REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL 278 & 279 OF 2006

1. SILAS K. NGARI

2. STEPHEN M. MURITHI..APPELLANTS

VERSUS

REPUBLIC..RESPONDENT

(From original conviction and sentence in Mombasa Chief Magistrate's Court Criminal Case No. 2190 of 2005, T Mwangi, SRM on 11th October, 2006)

JUDGEMENT

1. The appellants herein **Silas Kariuki Ngare** (hereinafter referred to as "the 1st appellant") and **Stephen Maina Murithi** (hereinafter "the 2nd appellant"), together with **Stephen Mwaniki Ndungu** (hereinafter referred to as "the co-accused") were charged the Chief Magistrate's Court Mombasa in Criminal Case No. 2190 of 2005. At the end of the case, **Hon T. Mwangi, SRM** acquitted them of all the counts save for the 1st count of robbery with violence contrary to section 296(2) of the ***Penal Code,*** in respect of which the appellants were convicted. The particulars of the said count were that the appellants and the said co-accused *on the 14th day of June, 2005, at Tudor Manyimbo area within Mombasa District of the Coast Province, while armed with dangerous weapons namely pistols and a knife, jointly robbed Stephen Onyango Ochola, (hereinafter "the complainant") of his compressor, one bicycle - make Diamond, a wrist watch make Cambridge, cash of Kshs. 425/=, a spanner and a bunch of keys, all valued at Kshs. 21,125/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said complainant.*

2. The appellants were accordingly convicted and each sentenced to death.

3. Being dissatisfied with their conviction and sentence, the appellant appealed to this court against their conviction and sentence. This appeal was initially heard by **Azangalala, J** (as he then was) and **Odero, J** and their appeal was dismissed. However their appeal to the Court of Appeal was allowed on a technicality as the said judgement was only signed by one Judge. The Court therefore directed that the appeal be heard afresh.

4. The appellants have raised the following issues: that the first report made to the police did not disclose a commission of robbery but theft; that the appellants were arrested on the basis of a report made by one **Mbaruk** who was not called to give evidence; that the evidence of identification was not positive; that accomplice evidence was considered in convicting them, yet they were not given an opportunity to cross-examine the accomplice and that the prosecution case was not proved as required in Law.

5. When the appeal came up for hearing before us, the appellants who were unrepresented, relied upon their written submissions while **Miss Ogweno**, Learned Senior State Counsel, represented the Republic and opposed the appeal contending that the same was without merit. In his view, the appellants were convicted on sound evidence; they were found in possession of recently stolen property which had shortly before been robbed from the complainant who had identified the appellants at the scene of crime and at an identification parade.

6. In summary, the facts of the case before the Learned Senior Resident Magistrate were as hereunder: - The complainant, **Stephen Onyango Osora**, (PW1) hired from **Peter Okemo Okumu**, (PW2), a compressor for his spray painting work on 13th June, 2005 to be undertaken at Changamwe. On 14th June, 2005, he completed the work, loaded the compressor on a bicycle which he had borrowed from the same PW2 and commenced his trip back home. On the way home, he called on his colleagues at his former work-station at Tudor where he chatted with friends and then proceeded with his return journey. When he reached Tudor Day Secondary School at about 3.00 p.m., a pick-up vehicle approached from behind and stopped where he was and two men alighted therefrom, produced a pistol and a knife and demanded the items he had and threatened to kill him if he screamed. The men then took the compressor and the bicycle and put it on the pick-up. They also took his watch-make cambridge, house keys, a spanner and cash of Kshs. 425/= all valued at about Kshs. 27,000/= and drove off. According to PW1 he identified the faces of the men but not the driver of the pick-up and the registration number of the pick-up. He then proceeded home and reported to the owner of the compressor and the bicycle, (PW2) and the following day, he reported the incident to Makupa Police Station.

7. On 18th June, 2005, he was informed by his uncle that the compressor had been recovered and suspects arrested by Makupa Police after which he went to Makupa Police station and saw the attackers as well as the compressor whose description he gave to the court.

8. PW2, **Peter Okemo Okumu**, confirmed giving the compressor and the bicycle to the complainant on 13th June, 2005. He further identified the compressor at Makupa Police station after it was recovered on 18th June, 2005.

9. PW3, **PC Gabriel Nyongesa** of Makupa Police Station was the Investigating Officer and he testified that on 18th June, 2005, he received information that there were three men who were suspected to be thieves at a garage at Kiziwi area. In the company of his colleague, they visited the said garage where they found the owner, **Joseph Odhiambo Wandai**, PW 4, who pointed out the three suspects whom they arrested and escorted to Makupa Police Station together with the compressor. He produced the compressor at the trial.

10. According to **Joseph Odhiambo Wandai**, PW 4, on 18th June, 2005, at 9.00 a.m., one of his colleagues informed him that a compressor had been brought to their place for sale. He was however aware that PW 1 had been robbed of a compressor and a bicycle. At about 1.00 p.m., the same date, the men went to PW4, at his workplace and offered the compressor for sale at Kshs. 15,000/=. He pretended to be interested and told them to wait for money. In the meantime, he informed the complainant and sent his colleague to report to the police who came, arrested the suspects and carried the compressor with them.

11. On 22nd June, 2005, **IP Said Bueto**, PW 5, mounted two identification parades at which the appellants were identified by the complainant.

12. In their defence, the appellants gave unsworn statements. According to the 1st appellant on the 18th August, 2005, he was arrested after an unrelated conversation with the police. At the police station, he was pointed out to the complainant and PW 4 whom he found at the booking office. He was then taken home where a search was carried out in the presence of the complainant and he was later identified by the complainant at an identification parade conducted on 22nd August, 2005.

13. On his part, the 2nd appellant stated that on 18th June, 2005, he went to buy sugar for his snack business. On the way, a motor vehicle approached from behind without hooting. He was enraged and threw stones at the vehicle breaking its windscreen. He was arrested and handed over to police officers who took him to Makupa where he was asked for Kshs. 10,000/= for his freedom which he did not have. On 19th June, 2005, the complainant went to the police cells and pointed him out as one of his attackers. He later participated in an identification parade at which the complainant identified him.

14. It was on the basis of the said evidence, that the trial Magistrate found as a fact that the complainant had been attacked by the appellants during the day when visibility was good and that his testimony of the robbery had not been challenged by the appellants. The Learned Magistrate further found that the prosecution had proved that the appellants were found in possession of property which had recently been stolen from the complainant. He further found that the complainant had identified the appellants at the identification parade conducted by PW 5, **IP Said Bueto.** He concluded that the charge had been proved to the required standard.

15. 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."**

16. 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.**

17. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

18. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I

adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

> **"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:**
>
> **'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"**

19. 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."**

20. I have independently re-evaluated and re-examined the evidence which was presented before the Learned Senior Resident Magistrate.

21. 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.***

22. 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 liable to be sentenced to death.

23. In this case the attack on the complainant took place in broad day light at about 3.30 p.m. and the attackers were not disguised. As a result the complainant was therefore able to see their faces well. The conditions, therefore favoured a positive identification which though was by a single witness. However in **Maitanyi vs. Republic [1986] KLR 198**, it was held, with respect to the reliability of the evidence of a single identifying witness as follows:

> **"Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with greatest care the evidence of a single witness respecting identification…The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made."**

24. **Wamunga versus Republic (1989) KLR 424** the Court of Appeal spoke of the evidence of identification generally in the following terms:

> **"It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."**

25. The same court acknowledged in **Ogeto versus Republic (2004) KLR 19** that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult; it noted as follows:-

> **"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken."**

26. In **Abdala bin Wendo & Another versus Republic (1953), 20 EACA 166** the East African Court of Appeal it held that:

> **"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."**

27. The Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in **<u>Roria versus Republic (1967) EA 583 at page 584</u>**. It stated:

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness…That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."**

28. It was therefore held in **<u>Criminal Appeal No. 24 of 2000 Paul Etole & Reuben Ombima vs. Republic</u>**, as follows:

> **"The appeal of the 2nd appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case the danger of mistaken identification is lessened, but the poorer the quality the greater the danger. In the present case, neither of the two courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no enquiry as to the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity. It was essential that there should have been an enquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size and its position the vis-à-vis the accused would be relevant."**

29. In such matters, the importance of the first statement to the police cannot be downplayed. If the description of the attackers is not given to the police then the evidential value of the identification parade from which the attackers were purportedly picked would be substantially diminished though the parade itself may not, merely for that reason, have been rendered invalid (see the Court of Appeal decision in **<u>Nairobi Criminal Appeal No. 176 of 2006, Nathan Kamau Mugwe versus Republic (2009) eKLR)</u>**. In **<u>Ajode versus Republic (2004) 2 KLR 81</u>** the same Court held that it is trite law that before an identification parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade. See also **<u>Maitanyi versus Republic (1986) KLR at page 198</u>** where the Court of Appeal held:

> **"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made…if a witness receives a very strong impression of feature of an assailant; the witness will usually be able to give some description."**

30. The court proceeded to hold further that:

> **"In this case J admitted that she did not give the description of the 1st appellant before he was arrested and before she identified him when he was brought into the police station. We are of the considered view that J's evidence on identification ought to have been tested by her first recording her initial statement indicating whether she could identify her attackers and giving their descriptions."**

31. The appellants' complaint regarding the manner in which the identification parade was conducted is therefore not without some merit. This must be so, because the complainant stated in his evidence that when the appellants were arrested, and were taken to the police station, he was at the police station and saw them even before anyone could tell him who they were. He also accompanied the appellants when police officers visited their homes in Mariakani. In those premises, an identification parade served no purpose and I agree that if it had been the only evidence of identification, it would have been unsafe to rely upon it for conviction.

32. From the decision appealed from, there is nowhere indicated that the trial Court warned himself on this danger. Accordingly, if that had been the basis for the conviction, I would not hesitate in upsetting the same.

33. There was however, other evidence upon which the Learned Senior Resident Magistrate relied in convicting the appellants. PW 4, **Joseph Odhiambo Wamdai,** to whom the stolen compressor was offered for sale testified that the appellants, with another, went to his place of work on 18th June, 2005, at about 1.00 p.m. and offered the compressor for sale to him at Kshs. 15,000/= and that he pretended to be interested but in the meantime contacted the complainant and sent for the police as he had been earlier informed of the robbery against the complainant. PW3, **PC Gabriel Nyongesa** was one of the police officers who responded to PW 4's report and when he arrived at the place of work of PW4, he found the appellants and arrested them and also took possession of the compressor which compressor was positively identified by the complainant and PW2, **Peter Okemo Okumu** from whom the complainant had hired the same.

34. The evidence of recovery provided proof that the appellants were found in possession of stolen compressor just four (4) days after the robbery on the complainant. The court therefore relied on the doctrine of recent possession.

35. Delivering the judgment for the majority, **McIntyre J.** in the Canadian Supreme court case of **<u>Republic vs. Kowkyk (1988)2 SCR 59</u>** explored at length the history of the doctrine in various decisions from its roots in the nineteenth century in England and Canada and said in part:

“Before going further, it will be worthwhile to recognize what is involved in the so called doctrine of recent possession. It is difficult, indeed, to call it a doctrine for nothing is taught, nor can it properly be said to refer to a presumption arising from the unexplained possession of stolen property, since no necessary conclusion arises from it. Laskin J. (as he then was) (Hall J. concurring) in a concurring judgment in R. v. Graham, supra, said at p. 215:

“The use of the term 'presumption', which has been associated with the doctrine, is too broad, and the word which properly ought to be substituted is 'inference'. In brief, where unexplained recent possession and that the goods were stolen are established by the Crown in a prosecution for possessing stolen goods, it is proper to instruct the jury or, if none, it is proper for the trial judge to proceed on the footing that an inference of guilty knowledge, upon which, failing other evidence to the contrary, a conviction can rest, may (but, not must) be drawn against the accused.”

He went on to point out that two questions, that of recency of possession and that of the contemporaneity of any explanation, must be disposed of before the inference may properly be drawn. He made it clear that no adverse inference could be drawn against an accused from the fact of possession alone unless it were recent, and that if a pre-trial explanation of such possession were given by the accused and if it possessed that degree of contemporaneity making evidence of it admissible, no adverse inference could be drawn on the basis of recent possession alone if the explanation were one which could reasonably be true. Implicit in Laskin J.'s words that recent possession alone will not justify an inference of guilt, where a contemporaneous explanation has been offered, is the proposition that in the absence of such explanation recent possession alone is quite sufficient to raise a factual inference of theft.”

36. In the end, the majority of that Supreme Court accepted the following summary of the doctrine:-

“Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.”

37. In **Isaac Ng’ang’a Kahiga alias Peter Ng’ang’a Kahiga vs. Republic Cr App. No. 272 of 2005(UR),** the Court of Appeal held that:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.

In other words, there must be positive proof:

i). that the property was found with the suspect;

ii). that the property is positively the property of the complainant;

iii). that the property was stolen from the complainant;

iv). that the property was recently stolen from the complainant.

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”

38. The applicability of the doctrine of recent possession was dealt with in **Erick Otieno Arum vs. Republic [2006] eKLR** where he Court of Appeal held:

“In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version. That duty as has been said is wholly on the trial court and on the first appellate court. This court has no such duty on hearing a second appeal such as before us but if it be satisfied that that duty has not been fully discharged by the first appellate court then it will take the line that had it been done either or both courts would have arrived at a different conclusion.”

39. In this case the evidence was that the stolen property was in possession of the appellants who were attempting to sell the same. It is not in doubt that the same was stolen 4 days before and it is not controverted that the same belonged to PW2. A compressor, unlike a shirt for example, is not an article whose movement from one person to another is easy.

40. I am therefore satisfied that the above ingredients of recent possession were proved by the prosecution. In his judgment, the Learned Senior Resident Magistrate stated as follows:-

> **"The three accused persons were arrested in possession of the compressor as they waited for a buyer.**
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> **PW 3 arresting officer and PW 4 the owner of the garage did confirm that the compressor was recovered in the presence of the accused persons at the time of arrest. None of the witnesses knew accused persons prior to that day. There would have been no reason for the witnesses wanting to frame accused persons therefore."**

41. It is clear that the Learned Senior Resident Magistrate clearly had the doctrine of recent possession in mind as he considered the evidence adduced before him. I therefore find that the recent possession of the compressor by the appellants clearly implicated them in the robbery.

42. The appellants have further complained that they were convicted on the evidence of an accomplice (the 2nd accused who was acquitted) which evidence was not tested by cross-examination. I have indeed noted that the 2nd accused, **Stephen Mwaniki Ndungu** testified on oath at the trial. The record shows that he was then cross-examined by the prosecutor. The appellants do not appear to have been given an opportunity to cross-examine him.

43. I agree that the right to cross-examination is a fundamental one, and would repeat what His Majesty's Court of Appeal for Eastern Africa said in **Edward S/O Msenga vs. Reginam, (1942) EACA 553** where, the Court held that:-

> **"The failure to give the appellant an opportunity to cross-examine the second accused was the denial of a fundamental right which was fatal to the conviction on the first count."**

44. What happened in that case was that a co-accused gave evidence on oath and implicated **Msenga** on count one of the charge. The prosecutor cross-examined the co-accused but:-

> ***"the first accused (MSENGA) was refused permission to do so."***

45. The Court in **Msenga's** case examined the nature of the evidence which the co-accused had given against **Msenga** and said at page 554:-

> **"We find it impossible to say that the refusal by the learned trial Magistrate to allow the appellant to cross-examine the second accused did not prejudice the appellant in his defence and did not result in a miscarriage of justice. The evidence given by the second accused undoubtedly tended to incriminate the appellant, particularly his evidence that the appellant did not hand over the money to him for, if the appellant did not hand over the money, the only reasonable inference which could be drawn was that the appellant had stolen the money himself. But if doubt were thrown on the truth of the second accused's testimony, a reasonable doubt might well have been raised as to the guilt of the appellant. It was, therefore, clearly in the interests of justice that the appellant should have been given an opportunity of testing by cross-examination the truth of the evidence given against him by the 2nd accused. Although it is true that the prosecutor cross-examined the second accused on most of the points on which the appellant says he wished to cross-examine, we are unable to agree with the conclusion of the learned appellate Judge that 'had the appellant been allowed to cross-examine, there is no reason whatsoever to believe that the 2nd accused would have answered differently.' It cannot be assumed that the second accused would not have answered differently if he had been cross-examined by the appellant. The appellant might well have material which was unknown to the prosecutor and which would have enabled him to cross-examine more effectively than the prosecutor. We think that the failure to give the appellant the opportunity to cross-examine the 2nd accused was a denial of a fundamental right which was fatal to the conviction on the first count."**

46. Considering the evidence of the co-accused it is my view that if the conviction of the appellants depended entirely on his testimony it would have been unsafe. A re-examination of the evidence however shows that the conviction of the appellants was not dependent on the testimony of the 2nd accused. The Learned Senior Resident Magistrate concluded as follows:-

> **"I am satisfied with the evidence on record that the prosecution did prove its case as required in respect of the 1st and 3rd accused on count 1. The two persons were positively identified by the complainant. The robbery took place during the day. None of the two would give an account of their whereabouts on 14th June, 2005 to take them away from the scene of crime. Having failed to do so and considering that the evidence by the prosecution was well corroborated and overwhelming, I do find both accused one and III guilty as charged on count 1."**

47. This conclusion, it would seem, was not influenced by the testimony of the 2nd accused and that he relied, for the appellants' conviction, entirely on the testimony of the prosecution. So, whereas the appellants appear not to have been given an opportunity to cross-examine the 2nd accused, that failure was not fatal to the entire prosecution case since its case was founded on the identification of the appellants at the time of the commission of the crime and on the doctrine of recent possession which doctrine is discussed above. While I have discredited the identification of the appellants I am satisfied that the doctrine of recent possession was properly relied upon in convicting the appellants.

48. The upshot is that the appellants were convicted on sound evidence and the Learned Senior Resident Magistrate, despite the procedural flow she committed, was justified in convicting them for the offence of robbery with violence contrary to section 296(2) of the ***Penal Code***. Accordingly, there is no valid reason to interfere and I hereby uphold the conviction.

49. 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.**
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> **[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.**
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> **[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.**
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> **[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.**
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> **[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.**
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> **[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."**

50. 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."***

51. 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."

52. 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."

53. 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 …"

54. 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."*

55. 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."

56. 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.

57. 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 20th June, 2008, which was then the last appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered its decision, this appeal was still pending.

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

[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."

58. 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."**

59. 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."**

60. 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.

61. 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."**

62. 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.

63. 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."**

64. 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.

65. 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.

66. 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.

67. 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."**

68. 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."

69. 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.

70. Back to the instant case, appellants have been in custody since 2005, a period of 13 years. Though the Appellants were alleged to have had a knife and a gun the same were not produced and there was conflicting evidence as to whether they were actually armed. This however does not make the offence any lighter since the assailants were in company with one or more other person or persons. Secondly, the complainant did not sustain any serious injury in the course of the robbery. Thirdly the compressor which was stolen during the robbery was recovered and the value of the property was estimated at about Kshs. 27,000/=.

71. Consequently, I set aside the death sentence imposed upon the appellants and substitute therefor a sentence of 15 years imprisonment to run from the date of arrest.

72. Right of appeal within 14 days.

73. Orders accordingly.

Judgement read, signed and delivered in open court at Machakos this 6th day of September, 2018.

G V ODUNGA

JUDGE

In the presence of:

The Appellants in person

Ms Ogweno for the Respondent

CA Gladys