REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 59 OF 2003

KIMANI MASAI MBANDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the whole judgement of in Criminal case 994 of 2002 delivered by J.R. Karanja (SPM) on 28.2.2003)

ARISING FROM

REPUBLIC.....PROSECUTOR

VERSUS

KIMANI MASAI MBANDI.....ACCUSED

JUDGEMENT

1. The appellant herein, **Kimani Masai Mbandi,** was charged before the Chief Magistrate's Court, Machakos in Criminal Case No. 994 of 2002 with the offence of robbery with violence contrary to section 296(2) of the ***Penal Code.*** The particulars of the offence were that on the nights of 17th/18th May, 2002 at Masonglani Location in Makueni District of Eastern Province, the appellant jointly with another while armed with a *panga* and a *rungu*, robbed **David Kioli Wambua** of cash 9,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **David Kioli Wambua**.

2. After hearing the case, the Learned Trial Magistrate convicted the appellant and proceeded to sentence him to death in the manner prescribed by law.

3. Aggrieved by the said decision the appellant preferred this appeal based on the following grounds:

> **1) The learned trial magistrate erred in law and fact when he based the appellants conviction on the sole evidence of identification by Pw1 and Pw2 without even ruling out altogether as to the existence for a possibility of mistaken identification of the robbers more so in view of the prevailing circumstances at the scene of crime by the time of attack.**
>
> **2) The learned trial magistrate erred in law and fact by failing to observe that the appellants arrest was not due to any facial or physical identification but due to similarity of shoe sole prints which evidence was given by Pw8.**
>
> **3) That learned trial magistrate erred in law and fact by failing to observe that soon after his arrest the complainants were unfairly shown to him for identity purposes which was not an identification parade and was unprocedural and the same invalidated the entire identification evidence hence his conviction was manifestly unsafe.**

4. At the trial, the prosecution called 8 witnesses.

5. The prosecution evidence is briefly as follows. Pw1, **David Kioli Wambua**, told court that on the material day he was at his house when he heard the main door being banged. When he lit his torch his hand was immediately hit and the torch dropped. He was then attacked and beaten by people who were asking for money in the process of which he sustained cut on his left leg and forehead and the people took away

his Kshs 9,000/- after they were shown it by his wife. It was his testimony that he saw the robbers during the robbery and identified one of the robbers who is locally known as "Salome" who hit his hand. In examination in chief he stated that an identification parade was conducted at Kibwezi Police Station at which he was able to pick out the appellant. On cross examination he testified that he reflected the torch on the face of the appellant thus saw him and that the appellant is locally called "Salome". He however stated that he did not participate in an identification parade in which the appellant was a suspect. When questioned by the trial magistrate, he testified that the appellant was in an identification parade and that he knew the appellant before. However, re-examination he told court that no identification parade was conducted for any of the accused. He testified that he told the chief that he was robbed by the appellant and another person.

6. **Christine Nguise David**, Pw2, PW1's wife was, according to her testimony, on the night of 17th /18th May, 2002 at about midnight together with PW1 invaded by 2 people who had *pangas* and *rungus* who attacked her and Pw1 with *pangas*. It was her testimony that she has a torch that was hit away from her and the robbers injured her husband and took Kshs 9,000/- and fled. She told court that the robber she saw was the appellant who is a local person. She was however, not called for an identification parade. On cross examination by the appellant she testified that the torch was hit away after she saw the appellant and that the offence took 2 hours. She testified that the appellant is locally called "Salome". On cross examination by the 2nd accused she testified that she saw him at the police station.

7. Pw3, **Onesmus Muthiani Nzamau**, testified that he received a report on the attack on Pw1 and Pw2 by a person known as "Salome". He was able to trace the said "Salome" to the home of **Wambua Kilonzo** but the appellant was not at the home. He, however, found the appellant at Machinery Market and had him arrested. He identified "Salome" as the appellant. In cross examination by the appellant he told court that he traced the footprints from Pw1 and Pw2's home up to **Wambua Kilonzo's** homestead where he discovered that the appellant was a visitor.

8. Pw4, **Mutunga Wambua Kilonzo**, testified that the appellant is his uncle and that the appellant spent the night on 16th May, 2002 at his home and left at 2 pm. On 17th he left and returned at 7 pm with a friend and at 11 pm the appellant told him that he was leaving. The following day at 6 am the next morning, PW3 went looking for the appellant but he was not at home. He later learnt that the appellant was arrested at Kibwezi.

9. Pw5, **Peter Musyoka Ndambuki**, testified that on 18th May, 2002 he heard that Pw1 was attacked by the appellant. When he spotted the appellant at Machinery, he mobilized people to arrest him after which he took the appellant to Kibwezi Police station. On cross examination he told the court that he did not find the appellant with stolen property.

10. Pw6, **John Kimani Mungai**, testified that he conducted examination on blood samples that were presented to him by the police at Kibwezi and prepared a report that was tendered in court.

11. Pw7, **Willy Wambua's** testimony was that on 18th May, 2002 he received information that the appellant was arrested at Machinery. According to him after the arrest of the appellant, his co-accused was also arrested and when they took the latter to his house they found a blood-stained shirt which they handed to the police.

12. Pw8, PC **Moses Muriithi** attached to Kibwezi Police Station testified that on 18th May, 2002 the appellant was taken to the station on allegations of robbery and he rearrested the appellant. Later PW1 went to the police station and identified the appellant and Pw1 was issued with a P3 form that was produced in court. In cross examination, he testified that nothing was found on the appellant. According to his investigations, the appellant was said to have been wearing a pair of shoes which were produced in court. According to him, members of the public traced the appellant by the said shoe prints though he admitted that anyone can own such shoes.

13. At the close of the prosecution's case, the appellant was found to have a case to answer and was placed on his defence. In his unsworn statement, the appellant stated that on 18th May, 2002 he left his home for a place called Machinery where he was arrested and taken to the police station and was later charged with the offence in question. According to him, he had nothing to do with the offence.

14. In his judgement, the learned trial magistrate found that based both on the identification of the appellants and the doctrine of recent possession the appellants committed the offence.

15. In this appeal, the appellant submits that the there was no adequate opportunity for positive identification because the robbers were too swift and the Pw1 and Pw2 were shocked and confused. The appellant placed reliance on the case of **Turnbull vs. R (1976) 3 All ER 549 at 522** and submitted that the trial magistrate ought to have considered that there was a possibility of mistaken identity or recognition. He further relied on the case of **Roria v R (1967) EA 583 and Kamau vs. R (1975) EA 139** and emphasized that he was not recognized by Pw2. He submitted that Pw8 recognised him by the sole prints of his shoe hence this was suspicion and not identification based on recognition and this was mistaken identification.

16. Learned Counsel for the Respondent, Miss Mogoi, in opposing the appeal submitted that the appeal relates to the issue of identification. It was her argument that Pw1 saw the appellant with the torch light and that Pw1 knew the appellant before therefore the identification of the appellant was of recognition. Further that the weight of the prosecution evidence was sufficient to find the appellant guilty as charged and court made no error in its finding. She prayed that the appellant face the death penalty as per the law.

Determinations

17. 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."

18. 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."

19. In **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

20. In this case, the prosecution's case in summary was that on the night of 17th/18th May, 2002, PW1 and PW2 were sleeping in house when at around midnight they were attacked by robbers armed with *pangas* and *rungus*. When they switched on their torches, the robbers hit them and the torches dropped. However, they managed to recognise the appellant who was from the locality. The said robbers took from them Kshs 9,000.00. PW1 then relayed the information to PW3, the area chief and in that information, PW1 informed PW3 that he was robbed by the appellant. Based on the shoe prints, they tracked the movements of the attackers to the homestead of PW4 who confirmed to them that the appellant was his visitor though the appellant was not found at the homestead. PW3 then instructed some young men to search for the appellant who was later arrested at Machinery. According to PW4, ON 16th May, 2002, the appellant visited him and spent the night at his home. The appellant however left his home the following day at 2.00pm but returned later at 7.00pm with an unknown friend. After dinner they went away. At 11.00 pm the appellant informed him that they were leaving the area. However, at 6.00 am PW3 arrived looking for the appellant and PW4 led them to the appellant's homestead but the appellant was not found.

21. It is clear that the evidence against the appellant is that of recognition. In **Stephen Karanja vs. Republic [2011] eKLR**, the Court of Appeal held:

"The evidence of the complainant was that the robbery took place at about 8:00 a.m. hence in broad daylight. The appellant was known to the complainant prior to that day. This makes the evidence of identification, although by a single witness, free from any possibility of error as it was, indeed, evidence of recognition."

22. It was however noted in **R vs. Turnbull (1976) 3 All E.R 549** that:

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

23. It was therefore held by the Court of Appeal in **Peter Musau Mwanzia vs. Republic [2008] eKLR**, as follows:

"…for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident."

24. In **Ali Mlako Mwero vs. Republic [2011] eKLR** the Court of Appeal expressed itself as follows:

"The identification of the appellant in this case lay not only on the visual features observed by Mesalim but also on his recognition by that witness. We agree with Mr. Oguk, that in either case, the evidence ought to be tested with utmost care

because it is not unknown for a witness to be honest but mistaken. So may a number of them; see Roria v R [1967] EA 583."

25. In this case obviously, the circumstances under which the appellant was recognised were stressful. It is not indicated how long the torches were on before the attackers hit them. It was not stated that the attackers were recognised by their voices. The recognition was simply facial recognition. However, soon after the attack, the footprints of the attackers led to PW4's house and PW4 confirmed that the appellant had been there but had left after dinner. At about 11.00pm the appellant informed him that they were leaving the area and after that PW3's team arrived looking for the appellant.

26. Whereas, PW1 and PW2 may have been mistaken as regards the recognition of the appellant, the fact that the footprints from his house led to a place where it was confirmed that the appellant had sought refuge confirms that PW1 and PW2 were not mistaken in their identity or recognition of the appellant. Based on these circumstances, I agree with **Miss Mogoi** that the learned trial magistrate properly relied on the evidence of identification in convicting the appellant.

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

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

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

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

[50] We consider *Reyes* and *Woodson* persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

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

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

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

28. 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."

29. 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."

30. 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."**

31. 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 …"**

32. 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."*

33. 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."**

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

35. This being the first appeal, this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed. That jurisdiction, in my view calls for circumstances in which it should be exercised so that it exercised judicially rather than arbitrarily. In ***William Okungu Kittiny Case***, the said Court noted that:

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

36. 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.

37. 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.

38. 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."

39. 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."

40. Therefore, whereas death sentence has not been declared unlawful and may still be lawfully imposed where there exist the most exceptional and appropriate circumstances, it is nolonger mandatory to impose such a sentence where the facts to not cry out for the same. In my view in situations where the law prescribes a grave sentence, the Court in imposing the sentence ought to give reasons for imposing a particular sentence so that the act of sentencing does not become arbitrary.

41. I associate myself with views of **J. Ngugi, J** in **Benson Ochieng & Another vs. Republic [2018] eKLR** that:

"Re-phrasing the *Sentencing Guidelines*, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years imprisonment). These are the following:

a. Circumstances Surrounding the Commission of the Offence: The factors here include:

i. Was the Offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence.

ii. Was the offender armed with a gun?

iii. Was the gun an assault weapon such as AK47?

iv. Did the offender use excessive, flagrant or gratuitous force?

v. Was the offender part of an organized gang?

vi. Were there multiple victims?

vii. Did the offender repeatedly assault or attack the same victim?

b. Circumstances Surrounding the Offender: The factors here include the following:

i. The criminal history of the offender: being a first offender is a mitigating factor;

ii. The remorse of the Applicant as expressed at the time of conviction;

iii. The remorse of the Applicant presently;

iv. Demonstrable evidence that the Applicant has reformed while in prison;

v. Demonstrable capacity for rehabilitation;

vi. Potential for re-integration with the community;

vii. The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind.

c. Circumstances Surrounding the Victim: The factors to be considered here include:

i. The impact of the offence on the victims (if known or knowable);

ii. Whether the victim got injured, and if so the extent of the injury;

iii. Whether there were serious psychological effects on the victim;

iv. The views of the victim(s) regarding the appropriate sentence;

v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;

vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and

vii. Whether there been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime."

42. In this case, the attackers were armed with pangas and rungus. In the process of the robbery PW1 and PW2 sustained some injuries and also lost money.

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

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

45. Taking into account the circumstances of this case, I am of the view that a sentence of 25 years imprisonment would adequately serve the course of justice. However, the appellant has been in custody since 18th May, 2002. Section 333(2) of the ***Criminal Procedure Code*** provides that:

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

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

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

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

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

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

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

49. Accordingly, I direct that the appellant's sentences will run from 18th May, 2002. Based on this court's decision in **Sammy Musembi Mbugua & 4 Others vs. Attorney General & Another [2019] eKLR,** the appellant is entitled to remission of his custodial sentences if he qualifies due to good behaviour while serving their said sentence.

50. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 16th day of October, 2019.

G. V. ODUNGA

JUDGE

Delivered in the presence of:

Appellant in person

Ms Mogoi for the Respondent

CA Geoffrey