Republic v Koech & another (Criminal Case 63 of 2019)
[2024] KEHC 13581 (KLR) (5 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13581 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE 63 OF 2019

RN NYAKUNDI, J

NOVEMBER 5, 2024

BETWEEN

REPUBLIC .... PROSECUTION

AND

DANIEL KIPRUTO KOECH .... 1ST ACCUSED

RONALD KIPLAGAT .... 2ND ACCUSED

JUDGMENT

1. The accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 28th of September, 2019 at Baharini Centre Turbo Sub-County the accused persons jointly murdered Nicholas Tenai.

2. The accused persons pleaded not guilty to the offence as stipulated under section 203 of the Penal Code. The lead prosecution counsel in these proceedings was Mr. Mugun for the state whereas the defence was under the retainer of Learned counsel Ms. Khayo.

3. At the hearing, it is incumbent upon the prosecution to prove all the essential ingredients of the offence of murder beyond reasonable doubt. To establish its case, the prosecution led evidence from five witnesses.

The Prosecution case

4. PW1: Aaron Tenai testified that on 30th September 2019 at about 0930HRS in the morning, he was informed that the deceased was feeling ill as a result of an assault. He was requested to get a taxi to ferry him to the hospital, which he immediately did. He took the deceased to MTRH for treatment and left him under the care of another brother of theirs. He took the initiative of reporting the matter to the police. He later went back to the hospital and was notified that his brother (the deceased) had sustained serious injuries and might not make it. Armed with that information, the police were notified

and shortly thereafter came to the hospital to record the deceased's statement. He took turns with his other brother in attending to the deceased while he was in hospital until 3rd October 2019 when he was informed of the demise. By then, the deceased had intimated that he had been assaulted by Kiplagat, Duncan and Septenok, all of whom he had personal acquaintance of. He identified the accused persons as the people mentioned by the deceased as the assailants.

5. PW2: Anthony Kipkoech Tenai testified that in the morning of 29th September 2019 at around 0600HRS he found his brother, Nicholas Kiprugut Tenai, the deceased, lying on the ground about 30m away from the home. The deceased told him that he was in pain after being assaulted. This witness took the deceased to Huruma sub-county Hospital for treatment. From there, they were referred to MTRH for further treatment. The following morning, he called PW1 to hire a taxi to take the deceased to the hospital. The deceased was admitted at the hospital owing to the injuries that he had sustained. While still receiving treatment, the deceased cried out in pain and mentioned Ronald Kiplagat, Duncan and Septenok (an alias) as the people who had assaulted him. Shortly thereafter, he lamented about a serious headache and started foaming from the mouth and nose. He received treatment but succumbed to the injuries on 4th October 2019 while still hospitalised. After his brother's demise, he identified the accused persons as the people the deceased had indicated were his assailants.

6. PW3: John Mwale Beru testified on 28th September 2019 at around 2100HRS he was on his way to his 2nd wife's home. When he was just about to enter the compound, he overheard two people conversing in low tones. He recognised their voices as Duncan and Nicholas, the deceased. When he moved closer, he noticed that the deceased was lying on the ground while calling out the name of Kiplangat. He assumed that they were both drunk and went his way. He had noticed that Duncan was carrying something that looked like a panga and was trying to hide it behind his back. On 29th September 2019 he learned that the deceased had been assaulted the previous night by Duncan, Septenok and Kiplagat. He visited the deceased after he was brought back from Huruma sub-county Hospital the following day. The deceased complained of pain in the back and along the neck. That was the last time he saw the deceased alive.

7. PW4: Beatrice Nafula testified that on 28th September 2019 at around 1930HRS she was at home which also doubles up as her business premises whence she sells food and refreshments. Amongst her customers were Lagat, Dan, Chirchir, Kipsang and Bernard Kijana. While still attending to her clients, the deceased came while armed with a panga demanding to know whether Dan was there. He then ordered for chang'aa which he quickly gulped down. He then handed over the panga to a lady who was next to this witness then went to the kitchen. The deceased was heard quarrelling with the accused persons over some money owed to him. He shortly thereafter came back for his panga and went back to kitchen to again demand for the money. This witness rushed to the kitchen to pacify the parties and as soon as he did, Lagat got up from where he was seated, got hold of the deceased by the neck and pushed him to the wall. He then grabbed the panga from the deceased and threw it to Dan, ordering him to run away with it. The deceased then ran after Lagat and they started fighting. He saw Lagat trip the deceased causing him to fall down before he continued assaulting him. He pulled Lagat from the deceased and demanded that he leaves the homestead. He also helped the deceased to stand up and similarly demanded that he leaves the homestead. After a while, the deceased's wife came to inquire whether the deceased had been there because Dan had brought back a panga which he said, he had taken from the deceased. She told him that she had found the deceased lying on the ground and would go back for him after taking their children home. The following morning, he visited the deceased's home and found him in pain. The deceased told them that he still felt pain in the neck despite having been taken to Huruma sub-county hospital for treatment. Lastly, he told the court that he was aware that the deceased passed on while receiving treatment at MTRH.

8. PW5: PC Simon Wanjala testified as the last witness for the Republic. He told this court that on 01/10/2019 he was instructed to investigate this case, which had been reported as a case of grievous harm. In the company of his colleague, he went to MTRH to visit the deceased and recorded his statement. The deceased informed him that he was attacked by three people who were very well known to him as Daniel, Lagat and Septerok. He produced the statement of the deceased as Exh 2. The following day, he learned that the deceased had succumbed to injuries from the attack. He then caused the arrest of the three accused persons after they were identified by the relatives of the deceased. Because the fact and cause of death were not in dispute, by mutual consent this witness produced the Post-Mortem Form as Exh 1.

9. The prosecution closed its case and the accused persons were placed on their defence under Section 306 of the Criminal Produced Code.

10. In support of the case for prosecution, learned Senior Prosecution Counsel canvassed his case by way of written submissions urging this court to find that all the ingredients of the offence of murder have been proved beyond reasonable doubt to warrant the court to find the accused persons guilty and have him convicted of the crime as initially charged of causing the death of NICHOLAS TENAI. He buttressed his arguments by placing reliance on the following authorities:

    a. N M W v Republic [2018] eKLR

    b. Republic v Silas Juma Odhiambo & Ano [2023] KEHC 25889 (KLR)

    c. Njoroge v Republic, [1983] KLR 197

    d. Rex v Tabula Yenka s/o Kirya & others (1943) 10 EACA 51

    e. Republic v Christopher Nderu Ngari & 3 Others [2021] eKLR

11. When place on their defence the accused persons elected to give unsworn testimonies and call no witnesses.

12. DW1: Daniel Kipruto Koech gave his testimony that he works in a car-wash business in Baharini Centre. On 29th September 2019 he was at an establishment run by PW4 to eat and drink chang'aa. The deceased walked into the establishment while armed with a panga. He quarrelled with Kipchirchir over a debt. The deceased threatened to cut Kipchirchir with that panga. Ronald Kiplagat (Accused 3) then pushed the deceased causing him to fall near the main door. Kiplagat (Accused 3) then snatched the panga from the deceased and gave it to him. He took the panga to the deceased's homestead and gave the panga to the deceased's wife then went home. The following day, he learned that the deceased had been taken to a nearby hospital with complaints of pain on the head, neck and back. He was later arrested after the deceased succumbed to the injuries.

13. DW2 Ronald Kiplagat testified that he also works in a car-wash business in Baharini Centre. On 29/09/2019 he went to PW4's place to have supper and a drink. Kiprugut came and informed him that he wanted to cut Chirchir over a debt. The deceased came back with a panga but was disarmed. He then pushed the deceased to a wall causing him to fall on his back. A fight ensued but they were separated and the deceased went about his business but he stayed behind in PW4's home. The following day, he learned that the deceased had succumbed to the injuries and was arrested over the murder.

Determination

14. Having laid that background, the sole issue for this court's determination is whether the accused persons caused the death of the deceased. It is trite law that the standard and burden of proof is upon

the prosecution to prove all the ingredients beyond all reasonable doubt. This principle of 'reasonable doubt' is well enunciated by Justice Cookbur, as follows:

> " It is the business of the prosecution to bring home the guilt of the accused to the satisfaction of the minds of the jury; but the doubt to the benefit of which the accused is entitled to must be such as rational thinking, sensible man fairly and reasonably entertain, not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism. There must be doubt which a man may honestly and conscientiously entertain." see also the principles as illuminated in the cases of Republic versus Nyambura and four other (2001) KLR 355, Sekitoleko v Uganda (1967) EA 531, Msembe & another versus Republic (2003) KLR 521, Mbuthia v Republic (2010) 2 EA 311.

15. In Kioko versus Republic (1983) KLR 289, the court of appeal held that the law does not require the accused to prove his innocence save in a few exceptional cases under Section 111 of the *Evidence Act*. The test remains that of beyond reasonable doubt not of any doubt at all.

16. In section 203 of the Penal Code, which provided for murder envisages the following ingredients to be proved beyond reasonable doubt:

    a. The death of the deceased,

    b. The death was unlawfully caused

    c. That in causing death of the deceased accused's unlawfully acts were accompanied with malice aforethought.

    d. That the accused is responsible in causing the death of the deceased.

17. From the evidence of the five witnesses, it emerges that this was purely a case based on circumstantial evidence. The principles are well elucidated in the following cases.

18. In Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

> " However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -
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> "It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

19. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

> " Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject

person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:

> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; 9iii) the circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

20. In the case of R v Hillier (2007) 233 A.L.R 63, shepherd v R (1991) LRC CRM 332 the courts observed that:

> " The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence."

21. Similarly, the Court of Appeal had occasion to consider the requirements to be met before placing reliance on circumstantial evidence in Simon Musoke v R 1 EA 715 where it observed that:

> " In a case depending exclusively upon circumstantial evidence, he (the Judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt." (See also R v Kipkering Arap Koske 16 EACA 135, Musili Tulo v R {2014} eKLR).

22. The learned author Sir Alfred Willis in his book on circumstantial evidence chapter VI lays down the following rules to be observed in circumstantial evidence:

    a. The facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;

    b. The burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;

    c. In all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits;

    d. In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt;

    e. if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted

23. From the above analysis, it is undisputed that the deceased succumbed to injuries which were as a result of an assault alleged to have been perpetrated by the accused persons. The medical report as filed by the

prosecution revealed that on examination, the deceased has a nodular cystic swelling – left eyebrows; Bruise on the chin; cyanotic nails; swollen hands with multiple tiny bruises; multiple abrasions on the back, the largest being 10x1cm and multiple tiny bruises in the interior chest. The report concluded that the deceased person died as a result of severe neck injuries due to assault. PW1 gave an account of how he was informed of the deceased's condition and came in to help in ferrying the deceased to hospital for treatment. He would then report that to the police who began their investigations into the individuals involved in assaulting the deceased. PW2 on the other hand told the court that he found the deceased lying on the ground about 30m away from the home. The deceased told him that he was in pain after being assaulted. That while still receiving treatment, the deceased cried out in pain and mentioned Ronald Kiplagat, Duncan and Septenok (an alias) as the people who had assaulted him. Shortly thereafter, he lamented about a serious headache and started foaming from the mouth and nose which led to his death.

24. According to PW3, while he was on his way back home he overheard to individuals conversing in low tones when he was about to enter his compound. He recognised the voices as those of Nicholas, the deceased and Duncan. On getting closer he saw the deceased lying on the ground while calling the name of Kiplangat. To his mind, they must have been drunk but he noticed that Duncan was carrying something that looked like a Panga and was trying to hide it behind his back. He later came to learn that the deceased had been assaulted. The evidence of PW4 and PW5 corroborated the evidence as testified by PW1, PW2 and PW3.

25. From the evidence of the Prosecution witnesses, it came out that the deceased was in some kind of disagreement, particularly on a debt which later escalated to a fight and as result the accused persons assaulted the deceased. As recorded by PW4, she heard the decease quarrel with the accused persons over some money owed to him.

26. The fact remains that the deceased was last seen with the accused persons when the fight between them ensued. In the evidence presented by the prosecution, this is an incident which manifests an unlawful act of the accused persons causing assault to a large extent that causes the death of the deceased. The circumstances of the unlawful act are such that after a careful consideration of the facts, circumstantial evidence on record cannot be ignored by this court and of course given the fact that the witnesses were able to see the deceased being assaulted and before his death he was in a position to mention what the accused persons had done to him.

27. I take cognizance of the fact that most of the prosecution witnesses did not witness the assault. It is only PW4 who testified that she was able to see one Lagat who got up from where he was seated, got hold of the deceased by the neck and pushed him to the wall. He then grabbed the panga from the deceased and threw it to Dan, ordering him to run away with it. The deceased then ran after Lagat and they started fighting. He saw one Lagat trip the deceased causing him to fall down before he continued assaulting him. He pulled Lagat from the deceased and demanded that he leaves the homestead. He also helped the deceased to stand up and similarly demanded that he leaves the homestead. After a while, the deceased's wife came to inquire whether the deceased had been there because Dan had brought back a panga which he said, he had taken from the deceased. She told him that she had found the deceased lying on the ground and would go back for him after taking their children home. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused persons who unlawfully caused the deceased's death.

28. At the centre of every homicide case, is the element of malice aforethought as defined under section 206 of the penal code;

> " Malice aforethought Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -
>
> (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> (c) an intent to commit a felony;
>
> (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

29. In the case of In *Daniel Muthee -V- Rep. CA NO. 218 OF 2005* (UR), Bosire, O'kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:

> " When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code."

30. For the acts of the accused persons to attract criminal liability, it must be shown that they intended to do wrong or that they acted in a reckless and negligent manner, knowing that their actions would cause or likely cause the result complained of.

31. In Republic versus Hancock and Shankard (1985) 3WLR 1014, it was held that: -

> " Probability of an injury arising from an act done is important because if the likelihood that the injury will result is high, the probability of that result may be seen as overwhelming evidence of the existence of the intent to injure."

32. In the case of Republic versus Nedrick 1986 HL, it was rightly held that a person would be guilty if his actions are virtually certain to result to death or serious harm regardless of intent. Actually a person is held in law to have intended natural and probable consequences of his own conduct.

33. In the matter at hand, the prosecution has relied on circumstantial evidence. There is no witness who saw the accused person cause the death of the deceased. However, the actions of the accused persons led to the death of the deceased person.

34. Not only in malice aforethought under Section 206 of the Penal Code be present when there is no actual design to kill or injure. It may even co-exist with a definite wish that such harm may be avoided, if an act is wilfully done the knowledge that it may probably cause death of bodily injury. It should be noted that Malice aforethought should be distinguished with negligence as a form of the element of breach of duty of care to occasion death of another human being. This is mainly the case in traffic

offences of causing death by dangerous driving. So far as this case is concerned, is the intent to kill formulated from the evidence adduced by the prosecution witnesses as captured elsewhere in this discourse. There is no doubt that the accused persons committed the offence with malice aforethought, it matters not whether they are under the influence of intoxication or not. That is not one of the grounds death may be held in law to be justified or excusable.

35. Additionally, the accused persons are charged jointly with the offence of killing the deceased. This brings into perspective the provisions of Section 20 as read together with Section 21 of the Penal Code. Section 21 of the Code provides the features of criminal responsibility as follows:

> "When two or more persons, form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."

36. The other overriding elements of a common intention concerns characteristics of it being formed at the very onset or during the commission of the offence. It may also arise spontaneously on the spur of the moment. According to Section 10 of the *Evidence Act*, anything said, done or written by any of the persons deemed to have a common intention, in reference to their common intention is relevant evidence of such intention. What is required of the prosecution is evidence tending to show that the individual accused persons were in fact part of the conspirators in a gang of two or more, sharing a common intention, purposed to commit a particular offence.

37. Going beyond our jurisdiction, the court in in Ismael Kiseregwa & Another v Uganda CA CRIM Appeal No. 6 of 1978 held as follows:

> "In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose, which led to the commission of the offence. It it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter."

38. It is now settled that an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions, and the omissions of any of them to disassociate himself from the assault. It can develop in the course of events, though it might not have been present from the start. It is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence where the doctrine of common intention applies, it is not necessary to make a finding as to who actually caused the death.

39. The evidence in my view was sufficient to prove the accused persons guilty of murder contrary to section 203 of the Penal Code and subsequently by the nature of the act they stand convicted for the crime subject to the sentencing hearing in compliance to pass the appropriate sentence prescribed under Section 204 of the Penal Code.

Sentence

40. ...

1. The convict was convicted on the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which were that on 28th September, 2019 at Baharini centre in Turbo sub-county within Uasin Gishu county, the accused persons murdered Nicholas Kiprugut Tenai.

2. This court has now been called upon to mete out an appropriate sentence, which I must state that is fairly complex of a task. In imposing a proper sentence, it requires striking a delicate balance by considering the offence and the circumstances surrounding it together with the interests of society. This court is also required to consider the various objectives of sentencing as laid out in the Judiciary Policy Guidelines 2023 together with the factors enumerated in the case of Francis K. Muruatetu v Republic (2017) eKLR.

3. The accused persons before court were charged and convicted for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The offence ordinarily attracts a death penalty but its mandatory nature was declared unconstitutional in the Muruatetu case.

4. In agitating for a lenient sentence, the accused persons offered their mitigation. In summary, learned counsel Ms. Khayo for the two accused persons submitted that the accused persons are first offenders and the fact that they are fairly young. She stated that Daniel Koech is a family man and that they are both remorseful and as such she pleaded for a non-custodial sentence.

5. I have considered the mitigation advanced by the accused person and the factors set out in the Muruatetu case being; Age of the offender, being a first offender, whether the offender pleaded guilty, character and record of the offender, commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform and social re-adaptation of the offender and any other relevant factor.

6. The Judiciary Sentencing Policy Guidelines also have identified some of the objectives that a court should have in mind so as to mete an appropriate sentence. The factors include:

    a. Retribution: to punish the offender for his/her criminal conduct in a just manner.

    b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

    c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.

    d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

    e. Community protection: to protect the community by incapacitating the offender.

    f. Denunciation: to communicate the community's condemnation of the criminal conduct.

    g. Reconciliation: To mend the relationship between the offender, the victim and the community.

    h. Reintegration: To facilitate the re-entry of the offender into the society.

7. In my judgment leading to conviction, I comprehensively addressed the facts occasioning the conviction of the accused persons. The post mortem report indicated that the cause of death

was severe neck injury due to assault. The injury on the neck demonstrated that the assailants were determined to terminate the life of the deceased.

8. In State v Banda and Others 1991(2) SA 352 (B) at 355A-C Friedman J explained that:

> "The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirement. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concerns."

9. The approach to sentencing is not complete unless and until a trial court directs its mind to the Bill of Rights in *the Constitution* as read with Section 333(2) of the Criminal Procedure Code on pre-trial detention. The provisions of the code are tailored to effectuate the period spent in remand custody before an accused person's case has been heard and determined to finality. This provision is underpinned on the presumption of innocence enshrined in our constitution that an accused person arraigned before a court of law is presumed innocent until proven guilty by the state. This right lies at the foundation of the administration of criminal justice. The bill of rights protects and guarantees the right to human dignity in Art. 28 and to have that dignity respected and protected. In Art. 29 of the same Constitution, every citizen enjoys the right to freedom and security which includes the right not to be deprived of freedom arbitrarily or without just cause.

10. In conclusion, imposing a sentence is an exercise that calls the trial court to objectively and purposively apply its mind underpinned on the objectives and principles as aforementioned. In attempting to strike a fair balance, the court in S v Rabie 1975 (4) SA 855 AD at 862D-F stated as hereunder:

> "A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive for severity, nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressure of society which contribute to criminality."

11. Having taken all the aforesaid factors into consideration together with the circumstances surrounding the offence, when striking a proper balance, the mitigating circumstances outweigh the aggravating factors and as such, the accused persons are hereby sentenced to 15 years each with a credit period pursuant to section 333(2) of the Criminal Procedure Code of the time spent in pre-trial detention.

12. Orders accordingly.

13. 14 days right of appeal explained.

DATED AND SIGNED AT ELDORET THIS 5TH DAY OF NOVEMBER, 2024

R. NYAKUNDI

JUDGE