



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mukhwana v Republic (Criminal Appeal 211 of 2020)  
[2026] KECA 188 (KLR) (30 January 2026) (Judgment)**

Neutral citation: [2026] KECA 188 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 211 OF 2020  
PO KIAGE, GV ODUNGA & DK MUSINGA, JJA  
JANUARY 30, 2026**

**BETWEEN**

**PETER WAFULA MUKHWANA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Bungoma  
(Ali Aroni, J.) dated 16th June 2017 in HCCRA No. 3 of 2008)*

**JUDGMENT**

1. Peter Wafula Mukhwana, the appellant herein, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the particulars being that on 15<sup>th</sup> December 2007, at Mukhuyu Village, Webuye Location in Bungoma District within the Western Province, he jointly with others not before the court, murdered Salome Alivitsa, hereafter referred to as “the deceased”. He pleaded not guilty to the offence. After hearing, the appellant was found guilty and was sentenced to death.
2. PW1, Lilian Kasoa Wainaina, a young girl aged 14 years, in her unsworn evidence, in the wake of voir dire examination by the trial court, stated that on 15<sup>th</sup> December 2007, at around 5.00am, she was at home with her grandmother, the deceased, together with her aunt, Betty, and uncle Simon. The appellant, carrying a sack, came and invited the deceased to accompany him for meat-feasting at Sango, in Webuye. The appellant and the deceased then left. At 10.00 am, the appellant returned alone, and informed them that the deceased was at the Fly Over, carrying a big luggage and needed help. He enticed PW1 that he would buy her a mandazi and PW1 left with him. However, her auntie, Eliza, followed her and ordered her to return home and, together with the aunt, they returned home. Her grandmother was later found dead in a forest near Fly Over.



3. PW3, Emily Namachanja Simiyu, confirmed that she was at home with her mother, the deceased, PW1 and her brother, Murunga, when the appellant, an acquaintance of the deceased, came to their home at around 9.00 am and invited the deceased to go for meat eating and asked for an empty sack from the deceased before the two left together. At around 2.00 pm, the appellant came back home and told them that the deceased was behind walking slowly and left. Failing to see the deceased return, PW3 informed her brother, Abisai (PW2), at around 7.00 pm, of the fact that the deceased was missing. A search was then mounted but in vain, after which a report was made to Webuye Police Station. On 17<sup>th</sup> December 2007 they received information that the appellant had been seen walking with their mother near the Webuye Fly. Upon proceedings to the place, which was near Webuye Railways line, the deceased's body was found lying on a sack with a stick inserted in her private parts.
4. PW2, Abisai Andelwa Wekesa, was on 15<sup>th</sup> December 2007 informed about the incident by one of his brothers, Leonard Wekesa, and they then embarked on the search for the deceased but they did not find her. On 17<sup>th</sup> December 2007 they reported to the police and proceeded to the forest where they found the decomposing body of the deceased, on top of an empty sack lying on its back with cut wounds all over the face and a stick inserted in her private parts, the eyes gouged out and mouth cut on both sides. The deceased's black blouse had been torn and the chest was bare, while the skirt had been pulled upwards, leaving the private parts bare.
5. PW4, Dr. Patrick Wambasi, the Medical Superintendent, Webuye District Hospital, produced the post mortem report which had been filled by his colleague, Dr. Ngigi on 20<sup>th</sup> December 2007. From that examination, the body had rigor mortis, external degloving of the right side of the skull, multiple blunt injuries on the frontal and anorectal region, penetrating injury on the genital urinary area or external genitalia which could have been caused by a sharp object and lacerations. The cause of death was opined to be cardiovascular arrest and severe bleeding.
6. At the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his sworn testimony, he stated that on 15<sup>th</sup> December 2007 at about 10.00 am, he left home to visit his in-law, Pius Maseli, in Matutu area in Webuye where his wife, Joyce Wafula, hails from. While there and in the company of his in-laws, Rukia and Jane, he went to partake of a local brew before returning home. He was arrested on 17<sup>th</sup> December 2017 when he went to Naitiri for the offence of house breaking and charged with stealing maize. He denied visiting the deceased and stated that he heard of the deceased for the first time in court. It was his further evidence that on 15<sup>th</sup> December 2017, between 8-9am he was on the road travelling on a motor cycle to Webuye and reached his in-law's place at 10am. He denied that he was a neighbour to the deceased and denied having committed the offence.
7. According to his testimony, on 15<sup>th</sup> December 2007 he was arrested by police of Mbakalu Naitiri and charged with the offence of assault and stealing and on 20<sup>th</sup> December 2007 he was taken to Kapchong Police Station and on 21<sup>st</sup> December 2007 was charged in Webuye Court. He, however, had no evidence of the existence of that case.
8. In her judgment, the learned Judge (Ali-Aroni, J. as she then was), appreciating that the culpability of the appellant was premised on circumstantial evidence, found that the chain was not broken. While noting that there were a few contradictions in the prosecution's case, the learned Judge was of the view that they did not go to the core of the evidence tendered in court. The appellant's alibi defence was found wanting, the learned Judge observing that it was also too much of a coincidence that the body of the deceased was discovered lying on a sack which the appellant carried the day they left with the deceased. The appellant was convicted of murder and sentenced to death, on the basis that it was the only available sentence in law.



9. Dissatisfied with the decision, the appellant challenges the decision on the grounds that the learned Judge erred in points of law and fact: by failing to properly analyse the evidence before court, hence arriving at a determination not backed by evidence on record; by failing to uphold the appellant's alibi defence which warranted an acquittal; by sentencing the appellants to death, yet its mandatory nature was declared unconstitutional; and by failing to provide an opportunity for the appellant to mitigate thus arriving at a wrong decision.
10. We heard this appeal on 3<sup>rd</sup> September 2025 when learned counsel, Ms. Ida Anyango, appeared for the appellant, while learned Assistant Director of Public Prosecutions, Ms Mwaniki, appeared for the respondent. Both counsel relied on their written submissions which they briefly highlighted.
11. On behalf of the appellant, it was submitted: that since PW1 was not cross-examined, the appellant did not get an opportunity to test her testimony, in particular, to confirm the persons present at home with her during the alleged visit by the appellant or even the time the appellant and PW1 first interacted, which was said to be at 5.00 am; that the conversation between the appellant and the deceased regarding buying of meat and how they subsequently left was hearsay; that since PW2's brother was not called to testify in support of his version of events, the learned Judge erred in relying on his evidence; that PW1's unsworn testimony did not hold much evidential value; that PW2's evidence was hearsay and PW3 was not present at the scene, going by PW1's testimony; that section 124 of the [Evidence Act](#) was not complied with as there was no corroboration of PW1's testimony by PW2 and PW3 as to the alleged interaction between the appellant and the deceased at the deceased's home; that the failure to call the investigating officer to testify is, ipso facto, a sufficient reason for acquittal of an accused person, particularly in a case such as this where all the witnesses were relatives except PW4; that lack of the investigating officer's testimony was fatal to the prosecution's case and raised doubt, which doubt ought to have been resolved in favour of the appellant. In support of this line of submissions, the appellant cited *Bwaneka v Uganda* [1967] EA 768 at page 771 to 772 and *Bukenya v Uganda* (1973) EA.
12. According to the appellant, the circumstantial evidence did not meet the requisite threshold set out in *Abanga alias Onyango v Republic*, Cr. App. No. 32 of 1990 since PW4 admitted that he did not know the date of death. The appellant asserted that in light of the uncertainty as to the time of the deceased's death, his defence that he had been arrested on the material day, caused a break in the chain of events thus warranting an acquittal.
13. It was further submitted: that the appellant could not be blamed for raising the alibi defence late since, in the absence of the investigating officer, the appellant was never accorded an opportunity to state his whereabouts or even raise his alibi early enough, (See *Victor Mwendwa Mulinge v R* (2014) eKLR and *Uganda v Sebyala & Others* (1969) EA 204); and that the alibi was not dislodged, thus a plausible conclusion that the appellant was not at the scene.
14. According to the appellant: the mandatory nature of the death sentence was declared unconstitutional in accordance with the decision of the Supreme Court in *Muruatetu & Another v Republic* [2017] eKLR (*Muruatetu Case*); that on the authority of the case of *William Okungu Kittiny v Republic* Criminal Appeal No. 56 of 2013, death sentence is a discretionary maximum punishment; that the Court ought to give a term sentence, taking into account the 9 years 5 months spent in custody and already served, which cumulatively come to 16 years 8 months in prison.
15. It was contended that the appellant was sentenced immediately without the requisite mitigation, thus the provisions of section 216 of the Criminal Procedure Code were never complied with contrary to the decision in *John Muoki Mbathya v Republic*, Criminal Appeal No. 72 of 2007 (Unreported). We were urged, in this regard, to remit the matter to the trial court for purposes of mitigation and



sentencing, taking into account the time spent in custody during the trial and the time already served since the sentence was imposed.

16. In opposition to the appeal, it was submitted by the respondent: that the eye witnesses placed the appellant as the last person seen leaving with the deceased before her lifeless body was discovered in a sack which the appellant had taken from the deceased's home (See *Mohamed Mwachai v Republic* [1997] eKLR and *Republic v EMM* [2014] eKLR); that "the last seen doctrine" was corroborated by the medical and circumstantial evidence which placed the appellant at the scene, hence meeting the threshold of circumstantial evidence as set out in *Republic v Kipkering Arap Koskei & Another* (1949) 16 EACA 135; that the learned Judge gave reasons why the appellant's version was not convincing and why the inference drawn from the last seen evidence was the most logical; that the sentence was lawfully and properly imposed within the legal framework applicable at the time and in any case, the Supreme Court in *Muruatetu Case* did not outlaw the death penalty itself but held that it should not be mandatory; and that the trial courts must consider mitigating factors before imposing any sentence, including death; that there is nothing to indicate that the learned Judge failed to consider the relevant mitigating and aggravating factors as the record shows that the appellant was given the opportunity to mitigate; that the court considered the brutality or premeditation involved in the murder as well as the victim's family and the circumstances of the offence; and that the appellant's constitutional rights under Articles 50(2)(q) and 28 of *the Constitution* were not violated, thus the fair trial principles were adhered to. The respondent urged this Court to dismiss the appeal in its entirety and uphold the conviction and sentence of death as imposed.

17. We have considered the grounds of appeal and the evidence on record, the respective submissions filed by and on behalf of the appellant and by the respondent. Our mandate, sitting as a first appellate Court, is provided for under rule 31(1)(a) of the Rules of this Court, which provides as follows:

"(1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—

a. to re-appraise the evidence and to draw inferences of fact; ..."

18. That this Court is enjoined, in a first appeal, to undertake a fresh and exhaustive examination and reach its own decision on the evidence on record was affirmed by this Court's predecessor in *Okeno v Republic* (1972) EA 32 in the following terms:

"An appellant on 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 conclusion. 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; 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."

19. The offence of murder, with which the appellant was charged, is provided for in section 203 of the Penal Code which states that:

"Any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."



20. In the case of *Chiragu & Another v Republic* [2021] KECA 342 (KLR) this Court restated that:

“The prosecution in an information of murder has the singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the appellant and that the appellant had malice aforethought as he committed the said act.”

21. That the deceased died is not contested. Her death was confirmed by the evidence of PW2 and PW3 who saw the body lying near the fly over in a state of decomposition. The evidence of PW4 corroborated the fact of the death of the deceased. There was also ample evidence to prove that the death of the deceased was caused by an unlawful act. From the state in which the body was found coupled by the conclusion in the post mortem report that the probable cause of death was cardiovascular arrest and severe bleeding, there can be no doubt as regards the unlawfulness of the deceased’s death.

22. The only issue in contention was whether it was the appellant who caused the death of the deceased. It is not in doubt that the conviction of the appellant was based on circumstantial evidence. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence, the courts have established certain threshold to be met if a conviction is to be based thereon. In *Sawe v Rep* [2003] KLR 364 this Court held that.

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

23. This Court in *Abanga alias Onyango v Republic*, CR. A No.32 of 1990 (UR) set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction in the following terms:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
- ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

24. Therefore, for this Court to find the appellant guilty, the inculpatory facts must be incompatible with his innocence and be incapable of explanation upon any other hypothesis than that of his guilt. In this case the inculpatory facts relied upon in convicting the appellant were that he was the last person to be



seen with the deceased alive. The principle of “last seen with” has been applied by our courts by virtue of Section 111(1) of the *Evidence Act* which provides that:

“(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact, especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist, Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

25. This Court in the case of *Kimani v Republic* [2023] KECA 1390 (KLR) held that:

“The doctrine of ‘last seen alive’ is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before their death was responsible for his or her death and the accused is expected to provide an explanation as to what happened.”

26. And in the case of *Moingo & Another v Republic* [2022] KECA 6 (KLR) the Court reiterated that:

“The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased).”

See also *Ngeno v Republic* (Criminal Appeal 24 of 2016)[2024] KECA 757 (KLR).

27. In this case the evidence of PW1, as corroborated by PW3, was that the appellant, who was well known to them and who was the deceased’s acquaintance, went to the deceased’s home and invited the deceased for a meat-eating session. The appellant then left carrying a sack. It was not clear whether he came carrying the sack or requested for it as the evidence on this point was at variance. However, whether he came with the sack or requested for it is immaterial. What is material, as we shall see later in this judgement, is that he left with a sack. The incident occurred in broad daylight, although there were contradictions regarding the timings. This was not a case of the appellant being merely identified but was one of identification by recognition which is appreciated “is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.” See *Anjononi & Others v Republic* [1980] KLR 59.

28. Later when the appellant returned alone, he disclosed that he had left the deceased behind since the load was heavy. One wonders why he did not lend a hand to the deceased, if at all it was true that she was heavily laden. He instead enticed PW1, a child aged 14 years, to accompany him back, and were it not for the quick intervention of PW1’s aunt, PW1 would have accompanied the appellant for a mission whose aftermath we can only shudder to imagine.



29. When the body of the deceased was eventually recovered, it was lying on the sack which was identified by PW2 and PW3 as the one which the appellant had left carrying. In our view, the evidence of PW1 and PW3 placed the appellant on the scene where the deceased was last seen alive and he was the last person who left with the deceased before the deceased's body was recovered decomposing next to the railway line. It is now trite that even though the onus of proof in criminal cases always rests squarely on the prosecution, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased. In this case, the appellant offered no explanation at all. His defence was a denial of any knowledge of the deceased. In *Rafaeri Munya alias Rafaeri Kibuka v Reginam* (1953) 20 EACA 226, the appellant was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

“The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”.

30. Explaining the above position, this Court in *Abanga alias Onyango v Republic* (supra) held that:

“This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But it's a basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available evidence.”

31. While we agree with the appellant's counsel that in alibi defence, the burden does not shift to the accused to prove that line of defence, we are satisfied that appellant's alibi defence was clearly dislodged by the evidence of PW1 and PW3.

32. The appellant's complaint that since PW1 was not cross-examined, the appellant did not get an opportunity to test her testimony has no substance since PW1's evidence was corroborated materially by the evidence of PW3, whose evidence was subjected to cross-examination. We appreciate that there were some inconsistencies between the evidence of PW1 and that of PW3, but having subjected those inconsistencies to scrutiny, in the exercise of our duty as a first appellate court, we find them to be minor in nature and as was held by this Court in *Willis Ochieng Odero v Republic* [2006] eKLR, inconsistencies, per se, is not a ground for quashing the conviction in view of the provisions of section 382 of the Criminal Procedure Code. As held by this Court in *John Nyaga Njuki & Others v Republic*, Nakuru Criminal Appeal No. 160 of 2000 [2002] eKLR, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict.

33. As regards the failure to call the investigating officer, while we appreciate the important role played by investigating officers in gathering evidence and assisting the court to understand the factors that led to the arraignment of the accused (see *Bwaneka v Uganda* [1967] EA 768), it is not every case where such



officer does not testify that the conviction is to be quashed. As was observed by this Court in *Harward Shikanga alias Kadogo & Another v Republic* [2008] eKLR:

“We think that in all cases it would be good practice which prosecuting authorities ought to comply with, but the mere failure to comply with it, i.e. calling an investigating officer, cannot automatically result in an acquittal. Each case would have to be considered on its own circumstances in order to determine the effect of such a failure on the entire case for the prosecution.”

34. We are not persuaded that in this case the failure to call the investigating officer prejudiced either the prosecution or defence case.

35. It is true that the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* (supra) was categorical that death sentence, if imposed merely because it is mandatory, is unconstitutional. It does not matter whether the sentence was meted before that decision was delivered. In this case, the learned Judge in the very same judgement in which the appellant was convicted, concluded:

“The only available sentence for this offence in our books is the death sentence and I accordingly convict (sic) the accused to suffer death.”

36. No mitigating circumstances were therefore taken into account by the learned Judge. Even before the decision in *Muruatetu* (supra) was delivered, this Court had expressed itself on the importance of taking down mitigation, even in capital offences. In *Henry Katap Kipkeu v Republic* [2009] eKLR as we held as follows:

“Before we conclude this judgment, we must say something about the manner the learned Judge dealt with the sentence. We note that the learned Judge sentenced the appellant to death in his main judgment without recording mitigating factors, if any. This was not proper. As we have stated previously, after the judgment is read out and in case of a conviction, the court must take down mitigating circumstances from the accused person before sentencing him/her. This obtains even in the cases where death penalty is mandatory and the reasons for this requirement are clear. Some of the reasons are first that when the matter goes to appeal as this matter has now come before us, there are chances that the appellate Court may reduce the offence to a lesser charge such as that of manslaughter, grievous harm or assault. In such circumstances, mitigating factors would become relevant in assessing the sentence to be awarded. Secondly, even if the matter does not come to this Court on appeal or if it comes to this Court and the appeal is dismissed, such mitigating factors would still be required when the matter is placed before another body for consideration of clemency. Thirdly, matters such as age, pregnancy in cases of women convicts, may well affect the sentence. It is thus necessary that mitigating factors be recorded even in capital offences. In *JOHN MUOKI MBATHA V. R. – Criminal Appeal No. 72 of 2007* (unreported) this Court stated:-

‘As we have stated over and over again when considering sentences in respect of murder cases, the sentences should be reserved and pronounced only after mitigating factors are known. This is important because, in mitigation, matters such as age, and pregnancy in cases of women convicts, may affect the sentence even in cases where death sentence is mandatory. In our view, no sentence should be made part of the main judgment. Sentencing should be



reserved and be pronounced only after the Court receives mitigating circumstances if any are offered.’

In conclusion, we are of the view that apart from the error in sentencing the appellant in the main judgment we decipher no other error on the part of the learned Judge.”

37. Muruatetu crowned it up by decreeing that:

“It is generally accepted that both the accused and the State have a right to address the court regarding the appropriate sentence. Although s 274 of the Criminal Procedure Act uses the word ‘may’ which may suggest that a sentencing court has a discretion whether to afford the parties the opportunity to address it on an appropriate sentence, a salutary judicial practice has developed over many years in terms whereof courts have accepted this to be a right which an accused can insist on and must be allowed to exercise. This is in keeping with the hallowed principle that in order to arrive at a fair and balanced sentence, it is essential that all facts relevant to the sentence be put before the sentencing court. The duty extends to a point where a sentencing court may be obliged, in the interests of justice, to enquire into circumstances, whether aggravating or mitigating which may influence the sentence which the court may impose. This is in line with the principle of a fair trial. It is therefore irregular for a sentencing officer to continue to sentence an accused person, without having offered the accused an opportunity to address the court or as in this case to vary conditions attached to the sentence without having invited the accused to address him on the critical question of whether such conditions ought to be varied or not. See Commentary on the Criminal Procedure Act at 28-6D.”

38. Sentencing being part of a trial, the failure to hear the accused before meting out the appropriate sentence cannot be said to be a just exercise of judicial discretion. Discretion must be based on relevant material, and where it is exercised without taking into account such material, it is not judicially exercised. What then is the recourse available to the appellate court in such circumstances? In our view, no difficulty arises where there is material on record on the basis of which a proper sentence would have been meted since it is only a matter of considering the material and arriving at the suitable sentence. However, where no such material exists, such as in this case where no opportunity was availed for mitigation, this Court would be “guilty” of injudicious exercise of discretion if it were to pluck a sentence “from the air” as it were. Secondly, such course would deny the appellant a right to challenge the sentence on appeal and hence deprive him of one appellate rung in the appellate ladder.

39. In the premises, while we dismiss the appellant’s appeal on conviction, we set aside the sentence imposed on him and direct that the matter be remitted to the trial court to take mitigating circumstances and impose an appropriate sentence, taking into account the period of the appellant’s incarceration pre and post his conviction.

40. We so order.

**DATED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF JANUARY, 2026.**

**D. K. MUSINGA, (PRESIDENT)**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....



**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....

**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**

