Makoiya & 4 others v Republic (Criminal Appeal E006 of 2021)
[2026] KECA 730 (KLR) (10 April 2026) (Judgment)

Neutral citation: [2026] KECA 730 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E006 OF 2021

JM MATIVO, PM GACHOKA & WK KORIR, JJA

APRIL 10, 2026

BETWEEN

FLORA MAKOIYA ..... 1ST APPELLANT

ARNOLD BARASA ..... 2ND APPELLANT

ANTHONY WANYONYI ..... 3RD APPELLANT

STEPHEN WAFULA KWEYU ..... 4TH APPELLANT

BENJAMIN KHAEMBA ..... 5TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgement of the High Court of Kenya at Kitale (H. K. Chemitei, J.) dated 6th June 2019 in Criminal Case No. 25 of 2014)

JUDGMENT

1. The appellants were jointly charged in Kitale High Court Criminal Case No. 25 of 2014 with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The charges against 5 others with whom they had been jointly charged were terminated after the state entered a nolle prosequi on 14th July 2025 before the trial commenced. The accusation against the appellants was that on 5th April 2024 at Simatwet Village within Trans Nzoia County, they murdered Gladys Masisa (deceased). They all denied the charges and in the ensuing trial the prosecution case stood on the evidence of 5 witnesses.

2. The facts which triggered this sad case remind us of the axiom "one unfortunate event led to another," which describes a domino effect where a series of undesirable, unlucky, or destructive events are casually linked, often leading to a worsening situation, sometimes referred to as "a series of unfortunate events."

As the overall evidence shows, the attack meted on the deceased which sadly terminated her life is linked to a revenge mission. The deceased's daughter, known as Flora was defiled by a man described as Dickson. Dickson was jailed for 20 years for the offence. He died while prison. The acrimony triggered by the news of his death was instant. The anger was against the deceased and her children as the evidence shows. As is evident from the evidence of PW5, (the Investigating Officer), Dickson's death elicited a desire to revenge by some members of his family.

3. With the above overview in mind, we will briefly highlight the prosecution case as presented by its 5 witnesses. PW1, then aged 14 years, a daughter to the deceased, recounted how on 5th April 2014, at around 4 pm, while at their home together with her sister Flora and two other children, a crowd came searching for her mother, the deceased. The crowd started cutting iron sheets from their roof, and the 3rd appellant started beating Flora and Gabriel. It was her evidence that one Dick who had been jailed for defiling Flora had died in prison. Sensing that her mother was in danger, PW1 rushed to tell her to go and report at Moi's Bridge Police. However, the 4th appellant told her to go back. Standing at a distance of about 25 meters, she could clearly see the 2nd, 3rd, 4th and 5th appellants beating her mother while the 1st appellant was undressing her. She saw the 2nd appellant striking the deceased with a jembe while the 4th and 5th appellants were using metal rods to beat her. PW1 called someone to photograph them as they assaulted the deceased. She produced the photographs in Court showing the 1st, 2nd, 4thand 5th appellants attacking her mother. She could not recall where her sister Flora went.

4. PW2, Dr Blustus Kegondi produced the post mortem report prepared by Dr. Odhiambo, whom he had previously worked with. The findings in this report were that the body had bruises, cut wounds on the head, fracture on the left side of the rib cage and her lungs had collapsed. The cause of death was cardiopulmonary arrest due to severe head injury, chest injury and internal bleeding. He produced the post-mortem report.

5. PW3, Florence Mchae, a daughter to the deceased narrated how on the material day the 3rd appellant assaulted her and her brother Eliud. It was her evidence that the 3rd appellant dragged her to the road where together with the 5th, 4th, the 1st appellants and one Simiyu they assaulted her. She managed to escape after the 3rd appellant started attacking a lady who came to her rescue and as she ran, she saw the attackers beating the deceased and drowning her in the river. She confirmed that the boy who had died while in prison was her boyfriend who had been jailed for defiling her.

6. PW4 responded to screams only to find the deceased naked and badly injured. He knew the appellants who were his neighbours and all were beating the deceased using sticks and a wooden stool. The 2nd appellant was removing her clothes. Police arrived after she had died.

7. PW5, a Police Officer testified that the deceased was attacked by villagers who were alleging that a young man had died in prison while serving a sentence of 20 years for defiling PW3, the deceased's daughter. It was his evidence that before the deceased died, she had reported to the police that 3 people had threatened her. He produced the Occurrence Book number to confirm that the threats were reported at the police station. He also produced the photographs (exhibit 2) which were taken at the scene by a relative of the deceased who had since fled fearing for his life.

8. In her unsworn defence, the 1st appellant stated that on the material day while coming from casual work, she saw the deceased surrounded by many people, the police arrived and took her body. She stated that she was arrested for an offence she did not know.

9. The 2nd appellant stated that he went to the scene after a neighbor called Baraza informed him someone had been killed near their place and he found many people and later the police took the deceased's body.

10. The 3rd appellant stated that on his way home he heard people screaming, that a lady told him that the person who was arrested for defiling a girl had died and people were retaliating. He was asked to save the lady who was being beaten by the mob. He saved a child from the mob telling them that she was innocent. He stated that the mob attacked him and tore his shirt. He saw the deceased's body on the side.

11. The 4th appellant stated that on the material day he saw a child crying saying her mother was being assaulted, he took the child home and left her with his wife. At the scene, he saw the deceased's body. He was arrested after 3 days.

12. The 5th appellant stated that on the material day at around 3pm he was working in a farm, he heard people screaming from the opposite farm. He learnt that Dickson who had been jailed for defiling a girl had died. He stated that he was trying to save the deceased from the attackers and in the process, he was stoned. Three days later he was arrested. He maintained that he is innocent and that he was arrested together with his younger brother and mother. He denied committing the offence.

13. In the definitive paragraphs, after analyzing the prosecution and the defence evidence, the learned Judge stated:

> " 19. Although there could be slight variance on what the assailants carried in form of the weapons used to attack the deceased, this court is satisfied that the witnesses managed to see them during the incident.
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> 20. It has not been disputed by the accused in their unsworn evidence that they were not known to the witnesses. They were all neighbours and that was not disputed. They have not equally denied that they were not at the scene. Each of them in their evidence tried to explain what they did and how they saw the incident.
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> 20. Looking at the evidence of the three eye witnesses I have tried to see whether there could be a case of mistaken identity. Is it possible that in the nick of time and the distress that the witnesses were going through they could be a possibility of such mistake?
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> 21. The incident occurred around 3.00 pm a fact admitted across the board. PW1 and 3 described the weapons used by the assailants. Although not recovered the nature of injuries suffered by the deceased as found by the pathologist were consistent with such.
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> 20. Then there was the production of the uncertified photograph which was not disputed by the parties. Although the maker was not called to produce and the reasons were explained by the investigating officer, the same in the manner taken shows some of the accused standing next to the deceased naked body and they are holding crude weapons including a hoe/jembe.
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> 21. None of the accused denied that they were not present at the scene and thus it can be concluded that they are actually the ones who attacked the deceased contrary to what they have stated in their defence. Granted that the weapons were not produced, the mere fact that they were mentioned by the witnesses and can be seen in the photo leads this Court to conclude irresistibly that they were the once used to injure the deceased and caused her death.

22. On the question of the accused unsworn evidence, the same is of no probative value as they were not cross-examined. Nobody for instance could tell whether DW3, 4 or 5 assisted any of the witnesses and in the process were also injured. There was no production of any medical documents to indicate any injuries they may have suffered. The said defences in totality are hereby rejected. They did not bother to call any witness to back up their defence.

23. Consequently, I find that the ingredients of murder have been established against each and every accused person. There was a common intention to kill the deceased and that was to avenge the death of Dickson Nyongesa who had died in prison. The accused had malice and despite coating it to look as though it was a mob justice the witnesses were able to positively identify them. There was nothing that could have stopped the witnesses from seeing the attack as the same took place in broad daylight. The accused and the witnesses were neighbours who knew each other well. In a nutshell, there was no case of mistaken identity.

24. In the premises each of the accused person is found guilty of murder under the provision of Section 203 as read with Section 204 of the Penal Code."

14. In his ruling on sentence dated 19th September 2019, after considering each of the accused person's mitigation, the learned Judge sentenced each of them to serve 25 years in prison.

15. Aggrieved by the said decision, each appellant filed grounds of appeal drawn without the assistance of counsel essentially questioning their conviction. However, when their current advocate M/s Oyaro, J & Associates came on record, they filed supplementary grounds of appeal dated 29th January 2026 listing only three, faulting the trial Judge for: (a) relying on inconsistent, shaky and unreliable evidence; (b) failing to consider the fact that the prosecution did not call a vital witness, contrary to Section 150 of the Criminal Procedure Code; and, (c) imposing harsh and excessive sentences and omitting to apply the provisions of Section 333 (2) of the Criminal Procedure Code.

16. In his submissions in support of the appeal, the appellants' counsel asserted that the appellants' arrest was founded on suspicion and circumstantial evidence rather than direct evidence. Counsel cited Kipkering Arap Kosgei vs. Republic [1949] 16 EACA 135 in support of the proposition that circumstantial evidence, inference of guilt, and inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. Counsel further cited Simon Musoke vs. Uganda [1958] EA 715 to urge that before drawing an inference of guilt, the Court must ensure there are no co-existing circumstances which weaken or destroy that inference.

17. The appellants' counsel maintained that none of the witnesses placed the appellants at the scene. According to him, PW2 did not mention the 2nd appellant, save alluding that she saw PW2 in an unauthenticated photograph whose maker was not called. Counsel dismissed PW3's evidence as riddled with contradictions such as: (a) the crowd was estimated at 65, 200 or more persons, (b) accused number two was removing her clothes contrary to PW1's evidence that the 1st accused was removing her clothes. According to counsel, this witness removed the 3rd appellant from the scene which weakens the prosecution case based on joint participation by all the appellants. Counsel maintained that PW4 & PW5 did not place any of the appellants at the scene.

18. Contending that the appellants were not properly identified, counsel cited Republic vs. Turnbull & Others [1976] 3 All ER 549 to urge that none of the witnesses gave coherent, consistent and reliable

account capable of satisfying the threshold set out in the said case. Counsel also relied on Sawe vs. Republic [2003] eKLR in support of the proposition that suspicion, however strong, cannot form the basis of a conviction. He faulted the trial court for considering the appellants' defences separately and allowing PW4 to testify despite having been in court when PW3 was testifying which he described as an affront to a fair trial. Citing Section 77 of the *Evidence Act* and Juma vs. Republic Criminal Appeal No. 71 of 2000, counsel stressed that it is good practice for the maker of a document to always be called to testify.

19. Regarding sentence, counsel maintained that the provisions of Section 333 (2) of the Criminal Procedure Code were not applied while computing the sentence.

20. The respondent filed submissions in opposition to the appeal maintaining that the appellants were positively identified and urging that as was held in Reuben Taabu Anjononi & 2 Others vs. Republic [1980] eKLR, this was a case of recognition which is more reliable than identification of a stranger. Further, common intention as defined in Section 21 of the Penal Code was proved. In support of this statement counsel relied on the High Court decision in Republic vs. Simon Ikunza Lusuli [KEHC] 1761 (KLR).

21. Answering the submission that a crucial witness was not called, the respondent's counsel cited Bukenya & Ano. vs. Republic [1972] EA 549 in support of the proposition that the prosecution has the discretion to decide the number of witnesses to call and maintained that the appellants should have gone a step further and demonstrate how the evidence of the uncalled witnesses could have altered the trajectory of the prosecution case.

22. Lastly, regarding sentence, the respondent maintained that sentencing is a matter of the discretion of the trial court and that a sentence of 25 years for such a brutal murder cannot be termed as harsh and urged this Court to dismiss the appeal both on conviction and sentence.

23. Our mandate in a first appeal under Section 379 (1) of the Criminal Procedure Code is akin to a retrial because it involves a reconsideration of the facts and the legal principles relevant to the conviction and sentence. We are alive to the fact that the appellants' expectation is that we will conduct a thorough and fresh examination of the evidence, carefully weigh conflicting testimonies before arriving at our own independent inferences. However, we must remain alive to the fact that we did not have the opportunity to hear and observe the witnesses as they testified in order to gauge their demeanour. Consequently, we must give room to that fact. (See Dickson Mwangi Munene & Ano. vs. Republic [2014] eKLR). Alive to the stated mandate, we have reviewed the record, the submissions, and the authorities cited by counsel. In our view, the germane issue in this appeal is whether the offence of murder was proved against each of the appellants to the required standard, and, if so, whether the appellants have established a basis for this Court to interfere with the sentence.

24. It is settled law that for the prosecution to secure a conviction in a charge of murder under Section 203 as read with section 204 of the Penal Code, it must prove the facts and cause of the death of the deceased, that it is the accused whose actions or omissions led to the deceased's death, and, that the accused in killing the deceased had malice aforethought. (See Roba Galma Wario vs. Republic [2015] eKLR). It is within the bounds of these three elements that we shall consider all the issues raised by the appellants in their submissions.

25. From the evidence on record, the fact and cause of the deceased's death is not in question. PW2, Dr. Blustus Kegondi produced the post mortem report prepared by Dr. Odhiambo, whom he had previously worked with. This report was not disputed nor do we have any reason to doubt it. According to this report, the deceased's body had bruises, cut wounds on the head, a fracture on the left side of

the rib cage and the lungs had collapsed. The cause of death was cardiopulmonary arrest due to severe head, chest injury and internal bleeding.

26. This appeal turns on the question whether the appellants were positively identified as the persons who caused the deceased's death. We are alive to the fact that our system of justice is deeply concerned that no person who is innocent of a crime should be convicted of it. In order to avoid that, where identification of an accused person is disputed, a court must consider the evidence with great care. A guilty verdict is permitted, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate. As was held in Cleophas Otieno Wamunga vs. Republic [1989] eKLR:

> "Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

27. PW1, PW3 and PW4 gave a detailed account of what they personally witnessed. Eyewitness evidence provides a first- hand account. It is powerful direct evidence that helps to reconstruct events. It acts as the centre piece of a case. We appreciate that eyewitness accounts can be contaminated by errors due to memory loss, stress levels, distance and lighting. However, the witnesses and the assailants are village mates. They knew each other. This fact was not disputed. While identification evidence is approached with caution due to the fallibility of human observation, courts distinguish between identification of a stranger and recognition of a known person. Evidence of recognition is considered significantly more reliable and "stronger" because it involves a familiar "picture of the person" rather than a fleeting observation of a stranger. This was a clear case of recognition.

28. If a witness knows a person well or has seen them frequently, the probability of an accurate identification is substantially increased. The extent of prior knowledge of the accused is a critical factor in testing the reliability of an observation. As was held by Supreme Court of Appeal of South Africa in Nkomo and Others vs. S. (130/2022) [2024] ZASCA 61, "recognition of a known individual by an eyewitness is a more reliable form of identification evidence compared to identification of an unfamiliar person". We find that the appellants were positively identified by eyewitnesses who knew them, therefore, their identification was free from error.

29. Closely tied to the visual identification by PW1, 3 and 4 is the photographic evidence. These photographs were taken by a person using his phone. This person was not called to testify. According to the prosecutor, this witness fled following threats to his life. Nevertheless, the photographs were admitted in evidence. During the trial, no objection was raised on the production of the photographs. The appellants are now questioning the manner in which this evidence was admitted. However, the appellants are not disputing the photographs given a graphic picture of the scene showing them attacking the deceased. The photographs collaborate PW1's account that she clearly saw the 2nd, 3rd, 4th and 5th appellants beating her mother while the 1st appellant was undressing her. She saw the 2nd appellant striking the deceased with a jembe while the 4th and 5th appellants were using metal rods to beat her. The photographs show the 1st, 2nd, 4th and 5th appellants attacking the deceased. Much as the appellants question the authenticity of the photographs, they did not disown their images in the photographs. There is also undisputed evidence that the photographer fled fearing for his life, therefore, he could not be procured to testify. In any event, the appellants admitted that they were at the scene.

30. Equally important is the fact that they were not convicted solely on the basis of the photographic evidence. There is nothing to show that the evidence of PW1, PW2 and PW3 could not stand on its own. The photographs were typically evaluated alongside the other evidence. More important, the incident took place in broad daylight at 3pm. We are persuaded that the appellants were positively identified with reasonable certainty and beyond reasonable doubt.

31. The third element the prosecution was required to establish is malice aforethought on the part of the appellants. Section 206 of the Penal Code provides as follows:

> 206. Malice aforethought
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> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
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> a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
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> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
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> c. an intent to commit a felony;
>
> d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

32. In determining the existence or nonexistence of malice aforethought, one has to look at the facts, the weapon used, the manner in which it is used and part of the body injured. (See the Eastern Africa Court of Appeal decision in Rex vs. Tubere s/o Ochen [1945] 1Z EACA 63). Malice aforethought may also be inferred from the acts of the accused person. This Court in Ernest Asami Bwire Abanga alias Onyango vs. R. (CACRA No. 32 of 1990) stated that the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased. (Also see George Ngotho Mutiso vs. Republic [2010] eKLR & Karani & 3 Others vs. Republic [1991] KLR 622).

33. As decided cases suggest, there has to be intent to cause grievous harm or death or knowledge that an act can cause death or injury on the part of the accused person. Did the evidence establish the requisite mens rea on the part of the appellants? We have perused the evidence tendered before the trial court and the impugned judgment. We note that by viciously attacking the deceased using the crude weapons highlighted earlier and even drowning her in a river, the appellants had intended to kill or cause grievous bodily harm. The cause of death as highlighted in the post mortem report confirms that the injuries inflicted were serious and fatal. As was stated in Rex vs. Tubere s/o Ochen, (supra), if repeated blows to the vulnerable parts of the body are inflicted, then malice aforethought can be inferred. The other fact that supports malice is the undisputed evidence that the appellants were aggrieved by the death of Dickson who died in prison while serving 20 years imprisonment for defiling PW2. From the evidence tendered by PW5, the appellants were on a revenge mission which was premeditated. The deceased had reported previous threats to her life to the police. Accordingly, it is our finding that malice aforethought was sufficiently proved against all the appellants to the required standard.

34. The appellants' counsel described the prosecution evidence as contradictory. As was held in Twehangane Alfred vs. Uganda [2003] UGCA 6, it is not every contradiction that warrants rejection of evidence. Inconsistencies unless satisfactorily explained would usually but not necessarily result in the

evidence of a witness being rejected. The question is whether the prosecution evidence is contradictory on the occurrence of the event(s) and whether the contradictions (if any) are grave and point to deliberate untruthfulness of the witnesses or whether they affect the substance of the charge.

35. This Court has said times without number that contradictions in evidence of witnesses that would be fatal must relate to material facts and must be substantial. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the Court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit therefrom. (See Langat alias Kichokio vs. Republic (Criminal Appeal E004 of 2022) [2025] KECA 1531 (KLR) (3 October 2025) (Judgment)). The correct approach is to read the evidence tendered holistically. We are not persuaded that the prosecution evidence was marred by inconsistencies and if at all they existed, they are trivial and did not go into the substance of the charge.

36. The other issue urged by the appellant is that the person who took the earlier mentioned photographs was not called to testify as a prosecution witness. Section 143 of the *Evidence Act* provides that no particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact. This Court in Julius Kalewa Mutunga vs. Republic [2006] eKLR stated that as a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appellate court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.

37. The East African Court of Appeal in Bukenya & Others vs. Uganda (supra) was categorical that: (a) the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent, (b) the court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case, (c) where the evidence called is barely adequate, the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution. However, the court was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the Court if the evidence by the prosecution is not sufficient or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. In order for the adverse inference to be made, the evidence of the missing witness must be such as would have elucidated a matter. The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case. Our analysis of the entire evidence leaves us with no doubt that there were no gaps in the prosecution evidence and as discussed in the issues addressed herein above, all the ingredients of the offence were proved.

38. Arising from our analysis of the issues discussed above and the conclusions arrived at, we find no basis upon which we can interfere with the trial court's findings on conviction. Accordingly, the appeal against conviction fails.

39. On the appeal against sentence, we observe that the Supreme Court in Francis Muruatetu & Ano. vs. Republic, the Supreme Court of Kenya Petition No. 15 & 16 of 2016, [2017] eKLR affirmed the importance of judicial discretion in sentencing. It emphasized that courts must weigh the specific circumstances of both the offender and the offence to ensure a just outcome. In passing the sentence the learned Judge stated:

> " The court has heard the mitigation by each of the accused persons. It notes that they generally middle ages and have families. The offence committed was however heinous. They took revenge on innocent woman whose only crime was that her daughter had been defiled

by the accused's incidentally brother who incidentally died while in custody. She was not the cause of his death or at all.

She died a brutal death. She was hacked, beaten and suffered serious bodily injuries. She died a painful death...Despite their mitigation they have to suffer punishment commensurate to the offence. Hopefully, they shall learn their lesion while in prison."

40. The trial Judge proceeded to impose a sentence of 25 years to each of the accused persons. Like the trial Judge, we have considered the manner in which the offence was committed, the aggravating factors and weighed them against the extenuating factors in the case. In our view, the sentence of 25 years was too lenient considering the manner in which the offence was committed. It is not lost upon us that the deceased who sought justice for her defiled child was killed following the death of the defiler in legal custody. We will not disturb this sentence.

41. The next question is the appellants' plea that the period spent in custody be considered. From the record, the appellants were granted bail of Kshs.500,000/- plus one surety. There are bail approval proceedings for the 3rd and 5th appellants but there are none for the 1st, 2nd and 3rd appellants, which means that they were in custody from 21st October 2014 when they took plea up to 19th September 2019 when they were sentenced. Under Section 333 (2) of the Criminal Procedure Code, it is mandatory for the court to take into account the time an accused person spent in custody during the trial when computing their jail term. The law obligates the court to consider this period to prevent excessive punishment.

42. Arising from the conclusions arrived at herein above on each and every issue discussed, the appellants' appeal against both conviction and sentence is dismissed. However, the period of the 1st,2nd and 3rd appellants spent in custody between 21st October 2014 and 19th September 2019 shall be considered when computing their sentences.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF APRIL, 2026.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this a true copy of the original.

Signed.

DEPUTY REGISTRAR.