



## REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 2 OF 2013

**BENJAMIN MAINGI KITUKU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the whole judgment and sentence of Honourable M.K. Mwangi- PM dated 16-1-2013 in Machakos Criminal Case No. 2466 of 2010)*

**BETWEEN**

**REPUBLIC.....COMPLAINANT**

**VERSUS**

**BENJAMIN MAINGI KITUKU.....ACCUSED**

### JUDGEMENT

1. The appellant, **Benjamin Maingi Kituku**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No. 2466 of 2010 with the offence of Robbery with Violence contrary to section 296(2) of the **Penal Code**. The particulars were that the appellant on the 11<sup>th</sup> day of December, 2010 at Kitanga Area, Kathekani Location in Machakos District within Eastern Province, jointly with others not before Court, being armed with dangerous weapon namely a knife robbed **Jackson Mutunga** of his mobile phone make Samsung valued at Kshs.2,500/=, and at or immediately before or immediately after the time of such robbery threatened actual violence to the said **Jackson Mutunga**.

2. He was convicted of the offence and sentence to death on 16<sup>th</sup> January, 2013.

3. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

1. **The magistrate erred in law and fact in convicting the accused on charges which were not proved beyond reasonable doubt.**
2. **The learned magistrate erred in law and fact in convicting the appellant on plea which was not unequivocal.**
3. **The learned magistrate erred in law and fact when he relied on a defective charge sheet to convict the appellant.**
4. **The learned magistrate erred in law and fact when he relied on a duplous (sic) charge sheet to convict the appellant.**
5. **The learned magistrate erred in law and fact in imposing an excessive sentence on the appellant.**
6. **The learned trial magistrate erred in law and in fact when he found that the accused's defence was implausible.**

4. According to PW1, **Jackson Mutunga Mumo**, a driver, on 11<sup>th</sup> December, 2010 he was working for **Jacob Wambua** in Katelembo area when at about 9 pm he saw three people outside the kitchen door one of whom ordered him to hand over his phone. The other person snatched the same phone, Samsung worth Kshs 2,500/=. It was his evidence that he then lit a hurricane lamp through which the face of the appellant was illuminated though he was unable to see the other assailant who struck him with a piece of metal. He testified that he screamed and his uncle went and stated struggling with the assailant. At this stage he ran away.

5. It was PW1's evidence that when he first saw the appellant he was carrying a kitchen knife. Thereafter, the appellant was subdued by his uncle and the appellant was tied by a rope and as taken to the police. It was PW1's evidence that during the scuffle, the appellant attempted to stab the said Jacob severally though he, himself was hit on the face but he did not seek treatment at a medical facility but simply resorted to traditional therapy. While he was the appellant with a knife and the other person with a metal bar, he did not see what other weapons the assailants had. It was his evidence that he had lost the receipt for the phone.
6. In cross-examination by the accused, PW1 reiterated that he was employed by Jacob, who was also his uncle and that they were 2 employees. He stated that the attack took place after 8.00pm and though he had not seen the appellant be fire, there was a hurricane lamp inside the kitchen through which he was able to identify the appellant as the lamp was bright enough. It was his testimony that he narrated to the police what happened. He stated that while the other assailants had metal road, the appellant also had a stick. He testified that it was the appellant who was the first to approach the door way and struck him while the other assailant took the phone. After he was subdued by the uncle, the appellant was taken to the police.
7. PW2 was **Jacob Musau Wambua** who testified that on 11<sup>th</sup> December, 2010 at about 8 pm he was at home after work seated when he heard PW1 shout his name. On getting out to go to the kitchen, a knife wielding person demanded for money from him. He however struck back and threw the person to the ground and with the help of his wife subdued him. He then instructed PW1 to lock the door in order to prevent the others from entering after which his wife and PW1 raised alarm and the neighbours went. In the meantime the appellant's co-assailants escaped. Using his brother's vehicle, PW2 drove the appellant to the police. He identified the knife that he snatched from the appellant and the jacket as well as his p3 form. It was his evidence that he never saw the other assailants and that he never knew the appellant before he was attacked.
8. In cross-examination PW2 stated that he was attacked before he could step out just after opening the door. According to him, though he pinned the appellant to the ground, the appellant kept on striking the knife hence punching holes of PW2's jacket. He insisted that it was him who arrested the appellant. It was his evidence that his house was well lit as there was a hurricane lamp. It was his evidence that the appellant attacked him with a knife and demanded money from him.
9. PW3, **Musi Ndambuki**, also an employee of PW2 on the same day heard PW1 screaming his name. He then saw the appellant being removed from the house tied with a rope. He affirmed that the appellant was not one of the employees. In cross examination, PW3 stated that he was able to identify the appellant through a hurricane lamp. It was his evidence that the appellant was being taken to the police station when they met the police on the way.
10. PW4, **Margaret Waweu**, was with her husband on that day at home, in her bedroom when she heard PW1 screaming in the kitchen. As her husband started going out through the rear door, she heard a loud bang and found her husband, PW2, struggling with knife wielding man, the appellant. Who was attempting to stab PW2's back. She pounced on him, caught the knife and was able to wrestle the knife from him. She had however not seen the appellant before. She then brought the rope which was used to tie the appellant and then called **Major Mativo**, and the appellant was taken to the police.
11. In cross-examination, PW4 reiterated the foregoing and explained that while she was in the bedroom, PW2 was in the sitting room and confirmed that she informed the police what happened. According to her during the scuffle, the appellant was urging the others to enter the house, though she did not see his accomplices because it was dark outside. She however disclosed that the appellant was not found with the stolen phone. It was her evidence that since the appellant was arrested at the scene there was no need to describe him to the police.
12. PW5 was **PC Wycliffe Ashiundu**, was the investigating officer. According to him, on that day he was in a crime scene when he was informed that a robber had been arrested at Katheka Kai. Though there were several robbers, only the appellant had been arrested. They proceeded to the scene and found that the appellant had been removed from the compound, had been beaten and they met him being taken to the police station. In his evidence, PW2 had been stabbed severally on the back. He testified that though PW1 was robbed of the phone but same was never recovered.
13. **Dr Mutuku Pius** testified as PW6. According to him, he prepared P3 form for PW2 who had blood stained clothes following an assault. It was his evidence that PW2 suffered knife stabs and had scars to the right lumbar area. Apart from that he suffered disarticulation on the right thumb that he could not flex and had deep wound on the right sheen. In his opinion the probable weapon used was a sharp penetrating object. PW2 was accordingly treated at Machakos General Hospital. To PW6, the injury would be classified as grievous harm.
14. In cross-examination, PW6 stated that he saw PW2 8 weeks after the date of the injury. Though he was not the person who treated PW2, he simply filled in the P3 form based on physical examination, treatment notes and the history.
15. In his defence, the appellant testified that on the material day, after working the whole day, he left home to go to Kathome area to look for casual work in PW2's farm when he met a worker who informed him that he was employed thereat and asked him to go back in the evening as PW2 was not at home. Later in the evening when he went back, the said worker upon seeing him raised alarm and the neighbours went and attacked and injured him badly. He therefore denied the charge.
16. In her judgement, the learned trial magistrate found that the prosecution case was corroborated in material aspects by the witnesses who testified for the prosecution. She however found that the appellant's defence was not plausible and could not dislodge the string evidence led by the prosecution hence the prosecution had proved its case to the required standards.
17. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I 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 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.**

19. In the first ground of appeal the appellant contends that he was convicted on charges which were not proved beyond reasonable doubt. In this case the appellant relied on what in his view were inconsistencies and the fact of the delay in preparing the P3 form. As regards the later, PW6 was clear in his testimony that he was not the one who treated PW2 and that his role was limited to the preparation of the P3 form. It is therefore clear that the delay in preparing the P3 form cannot be basis for interfering with the decision of the trial court.

20. It was the appellant's case that the case against him was not proved beyond reasonable doubt. In this case most of the witnesses who testified for the prosecution were clear that the appellant attempted to stab PW2 with a knife which was in his possession. The prosecution evidence was clearly that not only did the appellant demand that PW1 surrenders his phone but also demanded money from PW2. There was ample evidence that the appellant used violence against PW2 either before or after the offence. In my view there is no basis upon which I can find that the prosecution's case was not proved to the required standards.

21. While there might have been minor inconsistencies and contradictions in the prosecution case, that does not warrant interference with the decision of the trial court. 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."**

22. In Aloise Onyango Odhiambo vs. Republic [2006] eKLR the Court expressed itself as follows:

**"We have perused the judgment of the learned trial magistrate and are satisfied that after summarizing the evidence adduced before her, the learned magistrate analyzed and evaluated this evidence and gave reasons for the decision she reached. It may not have been a perfect analysis and evaluation but it does meet the basic requirements of Section 169(1) of the Criminal Procedure Code. In any event, this court as a first appellate court has a duty to analyze and evaluate afresh the entire evidence adduced before the trial court and draw its own conclusion to ensure that the Appellant is not prejudiced."**

23. In Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki JSC (as he then was) said:

**"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."**

24. I have myself re-evaluated the evidence. Section 296 of the *Penal Code* provides as hereunder:

**296. (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.**

25. Under section 295 of the *Penal Code*:

**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.**

26. Therefore for the offence of robbery to be proved there must be evidence of theft by the person charged. A person cannot be guilty of the offence of robbery unless he is guilty of theft. The theft must however be accompanied by the use or threat of use of actual violence to a person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained. If all these

ingredients are present and the offender was armed with any dangerous or offensive weapon or instrument, or was in company with one or more other person or persons, or at or immediately before or immediately after the time of the robbery, he wounded, beat, struck or used any other personal violence to any person, he would have committed robbery with violence and would be sentenced to death.

27. I must however mention that the manner in which section 295 and 296 are couched do not set out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery. This is so because a strict reading of section 295 of the *Penal Code* reveals that a person who commits the offence of theft **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. Similarly a person who commits the offence of theft (which is one of the ingredients of robbery) **and at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person,** is to be sentenced to death. To wound, beat, strike or use personal violence under section 296(2), in my view is the same as to use actual violence to a person under section 295 of the *Penal Code*.

28. I therefore I agree with the position adopted in **Joseph Kaberia Kahinga & 11 Others [2016] eKLR** that the said sections do not meet the constitutional threshold of setting out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery with such particularity as to enable those accused to adequately answer to the charges and prepare their defences.

29. Before dwelling further on the particulars of this case, it is important to deal with that particular sentence of death.

30. 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.”**

31. 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), the 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.”*

32. 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) (g) 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.”

33. 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.”

34. 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 ...”

35. 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.”

36. 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.”

37. 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.

38. That the decision of the Supreme Court applies to even matters in which the appeals had been heard and disposed of was explained by the Court of Appeal in **William Okungu Kittiny vs. Republic** (supra) when it held that:

**“[11] Although the appellants’ appeal was dismissed by the Court of Appeal on 20<sup>th</sup> 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.**

**[12] From the foregoing, the learned judge having partly found in favour of the appellant erred in law in not remitting the case for sentence re-hearing and the appeal is allowed to that extent. Now that the Supreme Court has opened the door for sentence re-hearing, the matter is remitted to the Chief Magistrate’s Court, Kisumu, for sentence re-hearing and sentencing only. The Registrar of this Court to return the record of the Chief Magistrates Court at Kisumu- Criminal Case No. 181 of 2004 as soon as reasonably practicable for sentence re-hearing and sentencing by the Chief Magistrate.”**

39. Similarly, the same Court in **Rajab Iddi Mubarak vs. Republic [2018] eKLR** 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.”**

40. The Court therefore found that the decision did not prohibit courts below it from ordering sentence re-hearing in any matter pending before those courts. Accordingly, 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. 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.”**

41. 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 following guidelines 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 re-hearing sentence for conviction of robbery with violence.

42. 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.”

43. 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.*

44. That the possibility of reform and social re-adaptation of the offender is to be considered in sentence re-hearing implies that where the appellant or the petitioner has been in custody for a considerable period of time the Court ought to consider calling for a pre-sentencing report and possibly the victim impact report in order to inform itself as to whether the appellant/petitioner is fit for release back to the society. 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.”

45. In my view, fairness to the petitioner or appellant where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the appellant during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the Court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report.

46. In its decision the Court referred to Article 10(3) of the Covenant stipulates that— “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.” In my view where the Petitioner/Appellant has

spent a considerable period of time in custody, it may be prudent for the Court while conducting a sentence re-hearing, in order to determine whether the Petitioner/Appellant has sufficiently reformed or has been adequately rehabilitated to direct that a pre-sentencing report be compiled. This is so because the circumstances of the appellant in custody may have changed either in his favour or otherwise in order to enable the Court to determine which sentence ought to be meted. It may be that the appellant had sufficiently reformed to be released back to the society. It may well be that the conduct of the appellant while in custody may have deteriorated to the extent that it would not be in the interest of the society to have him released since one of the objectives of sentencing is to protect the community by incapacitating the offender.

47. 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.

48. 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.”**

49. 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.”**

50. Back to the instant case, there was no evidence that the appellant was guilty of theft. The person against whom the allegation of theft was made was never apprehended. It was not alleged that the appellant's use of violence against PW1 was meant to enable him obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained. It may well have been that the violence was meant to make him escape. Accordingly, there was no evidence of robbery and without such evidence the offence of robbery with violence pursuant to section 296(2) of the **Penal Code** could not be sustained.

51. As to whether the trial court erred in finding that the defence was not plausible, that is not necessarily fatal to the findings since this being a first appeal this Court is obliged to reassess and re-evaluate the evidence that was presented before the trial Court which evidence I have analysed and found that no issue turns thereon. As was held by the Court of Appeal in **Isaac Njogu Gichiri vs. Republic [2010] eKLR**:

**“With regard to failure by the superior court to give due consideration to the appellant's defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: “I find that the defence of the 5<sup>th</sup> accused is not true.” We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8<sup>th</sup> October, 1998. On this, the superior court stated: “The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances.” We agree with this confirmation.**

52. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)**, **Odoki, JSC** (as he then was) said:

**“While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance.”**

53. The Learned State Counsel has, properly in my view, not supported the conviction of robbery with violence contrary to section 296(2) of the **Penal Code**. The Court was however urged to exercise its powers under section 179 of the **Criminal Procedure Code** and to substitute the offence with the one of assault and to sentence the appellant accordingly.

54. Section 179 of the **Criminal Procedure Code** provides that:

**179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**

**(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.**

55. Section 191 of the **Criminal Procedure Code** provides that:-

**The provisions of Sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of Sections 180 to 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of Section 179.**

56. Section 179 aforesaid was dealt with by the Court of Appeal in the case of **Rashid Mwinyi Nguisa & Another vs. Republic [1997]**

eKLR in which it was held:-

**“In short this means that apart from recognizing that Section 179 sets out the principle of law applicable in a trial with respect to conviction for offences other than those charged, and that this general principle shall apply as such notwithstanding that Sections 180 to 190 deal with special cases in a trial.....Section 179 of the Criminal Procedure Code cannot be in derogation of the appellate powers of the High Court contained in Section 354(3) (a) of the same code.”**

57. The same Court in Kalu –vs- Republic (2010) 1 KLR observed as follows:-

**“With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading:-“Convictions for Offences Other than Those Charged” and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder”.**

58. The *Black’s Law Dictionary* 9<sup>th</sup> Edition page 1186 defines a cognate offence as:-

*A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.*

59. I agree with Ngenye-Macharia, J in David Mwangi Njoroge vs. Republic [2015] eKLR that:

**“...the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with.”**

60. The question is therefore whether the offence of assault is cognate to the offence of robbery with violence. In my view apart from assault under section 298 of the *Penal Code*, the other types of assaults cannot be said to share several of the elements of the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. However section 298 provides that:

*Any person who assaults any person with intent to steal anything is guilty of a felony and is liable to imprisonment for five years.*

61. From the evidence of PW2, the appellant was wielding a knife and demanded money from him. Accordingly, I am satisfied that the violence meted against PW2 by the appellant was partly if not wholly geared towards stealing. Accordingly I am satisfied that the evidence adduced merited a conviction of an assault pursuant to section 298 of the Penal Code. Consequently, I set aside the conviction of the appellant under section 296(2) of the *Penal Code* and substitute therefor one under section 298 of the *Penal Code*.

62. The appellant has been in custody since 16<sup>th</sup> January, 2013, a period of more than 5 years. The complainant did not sustain very serious injuries and the robbers were armed with a knife and a stick. The amount lost was Kshs 2,500.00.

63. Consequently, I set aside the death sentence imposed upon him and substitute thereto a sentence of 3 years imprisonment. As the appellant has served more than 5 years, I direct that he be set free forthwith unless otherwise lawfully held.

64. Right of appeal within 14 days.

65. Orders accordingly.

**Judgement read, signed and delivered in open court at Machakos this 12<sup>th</sup> day of June 2018.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**The Appellant in person.**

**Miss Mogoi for the Respondent**