REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL No. 40 & 41 OF 2009

JOSEPHAT MUTUKU KIMANTHI.....1ST APPELLANT

DANIEL MUTUNGA MASILA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the original conviction and sentence by Hon. W. N. Kaberia Senior Resident Magistrate dated 4th day of February 2009 in Kajiado SRM'S Court Criminal Case Number 1650 of 2005 as per Ruling of Court of Appeal Criminal Appeal No. 205 of 2016 delivered on 8th day of November 2017*)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

JOSEPHAT MUTUKU KIMANTHI.....1ST ACCUSED

DANIEL MUTUNGA MASILA.....2ND ACCUSED

JUDGEMENT

1. The appellants, **Josephat Mutuku Kimanthi**, and **Daniel Mutunga Masila** were charged together with his co accused, **John Wambua Mutuku**, were charged in the SRM's Court at Kajiado in Criminal Case No. 1650 of 2005 with two counts of the offence of robbery with violence contrary to Section 296(2) of the ***Penal Code***.

2. The particulars of count 1 were that on the 19th October, 2005 at Milimani Estate in Kitengela Township, in Kajiado District within Rift Valley Province, the Appellants jointly with another not before Court while armed with dangerous weapons namely pistol robbed off **Vanwinter Gunther** one ID card, one cell phone make samsung D 500 and cash Kshs. 9700/- all valued at Kshs. 56, 700 and at or immediately before or immediately after the time of the robbery wounded the said **Van Winter Gunther**.

3. The particulars for count II were that on the 19th October, 2005 at Milimani Estate in Kitengela Township, in Kajiado District within Rift Valley Province, the Appellants jointly with another not before Court while armed with dangerous weapons namely pistol robbed off **Isaack Gitau Musoi** one mobile phone Nokia 3310 and cash Kshs. 2,500/- all valued at Kshs. 7,500 and at or immediately before or immediately after the time of the robbery threatened to cause actual bodily harm to the said **Isaack Gitau Musoi**.

4. The prosecution called a total of five (5) witnesses while for the defence, the Appellants were the only defence witnesses and they gave unsworn testimony. The trial Court upon evaluation of the evidence from both sides, found the Appellants guilty of the offence of robbery with violence and sentenced them to death according to the law.

5. The appellants being aggrieved by the said decision preferred these two appeals which were consolidated. However, before the same could be heard, **Lenaola, J** (as he then was) on 20th July, 2009 summarily rejected the appeals. Further aggrieved by that decision, the appellants

moved to the Court of Appeal vide Criminal Appeal No. 205 of 2016 which appeal was allowed on 8th November, 2017 and the said Court directed that the appeal be heard in accordance with the law.

6. After the matter started de novo, PW1, **Isaac Gitau Musoi**, testified that on 19th October, 2005 at around 3:30 pm, he was at Milimani estate at Kitengela building a gate for **Mr. Gunther** (PW2). At 3.30 pm PW2 left the house and gave PW1 a lift to Kitengela using his motor vehicle registration No. KSA 438S saloon. When they reached the old Kajiado road, three men armed with two pistols emerged from the corner of a nearby fence and stood in front of the vehicle. One of the men stood on the left side of the vehicle, one on the right side and the other in front. The one on the driver's side opened the driver's door and pulled PW2 out of the vehicle and pushed him to the back seat. The one who was standing on the left side got into the vehicle and ordered PW1 to lie down. The one in front got into the driver's seat and drove the vehicle towards Kitengela. As the vehicle was being driven, the other two demanded money from PW2 and the person who was seated on the left back seat searched PW1 and took from him Kshs. 2,500 from his trouser pocket and his Nokia 3310 mobile phone.

7. The attackers drove for about 300 metres while robbing them then they stopped the vehicle and ordered PW2 who had been seated between the two attackers on the back seat to drive it. The attacker who was driving got out of the vehicle and the other two alighted too and they ordered PW1 and PW2 to drive away as they walked into a field near Milimani Estate. PW1 and PW2 then drove to Kitengela Police Post where they reported the matter and it took them about 5 minutes to reach the station.

8. Accompanied by three officers, they immediately boarded the vehicle and returned to the scene. They followed the route the attackers had taken and drove to the back of Athi River Prison where they found the three thugs. PW1 was able to identify them through their dressing. It was the evidence of PW1 that the thug who was driving the vehicle had a greyish jacket and he was short and plump, while the other one was in blue jeans jacket and the other one was in black t-shirt and cap. Upon seeing the vehicle, the attackers removed their jackets and started running away but the officers alighted and started shooting at them as they chased them and members of the public too joined the chase. Two of the thugs ran together while the third one, the 1st appellant, ran alone. PW1, PW2 and one police officer pursued the appellant and with the assistance of members of the public, they apprehended him at a dam behind Athi River Prison and using PW2's vehicle, they took him to Kitengela Police Post. After about 20 minutes, one of the other two attackers, the 2nd appellant, was brought to the station with the body of the third attacker who had been shot dead. After apprehending the said persons and taking them to the Police Post, they went back to the scene and collected the jackets.

9. According to PW1, the 1st Appellant was dressed in a short sleeved jacket which he identified in Court. The said jacket contained the 1st Appellant's ID, job identity card, a sim card holder which were in a black safaricom wallet all of which were marked. The blue jeans jacket worn by the 2nd Appellant was also marked though they did not find anything in the jacket. They however found a toy pistol next to the jeans which was also marked. However, stolen money and phones were never recovered.

10. According to PW1, it was the 1st appellant who was driving the vehicle while the 2nd Appellant sat at the back right seat and the deceased thug sat at the back left seat. He however did not know the Appellants prior to the incident. It was his testimony that PW2 was punched on the cheek as the thugs pushed him into the car.

11. In cross examination by the 1st Appellant, PW1 testified that he was shocked when they were attacked. He further testified that he was ordered to lay his head on the dashboard and he did so but he did not close his eyes. The crime scene was about 1-2 kilometres from Kitengela police post and PW1 and PW2 had driven straight to the post after their attack and took about 5 minutes to get there and they took about 10 minutes from the post to where they found the Appellants. He stated that the 1st Appellant was arrested by members of the public and that he saw him being arrested since he was close to him. It was the evidence of PW1 that he could not have mistaken him. They were shouting "mwizi mwizi" as they chased after the Appellants and that is how members of the public got involved.

12. In cross-examination by the 2nd Appellant, PW1 testified that the 2nd Appellant was dark in complexion. He was scared when the Appellants pointed a gun at them. The 2nd Appellant sat on the right back seat. PW1 saw the 2nd Appellant when he entered the vehicle because he had not ordered him to place his head on the dash board by then. They saw the Appellants as they entered into the field. PW1 stated that he did not give the description of the 2nd Appellant to the police since they returned immediately to the scene after reporting the matter and that the Appellants started running away on seeing the vehicle and that they caught up with the Appellants around 1 kilometre from the scene. He was however not present when the 2nd Appellant was arrested since he was already at the police post when the 2nd Appellant was taken there.

13. In re-examination PW1 explained that he saw the 2nd Appellant before he entered the vehicle and was in the blue jacket that was before Court and he was able to identify the 2nd Appellant by his clothes. The 2nd Appellant however, removed his jacket and threw it down as he ran away and it was collected in an open field near Athi River prison. According to PW1, he saw the 2nd Appellant very well when they stopped the vehicle and he also saw them as they left the scene. It was the 1st Appellant who drove the vehicle and PW1 could see him from where he had bent on the dashboard and that it was the 2nd Appellant who had removed PW2 from the vehicle and pushed him into the back seat. He, however, could not tell whether or not the pistol was a toy.

14. According to PW2, **Van Guinter Van Gunner**, on 19th October, 2005, he drove from Nairobi to his land in Milimani Estate within Kitengela. He arrived at around 3:00pm and met PW1 who was to do some work for him and after discussing the building a tomb stone for PW2's late mother in law they decided to go to Kitengela to buy the necessary items using motor vehicle registration No. KAS 438S Nissan Sunny which was being driven by PW2 while PW1 was on the passenger's seat. After driving for about 600 metres and at a bushy area, three people emerged from the corner and stood on the road aiming a pistol at them at a very narrow part of the road. One man remained at the front while the other two went to both sides of the vehicle. PW2 stopped the car and switched off the engine. The 1st Appellant, who was in a grey short sleeved jacket, which PW2 identified in court, told PW2 in English that they wanted his goodies and the car. PW2 then surrendered his mobile phone to the 1st Appellant who pulled him out of the car and then removed Kshs. 9700 from his breast pocket. PW2 struggled with the 1st Appellant as he wanted to take his wrist watch too. During this time, PW1 was on the passengers' seat with his face on

the dashboard.

15. According to PW2, he sustained an injury on the left cheek as the 1st Appellant pushed him into the back seat. After pushing PW2 into the back seat, the 1st Appellant got into the driver's seat while the 2nd Appellant sat with PW2 on the left side while the deceased robber sat at the back right seat. According to PW2, he was very calm and assured them nothing would happen. The 1st Appellant then drove the car for about 150-200 metres before it stalled. According to PW2, the car must have stalled because the 1st Appellant was not accustomed to it and was not able to change gears. After the car stalled, the attackers alighted and ran away. PW2 immediately jumped into the driver's seat and drove to Kitengela Police Post where he reported the matter. Accompanied by armed police officers they immediately got into his car and drove back to the scene where the Appellants had disembarked. They then spotted the suspects walking down the road about 500 metres from them and when they saw the car, they started running. The officers jumped out of the car and the suspects ran in two different directions. The 1st Appellant ran through an open space while the 2nd Appellant and the deceased robber ran into an estate. PW2 followed the 1st Appellant in his car and he heard gunshots and noise from members of the public who removed the 1st Appellant from a bush in front of PW2. They wanted to kill him with stones but PW2 pleaded with them to stop and a police officer arrived and they put the 1st Appellant in the boot of PW2's car and took him to Kitengela police post.

16. Thereafter, the police brought in the 2nd appellant and the body of the third attacker. According to PW2, the 2nd Appellant was in a blue jeans jacket which he identified in court. According to PW2 the buttons on the jacket were unique hence making it easy for PW2 to identify it. It was the evidence of PW2 that jeans jackets normally have metallic buttons which was not the case with the 2nd Appellant's jacket. However, their stolen properties were never recovered. At the police post, the police looked for the guns and other evidence but they did not find anything other than a toy pistol which was found in the field which PW2 identified as having been with the deceased robber. The police also recovered two jackets and a blue cap that was worn by the deceased robber.

17. After the robbery, PW2 was treated at Nairobi hospital and a P3 from was filled for him which was marked.

18. In cross-examination by the 1st Appellant, PW2 testified that he was terrified when a gun was pointed at him. He did not know the 1st Appellant before the incident and that he lost money, a cell phone and cigarette lighter during the robbery. He however insisted that he could not have mistaken the 1st Appellant since they followed him and arrested him with the help of members of the public but nothing was recovered from him. The 1st Appellant had wounds on his body from the assault by the members of public and he did not have shoes at the time of his arrest. According to him, he saw the green interior of the jacket as he struggled with the 1st Appellant and he informed the police of the same.

19. In cross-examination by the 2nd Appellant, PW2 testified that he was frightened when they pointed a gun at them. The vehicle was driven between 100 and 150 metres before it stalled. The 2nd Appellant stood on the left side of the car and he was in a blue jeans. The jackets were recovered on returning to the scene after the arrest and PW2 could identify it because of its buttons.

20. In re-examination, PW2 testified that the police officer jumped into his car immediately and they drove to the scene. It took them less than 10 minutes to return to the scene and they followed the route that the thugs had taken.

21. It was the testimony of PW3, **PC Jonathan Leramo**, that on 19th October, 2015 at about 4:00pm, he was at Kitengela police post when PW1 and PW2 went there in a motor vehicle Reg. No. KAS 438S Nissan Sunny and reported that they had been robbed by 3 people at Milimani estate. PW2 reported having lost his ATM card, cell phone and money while PW1 reported of having lost his Nokia cell phone. On receiving the report, PW3, PW4 **(Sgt. Olando)** and **PC Sheluko** boarded PW2's vehicle and they went to the scene at Milimani estate, about 3 km from the police post. PW2 showed them the direction the thugs had taken and they followed the direction for about 1 kilometre. While driving, PW2 showed them three young men who were walking so they approached them. PW2 stopped the car and they ordered the young men who were about 100 metres to stop but they did not. One of the men said "*mzungu amekuja*" and they started running away. PW3 shot in the air to scare them but they removed their jackets and continued to run. They chased after them. PW2 and **Sgt. Olando** chased the one who was in a half jacket while PW3 and **PC Shileko** chased the other two and they were joined by the members of the public. One of the attackers was shot while the other two (Appellants) were arrested with the help of members of public. They then called a police vehicle which they used to carry the body of the deceased robber and the 2nd Appellant to the police post. At the post, they found the 1st Appellant who had been arrested by PW4.

22. After taking the Appellants to the post, they returned to the scene to look for the items that the Appellants had thrown away. They recovered two jackets and inside one jacket they found a wallet which had a safaricom line holder. They also recovered an identity card for the 1st Appellant and also his staff ID. Further, they recovered a blue cap and toy pistol. PW3 identified all the said items in court. According to PW3, he did not know the Appellants before their arrest.

23. In cross-examination by the 1st Appellant, PW3 testified that PW2 gave them a description of the robbers who had robbed him. He described how they were dressed and when they went to the scene, they found the Appellants. After the arrest of the Appellants, PW3 in the company of PW1, PW2, PW4 and **PC Shileko** went to collect the items recovered. It was his testimony that he searched the clothes at the police post in the presence of PW1 and PW2.

24. In cross-examination by the 2nd Appellant, PW3 testified that he was 300 metres when the PW2 saw the Appellants. PW3 ordered them to stop when he was about 100 metres but they defied the order. Instead, they removed their clothes and started running away towards the Nairobi National park where they were smoked from. PW3 saw the 2nd Appellant in the blue jacket and he saw him too throw it away. They recovered the exhibits after arresting the Appellant but nothing was recovered from the 2nd Appellant's jacket.

25. In re-examination, PW3 testified that he saw the Appellants remove the jackets and that he searched the jackets in the office in the presence of PW3, PW4 and **PC Shileko**.

26. PW4, **Sgt. David Olando,** testified that on 19th October, 2005 at around 4:00pm, he was at Kitengela Police Post when PW2 drove there with PW1 in high speed and informed them that they had been robbed. They told him that they believed the thugs could be traced so PW4 mobilized PW3 and **PC Chelugo** and they boarded PW2's vehicle and drove to Milimani where PW2 led them to the route the thugs had taken. When they reached somewhere behind Athi River prison, they saw 3 young men about 300-500 metres away and when the said 3 men saw them, they started running away. PW2 and PW1 informed them that the 3 young men were the ones who had robbed them. PW2 increased the speed towards the thugs but at some point, they dispersed in different directions. Two took one direction while the third one took another. PW4 ordered the other two officers to go after the two men who had taken one direction while he pursued the other one with PW2. They shouted "mwizi mwizi" as they pursued the thugs, the other officers also shot in the air. The man PW2 and PW4 followed was the 1st Appellant and he was arrested by members of the public who started to beat him but were restrained. They re-arrested the 1st Appellant, placed him in PW2's vehicle and took him to the post. They however did not recover any of the stolen items. After about 15 minutes, the other two officers returned to the post with the 2nd Appellant and a body of the deceased robber who had been shot dead.

27. The OCPD ordered the two officers to return to the scene and search for the stolen items and they later returned with two jackets and a toy pistol. The jackets were grey and blue and a blue cap. Inside the grey jacket was found a black wallet which had the 1st Appellant's ID. In the wallet, there was a staff identify card and a safaricom simcard holder.

28. According to PW4, PW2 had injuries on the cheek, while PW1 had not sustained any injuries. PW2 was accordingly issued with a P3 form. It was the testimony of PW4 that the Appellants were strangers to him.

29. In cross-examination by the 1st Appellant, PW4 testified that PW1 and PW2 informed him that they could identify the robbers. They told him that the robbers wore blue and grey jackets. He reiterated that the Appellants started running away on seeing the vehicle. However, no weapon was recovered from the 1st Appellant. The exhibits were recovered after their arrest but he had witnessed them throw away their clothes and they did not get time to collect the clothes before taking them to the station because members of the public wanted to kill them. He was however, present when the clothes were searched.

30. In cross-examination by the 2nd Appellant, PW4 testified that he was not present at the time of the recovery of the exhibits but no recoveries of the stolen items were made.

31. In re-examination, PW4 testified that he was 50 metres away when the 1st Appellant was arrested by members of the public.

32. PW5, **PC Patrick Kasuki**, was on 29th October, 2005 ordered by the Kajiado deputy DCIO to accompany him to Kitengela where a robbery had been reported. When they arrived at Kitengela police post, they were shown the Appellants who were already in custody. They were given the statements of the witnesses and the exhibits. Among the exhibits was a toy pistol, two jackets blue and grey in colour, a blue, a black wallet containing the 1st Appellants identity card, staff identification card and a sim card holder. They took the Appellant to Isinya police station and later charged them. PW5 did not know the Appellants prior to their arrest. PW2 had complained of having lost Kshs. 9,700, a cigarette lighter, identity card and a cell phone while PW1 had lost Kshs. 2,500 and a nokia cell phone. PW5 produced the items which had been identified and marked as exhibits as well as PW2's P3 form. which was filled on 24th October, 2005.

33. In cross-examination by the 2nd Appellant, PW5 testified that he interrogated the 2nd Appellant but he pleaded ignorance. The witnesses had indicated in the OB extract that the 2nd Appellant was wearing the jacket which was exhibited.

34. In cross examination by the 1st Appellant, he stated that he did not arrest the 1st Appellant who was arrested by the complainants. The complainants reported that the 1st Appellant was in a grey jacket. The complainants had identified the Appellants at the scene leading to their arrest. According to him, the 1st Appellant did not complain about the identity cards.

35. At the close of the prosecution's case the learned trial magistrate ruled that the appellants had a case to answer and placed them on their defence. Both the Appellants opted to give unsworn statement.

36. In his statement in defence, the 1st Appellant stated that on 19th October, 2005, he was off duty so he went to Upendo bar at Noonkopir where he ordered for a tusker. He remained at the said bar from midday to evening. As he was going to the toilet, he accidentally knocked down someone's beer and it poured. The owner of the beer became enraged and despite the 1st Appellant's apologies, the person punched him and a confrontation emerged between the two and they were thrown out by the bouncer. Outside, the person pushed him and he fell in a ditch containing dirty water. The person held him down and as a result of the commotion, a number of people went to where they were. Soon after, a salon car with a white man and two Africans pulled up. The Africans alighted and one of them identified himself as a police officer. He asked what was happening and the patrons told them that the 1st Appellant was disturbing them. The officer then took the 1st Appellant to the car and threw him in the boot and took him to Kitengela police post and he was placed in the cells.

37. According to the 1st Appellant, at the post, he was searched but nothing was recovered from him. The officer removed his wallet containing his documents then placed him in the cells. The 1st Appellant remained in custody until the following day at 4:00pm when he was taken to Isinya police station and on 26th October, 2005 he was arraigned in court. It was his statement that he was surprised that he was being charged with the offence of robbery with violence an offence he knew nothing about and he did not know the 2nd Appellant.

38. On his part, the 2nd Appellant stated that on 19th October, 2005, he went to see his girlfriend at a slaughter house area in Kitengela where he was from 10:00 am to 1:00pm. At around 5:00pm, two men went there and one of them called his said girlfriend and asked her who the 2nd Appellant was but she did not answer. The 2nd Appellant told them that she was his wife. One of the men grabbed a stool and hit the 2nd Appellant on the head and a struggle ensued. Outside, the other man hit him on the head and he lost consciousness. He only came to his senses at Kitengela police post cells. According to him, he called the officer at the report office and told him what had happened and the

officer promised to look into his matter the following morning. At around 1:00pm, the 2nd Appellant was called from the cells and when he went outside, he saw an African and Whiteman outside but they never spoke to him. He was taken back to the cells. After an hour, he was called, put in a vehicle and was taken to Isinya police station until the day he was taken to court. He was surprised that he was being charged with the offence he knew nothing about.

39. In his judgement, the learned trial magistrate found that the ingredients of the offence of robbery with violence contrary to section 296(2) of the Penal Code were proved. He also found that the time between when the robbery was committed and when the appellants were apprehended eliminated any possibility of mistaken identity. According to the learned trial magistrate the conduct of the appellants in running away on seeing PW2's car showed that they had been involved in the robbery and that their allegations that they were arrested at different places cannot be true. There was also unlikelihood that they were framed since they were strangers to PW1 and PW2. The learned trial magistrate found that they were properly identified as the robbers who robbed the complainants and was satisfied that the prosecution established its case beyond any reasonable doubt and convicted them on both counts.

40. In this appeal, the appellants have relied on the following grounds:

1) The proceedings were defective in entirely as the appellants were denied their right to have witness statements despite requesting for the same and court having made an order to the same effect.

2) The learned trial magistrate erred in facts and in law when he convicted the accused persons on bases of uncorroborated evidence.

3) The learned trial magistrate erred in fact and in law when he convicted the accused persons on basis of contradicted evidence.

4) The learned trial magistrate erred in law and in facts when he held that the accused persons had been properly identified by the complainant by relying mostly on hearsay evidence.

5) The learned trial magistrate erred in law and in fact when he held that the charges against the accused persons had been proven beyond reasonable doubt and failed to consider the fact that prosecution totally relied on the circumstantial evidence to charge the accused persons and the court based the conviction on the same evidence without warning himself of the danger of convicting accused persons purely on the basis of circumstantial evidence.

6) The learned magistrate erred in law and facts when he dismissed the accused persons defence.

41. It was submitted that it is contended by the appellants that the ingredients of the offence of robbery with violence include use of offensive weapon and or the accused persons must have in a company of two or more individuals and additionally the victim must have been wounded in the process. It follows that, the prosecution was supposed to prove that there was offensive weapon used against the complainants and in addition the prosecution was to prove that the two accused persons were at the scene of crime at the same time when the alleged attack took place. Finally, the prosecution was duty bound to prove the complainant was harmed in the process of the alleged attack failure to proof the above ingredients then suffice the trial court to proceed and set the accused person at liberty.

42. It was further submitted that this being the first appeal from the trial court, this court is mandated to reconsider and re-evaluate the evidence which was adduced before the Trial Court and arrive at its own determination on whether or not to uphold the conviction bearing in mind that the court did not see or hear the witness testify.

43. It was submitted that given the facts of this case, there were glaring inconsistencies and contradictions in the evidences tendered by the prosecution witnesses during the trial in regard to an account of events that transpired at the material date of crime the 19th day of October 2005. According to the appellants, the narration by both Pw1 and Pw2 in regard to events that transpired is contradictory and presupposes witnesses who had been coached. In this regard the appellants relied on the evidence of PW1 and PW2 regarding the circumstances under which the attackers left them and submitted that such contradictions are not expected if at all this heinous act had occurred in a brood day light as alleged.

44. It was further submitted that Pw1, Pw2, Pw3 & Pw4 seems to have alleged that the arrest of the appellants took place within a period of less than 20 minutes after alleged offence had been committed and according to the evidence on record all the three suspects were apprehended since they indicated that the appellants herein were arrested and the third offender was gunned down and yet they were unable to make recovery of the items stolen from the appellants. The failure to recover the stolen items according to the appellants point to a situation, of witnesses having been coached to defeat the wheels of justice. It was noted that none of the items produced in evidence were recovered from the appellants or the deceased person. Since they were recovered from the field, there was no link whether they belonged to the appellants and in addition whether the appellants were at the scene of crime. According to the appellants, this evidence is purely circumstantial evidence which the trial magistrate should have warned himself in proceeding to pass his judgment however the trial magistrate's judgment doesn't have the reasoning behind basis to hold that prosecution had proved its case beyond reasonable doubt.

45. It was contended that the evidence on record was so scanty and contradictory to meet the threshold requirement in criminal proceedings and especially the ingredients of a case of robbery with violence due to the following reasons.

a) The element of the appellants being armed has not been established, it is alleged that the appellants were arrested almost immediately after the offence had been committed as they were seen walking within an open field and yet the two pistols the trial court alludes to have been used were not recovered and presented to the court. The prosecution managed to bring a plastic toy pistol which was collected from the field and not recovered from the appellants. Since PW2 was a retired commander air force pilot who was working for the Namibian air force, with the nature of his work he is expected to have been acquainted with all manner of

weapons since he was not an ordinary citizen hence if the attack occurred as PW2 says that he struggled with attackers, then he should have differentiated a real pistol from a toy pistol and since he maintained that the attackers were armed with pistols, then the toy pistol was pure fabrication by the prosecution case to defeat the justice.

b) Secondly though it is alleged that PW2 was injured at the time of attack and p3 form filed by one **Dr Kamau** the said doctor was never called to testify in court to confirm the alleged injuries and it appears that the same was produced by PW5 **PC Patrick Kasuki** who is a not a qualified doctor but a police officer, Pw5 did not even state whether he ever worked with **Dr. Kamau** and therefore it allegations that the degree of injury is harm is hearsay evidence and therefore inadmissible in evidence in a court of law. In the circumstances, it was submitted that there is no evidence that PW2 was harmed during the attack hence the ingredient that at the time of robbery, he wounds, beats, strikes or uses any form of personal violence has not been proved.

c) Finally, though PW2 stated that the attackers spoke to him in English, during the proceedings it was clear that the appellants relied on the services of an interpreter and at some point the 1st appellant failed to cross-exam the Pw2 then, (pw1) because he did not understand Kiswahili. In the circumstances, the appellants were not at the scene of crime since the person brought in court were not able to communicate in English despite Pw2 indicating to the court that attackers conversed in English dialect well. Furthermore, the trial magistrate casually dismissed the appellants' version of defence that they were arrested in different occasions and only found themselves in custody facing similar charges which didn't have any idea thereof.

46. It was further submitted that it was contradictory when Pw2 stated that the distance from the scene of crime to Kitengela Police Station is about 1.5Km and he says it took him about 15 minutes to reach the stations whereas Pw3 states that distance from the scene of crime to the police station is about 3 kilometres and further continues to state that from the scene of crime they went for another distance of 1 kilometre making a total of 4 kilometres before they could trace the appellants. To the appellants, it cannot be justified how one can take 15 minutes to drive a distance of 1.5 kilometres. To them, the distance and the time it took after the offence was allegedly committed is questionable and disputable and on the light of these material glaring contradictions in the prosecution witnesses, unfortunately, the trial magistrate and instead of being cautious in his determination since it was impossible for him to establish the truth as it was held in the case of **Felix LuwambeGonzi -vs- Republic in Criminal Appeal No. 83 of 2006**. It was submitted that this evidence was inconsistent and that the trial court had erred in relying on such evidence hence it was unsafe to convict the Appellants and more so when appellants were facing a capital offence. In this regard the appellants relied on **Onubugu vs. State 119741 9 S.C.1 KEM vs. State (1985)1 NWLR** and submitted that the trial court did not make specific finding prior to proceeding and convict the appellant thereby accessioning miscarriage of justice.

47. According to the appellants, the entire proceedings and the judgment of the trial court heavily relied on circumstantial evidence to lead into a conviction especially the items allegedly collected from the field and not from the accused persons. While it was alleged that all the accused persons removed their jackets and threw them away the appellants contended that practically persons in a state of danger cannot think and act the same hence it is impossible for the three persons to have thought of removing jackets at the same time. However, the trial magistrate heavily relied on that shaky evidence to hold that there was corroboration of prosecution witnesses. Based on **Sawe vs. Republic [2003] KLR 364** it was submitted that for circumstantial evidence to find a conviction, such evidence must point irresistibly to the accused. And in order to justify the inference, the exculpatory facts must be incompatible with the innocence of the accused and incapable of any other rational explanation or reasonable hypothesis than that of the accused guilty. In this case it was submitted that the circumstantial evidence relied upon by the trial magistrate was unsafe and it was erroneous for the learned magistrate to conclude that the appellants committed the offence of robbery with violence when the facts were contrary to the same and could not justify his inference in any manner and thus ought to have found it in favour of the appellants.

48. According to the appellants, they were denied their right to have witness statements despite and thereby their rights under the constitution infringed. To the appellants, the proceedings herein were contacted in contravention of the rights of the appellants of a fair trial. The prosecution 'manhandled' the proceedings in collaboration with the court and subjected the appellants to untold mental and physical torture. The prosecution failed to supply the witnesses with witness statements and proceeded with hearing regardless of the appellants complaints before the court the magnitude of mistreatment subjected to them by the police. According to them whereas the accused were charged in the year 2005, the trial court then, **RA Oganyo SRM** together with the prosecution infringed appellants' rights of fair trial and appellants remained in custody for a period of four (4) years without proceeding with the case leading to the accused persons proceeding to file an application in the high court of Kenya at Machakos to complain against the mistreatment meted against them, being Machakos Misc. app no. 17 of 2007. However, while misc. Application was still pending before the High Court the then magistrate of transferred but there was no indication of changes in the office of prosecution. In fact, this is so clear because when the matter came up for directions on how the case would proceed since it had been hard partly before different magistrate the prosecution opposed appellants' preference to have the matter start *denovo* regardless of the fact that the prosecution was aware the appellants had not been supplied with witness statements and at the same time had not been given opportunity to cross-examine the witness who had testified.

49. It was noted that a meticulous examination of the entire proceedings herein there is no mention whether the appellants were ever supplied with witness's statements regardless of their protracted efforts to demand to be supplied with the same hence we concluded that the appellants were never furnished with statement and other documentary evidence which the prosecution relied upon during the trial and it on that backstroke the prosecution managed to produce a key document in these proceedings namely P3 form marked as exhibit without calling the doctor to testify and the same was produced by a police officer.

50. It was therefore submitted that the proceedings herein were conducted in the violation of the appellant's right to a fair trial, and thus contrary to section 21 of the former Constitution which stated as follows:-

> *21(1) If any person is charged with a criminal offence, then, to secure unless the charge is withdrawn, the case shall be afforded a fair hearing protection within a reasonable time by an independent and impartial court of law established by law.*
>
> *(2) Every person who is charged with a criminal offence—*
>
> *a) shall be presumed to be innocent until he is proved or has pleaded guilty; .*

b) shall be informed as 'soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;

c) shall be given adequate time and facilities for the preparation of his defence;

d) shall be permitted to defend himself before the court in person - or by a legal representative of his own choice;

e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, and except with his own consent the trial shall not take place.

51. It was therefore submitted that the provisions of the then constitution the appellants' rights were violated hence they were denied a fair trial. To them, this right was violated because the appellants trial was not fair *ab initio* and therefore any conviction based on a trial which was not fair contravenes the fundamental law of the land and should be dismissed. Reliance was placed on the case of **Joseph Ndungu Kagiri vs. Republic [2016] eKLR** where the Court of Appeal citing the decision in case of **Thomas Patrick Gilbert Cholmondeley vs. Republic**, (decided before the promulgation of the 2010 constitution) held that:-

> ***"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under…our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items." In arriving at this holding, the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda: respectively R. V. Ward [1993] 2 ALL ER 557; R. V. Stinchcombe [1992] LRC (Cri) 68; Olum & Another V Attorney General [2002] 2 E.A. 508; and, the Kenyan Case of George Ngodhe Juma & two others Vs. The Attorney General Nairobi High Court, (Misc. Criminal Application No. 345 of 2001)."***

52. It was reiterated that the trial in these proceedings breached the fundamental provision of the constitution since the appellants were not afforded a fair trial hence the entire proceedings were a sham and a gross violation of constitutional provisions safe guarding a fair trial and the proceedings also violated the provisions of the ***Criminal Procedure Code***, the trial therefore was conducted in a manner that was prejudicial to the accused persons (appellants) and caused injustice and grave prejudice to the appellants and this court ought to proceed and quash the conviction and set the appellants at liberty.

53. According to the appellants, the learned magistrate misdirected his mind to hold that the appellants had been properly identified by the prosecution witnesses. While the trial magistrate relied on clothes produced in court which were allegedly collected from the field and presumed to be owned by the appellant, none of the clothes was found with the appellants hence PW3 & PW4's testimony was purely hearsay when they alleged to been informed by PW1 & PW2 that those were the clothes the accused were wearing at the time of the alleged attack. There was no identification parade conducted by the police to establish whether the complainants were able to positively identify the appellants. In that regard, it was submitted that appellants were purely victims of circumstances and the conviction was based on assumptions and speculations that the appellants were properly identified on basis of dress which they were not found wearing. Further PW1 & PW2 did not describe to the police at the time of making report the nature of dress the appellants were wearing at the time of attack.

54. It was therefore submitted that the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. Where the prosecution fails to prove their case as required, the accused is entitled to the benefit of every reasonable doubt as it was held in the case of **Tukaram&Anr. v. The State of Maharashtra,, AIR 1979 SC 185; and Uday v. State of Karnataka, AIR 2003 SC 1639)** and circumstances of this case qualifies for the appellants to be granted benefit of doubts and be set at liberty.

55. It was therefore the appellants' case that the learned magistrate erred in law and facts by convicting the Appellants and sentencing them to face death as prescribed under the law on the bases of the above stated and elaborated grounds of appeal and they urged this court to set aside their conviction, quash their sentences and set them at liberty.

56. On the part of the Respondent it was submitted that the Appellants were supplied with the witness statements on 29th August, 2006 while in Court and their only complaint was that they were not given time to read the statements especially the one for PW1 who had attended Court for cross-examination of his earlier evidence. Further, they also wanted PW2 to repeat his evidence in chief but the same was not allowed. However, the matter started de novo and PW2 gave his evidence again on 18th July, 2008 and since the Appellants had been supplied with witness statements they had had time to go through and understand the evidence therein, they were able to cross-examine the witnesses and the same is reflected in the proceedings. They never raised the issue of statements thereafter hence to state at the Appeal stage that they were never supplied hence prejudiced is aimed at to deceive the court, forgetting that this court is a court of record and the record indicated that they were supplied two years before the matter stared. In view of the foregoing, this ground must fail.

57. As for the second and third grounds on uncorroborated evidence and contradictory evidence, it was submitted that the two complainants in this matter PW1 and PW2 gave their evidence on how they were hijacked and robbed off their personal items and money. They both identified their attackers since it was during the day, they were able to state in court clearly in court who played which part in the hijacking and robbery and did not contradict themselves. Their evidence from what transpired while they were on their way to Kitengela was direct, clear and corroborated each other. Even if there were contradictions in their evidence, the same were very few and minor hence did not create doubt in their testimony as to who robbed them, how they were robbed and what transpired thereafter leading to the arrest of the two

Appellants and the shooting of one of the robbers.

58. On the issue of identification, it was submitted that PW1 and PW2 were robbed at around 3:00 pm which was during broad daylight. The robbers had not covered their faces and they first stood on the road before they got into the car. The robbers also spoke to PW1 and PW2 before robbing them. There was no time that the robbers covered the eyes of PW1 and PW2 so as not to be able to see who were robbing them. PW1 and PW2 were able to correctly describe in court who among the robbers wore what, the roles each played and where they sat meaning they were able to see them well and identify them. Further, when they made the report at the station and went to the scene, they were able to follow and spot the Appellants and the other deceased robber and were able to identify them firstly from their dressing. They had also spent some time with the robbers before the car stalled forcing them to get out and leave the complainants. It was the evidence of PW1, PW2 and the officers who accompanied them to the scene that the Appellant and the deceased robber started running upon seeing the car. This means that they were able to identity that that was the same car they had robbed and they opted to try and escape. Though they removed their jackets and threw them so as to avoid being identified, they were pursued with the help of the members of the public who were able to arrest them.

59. It was therefore submitted that from the evidence of PW1 and PW2, the Appellants were properly identified and were arrested just few minutes after the commission of the offence and not far from crime scene and the complainants took part in their arrest hence there was not need to conduct an identification parade.

60. According to the Respondent, the evidence was sufficient and proved the case against the Appellant beyond reasonable doubt. It was the evidence of PW1 and PW2 that they were carjacked by three robbers who were armed with a pistol and in the course of the robbery, PW2 was also injured. The robbers robbed PW1 and PW2 off their mobile phones and money. The foregoing fits the ingredients needed for the offence of robbery with violence to be said to have been committed. Further, the Appellants were positively identified and arrested hence the evidence was sufficient to prove the offence of robbery beyond reasonable doubt and the trial court did not error in convicting the Appellants based on the same.

61. The Respondent however noted that what was not clear was how nothing that was robbed from PW1 and PW2 was recovered from the Appellants or the deceased robber despite them having been spotted almost immediately, chased and captured. Although they had taken their jackets off and thrown them in the bush, the same were recovered with some items of the Appellants and the toy pistol but nothing that was alleged to have been stolen was recovered.

62. It was submitted that the Appellant's defence was a mere denial that did not punch holes into the prosecution's case hence the same remained unchallenged since no doubt was created. The trial court did consider their defence in its judgement before it decided that the prosecution's case had been proved and went ahead to convict the Appellants. The trial court analysed their defense in its judgement hence the decision to convict the Appellants was reached after the consideration of both the prosecution and defence evidence. It was therefore submitted that the prosecution's evidence was consistent, direct, clear and without any doubt whatsoever that the appellants committed the offences as convicted.

63. In view of the foregoing, the Respondent urged this Court to uphold the conviction of the Lower Court. However, in view of Supreme Court Petition No. 15 & 16 of 2015 - ***Francis Muruatetu and Anor. Vs Republic***, it was submitted that notwithstanding the fact that the Appellants were given a chance to mitigate, the Trial Court in sentencing them noted that the only sentence provided for by the law was death and went ahead to sentence them to suffer death. This court, it was submitted, can freshly consider the circumstances of this matter, the extent of the offence and issue a suitable sentence.

Determinations

64. This being a first appeal, the court is expected to analyse and evaluated afresh all the evidence adduced before the lower court and draw its my 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."**

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

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

66. 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.**

67. In this case, the complainant's case in summary was that on 19th October, 2005, PW1 and PW2 were driving from Milimani Estate to Kitengela Township when along the way at some narrow bushy part of the road they were accosted by three gun wielding men who stopped them, entered the vehicle, pushed PW2 to the back seat while making PW1 to place his head on the dashboard. They then drove the vehicle for about 300 metres. In the meantime, they robbed PW1 and PW2 of some money and their phones. At some point the vehicle stalled or stopped and the said men got out of the vehicle and PW2 then drove to Kitengela Police Post and reported the incident. In the course of their ordeal, PW2 sustained injuries.

68. After reporting the incident, PW1 and PW2 were accompanied by police officers back to the scene where they found the said attackers who started running away upon seeing their approach. They removed their jackets and two of them ran in one direction while one ran in separate direction. However, eventually two of them were apprehended while one was shot dead. The two who were apprehended were, according to the prosecution witnesses the appellant herein. They together with the body of the deceased were taken to the Police Post.

69. According to PW1 and PW2, they were able to identify the appellants. It was their evidence that it was the 1st appellant who drove the said vehicle before it stalled while the other two attackers sat with PW2 in the back seat. According to PW2, in the course of his struggle with the 1st appellant he was able to notice the colour of the lining of his jacket which was unique. He was also able to notice that the buttons of the jacket of the other attacker were not the usual jacket buttons. After the attackers were apprehended and taken to the Police Post, the police officers returned to the scene where they collected the jackets which the attackers had thrown as they were trying to escape. From the 1st appellant's jacket was recovered his ID Card, Staff ID Card and Simcard holder. Also recovered was a toy pistol. However, none of the stolen items were recovered.

70. On the part of the appellant's the 1st appellant stated in his unsworn statement that he was arrested after an altercation with some patrons at a bar where he was drinking and that he never participated in the said robbery. The 2nd appellant on the other hand stated that he was arrested when he had gone to visit his girlfriend.

71. Section 296 of the ***Penal Code*** provides as follows:

> ***(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.***
>
> ***(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 before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.***

72. The definition of robbery however appears in section 295 thereof as follows:

> ***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.***

73. In this case the appellants were in company of another person. In **Masaku vs. Republic [2008] KLR 604**, the Court reiterated that:

> **"It is now well settled that any one of the following need be proved to establish the offence:**
>
> **(1) If the offender is armed with any dangerous or offensive weapon or instrument or**
>
> **(2) If the offender is in the company of one or more offenders or**
>
> **(3) If at or immediately before or immediately after the time of the robbery he wounds, strikes or uses any other violence to any person.**
>
> **In this case, the particulars of the charge stated that the appellant was with another at the time of the robbery and further that at or immediately before or immediately after the time of such robbery wounded the deceased. It is plain therefore that two of the three ingredients of the offence of robbery with violence under section 296(2) of the Penal Code were given. It should be remembered that a single ingredient is sufficient."**

74. It was submitted on behalf of the appellants that since the evidence of injuries inflicted on PW2 was inadmissible having been given by a person who did not prepare the P3 form, one of the ingredients of the offence was not proved. With due respect that is not the legal position.

The offence may be proved even in the absence of evidence that injuries were inflicted on the victims as long as the other alternative ingredients that is being armed with any dangerous or offensive weapon or instrument or if the offender is in the company of one or more offenders. In this case the complainants stated that the attackers were armed with pistols and were three in number. Accordingly, even without the P3 form the evidence was sufficient to constitute an offence of robbery with violence.

75. The appellants contended that their rights to fair trial was violated in that they were never furnished with statements. Article 50(2)(c) and (j) of the Constitution provides as hereunder:

> ***(2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(c) to have adequate time and facilities to prepare a defence;***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;***

76. It is therefore clear that the appellants were entitled to be informed in advance of the evidence the prosecution intended to rely on, and to have reasonable access to that evidence. In **Dennis Edmond Apaa & Others vs. Ethics & Anti Corruption Commission [2012] eKLR** the court had this to say on the same: -

> **"The words of Article 52(2) (j) that guarantee the right to be informed in advance cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused person and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with other rights to fair trial. Article 50(2) (c) guarantees the accused the right to have adequate facilities to prepare a defence. This means the duty is cast on the prosecution to disclose all evidence, trial materials and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure if made during the trial the accused must be given adequate facilities to prepare his/her defence. The obligation to disclose was a continuing one and was to be update when additional information was received."**

77. In **R vs. Ward [1993] 2 All ER 557**, **Glidewell, Nolan and Steyn, LJJ** held that:-

> ***"The prosecution's duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses."***

78. However, as was held by the Court of Appeal in **Republic vs. Ahmad Abolfathi Mohammed & Another [2019] eKLR**:

> **"The record indicates that the appellants were availed all the statements of the prosecution witnesses before those witnesses testified. They also had access to the exhibits that were produced. What we understand the appellants to complain about is that they were not availed the intelligence report that led to their arrest for suspicion of involvement in terrorism acts. Our reading of Article 50(2) (j) of the Constitution does not grant the appellants the blanket right to access all the information in possession of the police including intelligence reports. What the appellants were entitled to was the evidence that the police intended to rely on at the trial, and of course any other evidence in possession of the police that could have exonerated them from the charges they were facing, even though the police did not wish to use that evidence. Indeed, even the right to access the evidence that the police intend to rely on is not totally unfettered; it is qualified by the constitutional requirement that the access should be reasonable, the determination of which must depend on the circumstances of each case. In *Bakari Rashid v. Republic [2016] eKLR*, this Court refused to fault the prosecution for failure to produce police informers as witnesses. It stated thus:**
>
> > **"Police officers and crime-busters, most of the time use informers to gather information regarding crime. The informers are normally secretive as they go about their business and to open them up by calling them as witnesses in open court would certainly blow up their cover, compromise them and expose them to danger. That will defeat the very purpose for which they exist. That is why they are never called or are rarely called as witnesses."**
>
> **We are therefore satisfied that the appellants' right to fair trial under Article 50(2)(j) was not violated because all the evidence that the prosecution produced in support of its case was availed in advance to the appellants."**

79. In Kenya, the prosecution is obliged to inform the accused in advance of the evidence they intend to rely on, and to give the accused reasonable access to that evidence. It is an obligation that never shifts to the accused and hence even without an accused applying for the same, the prosecution has a constitutional duty to place the said material at the disposal of the accused upfront. That is my understanding of the decision of the Court of Appeal in **Simon Githaka Malombe vs. Republic [2015] eKLR,** where the said Court expressed itself as follows:

> **"We do not quite fathom how the appellant can possibly be to blame for the prosecution's failure to supply the witnesses'**

statements requested by the appellant and ordered by the trial court. It would seem that both courts below somehow considered the appellant to blame for not having money to photocopy the statements. This notwithstanding that he was in custody and had indicated on the record that his kin had not been to see him. To adopt the stance of the two courts would be to stigmatize and even criminalize poverty or inability to pay for statements. It is rather surreal…It is the prosecution that assembles and retains custody of evidence against an accused person. The duty of disclosure lies with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a responsibility that the Office of the Director of Public Prosecutions can shirk. Whenever an accused person indicates inability to make copies, the duty must lie with the State, which the prosecutor represents, to avail the copies at State expense. It is for that Office to make proper budgetary allocation for that item. Then only can the constitutional guarantee in Article 50(2) (c) and (j) be real."

80. In this case, the record does indicate that on 10th January, 2006, the 1st appellant stated that he wanted to be furnished with witnesses' statements before he could proceed with the case. The court then directed that the appellants be furnished with the said statements and adjourned the matter to 2.00pm but the matter could not proceed as the appellants had not been furnished with the same. The position seemed not to have changed till 29th August, 2006 when the court directed that the statements be copied immediately and they be supplied therewith. The issue of the supply of the statements seems to have ended there. It is therefore my view that the contention that the appellants were not supplied with the witnesses' statement is not borne out by the record and that ground must similarly fail.

81. It was further contended that the learned trial magistrate relied on circumstantial evidence to convict the appellants yet the standard of proof in such cases was never met. On this issue, **Mativo, J** in **Moses Kabue Karuoya vs. Republic [2016] eKLR** expressed himself as hereunder:

"The evidence used to prove guilt is classified as either direct or circumstantial. Direct evidence, is a statement about a fact constituting a disputed material proposition of a rule of law, while circumstantial evidence is testimony about a fact or facts from which the disputed material proposition may be inferred. Thus, circumstantial evidence can be defined as relying on certain proved or provable circumstances from which a conclusion can be drawn that it was the accused person who committed the offence. It is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. It differs from direct evidence, which tends to prove a fact directly, typically when a witness testifies about something which that witness personally saw, or heard. Both direct and circumstantial evidence are to be considered, but to bring a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty. This follows from the requirement that guilt must be established."

82. In this case, PW1 and PW2's evidence was that they were accosted by the appellants and a third person who forced them to stop the vehicle. The attackers then took control of the vehicle until either the vehicle stalled or was stopped after which they were left. Upon their return to the scene, they saw the attackers who included the appellants who started running away but were apprehended. As they run away they dropped their jackets. However, it was the complainants' evidence that they had sufficient time to see the attackers. In these circumstances, it is my view that the case cannot be said to have been based on circumstantial evidence. Rather, the evidence of PW1 and PW2 was direct evidence.

83. It was contended that there were contradictions in the evidence of the prosecution witnesses.

84. I find myself persuaded to borrow the definition rendered by the Court of Appeal of Nigeria in the case of ***David Ojeabuo vs Federal Republic of Nigeria*** **{2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.** where the court stated as follows:-

"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

85. It is true that there were contradictions in the evidence of PW1 and PW2 with regard to the circumstances under which the vehicle was stopped by the 1st appellant. While PW1 stated that the 1st appellant stopped it, PW2 stated that it stalled. Again there was a contradiction with respect to the distances and the timings. I agree with the holding in on **Onubugu vs. State 119741 9 S.C.1 Kem vs. State (1985)1 NWLR** where the court was of the opinion that**:-**

"Where prosecution witnesses have given conflicting version of material facts in issue, the trial judge by whom such evidence is led must make specific findings on the point and in so doing must give reasons for rejecting one version and accepting the other. Unless this is done, it will be unsafe for the court to rely on any of the evidence before it."

86. However, this being a first appellate court, the omission by the trial court to deal with the same is not necessarily fatal to the decision arrived at. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See ***Law of Evidence*** **(10th Ed) Vol. 1 at 46.**

87. As was stated in **John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:**

"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people

allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."

88. This was the position in **Willis Ochieng Odero vs. Republic [2006] eKLR,** where the Court of Appeal held:

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

89. Where there are differences in the narration of events by prosecution witnesses, especially as to recounting or recollecting the distances and the timings of the events, which are mere discrepancies that would not avail the accused person, because some of such discrepancies are expected as being natural (**The State v Sunday Dio Dogo (Alias Sunday Idogo)** HSO/3C/2012, **Oboh J** in the High Court of Nigeria).

90. Each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that a clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. (**Nyakisia v. R**. E. A. C. A. Crim. App. 35-D-71; -/5/71; Duffus P., Spry v. P. & Lutta J. A., in the East African Court of Appeal). The contradictions in respect of the child's age therefore cannot assist the appellant to avoid criminal.

91. In the case of **Njuki vs. Rep 2002 1 KLR 77**, the court said the following in respect of discrepancies in the evidence of witnesses:

"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused… however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused".

92. In **Philip Nzaka Watu vs. Republic [2016] eKLR,** the Court of Appeal held that:

"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

93. In **Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

94. In **Erick Onyango Ondeng' vs. Republic [2014] eKLR**, the Court of Appeal held that:

"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. *(See OKENO VS REPUBLIC (1972) EA 32*). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

95. As was noted in **Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:**

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

96. In **Joseph Maina Mwangi vs. Republic CA No. 73 of 1992** (Nairobi) **Tunoi, Lakha & Bosire JJA** held: -

"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

97. In this case whereas I appreciate that there were minor discrepancies in the evidence of the witnesses it is my respectful view that such minor discrepancies are common.

98. In this case according to PW1 and PW2, the appellants were arrested almost immediately after the incident. At the time of their arrest they were fleeing according to the witnesses. It is true that they were not apprehended with any of the stolen items. However, their jackets which they were seen removing and the 1st appellant's personal effects were recovered in his jacket. In **John Gichunge Mitie vs. Republic [2006] eKLR** the complainant was in her house at 8.30 p.m. together with her minor children when two people entered the house and attacked her. One of the two men had a *simi* and cut her on the forehead but she held onto it. Another hit her on the back with a gun butt and as she was screaming, her brother came to her rescue and the two men ran away. The attack took less than ten (10) minutes and nothing was stolen during the incident. It was her evidence that she did not recognize her attackers but later in evidence, she said that "the accused person …..cut" her on the forehead and that she was also cut on her fingers as she held on to the simi. She also said that she did not know the Appellant before but in cross-examination, she stated that the Appellant was arrested five (5) minutes after the incident, near P.W.1's house. It was submitted by the appellant that the evidence against him was wholly unsatisfactory and could not sustain a conviction. The Court, however, proceeded to find as follows:

"We now have two matters that we must resolve; the contradictory evidence as articulated above and the circumstantial evidence of the presence of the Appellant near the scene of the attempted robbery without explanation. Which evidence must prevail? There is no doubt that P.W.1 and P.W.3 were attacked by three (3) men whose motive in the absence of any other evidence may have been robbery. When P.W.1 raised an alarm, the robbers took to their heels and headed in the direction of P.W.2's land. Shortly thereafter the Appellant was arrested hiding in napier grass within that land. This was five (5) minutes or so after the attempted robbery. He had no weapon with him and the simi used to attack P.W.1 was actually found in P.W.1's house and it was produced in evidence. He goes on to admit the circumstances of his arrest but gives no reasonable explanation for it. In those circumstances what would any court confronted with that evidence decide other than that the Appellant with or without the evidence of identification was one of the robbers?... It is our considered view that taking all circumstances of this case into account and removing the contradiction highlighted, the Appellant was involved in the attempted robbery at the house of P.W.1 and that is the only conclusion that we can reasonably reach and even the benefit of contradictions being given to the Appellant, he cannot escape the consequences of his participation in it."

99. All the witnesses testified that they did not know the appellants prior to the date of the incident. The appellants themselves have not alleged that there was any reason why they would be the ones accused of the offence. There is evidence that one of the attackers was shot dead during the pursuit of the attackers. PW2 testified as to what made him be able to identify the appellants.

100. Having considered the evidence adduced before the learned trial magistrate, I do not find any reason or justification to interfere with the findings that the case against the appellants was proved beyond reasonable doubt. In the premises their appeal against their conviction fails and is dismissed.

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

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

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

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

[50] We consider *Reyes* and *Woodson* persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right

to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

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

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

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

102. 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."

103. The Court therefore concluded as follows:

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

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

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

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

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

104. The Court also found that:

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

……..

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

……

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

105. 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 …"

106. 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."*

107. 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."**

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

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

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

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

> **"It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage too. Pursuant to Sections 216 and 329 of the Criminal Procedure Code, Chapter 75, Laws of Kenya, mitigation is a part of the trial process. Section 216 provides:**
>
> ***The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.***
>
> **Section 329 of the Criminal Procedure Code provides:**
>
> ***The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.***
>
> **Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency."**

111. The Court found that due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. At paragraph 71 of its judgement, the Supreme Court in the **Muruatetu's case** (supra), while making it clear that it was not replacing judicial discretion, and in order to avoid a lacuna, advised the Courts to apply the guidelines set out hereinbelow with regard to mitigating factors in a re-hearing sentence for the conviction of a murder

charge. In my view there is no reason why the same principles cannot apply to an appeal against a sentence for conviction of robbery with violence.

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

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

113. 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.***

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

> **"Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR,* where the High Court held that the objectives include: *"deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim."* The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:**
>
> **"*Sentences are imposed to meet the following objectives:***
>
> ***1. Retribution: To punish the offender for his/her criminal conduct in a just manner.***
>
> ***2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.***
>
> ***3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.***
>
> ***4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.***
>
> ***5. Community protection: To protect the community by incapacitating the offender.***
>
> ***6. Denunciation: To communicate the community's condemnation of the criminal conduct."***
>
> **The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict."**

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

116. 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."**

117. 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."**

118. In the premises, the sentenced of death imposed against them is hereby set aside and substituted therewith to a sentence of 20 years' imprisonment. The said sentence will take into account the period of their incarceration since 19th October, 2005. However, based on this court's decision in **Sammy Musembi Mbugua & 4 Others vs. Attorney General & Another [2019] eKLR,** the appellants are entitled to remission of their custodial sentence if they qualify due to good behaviour while serving their said sentence.

119. Orders accordingly.

Judgement read, signed and delivered in open court at Machakos this 16th day of January, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Musembi for the Appellants

Miss Mogoi for the Respondent

CA Geoffrey