REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 12A 0F 2018

IBINALIS OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon E Kimilu, PM delivered on 16th August, 2018 in Naivasha CMCR No 1101 of 2016)

JUDGMENT

Background and Facts

1. In his amended grounds of appeal, the appellant appeals against conviction and the mandatory death sentence imposed by the lower court. He was convicted with robbery with violence. The particulars were that on 26th July 2016, at Kihoto estate in Naivasha jointly with another not before the court, robbed Peter Karanja Njatha of a thandbag containing Ksha 78,854/- the property of M&N Enterprises and at the time of such robbery he threatened to use actual violence.

2. The grounds of appeal are as follows:

> *1) That, the learned trial magistrate erred in law and facts by convicting and sentencing the appellant to a mandatory sentence but failed to consider the appellant mitigation and the circumstances that prevailed during the commission of the offence before awarding a mandatory death sentence this is what the Supreme Court warned in the Muruatetu case.*
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> *2) That, the learned trial magistrate erred in the law and facts by convicting and sentencing the appellant by reliance of evidence of a single identifying witness to hold that, the appellant was positively identified by pw 1 while the evidence was shaky and unreliable.*
>
> *3) That, the learned trial magistrate erred in the law and facts by convicting and sentencing the appellant by holding that, the offence of robbery with violence was proved beyond reasonable doubt, but failed to note the ingredients under section 296(2) were not proved. Thus the trial magistrate relied on assumptions and presumptions not supported in the evidence.*
>
> *4) That, the appellant defence was not critically weighed against the prosecution evidence, it was an error to dismiss it.*
>
> *5) That, the learned trial magistrate erred in the law and facts by convicting and sentencing the appellant on the defective charge sheet charged under section 295 as read with section 296(2) of the penal code, a charge that was duplex, the appellant should have been charged under section 296(2) of the penal code.*

3. The prosecution opposes the appeal, asserting that identification of the accused was proper; that there was proof beyond reasonable doubt that the accused was in company of another when committing the robbery using force; that with regard to the duplex charge, the same was not a fatal defect. However, with regard to the fact that the sentence meted was the mandatory death sentence without having regard to the accused's mitigation, the state made a concession that there was no consideration of mitigation.

4. The court's duty in this first appeal is to reconsider the evidence adduced and to reach its own conclusions being careful to note that this court did not have the benefit that the trial court had of seeing the witnesses and observing their demeanour. The court must weigh the material on record, and consider it objectively and dispassionately. Thereafter, the court must arrive at its own conclusions on the facts and the law. (See the case of **Okeno v R [1972] EA 32**).

5. Briefly, the facts according to PW1, the complainant, are that on the material day, he had gone round on a motorcycle collecting his customers' orders and receiving payment for goods he had supplied. He worked for M&N enterprises, and had received Kshs 78,854/- from

customers and kept the money in a black bag when he was accosted by two gentlemen at about 10.00am. He saw the attackers very well, and recognized one of them as familiar. However, it was the other one, the accused, who jumped on him, and the two assailants then attempted to strangle him by the neck demanding the money he had collected. The men then grabbed the black bag he had, and ran into the bushes. One of them was wearing a red shirt. The complainant then screamed and members of the public responded, and chased after the attackers. The complainant said he did not know the accused prior to the robbery.

6. KWS officers who were nearby joined in the chase. The accused, who could not run fast, was soon cornered and nabbed. He was searched and some Kshs 9,950/- was recovered from his trouser pockets. The thugs had dumped the bag in the bush as they ran away, and it was also recovered. Some coins totaling 258/- were also recovered in a polythene paper bag that the complainant had kept.

7. In cross examination the complainant said that he saw the attackers very well; that the second man ran fast and escaped arrest; that once the first attacker threw the complainant onto the ground, the accused joined him in strangling the complainant; that during the chase the complainant never lost sight of the accused and in fact saw the assailants in the Kenya Wildlife field at Kihoto, before the KWS officers arrested the accused.

8. PW1 was recalled for further cross examination. He confirmed that the accused had emerged from the roadside and grabbed his money bag; that he , PW1, saw the accused's faceand that ittwas the escaped suspect who jumped on PW1. clearly

9. PW2 Nicholas Kiptoo, a KWS Officer testified that he saw a group of people running towards their camp. They were chasing a suspect and by the time they reached them, they had arrested the accused. The complainant was in the chase group and claimed he had been robbed. In the presence of the people present, PW2 searched the accused and recovered Kshs 9,950/-. He produced it in court as PExb 2. He also found the accused with a white mobile phone and a wallet with ID card. These he produced as PExbs 5 and 6. He identified the person arrested as the accused. He noted that the members of the public had a black bag which was handed over to the police.

10. In cross examination, PW2 said he never interrogated the accused, but merely rescued him from the members of the public who wanted to lynch him. He then handed over the accused to the police. He also said that the other suspect was at large.

11. PW3, Anthony Kungu is an electrician in Kihoto. He was washing his clothes at home when he heard shouting along the road. He went towards the road and heard some women say that the the M&N Enterprises man had been robbed. He went and joined the chase. He saw two people running towards KWS area and they sat in the bushes until they saw the chasing group. Then they got up and run away – one towards the lake and the other towards Maai Mahiu-Naivasha road. KWS officers joined them and calmed the crowd telling them not to harm the appellant who they had arrested.

12. According to PW3 the KWs officer searched the accused and recovered Kshs 9,950/- from his pockets. The KWS officer took the accused to the KWS offices. PW3 was among those from the crowd who went back to the place the two suspects had sat in the bush and they recovered cash in form of coins. He identified the arrested man as the accused in court.

13. In cross examination, PW3 confirmed that he saw the two suspects seated in a bush near KWS, and that the accused had admitted to have shared money with the other suspect who escaped arrest. He also confirmed that both he and the complainant was present at the arrest and during the search when the money was recovered from the accused.

14. PW4, Timothy Ndwiga Nyaga testified that he was cycling back home and heard shouting in the neighbourhood. He dropped his bike at the gate and ran to where the shouting was emanating from. He heard people say that the M&N salesman had been robbed of his cash. He joined the members of the public chasing the thugs who had ran towards the KWs field. They appeared to sit down but when they saw their pursuers, they got up and ran in different directions; one towards the lake and the other towards the Maai Mahiu road. They caught up with one of them and arrested him near the KWs offices. KWs officers joined the group and searched the suspect, who was the accused and he was found to have Kshs 9,950/-. The other man was never found. PW4 left the accused with the KWS officers and went home. He recognized the accused as a man known by the nickname Ngawe in Kihoto area.

15. In cross examination, PW4 confirmed that he was present when the accused was searched – which was openly done in the presence of members of the public – and Kshs 9,950/- was recovered and counted; that he saw the accused and another person seated in the field near KWS and they ran away in different directions, as the chase group approached.

16. The investigating officer PC Henry Njagu testified as PW5. He said that: on the material day at around 11.50am he received a call from KWS Hippo Camp stating someone had been robbed and attackers were headed towards Hippo Camp; that on going there he found Corp, Kibet had arrested the accused; that they searched accused and found Kshs 9,950/- on him; that other members of the public came from the bush carrying Kshs 250/- in coins in a small black plastic bag; that he took all the money and the accused and complainant to Naivasha Police Station. He testified that the accused told him he was a salesman with M&N Enterprises and had been riding a bicycle when he was attacked; and that the robbery took place at 11.00am. He produced the cash as PExb 2, and the bag with coins as PExb 3. He also produced the complainant's Sales book showing the money he had collected of Kshs 78,854/- as PExb 4.

17. The accused gave an unsworn statement saying he was a trader and had gone to buy fish at the lake. When he got to the lake the suppliers had not landed, and as he headed back he suddenly heard shouts of *"Thief! Thief!"* in kiswahili. The people pointed at him and he run away towards KWS for safety. Before he got there the crowd arrested him and assaulted him saying he was the robber. The KWS officers called the police and he was taken to the police station. He denied the allegations.

18. Having carefully considered the testimony of the witnesses, my analysis and determination is as follows.

Analysis and Determination

On the issue of identification

19. The accused argues that there was a single identifying witness who was a stranger to the accused. That as a result, the identification was faulty and unreliable. The accused cited the case of **Abdalla Bin Wendo v R [1953] 20 EACA** where the court stated that where there is a single identifying witness the court should carefully examine:

> ***"…the circumstances in which the identification by each witnesss came to be made; how long did the witness have the accused under observation? Under what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he given special reason for remembering the accused. How long elapsed between the original observation and the subsequent identification to the police was there any material discrepancy between the description of the accused given to the police by the witness when first seen to them and ahis actual appearance?...recognition may be more reliable than identification of a stranger, but even where the witness is purporting to recognize someone who he knows, the jury should be reminded that mistake in recognition of close relatives or friends are sometimes made."***

20. In my view the trial court properly dealt with the question of identification. It noted that the accused was arrested by members of the public who were chasing him; that the incident occurred at about 10.00am; that the members of the public followed the robbers keenly until the arrest of the accused after the escape of his accomplice.

21. The complainant's testimony was that the incident occurred at 10.00am; that he saw his attackers very well; that he screamed and run after the two robbers, that the accused could not run fast; that he and the crowd that joined him in the chase followed both robbers. Most importantly, he testified that:

> ***"I never lost sight of both of you. I ran after you shouting for help"***

22. In terms of the **Abdalla Bin Wendo case**, the circumstances were extremely favourable to identification as it was 10.00am; accused saw his attackers; he chased them and did not lose sight of them; that the accused was slower and was arrested but his accomplice escaped. The accused was handed over to nearby KWS officers. The evidence of PW2,3 and 4 corroborated the arrest and hand over of accused to KWS and then to the police. The trial magistrate correctly found that the complainant needed not describe the accused as he was involved in the chase from the time of the robbery to the point of arrest. The accused also confirmed that he was arrested by the chasing gang and handed over to the KWS officers and then to the police.

23. I find and hold that the identification cannot be faulted and thus this ground of appeal cannot stand.

Whether the offence was proved beyond reasonable doubt

24. The elements of the offence of robbery with violence are that: the

25. From the evidence availed, all the elements of the offence were proved. The accused robbed the complainant; that he acted in common with another person who escaped; that the escapee used force by attempting to strangle the complainant; that the assailants both took the complainant's bag with the money in question and fled. All these were testified to by the complainant. His evidence withstood cross-examination and remained unshaken.

26. Issues of identification of the accused have already been dealt with in this judgment

27. The appellant complains of contradictions in evidence between that of the accused and the investigating officer, PW5. For example, PW5 said that the accused was riding a bicycle not a motorbike; that he did not say who recovered the money; that the offence was committed at 11.00 am not about 10.00am.

28. I have considered these contradictions and consider them to be trivial and not fundamental to the issues in the case. Accordingly, this ground of appeal cannot stand.

Whether the trial court properly took into account the accused's defence.

29. The appellant submitted that his defence was not taken into account by the trial court.

30. I have carefully perused the judgment. In her judgment at lines 24-33 on page 37 of the record, the trial magistrate outlined the defendant's defence. She found that the defendant did not mention anything in his testimony about the source of the money he was found with.

31. In his testimony he said he was walking to the lake to buy fish for sale when he heard people shouting thief and pointing at him. As he run away towards the KWS offices for safety, he was arrested. The trial court took into account the overall evidence and found the prosecution's evidence to be consistent. Nothing further need be said about this ground, except that the trial court did in fact take the accused's story into account before reaching judgment. This ground also fails

On whether the charge sheet was so defective that the charge was a duplex charge

32. The appellant's complaint here is that the charge is framed in a duplicitous manner, which he asserts is an error. As the charge sheet is so defective, it could not form the basis of a competent trial. By this he means that instead of being charged under section 296(2) of the Penal

Code which carries the ingredients of the offence, he was instead charged under section 295 – which is the definition provision – as read with section 296(2), which carries the offence.

33. The accused relied on the following authorities: **Ibrahim Mathenge v R Cr App No 222 of 2014** where the court held that a duplex charge was a fundamental breach which goes to the root of the appellant's conviction and cannot be cured under section 382 CPC; **Joseph Mwaura Njuguna & 2 Others v R [2013]eKLR** which explains why a charge under sec 295 and 296(2) of the Penal Code amounts to a duplex charge. In **Joseph Mwaura** the Court, which followed **Joseph Onyango Owuor & Another v R Criminal Appeal No 353 of 2008** stated that section 295 of the Penal Code is merely a definition section, and held that:

> ***"Sections 296 (1) and 296 (2) of the Penal Code deal with the specific degrees of the offence of robbery and have been framed as such."***

The court went on to state that:

> ***"We agree that this is the correct proposition of the law.***
>
> ***The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that 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 to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge."***

34. My understanding of the argument on duplex charges is that duplicity is the error committed when the charge or count on an indictment describes two different offences. Whilst an indictment may contain more than one count, each count must, however, allege only one offence, so that the defendant can know precisely what offences he or she is accused of. The important thing is that the accused must not face any prejudice in terms of his ability to defend against the nature of the charge.

35. I have perused the charge sheet. It appears, *prima facie*, to involve a duplicitous charge. It indicates the charge as follows:

> ***"Robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code"***

The particulars of the offence are stated as follows:

> ***"Ibinalis Ochieng ……jointly with another not before the court, robbed Peter Karanja Njatha, of a handbag containing cash Kshs 78,854/- the property of M&N Enterprises, and at the time of such robbery, threatened to use actual violence to the said Peter Karanja Njatha"***

36. The prosecution relied on the more recent Court of Appeal case of **Paul Katana Njuguna v R [2016] eKLR** in which that court clarified the law on duplex charges. There, the Court of Appeal analysed the law and authorities on duplicity, and stated concerning the Joseph Mwaura case as follows:

> ***"21. To put the decision of the court in proper perspective, it is important to consider the position taken by the appellant in that case. It was submitted on behalf of the appellant that the charge as framed was defective because only Section 296 (2) had been cited as the section contravened. In the appellant's view, the appellant should have been charged under Section 295 as read with Section 296 (1) and (2) of the Penal Code. That is, indeed, the proportion which the appellant in Joseph Onyango Owuor & Another -v- Republic (supra), had made in urging that his appeal be allowed. It is significant to note that in the two cases, the issue of duplicity was not raised by the appellants, and the court did not determine that a charge framed as the one we are considering should result in setting aside the conviction entered. The court could not, indeed, so find as the appellants were the ones complaining that they were prejudiced by failing to cite Section 295 in a charge under Section 296(2).***

37. The Court went on to contrast the **Paul Katana** case where the particulars of the offence charged were clear and support the aggravated charge as follows:

> ***"23. The particulars as stated are clear and do support the offence of aggravated robbery. The defect is alleged to be in the statement of the charge in the count in which the appellant was charged with robbery with violence contrary to Section 295 as read with Section 296 (2). Is that fatal? We think not. In Joseph Onyango Owuor & Another -v- R (supra) this Court found that when dealing with the offence under Section 296 (2) of the Penal Code the statement of the offence has to be read as referring to the aggravated circumstances of the offence of robbery provided for under Section 296 (1) of the same code. The Court further concluded that "the submission that the violence envisaged under Section 296(2) is different from that envisaged under Section 295 of the Penal Code is untenable. Section 295, does not deal with the degree of violence being merely a definition section".***

38. The Court of Appeal then considered other cases of duplicity involving different types of offences. It concluded by raising the critical question: whether the charge as framed was so defective as to occasion a failure of justice:

> ***"38 Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the Penal Code. We observe that the offence under Section 295 and 296 (2) were not framed in the***

alternative. So, following the decision in Cherere s/o Gakuli -v- R (supra) Laban Koti -v- R. (supra) and Dickson Muchino Mahero v R. (supra), the defect in the charge herein is not necessarily fatal.

39. We appreciate that Section 296 (2) of the Penal Code creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in Section 296 (2) of the Penal Code. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under Section 296 (2) were absent or were not demonstrated by the prosecution.

40. In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective."

39. Applying the principles in Paul Katana to the present case, I find that the charge sheet here states that the offence was:

"Robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code"

The particulars were:

"Ibinalis Ochieng ……jointly with another not before the court, robbed Peter Karanja Njatha, of a handbag containing cash Kshs 78,854/- the property of M&N Enterprises, and at the time of such robbery, threatened to use actual violence to the said Peter Karanja Njatha" (emphasis added).

40. There is no doubt that the accused in this case was aware of what was alleged against him: robbery with violence; that he acted in common with another person; and there was a threat to use actual violence. That is what accused had to defend against. It is certain and clear, and the particulars give clarity to the charge and are read together. Indeed, the references to section 295 and 296(2) of the Penal Code were not framed in the alternative.

41. The accused did not raise any complaint in the trial court that he was not sure of what was alleged against him. He did not suggest that there was any prejudice or confusion that he suffered. The record does not show a scintilla of evidence that the accused suffered any prejudice from the framing of the charge or particulars.

42. Accordingly, I do not find that the defect alleged in the charge sheet, if any, led to a failure of justice so as to warrant a dismissal of the case or to sustain the appeal. If there was a defect, it was curable under section 382 of the CPC.

On mitigation and mandatory sentence

43. The appellant, citing the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017]eKLR** argued that his mitigation and circumstances were not taken into account prior to sentencing; that if a court does not have the discretion to take into account an offender's personal history and mitigation circumstances it may mete a sentence wholly disproportionate to the accused's culpability; and that this violated his fair trial rights.

44. The state did not raise any opposition to this ground, and left it to the court.

45. I think it apt to cite some of the distinctive pronouncements made by the Supreme Court in the **Muruatetu case**:

"[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…….

[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."

…..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."

46. These sentiments have been used by applicants who have been sentenced to death for robbery with violence, as the springboard for review of their sentences. As such, in **William Okungu Kittiny v R [2018] eKLR** the Court of Appeal applied the reasoning in the **Muruatetu case** to robbery with violence cases, and by extension to other cases where a mandatory death sentence can be meted.

47. In particular, the Court of Appeal in **William Okungu,** very pertinently, stated as follows:

[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.

In the Mutiso case which was affirmed by the Supreme Court, the Court of Appeal said obiter that the arguments set out in that case in respect of Section 203 as read with Section 204 of the Penal Code might apply to other capital offences. Moreover, the Supreme Court in paragraph 111 referred to similar mandatory death sentences.

[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. The judgment of Chemitei, J., appealed from is four years earlier than the decision of the Supreme Court. That decision is in conformity with the decision of the Supreme Court. Thus, the finding of Chemitei, J., that death penalty per-se under Section 204 of the Penal Code is not inconsistent with the Constitution has been affirmed by the Supreme Court. By parity of reasoning the death penalty under Sections 296 (2) and 297 (2) is not inconsistent with the Constitution as the Supreme Court did not outlaw the death penalty. It follows that the main ground of appeal – the unconstitutionality of Section 204, 296 (2) and 297 (2) of the Penal Code on the death penalty fails.

[10] By paragraph 111 of the judgment, the Supreme Court allowed sentence re-hearing only for the two petitioners in the matter before it and said:

"In the meantime, existing or intending petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidance for the disposal of the same. The Attorney General is directed to urgently set up a frame work to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence which is similar to that of the petitioners in this case."

[11] Although the appellants' appeal was dismissed by the Court of Appeal on 20th June, 2008, which was then the last appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered its decision, this appeal was still pending.

The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases."

48. Further, in **Dismas Wafula Kilwake v R [2018] eKLR** the Court of Appeal extended the reasoning in the **Muruatetu** case to mandatory minimum sentences imposed by the Sexual Offences Act holding that there was no rational reason for not so extending under appropriate circumstances. However, unlike in the **Muruatetu** case, the decision in **Dismas Wafula Kilwake v R [2018] eKLR** was specifically stated to operate non-retroactively. As such the binding principles in **Dismas Wafula Kilwake** case operate only in respect of future cases.

49. In light of the principles in **William Okungu** and **Dismas Kilwake** foregoing, I find that there is nothing to prevent the application of

the principles in **Muruatetu** retroactively to this case.

50. I have perused the lower court's file and also the probation report. I note the following from the lower court proceedings immediately the following after judgment was delivered on 216th August, 2018:

> ***"State Counsel: First offender. No record***
>
> ***Mitigation: I have one parent who depends on me. I have a family. My parent is partially disabled. That is all.***
>
> ***Court: All considered. Accused is sentenced to serve mandatory sentence which is prescribed in the penal code. Accused is sentenced to suffer death sentence".***

51. In the present case, no serious mitigation factors concerning the offended were presented to the trial court for consideration. The sentence was meted forthwith as was usual at that time.

Disposition

52. For the reasons given herein, he appellant's appeal fails in each of its grounds except as to mitigation.

53. Applying the principles in **Muruatetu** and **William Okungu**, the appellant did not receive a fair hearing on sentencing. As such, I am satisfied that the accused is entitled to a re-hearing on sentence.

54. The sentence is therefore set aside, and the file is to be placed before the Chief magistrate within twenty-one days (21) for re-sentencing, which shall be done within ninety (90) days from the date hereof.

55. In the meantime, a probation officers report is to be filed together with a report from the Prisons Service on the appellant, to be considered at the re-sentencing hearing.

Administrative directions

56. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

57. A printout of the parties' written consent, if any, to the delivery of this judgment shall be retained as part of the record of the Court.

58. Orders accordingly.

Dated and Delivered via videoconference at Nairobi this 14th Day of May, 2020

RICHARD MWONGO

JUDGE

Delivered by Video-conference in the presence of:

1. **Ibinalis Ochieng, the AAppellant in person.**
2. **Nelly Maingi, for DPP.**
3. **Court Clerk - Quinter Ogutu.**