ali Mlako Mwero vs. Republic [2011] eKLR the Court of Appeal expressed itself as follows:

"The identification of the appellant in this case lay not only on the visual features observed by Mesalim but also on his recognition by that witness. We agree with Mr. Oguk, that in either case, the evidence ought to be tested with utmost care because it is not unknown for a witness to be honest but mistaken. So may a number of them; see Roria v R [1967] EA 583."

25. All factors considered, I am not satisfied that the evidence of PW2 regarding the identification of the 1st appellant that night can be said to have been free from error. It cannot be relied upon as the basis for sustaining the 1st appellant's conviction.

26. That notwithstanding, there is evidence that the appellants were in a matter of a few hours found in possession of the stolen motor cycle. When confronted, they attempted to flee but were apprehended.

27. Delivering the judgment for the majority, **McIntyre J.** in the Canadian Supreme court case of Republic vs. Kowkyk (1988)2 SCR 59 explored at length the history of the doctrine of recent possession in various decisions from its roots in the nineteenth century in England and Canada and said in part:

"Before going further, it will be worthwhile to recognize what is involved in the so called doctrine of recent possession. It is difficult, indeed, to call it a doctrine for nothing is taught, nor can it properly be said to refer to a presumption arising from the unexplained possession of stolen property, since no necessary conclusion arises from it. Laskin J. (as he then was) (Hall J. concurring) in a concurring judgment in R. v. Graham, supra, said at p. 215:

"The use of the term 'presumption', which has been associated with the doctrine, is too broad, and the word which properly ought to be substituted is 'inference'. In brief, where unexplained recent possession and that the goods were stolen are established by the Crown in a prosecution for possessing stolen goods, it is proper to instruct the jury or, if none, it is proper for the trial judge to proceed on the footing that an inference of guilty knowledge, upon which, failing other evidence to the contrary, a conviction can rest, may (but, not must) be drawn against the accused."

He went on to point out that two questions, that of recency of possession and that of the contemporaneity of any explanation,

must be disposed of before the inference may properly be drawn. He made it clear that no adverse inference could be drawn against an accused from the fact of possession alone unless it were recent, and that if a pre-trial explanation of such possession were given by the accused and if it possessed that degree of contemporaneity making evidence of it admissible, no adverse inference could be drawn on the basis of recent possession alone if the explanation were one which could reasonably be true. Implicit in Laskin J.'s words that recent possession alone will not justify an inference of guilt, where a contemporaneous explanation has been offered, is the proposition that in the absence of such explanation recent possession alone is quite sufficient to raise a factual inference of theft."

28. In the end, the majority of that Supreme Court accepted the following summary of the doctrine:-

"Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply."

29. In Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Cr App. No. 272 of 2005(UR), the Court of Appeal held that:

"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:

- i). that the property was found with the suspect;**
- ii). that the property is positively the property of the complainant;**
- iii). that the property was stolen from the complainant;**
- iv). 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."

30. The applicability of the doctrine of recent possession was dealt with in Erick Otieno Arum vs. Republic [2006] eKLR where the Court of Appeal held that:

"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; that 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. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version. That duty as has been said is wholly on the trial court and on the first appellate court. This court has no such duty on hearing a second appeal such as before us but if it be satisfied that that duty has not been fully discharged by the first appellate court then it will take the line that had it been done either or both courts would have arrived at a different conclusion."

31. In this case the evidence was that the stolen property was in possession of the appellants who were attempted to flee. It is not in doubt that the same was stolen a few hours earlier and it is not controverted that the same belonged to PW3. A motor cycle, unlike a shirt for example, is not an article whose movement from one person to another is easy.

32. Just like the learned trial magistrate, I believe the evidence of PW5 and PW4 as regards the manner in which the appellants were apprehended. I am therefore satisfied that the above ingredients of recent possession were proved by the prosecution.

33. The appellants further contended that their rights to a fair trial under Article 50(2)(h) of the Constitution were infringed. Article 50(2)(h) of the Constitution provides for the right of an accused person; -

"(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

34. The appellants argued that though they were entitled to legal representation at state's expense in the trial court, the State failed to provide such legal representation and neither was he informed of their rights. It is true that the appellants were unrepresented during their trial.

However, just like **Mrima, J** noted in **Lawrence Ombunga Otondi & Another vs. Republic [2016] eKLR**, I did not hear them say that they informed the trial court that they could not afford the services of a legal representative and as such needed the court's intervention.

35. According to the Constitution, the right to legal representation to an accused person by the State and at the State's expense crystallizes when substantial injustice would otherwise result. The Court of Appeal in the case of **David Macharia Njoroge vs. Republic (2011) eKLR** analysed several aspects of this right and as regards the applicability of Article 50 of the Constitution, the Court held as follows: -

“State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

We are of the considered view that in addition to situations where ‘substantial injustice would otherwise result.’ persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.”

36. The same court differently constituted in the case of **Karisa Chengo & 2 Others vs. Republic Criminal Appeal Nos. 44, 45 and 76 of 2014** dealt with the same issue at length and in finding that the appellants' right was not infringed for want of proof that the appellants could not afford legal representation, expressed itself as hereunder: -

“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.

Again, this Court differently constituted in the case of Moses Gitonga Kimani vs. Republic, Meru Criminal Appeal No. 69 of 2013, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows: -

“It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation.”

It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution.

The problem of lack of legal representation for persons charged with capital offences cannot be wished away, it is here with us and there is therefore need to have legislation in place as it would guide how that right would be achieved and be in line with the internationally acceptable standards. To that end, we strongly urge Parliament to fast track the enactment of the envisaged legislation under Article 261 of the Constitution. The legislation would entail a comprehensive approach that would address the issue of realization of the right to legal representation at the state's expense and should be done in close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in Articles 9 and 10 of the Constitution. The Attorney General must therefore move with speed and jump start the process leading to the enactment of that legislation. However, we take comfort in the fact that the draft legal aid bill is in the works. We believe this would be crucial in enabling the State to meet and fulfil its obligations with regard to the fulfilment of the Bill of Rights under Article 19 of the Constitution. As regards the denial of that representation in the instant case, we do not think that an acquittal is the remedy available to the appellants as they submitted. It cannot have been the intention of the framers of the Constitution, to halt all criminal prosecutions of persons charged with capital offences until the implementation of a scheme to provide legal representation to all persons charged with such offences. Sadly, again an acquittal is not the remedy available to the appellants even if their right was violated in the trial court. This Court in **Julius Kamau Mbugua v Republic Criminal Appeal No. 50 of 2008 has held that an acquittal is not an appropriate remedy where the alleged violation of fundamental rights of the accused has been proved. Nor did the appellant point out that the substantial injustice was caused to them by such failure. The respective records show that they were never inhibited at all in the prosecution of their cases during the trial. They actively participated in their trials and subjected to intense cross-examination the witnesses availed by the prosecution. We therefore discern no substantial injustice occasioned to the**

appellants by the State's failure to accord them legal representation. This ground must of necessity therefore fail.”

37. Based on the foregoing, **Mrima, J** in Lawrence Ombunga Otondi & Another vs. Republic (supra) noted that:

“They further actively participated in their trials and subjected witnesses to intense examination. I hence find that no injustice was occasioned to them by the State's failure to accord them legal representation. Turning to the submission that the appellants' right under Article 50(2)(h) of the Constitution was infringed, I wish to point out that I have carefully gone through the record before the trial court and did not find anywhere where the appellants protested to the court that they needed time and any particular facilities to aid him prepare their defence.”

38. I associate myself with the said findings and I have no reason for interfering with the appellants' conviction.

39. 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.”

40. 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.”

41. 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) (q) 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.”

42. 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.”

43. 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 ...”

44. 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.”

45. 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.”

46. 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 appellants, based as it were, on the view that the offence with which the appellants were charged carried a mandatory death sentence, ought to be revisited.

47. Accordingly, this being the first appeal, this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate’s court could have lawfully passed. That jurisdiction, in my view calls for circumstances in which it should be exercised so that it exercised judicially rather than arbitrarily. In William Okungu Kittiny Case, the said Court noted 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.”

48. 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.

49. 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.

50. 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.”

51. 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.”

52. Therefore, whereas death sentence has not been declared unlawful and may still be lawfully imposed where there exist the most exceptional and appropriate circumstances, it is no longer mandatory to impose such a sentence where the facts do not cry out for the same. In my view in situations where the law prescribes a grave sentence, the Court in imposing the sentence ought to give reasons for imposing a particular sentence so that the act of sentencing does not become arbitrary.

53. I associate myself with views of **J. Ngugi, J** in **Benson Ochieng & Another vs. Republic [2018] eKLR** that:

“Re-phrasing the *Sentencing Guidelines*, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years imprisonment). These are the following:

a. Circumstances Surrounding the Commission of the Offence: The factors here include:

- i. Was the Offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence.
- ii. Was the offender armed with a gun?
- iii. Was the gun an assault weapon such as AK47?

iv. Did the offender use excessive, flagrant or gratuitous force?

v. Was the offender part of an organized gang?

vi. Were there multiple victims?

vii. Did the offender repeatedly assault or attack the same victim?

b. Circumstances Surrounding the Offender: The factors here include the following:

i. The criminal history of the offender: being a first offender is a mitigating factor;

ii. The remorse of the Applicant as expressed at the time of conviction;

iii. The remorse of the Applicant presently;

iv. Demonstrable evidence that the Applicant has reformed while in prison;

v. Demonstrable capacity for rehabilitation;

vi. Potential for re-integration with the community;

vii. The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind.

c. Circumstances Surrounding the Victim: The factors to be considered here include:

i. The impact of the offence on the victims (if known or knowable);

ii. Whether the victim got injured, and if so the extent of the injury;

iii. Whether there were serious psychological effects on the victim;

iv. The views of the victim(s) regarding the appropriate sentence;

v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;

vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and

vii. Whether there been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime."

54. In this case the only factor that aggravated the offence was that it was committed in company of other persons. There is no evidence that any weapon was involved since the implements with which the appellants were found are ordinarily not dangerous weapons. As appreciated by the Court of Appeal in Manuel Legasiani & 3 Others vs. Republic [2000] eKLR:

"It was held in the case of Mwaura & others vs. Republic (1973) EA 373 that although there is no definition of "dangerous or offensive weapon" specifically applicable to section 308(1) of the Penal Code it ought to be shown that the weapon was one which could have caused injury. With respect, we agree with that decision. Earlier authorities show that a home-made gun had to be proved, by evidence, to be a lethal barreled weapon. See Mwangi s/o Njoroge vs. R (1954) 21 E.A.C.A. 377 and Gatheru s/o Njagwara vs. R (1954) 21 E.A.C.A. 384. There being no such evidence in the trial court the evidence as regards preparation to commit a felony with a weapon falls short of evidential requirements. Coming to the other two items, namely the torch and the knife we can say straight away that a torch is not an offensive weapon. A knife, per se, is not a weapon of offence although it could be so used. There was no evidence however that the knife was in any manner shown to have been used or even attempted to be shown to be used so as to support the prosecution case." [Emphasis mine].

55. Apart from that, there is similarly no evidence that any injuries were inflicted on the victim. The appellants have been in custody since 11th March, 2015, a period of about 2½ years. This however does not make the offence any lighter since the assailants were in company with one or more other person or persons. Secondly, the stolen article was recovered.

56. Consequently, I set aside the death sentence imposed upon the appellants and substitute therefor a sentence of 15 years' imprisonment to run from 11th March, 2015 when they were arrested.

57. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 30th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Appellants in person

Ms Mogoi for the Respondent

CA Geoffrey