REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL 84 OF 2002

TITUS NGOVI MUTHUSI Alias Onesmus.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Machakos SPM's Court

Criminal Case No. 1026 of 2001, Hon. SMS SOITA, SRM on 16th April, 2002)

BETWEEN

REPUBLIC.....PROSECUTOR

AND

TITUS NGOVI MUTHUSI Alias Onesmus.....ACCUSED

JUDGEMENT

1. The appellant herein **Titus Ngovi Muthusi Alias Onesmus** was charged **in Machakos SPM's Court Criminal Case No. 1026 of 2001** 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 6th day of September, 2000, in Muani Village in Makueni District being armed with a Masai sword and jointly with another robbed **Paul Mutuku Kiswii** cash of 4,000/- and a coat valued at Kshs 2,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said **Paul Mutuku Kiswii**.

2. After the hearing the appellant was found guilty of the same, convicted accordingly and was sentenced to death. The learned trial magistrate found that the appellant was properly identified since the robbery took place when there was bright moonlight and the appellant was well known to the complainant. The evidence of the complainant that the appellant sustained injuries when both the appellant and the complainant held the sword which a co-attacker was using was corroborated with the injuries seen on the appellant by other witnesses. Accordingly, the court found the case proved and convicted the appellant accordingly.

3. The summary of the prosecution case was that on 6th September, 2001 at 6.55pm PW1 was riding his bicycle from the market towards his home when on the way found two boys namely the appellant and one **Kinyae** Phillip standing next to the road. Being apprehensive, he stopped about 10 metres away and asked them what was wrong. However, the two started running towards him and the appellant jumped to kick him but missed. He then wrestled the complainant to the ground. While on the ground **Kinyae**, went and cut him on the head. At this point the complaint went for the sword and both himself and the appellant held the sword. When the said **Kinyae** pulled the sword both the complainant and the appellant were cut. The appellant then released him and **Kinyae** cut him on the back.

4. When PW1 managed to stand up the appellant removed his coat while demanding for money while **Kinyae** was ransacking his trouser pocket. While his coat had 7,000/- his trouser pocket had no money. The attackers then ran away leaving him there. After they left the complainant collected his notebook and his bicycle and proceeded towards his home. At the gate of Muani Primary School, he met two other young boys who had been alerted by his screams coming towards his direction. These were **Mutua Mutisya,** PW5 and **Muli Mutua** to whom he explained what had happened and they escorted him home. Where he arrived just when the 7pm news was coming to an end.

5. According to PW1, he sent for his brother and was taken to Sultan Hamud Police Station where he reported the incident after which he went to Sultan Hamud health Centre where he was treated and referred to Machakos General Hospital. He however went to Bishop Kioko Hospital where he was admitted for 4 days. According to him, whereas **Kinyae** was arrested in October, 200, the appellant was only arrested April, 2001 as he was at large.

6. PW1 testified that he was issued with a P3 form which was duly filled in. According to him, he disclosed the names of his attackers on the very day of the attack to his brothers while being taken for treatment.

7. According to PW1 he was not aware that he was going to be attacked. However, at that time it was around 7pm and there was bright moonlight and he knew the appellant very well, the appellant having been employed by PW1's brother. He stated that he screamed 3 times. . It was his evidence that due to excessive bleeding he lost consciousness and regained it at the Hospital.

8. PW2, **Bernard Wambua Mwania**, a watchman was on 6th September, 2000 at 7pm on duty when he saw the appellant, who had been engaged to take care of animals. Earlier on at 6pm he had seen the appellant in the company of **Kinyae Philip**. However, the second time the appellant was alone and went to the shop and disclosed that he had been attacked by thugs and his right hand was bleeding. The following day the appellant went to him to borrow a cigarette and at that time people were discussing the attack on PW1. At that time the appellant left and he saw him carrying his bag and was never seen by him again.

9. PW3, **Elijah Mukite** was the appellant's employer. According to him, on 6th September, 2000 the appellant left for the market at 1pm. The following day when he saw the appellant, the appellant had an injury on his palm and upon being asked the cause of the injury he said that in the company of **Kinyae**, they had met robbers at Mwatineu and had been injured. At 8am when PW2 returned he found the appellant gone. Later at mid-day he heard of PW1's incident and when he checked the hose where the appellant was staying he found his personal properties gone. It was his evidence that **Kinyae** had also disappeared. In cross-examination the witness confirmed that the injury was on the appellant's right pal.

10. PW4, **Fidelis Musyoki Kiswii**, the complainant's brother testified that the appellant was his worker in 1996. On 6th September, 200 he was at home when the complainant's son went to inform him that the complainant had been badly attacked. He rushed there and found the complainant with multiple injuries. Upon inquiring from him what happened the complainant informed him that he was attacked by the appellant and **Philip Kinyae** both which whom were known to PW4. PW4 then went to look for a vehicle but upon his return found the complainant unconscious. He then took him to Sultan Hamud Health Centre, Machakos District Hospital then to Bishop Kioko Hospital where the complainant was admitted. Upon returning home, he found **Kinyae** gone. Hr however recovered the complainant's coat near **Kinyae**'s home 100 metres away and handed it over to the police.

11. PW5, **Mutua Mutisya** was on 6th September, 200 at 7pm at home when he heard screams on the road. Upon going to check, on the way he met **Muli Mutua** with whom they proceeded. At the gate of Muani Primary School, they met the complainant bleeding. Upon inquiring from him what had happened, the complainant informed them that he had been attacked by the appellant and **Kinyae** who had stolen from him Kshs 4,000/= and a coat. They then escorted him to his home and his brother was sent for and came and the complainant was taken to the hospitals.

12. In his unsworn testimony the appellant stated that the allegations were unknown to him. According to him, on the morning of the day in question, he went grazing till 4pm. Upon his return he went to the shop to buy cigarettes. He met the village elder with two strangers and he was tied and taken to the cells. Later, he was taken to Kibwezi Police Station where he was for a week before being taken to Sultan Hamud for another one week before he was charged with the offence.

13. In this appeal the appellant contends that since it was at night there is a doubt as to whether the complainant was able to identify his assailants clearly. The appellant also raised the issue whether the complainant in his first report to the police disclosed the names of his assailants. In this regard the appellant relied on the case of **Wanjohi and Others vs. R [1989] KLR 415**. It was noted that in this case the case rested on the evidence of a single identifying witness and according to the appellant the test in **Abdalla Bin Wendo and Another vs. R [1953] 20 EACA 166** were not met. It was also contended that the complainant's evidence as to the amount of money he lost raised doubts regarding his credibility and reliance was placed on **Ndungu Kimanyi vs. [1979] KLR**.

14. It was the appellant's contention that in the absence of the medical reports, the offence was not proved.

15. According to the appellant none of the other 5 witnesses witnessed the crime being committed. He contended that the said 5 witnesses were all related to the complainant and that no independent witness was called. He also took issue with the failure to call the arresting officer and the investigation officer. Accordingly, it was submitted that the case was never proved beyond reasonable doubt.

16. As regards the sentence the appellant relied on the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015** and submitted that the mandatory deaths sentence has been abolished. He urged the court to find that the time already served in prison is sufficient.

17. On behalf of the Respondent, it was submitted by **Ms Mogoi**, learned prosecution counsel that from the evidence the appellant was in the company of another and they were armed with a dangerous weapon namely Somali sword and that they did injure the complainant. It was further submitted that from the evidence the complainant reported to the first people he met that he had been assaulted by the appellant and the attack having occurred at 7pm when there was bright moonlight there was no possibility of mistaken identity. Though the identification was by single witness, it was submitted that this being a case of recognition, and the injuries that the appellant sustained as well as his act of fleeing from the area confirmed his involvement. To learned counsel, the appellant's defence was a mere denial that did not shake the prosecution's case. The Court was urged to uphold the conviction but based on the ***Muruatetu*** decision mete an appropriate sentence.

Determinations

18. I have considered the material placed before the Court. This is a first appellate court, this court is obliged to analyse and evaluated afresh all the evidence adduced before the lower court and to 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."**

19. Similarly, 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. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

21. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

> **"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:**
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> **'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"**

22. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

> **"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."**

23. In this case the summary of the prosecution case is that the complainant was riding his bicycle home at around 7pm when he met the appellant with one **Kinyae** on the road. He was then attacked by the said persons whom he knew and they robbed him of his coat containing some cash. In the process of the robbery the complainant sustained some serious injuries from which he was admitted in hospital. However, in the same process the appellant also sustained injuries in his hand when the Somali sword that his co-assailant had was pulled by the latter which it was being held by both of them. PW2, confirmed that at around that time the appellant went to the shop he was guarding with his right hand bleeding and disclosed that he had been attacked by thugs. That the appellant had sustained injuries in his right palm was also corroborated by his employer, PW3, who stated that the appellant had an injury on his palm and upon being asked the cause of the injury he said that in the company of **Kinyae**, they had met robbers at Mwatineu and had been injured.

24. Whereas the issue here was one of identification by one witness, the case was one of recognition since the complainant stated that he knew the assailants. In **Wamunga versus Republic (1989) KLR 424** the Court of Appeal spoke of the evidence of identification generally in the following terms:

> **"It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."**

25. It was appreciated in **Ogeto versus Republic (2004) KLR 19** that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult. According to the Court:

"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken."

26. That was the position in **Abdala bin Wendo & Another versus Republic (1953), 20 EACA 166** where it held that:

"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

27. While it is true that this was evidence of a single witness, as it was held in **Anjononi & Others vs. The Republic [1980] KLR 59**: -

"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an 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."

28. It is true as was appreciated in in **Criminal Appeal No. 24 of 2000 Paul Etole & Reuben Ombima versus Republic** that though recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognize someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. However, in this case immediately after the incident, the appellant was seen with injuries in his right palm hand. He admitted that at the time that he sustained the injuries, he was with the said **Kinyae**. The complainant disclosed the identity of his attackers to the very first person he met, PW5. All these facts disclose consistency that it was the appellant and the said **Kinyae** who attacked the complainant. To further show the appellant's culpability, when he heard the incident being discussed he disappeared from the area. In **Malowa vs. The Republic [1980] KLR 110**, **Madan, Law and Potter, JJA** held that:

"The judge held, on the authority of Terikabi vs. Uganda [1975] EA 60, that corroboration of the evidence of Paulina and of the dying declarations of Blazio was provided by the conduct of Malowa, in disappearing from his home immediately after the murder to avoid arrest, and in remaining absent for six months; and he was left with no reasonable doubt that Malowa was guilty of the murder of Blazio. We see no reason to differ."

29. There was ample evidence that the appellant attacked the complainant. He was in the company of **Kinyae** and they were armed with a Somali sword. Whereas the treatment documents were not produced, there was sufficient evidence from the other witnesses that the complainant was injured in the process of the robbery. While there was discrepancy regarding the amount of money that the complainant lost, apart from the money the assailants took the complainant's coat. I do not place much premium on the failure to call the arresting officer.

30. In the premises, I find that the case against the appellant was proved beyond reasonable doubt and there is no warrant in interfering therewith.

31. Regarding 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."

32. 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), *t*he 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."

33. 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:**
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> **"*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."***
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> **[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.**
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> **[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."**

34. 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.**
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> **……**
>
> **[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."**

35. 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 …"**

36. 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."*

37. 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."

38. 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.

39. 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."

40. 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.

41. 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."

42. 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."

43. 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 nolonger mandatory to impose such a sentence where the facts to 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.

44. 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."

45. In this case, the attackers were armed with a Somali sword. In the process of the robbery the complainant sustained serious injuries and lost consciousness and was admitted in hospital. He also lost money.

46. In **Robert Mutashi Auda vs. Republic Crimial Appeal No. 247 of 2014**, the appellant in the company of others boarded a *matatu* and proceeded to rob the passengers therein. There was no evidence at all that they were armed. The Court of Appeal considered the fact that there were no injuries inflicted on the victims and that the appellant had already served 13 years which it considered sufficient retribution. Accordingly, the Court reduced the sentence to the period already served which was 13 years. Similarly, in **Aden Abdi Simba vs. The DPP Petition No. 24 of 2015**, the Court's decision in meting out the 15 years' imprisonment seems to have been informed by the fact that nobody was injured in the incident and the items were recovered. In **Daniel Gichimu Githinji & Another vs. Republic Criminal Appeal No. 27 of 2009**, the Court of Appeal in meting out the sentence of 15 years considered the fact that the appellant was a first offender, the violence meted was minimal and the item robbed was recovered. In **John Gitonga Alias Kadosi vs. Republic Petition No. 53 of 2018**, the victim was injured as a result of being attacked with a *panga*. The court resentenced him to 15 years.

47. In **Paul Ouma Otieno & Another vs. Republic [2018] eKLR**, the complainant drove to his house in his vehicle. He stopped at the door and knocked the door for his wife to open. Four people went towards him and told him that they were his visitors and he should not make noise. When his wife opened the door, the appellant who was armed with a pistol entered into the bedroom which had lights and directed that the complainant be brought into the bedroom. His co-assailant, who was also armed with a pistol, took the complainant to the bedroom. The two demanded money and were directed to where the money was and took Kshs. 2,500/=. The robbers also took a mobile phone and sonny speaker. They also demanded the car keys and the complainant gave the keys to them. Thereafter, the complainant and his wife were led outside, forced inside the car and driven off to a sugar cane plantation where they were abandoned. The robbers drove off in the complainant's car. The Court of Appeal, while noting that when the appellants were given an opportunity to mitigate before the trial Magistrate they reiterated their innocence and failed to make any mitigation, however held that that should not be a reason to deny them equal benefit of the law. While noting that the offence was aggravated because the appellants were armed with guns, the court found that a sentence of 20 years' imprisonment would adequately serve the interest of justice.

48. Taking into account the circumstances of this case, I am of the view that a sentence of 25 years imprisonment would adequately serve the course of justice. However, the appellant has been in custody since 16th April, 2001. Section 333(2) of the ***Criminal Procedure Code*** provides that:

> ***(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***
>
> ***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.***

49. I associate myself with the decision in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** where the Court of Appeal held that:

> **"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by *section 333(2)* of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."**

50. The same Court in **Bethwel Wilson Kibor vs. Republic [2009] eKLR** expressed itself as follows:

> **"By proviso to *section 333(2)* of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. *Ombija, J.* who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."**

51. According to ***The Judiciary Sentencing Policy Guidelines***:

> ***The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.***

52. Accordingly, I direct that the appellant's sentence will run from 16th April, 2001. Based on this court's decision in **Sammy Musembi Mbugua & 4 Others vs. Attorney General & Another [2019] eKLR,** the appellant is entitled to remission of his custodial sentence if he qualifies due to good behaviour while serving their said sentence.

53. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 25th day of November, 2019.

G. V. ODUNGA

JUDGE

Delivered in the presence of:

The Appellant in person.

Miss Mogoi for the Respondent

CA Susan