REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 5 OF 2017

1. SAMSON CHACHA RIOBA

2. FREDRICK GICHONGE RIOBA

3. JOSEPH SINDA NYAKEHE alias ORGANIZER.....APPELLANTS

-versus-

REPUBLIC .....RESPONDENT

(Being an appeal from the judgment, conviction and sentence of Hon. P. N. Maina, Principal Magistrate in Kehancha Senior Principal Magistrate's Criminal Case No. 484 of 2014 delivered on 15th day of December 2016)

JUDGMENT

Background:

1. Five accused persons were arraigned before the Kehancha Law Courts on 06/08/2014 facing the charge of **Robbery with Violence** contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code**. The accused persons were Sinda Joseph Nyakehe, Matiko Nyakehe Kiboma, Fredrick Gichombe Rioba, Nyahende Joseph Chegere and Samson Chacha Robi respectively. One of them, Sinda Joseph Nyakehe, faced a second count of **Assault causing previous harm** contrary to **Section 234** of the **Penal Code**. All the charges were denied, and a trial was ordered.

2. During the trial, Matiko Nyakehe Kiboma died and the charge was substituted with another one without the name of the said deceased. Fresh pleas were taken from Sinda Joseph Nyakehe, Fredrick Gichombe Rioba, Nyahende Joseph Chegere and Samson Chacha Robi respectively. They denied the charge of robbery with violence as the charge of assault causing grievous harm against Sinda Joseph Nyakehe was dropped. Upon compliance with **Section 200** of the **Criminal Procedure Code** the hearing continued from where it had reached up to judgment.

3. The particulars of the amended charge of robbery with violence were that '*on the night of 3rd and 4th July 2014 at Senta area in Kuria East District Migori County jointly with others not before court, being armed with offensive weapon namely pangas robbed PROTUS MWITA KEBONDARI of cash 18,000/= amd at the same time of such robbery wounded the said PROTUS MWITA KEBONDARI.'*

The Trial:

4. A total of 11 witnesses testified for the prosecution. They were the complainant who testified as **PW1** who was one **Protus Mwita Kebondari**. **PW2** was **Paulo Mbaru Sigore** who was a night watchman at Sam Millennium Academy. **PW3** was the complainant's wife one **Consolata Gati Mwita**. **PW4** was the owner of the homestead the complainant rushed to for help as he was attacked. He was one **Francis Rioba. PW5** was the wife of **PW4**. She was **Irene Robi Machera. PW6** was Isaac **Nyansiri Wambura** who assisted to arrest Sinda Joseph Nyakehe, The Assistant Chief of Kegocha Sub-Location one **Mawa Peter Ngoko** testified as **PW7. No. 234755 APC Kennedy Ouma** stationed at Chinato Divisional Headquarters testified as **PW8** whereas **No. 226844 APC Edward Gesoro** also from Chinato Divisional Headquarters testified as **PW9**. A Clinical Officer one **Andrew Francis** stationed at Kegonga District Hospital testified as **PW10** and the investigating officer **No. 91979 PC Cosmas Muli** testified as **PW11.**

5. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified and refer to Samson Chacha Robi as '**the first appellant**', Fredrick Gichombe Rioba, as '**the second appellant**' and Sinda Joseph Nyakehe as '**the third appellant**' respectively. Matiko Nyakehe Kiboma who died during the trial will be referred to as '**the deceased'**. Nyahende Joseph Chegere did not lodge any appeal against the impugned decision.

6. The prosecution's case was that PW1 who was a teacher at Kiungu Primary School in Kebaroti Sub-Location in Kuria East District went

to Senta Trading Centre on 03/07/2014 during the day and withdrew some money from a bank. He then met his colleague one **Zacharia Meganda** (not a witness) and they decided to watch a football match at a bar within the said Senta up to around 11: 00pm. PW1 did not however take any alcohol in the bar. Since it was late and their efforts to get transport home were futile they decided to walk.

7. After a while they parted ways and PW1 walked towards the direction of Sam Millennium Academy (hereinafter referred to as '**the Academy**'). As PW1 passed the said Academy he heard someone calling him out twice *'Mwalimu, Mwalimu'* as he is commonly known in the area. The person calling PW1 came from the direction PW1 walked to and that person approached PW1. As the person came near PW1, it happened that it was someone well known to PW1; a neighbor and one who they always interacted with. Indeed, PW1 had long recognized the voice as that of the second appellant and he so confirmed when the two met. Although it was at night, there was bright moonlight and PW1 could so clearly see. The two talked. The second appellant informed PW1 that he was as well walking back home and had decided to wait for PW1 to accompany him. Since PW1 had seen the second accused person at the bar as he watched football, he was not surprised at what the second appellant told him. The two then started waking together.

8. Earlier PW2 had encountered a group of around five armed men suspiciously walking along the road at the Academy as he was on duty. He had shone his six-battery torch towards them and the group told him not to do so. He then switched off his torch as he closely monitored them. The group walked up and down the road. At around 09:00pm PW2, while armed with a bow and arrow, escorted some pupils who had attended the Academy for night studies to their various homes. As PW2 walked along the road he encountered the group once again. They had blocked the road and PW2 knew that there was danger. Without wasting time, PW2 challenged the gang and prepared his bow and arrow ready to attack them. One of the gang members then talked to PW2. He was the deceased whom PW2 was related to and knew him well. The deceased was armed with a panga while the others variously had pangas and clubs. The deceased told PW2 that they had nothing against him and allowed him to pass.

9. When PW2 returned to the Academy, he was more curious with the gang and virtually followed it as the gang walked back and forth passing next to the Academy, but from a safe and unseen distance. At around 11:30pm PW2 saw someone walking from the direction of Senta towards the Academy as the gang was just passed the Academy. PW2 wanted to alert the person of the eminent danger as the person passed the Academy but one of the gang members called that person as 'Mwalimu'. One of the members approached and met the person and they talked before they began walking together. PW2 clearly heard the gang member saying that he was waiting for the person so that they would walk home together. PW2 quickly recognized the voice of the gang member as that of the second appellant who was his neighbor and knew him so well.

10. After a short walk around five other people joined PW1 and the second appellant and all walked away. To PW1's utter shock and surprise the first and the third appellants who were among those who had joined them and whom he knew too well as his neighbors ordered PW1 to give them all the money he had withdrawn from the bank. PW1 had withdrawn Kshs. 18,000/= from the bank as it was end month. PW1 sensed danger and retreated ready to run away, but that was not before the third appellant cut him with a panga on the head. Nevertheless, PW1 ran towards the homestead of PW4 and as he was trying to scale the gate he was cut severally. PW1 screamed and called PW4 by his name as the assault intensified and the attackers took away his said money. PW1 collapsed and was left for the dead.

11. PW2 watched PW1 and the second appellant walk away together after they met and briefly talked at the road near the Academy. They were shortly joined by the other gang members. PW2 then heard one of the gang members saying '*Mwalimu tembea haraka uko chini ya ulinzi. Sisi ni maaskari….*' PW2 drew near and heard the person saying *'Nyinyi mnifanye yote lakini nimeshawatambua….*' The person began screaming and PW2 swung into action and ran towards them. Two of the gang members followed PW2 and PW2 shot two arrows as the other members dealt with their prey as he ran towards a nearby homestead. The two gang members who PW2 shot at ran away. PW2 then rushed towards the person who had been attacked and found him lying down unconscious. He was heavily wounded all over the body. PW2 observed him and recognized him as PW1. PW2 took charge of the scene and his main assignment was to keep the gang at bay as the group was still milling around saying *'Shika hako kazee, tushambulie kazee, kanatuzuia nini!.....'* PW2 called PW7 for assistance and reinforcement and after some time the gang disappeared, and members of public began gathering at the scene including PW3, PW4 and PW5.

12. PW2 tied a rubber band around the leg of PW1 to stop bleeding and called a neighbor for transport to take PW1 to hospital. Police officers from Chinato Administration Police Divisional Headquarters arrived at the scene and assisted PW2, PW3 and PW4 take PW1 to Migori County Referral Hospital. PW1 was later transferred to Moi Teaching and Referral Hospital in Eldoret for further treatment. PW1 lost Kshs. 18,000/= which he had withdrawn from a bank in the afternoon to the robbers.

13. PW3 was asleep waiting for her husband's return when she was woken up with the news of her husband's attack and was hurriedly accompanied by the other family members to the scene. They all found PW1 lying unconscious.

14. PW4 was also sleeping in his house with his wife PW5 when he was woken up by the cries of PW1 calling his name. As PW4 was about to open his door and rescue PW1 some gang members threatened PW3 with dire consequences if he would go out of his house. PW5 then restrained PW4 for fear of attack. PW4 and PW5 heard PW1 attacked as he cried into silence. PW4 and PW5 screamed while inside their house and they could hear the voices of the attackers who seemed just around their home. No sooner had the voices of the attackers subsided than PW4 and PW5 went out of their house and found PW1 heavily wounded allover his body. PW1 was lying unconscious on their compound. PW4 while crying pulled PW1 into his house for fear of any further attack. PW1 was later rushed to hospital.

15. PW3 reported the matter to Nyamtiro Police Post on 04/07/2014 and the police commenced investigations. PW11 in the company of other police officers including the then lead investigator Sgt. Tanui visited the scene and interrogated several people. They recorded statements from potential witnesses and began looking for the attackers.

16. PW6 was a licensed gun holder. He aided in the arrest of the third appellant after a very heavy fight that left PW6 loose some teeth and the third appellant shot on one leg. At the time of the arrest the third appellant was with the second appellant and during the fight the second appellant wanted to stab PW6 with a big knife (*simi*) before the police from Nyamtiro Police Post intervened and arrested the third appellant. The second appellant escaped. The third appellant was later taken to hospital.

17. PW7 traced Nyahende Joseph Chegere (the third accused person during the trial and who did not challenge the judgment of the trial court) and with the help of the police from Nyamtiro Police Post arrested him at Senta Trading Centre. Nyahende Joseph Chegere (hereinafter referred to as '**Nyahende**') informed the police that he was not part of those whole attacked PW1 but that it was the appellants herein together with Marwa Robi, Robi Nyakehe and one Jackie. Nyahende then led PW7, PW8 and PW9 to a house in a forest in Awendo where he pointed out the second appellant and he was arrested. PW7 also arrested the first appellant at Senta Trading Centre in the company of PW8 and PW9. The appellants together with Nyahende had disappeared immediately after the incident and were only arrested later.

18. PW11 charged all those who had been arrested in connection with the robbery. Among the witnesses who testified was PW10 who produced a P3 Form for PW1 confirming the injuries which PW1 sustained. Among the many injuries which PW1 sustained were a fracture of the skull, a 15cm scary and large wound at the forehead, fracture of the tibia and fibula, a 25cm long cut on the thigh, a 16cm long cut on biceps and triceps, a 15cm long cut wound on the back alongside other injuries. PW11 produced the PW1's treatment notes at Migori County Referral Hospital and those from Moi Teaching and Referral Hospital in Eldoret as exhibits.

19. At the close of the prosecution's case the appellants were placed on their defenses. The first appellant opted to give an unsworn statement, the second appellant gave a sworn statement and the third appellant gave an unsworn statement. None called any witnesses.

20. The first appellant testified on how he was arrested. That, on 30/07/2014 he had gone to a *chang'aa* den where they were arrested by the police only for the false charge to be planted on him. The second appellant also testified on how he was arrested on 29/07/2014 at around 05:00am and eventually charged with an offence he knew nothing about. The third appellant also testified on how he was arrested on his way home from work and later framed up with the charge he also knew nothing about. None of the appellants made submissions at the close of their cases.

21. By a judgment delivered on 15th December 2016 the trial court upon evaluation of the evidence was satisfied that the charge had been proved beyond any reasonable doubt. The appellants were found guilty, convicted and accordingly sentenced to suffer death.

The Appeal:

22. Being aggrieved by the conviction and sentence, the appellants lodged the appeal subject of this judgment whose effect are the contentions that the trial court failed to find that they were not properly identified as the attackers, the charge was not proved and on an equal measure the court handed down a very severe sentence.

23. The appeal was heard by way of written submissions and the appellants filed separate written submissions. The State opposed the appeals and urged the Court to be guided by the evidence on record which go along to prove the charge.

Analysis and Determinations:

24. As this is the appellant's first appeal, the role of this Court is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

25. In discharging the above duty, this Court will consider each of the grounds of appeal by the appellant's Counsel and culminate with an exposition as to whether the charge of robbery with violence was proved as against the appellant. I will therefore deal with the appeal as follows: -

a. On the issue of identification:

26. It was the appellants' argument that they were not properly identified as one of those who attacked PW1 since the attack was at night, sudden, no identification parade was conducted, no proper description of the attackers was made to the police, their names were not given in the initial report and that the evidence on identification was contradictory.

27. The starting point is always that the evidence must support the charge. It is not for a court to be guided by otherwise factual positions which are not part of the tested evidence. The evidence in this case on identification was based on recognition therefore an identification parade was not necessary.

28. PW1 and PW2 were the witnesses who testified on the appellants' recognition. They narrated how the ordeal took place. PW1 had seen the second appellant at the bar where he was watching football. PW1 did not take any alcohol. PW1 saw the second appellant dressed in black trousers and a red jacket. PW2 also testified that when the suspicious group blocked his way on the road at the Academy as he was escorting the pupils home after night studies the gang members were dressed in jackets or overcoats. PW1 was an immediate neighbor to the second appellant and knew him quite well. It is again the second appellant who approached PW1 on the road near the Academy and told him that he was waiting to accompany him home. To PW1 that was reasonable in view of the proximity of their homes. The two talked and agreed to proceed home. Further, there as a large moon and as such sufficient brightness. PW1 was hence not in doubt whom he was dealing with.

29. PW2 also heard the second appellant talk to PW1 on the road. Since PW2 is also a neighbor to the second appellant he readily recognized him and as he was so sure that PW1 and the second appellant were immediate neighbors and he heard the second appellant that he was waiting for PW1 to accompany him home, PW2 did not even see the need of alerting PW1 of the suspicious gang.

30. The first and third appellants were only recognized by PW1. According to PW1 the first and third appellants joined him and the second appellant a short while after they began going home at the Academy. Although the two wore hooded jackets PW1 knew recognized them as he talked to them and they are the ones who ordered him to give them the money he had withdrawn from the bank. PW1 knew them as his neighbors as well. PW1 further clarified that it was the third appellant who was the first one to cut him with a panga on the face before he ran towards the home of PW4 and PW5.

31. PW1 and PW2 testified on the lighting during that night in issue. They both stated that it was a night of full moon and the moonlight was enough to recognize someone. The attack on PW1 was not instantaneous. It took time amid talking between PW1, PW2 and the assailants.

32. As said before, since this was a case of identification by recognition I find that there was no need of an identification parade. That however does not lessen the duty on this Court to treat the evidence of visual recognition with caution more so given that the first and third appellants were only recognized by PW1.

33. The principles to guide this Court when faced with the foregone issue are well settled. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under; -

> ***"It is trite law that where the only evidence against a defendant is evidence of 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 conviction."***

34. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

35. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

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

36. The foregone does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows: -

> ***"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -***
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> *"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."*
>
> ***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."***

37. Again, the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night: -

> ***"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."***
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> (emphasis added).

38. Whereas the evidence of PW1 on the recognition of the first and third appellants was that of a single witness, there can still be a legal conviction in such circumstances and more so even in instances where there is absolutely no corroboration. This issue has been a subject of consideration in various cases including one before the Court of Appeal of Uganda in **Obwana & Others v. Uganda (2009)2 EA 333** where the Court presented itself thus: -

> ***"It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. .....This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of***

a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence."

39. Going through the evidence on record, I have not come across any issue which could possibly be said to have impeded such recognition of the appellants. From the background of PW1 and PW2 there is no doubt that they knew whom they were dealing with without any doubt and that they were the appellants. From the above legal guidance and by considering the totality of the circumstances under which the attack took place, this Court reiterates the position that the identification of the appellants by way of recognition was free from error. I hence find that the appellants were positively identified as among those who attacked PW1.

b. <u>Was the charge proved in law?</u>

40. The starting point on this discourse is what the law provides on the offence of robbery with violence. The offence of robbery with violence is a creation of **Sections 295 and 296(2)** of the Penal Code and for clarity purposes I shall reproduce them as tailored: -

"295.Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296(2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

41. From the foregone legal provisions, the offence of robbery with violence is made up of two parts. The first part is the **robbery** and the other part is the **violence**.

42. **Robbery** is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: **<u>Theft</u>** and **<u>the use of or threat to use actual violence.</u>**

43. On the other hand, the offence of **robbery with violence** is committed when robbery is proved and further if any one of the following three ingredients are established: -

(a) The offender is armed with any dangerous or offensive weapon or instrument, or

(b) The offender is in the company of one or more other person or persons, or

(c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

44. The record has it that when PW1 was attacked aforesaid he lost Kshs. 18,000/= which amount he had just withdrawn from a bank at Senta Trading Centre. The money was not recovered. Since PW1 did not consent to the taking away of his money which was in his lawful possession, the acts on the part of the appellants constituted theft.

45. The issue of use of actual violence on PW1 was equally demonstrated. The record is alive to the fact that the attackers pounced on PW1 with pangas and rungus. Both PW1 and PW2 saw those items with the appellants and the other gang members. Those are some of the items used to overpower PW1 to be able to commit the theft. PW1's evidence on that aspect was corroborated by PW10, a Clinical Officer who produced the P3 Form. PW1 sustained so serious injuries that he had to be admitted in Migori County Referral Hospital and later transferred to a more specialized hospital. Treatment notes were also produced which confirm the injuries. Further, the trial court saw and noted the scars on the body of PW1. The degree of injury was assessed as grievous harm. That therefore settles the issue of the use of actual violence on PW1 hence proving the offence of robbery.

46. There is no doubt from the record that the attackers were more than one, were armed and they struck, beat and used personal violence on the complainant. That settles the requirements under **Section 296(2)** of the **Penal Code**.

47. This Court hence comes to the finding that the offence of robbery with violence was proved as against the appellants and that the learned trial Magistrate was merited in finding the appellants guilty as charged. The appeal on conviction is hereby dismissed.

c. <u>Sentence: -</u>

48. The appellants also contended that the sentence was very harsh and excessive. I have looked at the sentencing proceedings where the court was then rightly guided by the mandatory nature of the then sentence. The court then had no option but to hand down the death sentence.

49. That legal position has by now changed courtesy of the Supreme Court in **<u>Francis Karioko Muruatetu & Another v. Republic (2017) eKLR</u>**. The Court, rightly so, found and held that the mandatory nature of the death sentence in capital offences is unconstitutional since

mitigation is an important congruent element of fair trial.

50. For purposes of ease of understanding of the rationale behind the finding, I will reiterate what the Court said thus: -

> ***"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 Article 25 of the Constitution; an absolute right.***
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> ***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.***
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> ***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.***
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> ***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.***
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> ***53. If a Judge does not have discretion to take into account mitigation 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 individualize the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.***
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> ***58. To our minds, any law or procedure which when executed culminate in termination if life, ought to be just, fair and reasonable. As 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.***
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> ***59. We now lay to reset 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.***
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> ***60. Another aspect of the mandatory sentence in Section 204 that we have grappled with is its discriminate nature; discriminate in the sense that the mandatory sentence gives differential treatment to a convict under that Section, distinct from the kind of treatment accorded to a convict under a Section that does not impose a mandatory sentence.'***

42. Having said so, the Supreme Court remitted the matter to the High Court being the trial and sentencing court for purposes of sentence re-hearing. I have no doubt that such remain the only reasonable way forward as the sentencing court will receive appropriate submissions from the prosecution and the defence prior to the sentencing.

43. One thing which I must clarify is that although the decision in **Francis Karioko Muruatetu** (supra) was on a murder case, the position changes not in the case of robbery with violence cases since **Section 296(2)** of the **Penal Code**, Cap. 63 of the Laws of Kenya provides the only sentence on conviction to be a death sentence.

Conclusion:

57. The upshot of the foregone analysis is that the appeal is dismissed on conviction and allowed on sentence only. The matter is hereby remitted to the Senior Principal Magistrate's Court at Kehancha for hearing on sentence only and on a priority basis.

It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of June 2018.

A.C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Sinda Joseph Nyakehe, Fredrick Gichombe Rioba and **Samson Chacha Robi** the Appellants in person.

Miss Atieno, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Prosecutor.

Evelyne Nyauke – Court Assistant.