Makau & another v Republic (Criminal Appeal E037 & E038 of 2023 (Consolidated)) [2025] KECA 661 (KLR) (11 April 2025) (Judgment)

Neutral citation: [2025] KECA 661 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E037 & E038 OF 2023 (CONSOLIDATED)

KI LAIBUTA, FA OCHIENG & GWN MACHARIA, JJA

APRIL 11, 2025

BETWEEN

NICODEMUS NDUNDA MAKAU ..... 1ST APPELLANT

JOSEPH MUSYOKA MATIVO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Voi (Dulu, J.) delivered on 30th June 2023 in HCCRA Nos. E038 & E039 of 2021(Consolidated))

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Voi (Dulu, J.) delivered on 30th June 2023 in Criminal Appeal Nos. E038 & E039 of 2021 – consolidated. The factual background of the appeal is that the appellants, Nicodemus Ndunda Makau and Joseph Musyoka Mativo alias Mrefu, were charged in the Principal Magistrate's Court at Voi with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*.

2. The particulars of the offence were that, on 9th October 2018 at Ndii area along the Mombasa-Nairobi Highway in Voi Sub County within Taita Taveta County, the appellants, jointly with others not before the court, robbed Benson Kago Mwai of Motor Vehicle Registration Number KCK 076R, Mercedes Benz Axor lorry and trailer ZD 4063 loaded with assorted electric appliances valued at Kshs. 13,486,026, the property of ONE to ONE Logistics Company Limited and his mobile phone Techno touch screen, Nokia touch screen and Kabambe valued at Kshs. 27,449, the property of Benson Kago Mwai, all valued at Kshs 13,513,525 and, during such robbery, injured Benson Kago Mwai.

3. The appellants denied the offence and the case proceeded to trial with the prosecution calling thirteen (13) witnesses.

4. The complainant, Benson Kago Mwai (PW1), told the court that, on 9th October 2018, he left Likoni where the aforementioned vehicle was loaded with electrical appliances for delivery in Nairobi; that at 9.30pm, suspecting that he had suffered a tire burst, he stopped at Voi to inspect the motor vehicle when he was attacked by a gang of four people; that the gang tied him up and one of them hit him on the back as he struggled; and that they pushed him into the bed in the vehicle's cabin while one of them took control of the motor vehicle.

5. PW1 testified further that he could see the man driving as he lay on his stomach on the bed of the vehicle; that the man drove up to Ndii area where they pulled him (PW1) out of the vehicle, beat him up and tied him up near the national park fence; that one of the men, who he later identified as the 2nd appellant, was armed with a knife; that during this ordeal, they demanded to know from PW1 what was inside the trailer, and whether he had the key to it; that PW1 responded by requesting them to check the delivery documents, and that the owner of the consignment had the keys; that the men found his phones and demanded at knifepoint to know his (PW1's) PIN numbers; and that, thereafter, the men tied up his legs, covered his eyes, stuffed a shirt into his mouth, abandoned him and drove away in the motor vehicle.

6. PW1 concluded his testimony by stating that, after the gang abandoned him, he crawled for about 3 hours to the main road; that a motorist eventually spotted him, stopped and untied his legs and assisted him to board his vehicle; that he (the motorist) found police officers, who took PW1 to hospital where he was admitted for four days; that, on discharge, PW1 assisted the police officers to extract his MPesa statements, which showed that money had been withdrawn from his MPesa account using his stolen phone; and that, after his discharge from hospital, he attended two identification parades at Makindu Police Station where he identified the appellants as his assailants.

7. Jonathan Mulinge Mutuku (PW2) of ONE to ONE Logistics Company Limited testified that, on 10th October 2018, he received a call from the company's transport manager informing him of the incident, and that the subject motor vehicle was being held at Makindu Police Station; that he proceeded to the said police station; that the container aboard the vehicle was opened in the presence of a representative of the company, their client, an insurance surveyor, the driver sent to recover the subject motor vehicle, and PW1; that, upon inspection, it was discovered that part of the consignment was missing; and that an inventory was prepared and signed by all the aforementioned parties.

8. PC Julius Kibet Kiboi (PW3) testified that, on 10th October 2018, he received a call informing him that a lorry was parked at Kibarani Shopping Centre within Makindu area waiting to be offloaded; that he proceeded to the shopping centre in the company of PC Mark Okoth (PW10); that upon arrival, they found that part of the consignment had already been offloaded; that, of the 20 to 40 people found offloading the consignment, they only managed to arrest the 1st appellant, who introduced himself as the lorry driver; that an inventory was prepared and signed by one IP Marete and one PC Mohamed; that the offloaded goods were reloaded onto the lorry; and that the 1st appellant led them to the 2nd appellant's home where he was arrested.**

9. CIP Amos Kahindi (PW4) of Voi Police Station told the trial court that, on 10th October 2018, he received a report of PW1's complaint regarding the robbery; that, the very next day, he visited PW1 at Moi County Referral Hospital; and that he later proceeded to the scene accompanied by PW1 and recovered the clothes PW1 was wearing on the night he was attacked, the soiled and bloody clothes used to tie him up, pieces of a blue blood stained mosquito net, his National Identity Card and his two bank ATM cards, which he produced as evidence at the trial. In addition, PW4 introduced into evidence a sketch map of the scene, the knife recovered from the 2nd appellant, the inventory dated 10th October 2018 and PW1's MPesa statement confirming that money was transferred from his MPesa account.

10. In their testimonies, Mary Wakio Kivoi (PW5), a Warehouse Manager at Ideal Appliances, a sister company of ONE to ONE Logistics; Kelvin Agola Osango (PW6), the Operations Manager at ONE to ONE Logistics; Dennis Amabasa Karani (PW7), a vehicle inspector with ONE to ONE Logistics; Nicholas Ombi (PW8), an assistant operations manager at ONE to ONE; and Francis Gachohi Njagi (PW9), a driver at the same company, testified that they did not witness the robbery. According to them, the motor vehicle was loaded with electrical appliances consigned for Nairobi; and that they were contacted in their official capacities to respond to the robbery incident.

11. In his testimony, PW10 recapped most of what PW3 had testified, adding that, in the course of his investigation, he recovered a hacksaw and a metal bar used in the robbery.

12. PW11, IP Faith Chesire of Makindu Police Station, conducted an identification parade on 19th October 2018 and 24th October 2018 where the 1st and 2nd appellants were picked out by PW1 as his assailants. PW11 produced both Identification Parade forms as exhibits before the trial court.

13. Dr. Ayub Mwamwari (PW12) testified and produced PW1's P3 form prepared by Dr. Sumea, a former colleague of PW12 at Moi County Referral Hospital. PW12 took the trial court through the P3 form dated 19th October 2018, which revealed that PW1 had approximately 9-day old scars, bruises and numbness on the upper limbs, and normal lower limbs. In his opinion, the injuries suffered by PW1 were inflicted by use of a blunt object.

14. The last prosecution witness, Corporal Joel Ambisai (PW13), wound up the prosecution case by producing in evidence a bundle of photographs taken during investigations on the robbery.

15. Having considered the prosecution case, the trial court found that the appellants had a case to answer and put them on their defence. The two gave sworn evidence.

16. In his defence, the 1st appellant, Nicodemus Ndunda Makau, denied committing the offence and stated that he was employed by one James Matunda Kamuti as a driver to supply goods to his customers; that, on the material night, he was called by Mr. Kamuti, who informed the 1st appellant that he had some work for him; that he accompanied Mr. Kamuti to a shop at Kibarani where he found people offloading goods from a trailer; that Mr. Kamuti asked him to join them and ensure that the goods were offloaded into the store; that, a short while later, some people who identified themselves as police officers came, whereupon the other people who were offloading the goods immediately scampered and left him on his own; that the police officers sought to know the owner of the store; that he called Mr. Kamuti, who told the 1st appellant to talk to them; that the 1st appellant took the police officers to Mr. Kamuti's house, but did not find him; that, from then on, Mr. Kamuti declined to pick their calls, and his phone was switched off; that PW1 did not identify him at the identification parade; and that the MPesa statements showed that the money was transferred to one Titus Charo Ndeti, and not to him.

17. Likewise, the 2nd appellant, Joseph Musyoka Mativo, denied committing the offence. In his defence, he stated that the 1st appellant had written a letter exonerating him from the incident; that he protested the manner in which the identification parade was conducted; and that the MPesa statement showed that PW1's money was transferred to someone else.

18. In her judgment delivered on 14th September 2021, the trial Magistrate (Hon. D. Wangeci, PM) concluded that the fact that the 1st appellant was found in possession of the lorry immediately after the robbery was proof enough that he participated in the robbery; that the appellants were properly identified in the identification parades; that the parades were conducted in strict adherence to the police Standing Orders; that their defences were mere denials; and that the prosecution had proved its case

beyond reasonable doubt. Consequently, the court convicted the appellants and sentenced them to life imprisonment.

19. Aggrieved by their conviction and sentence, the appellants filed separate appeals to the High Court of Kenya at Mombasa. In his Criminal Appeal No. E038 of 2021, the 1st appellant advanced 5 substantive grounds set out in his undated Memorandum of Appeal contending that the learned trial Magistrate erred in law and fact: when she failed to observe that the 1st appellant was denied a fair trial after he was denied the right to recall PW1; for failing to observe that actus reus was not proved against him; for showing bias; for failing to observe that PW1 was not a credible witness; and for failing to observe that the identification parade was conducted in an improper manner.

20. Likewise, the 2nd appellant's Criminal Appeal No. E039 of 2021 was anchored on 5 substantive grounds set out in his undated Memorandum of Appeal. According to him, the learned trial Magistrate erred in law and fact: by failing to observe that the prosecution did not prove its case beyond any reasonable doubt; for "forming her own opinion" regarding the lighting available during the alleged incident; for convicting him on the evidence of a single witness; when he denied his request to recall PW1; and by convicting him on contradictory evidence.

21. The two appeals were consolidated and, in its judgment delivered on 30th June 2023, the High Court (G. Dulu, J.) held that the appellants were positively identified by PW1 as among the people who robbed him and injured him in the process, and that he found no reason to interfere with their conviction and sentence. Accordingly, the learned Judge dismissed the appellants' consolidated appeals and upheld the conviction and sentence meted by the trial court.

22. Being further aggrieved, the appellants moved to this Court on 2nd appeal in Criminal Appeal Nos. E037 and E038 of 2023 respectively.

23. Before the appellants were assigned legal counsel at the State expense, the 1st appellant filed an undated memorandum of appeal containing 9 homegrown grounds in a document styled 'Amended Grounds of Appeal'. However, the record as put to us does not contain the original grounds said to be amended.

24. The 9 grounds advanced by the 1st appellant in person were that the 1st appellate court erred in law by: failing to find that the charge sheet was defective; failing to find that PW1 did not initially report to the police that he could identify his attackers; by confirming that the identification parade was conducted within the law; for failing to find that the prosecution's evidence consisted of "massive contradictions, inconsistencies, discrepancies and immaterial to base a safe conviction"; for failing to find that the witnesses he "recalled were never availed"; for failing to find that his request to have the matter heard de novo was declined; by failing to find that Articles 35(1) (a) and (b) and 50(g) and (h) of *the Constitution* were violated; and for failing to find that sections 203 and 211 of the CPC were not complied with.

25. Of the 9 grounds, 7 are raised for the first time on 2nd appeal to this Court and, therefore, do not fall within our remit to consider. In any event, no submissions were made thereon and, in the circumstances, we can only presume that they were abandoned. In effect, nothing turns thereon.

26. The remaining two grounds that call for our attention are: that the identification parade was not conducted within the law; and that the witnesses the 1st appellant wished to be recalled were not recalled.

27. Subsequently, the court-appointed counsel came on record in the two appeals and filed separate Supplementary Grounds of Appeal dated 21st October 2024 containing 3 substantive albeit identical grounds. According to the appellants, the 1st appellate court erred: by failing in its duty to re-analyse and reconsider the evidence thereby drawing wrong conclusions; by upholding their conviction on a

charge that was declared unconstitutional by the High Court of Kenya in 2016 in Nairobi Petition No 618 of 2010 – Joseph Kaberia Kahinga & 11 Others v Attorney General; and by upholding the life imprisonment sentence which was declared unconstitutional by this Court in Julius Kitsao Manyeso v Republic [2020] eKLR.

28. Before the court-appointed counsel came on record, the 1st appellant filed written submissions in support of his appeal on the two grounds aforesaid, but cited no judicial authorities. According to him, PW1 was shown to him before the identification parade was conducted in violation of the Police Force Standing Orders. However, he did not make any submissions on the 2nd ground.

29. In support of the two consolidated appeals, learned counsel for the appellants, Ms. Aoko Otieno, filed written submissions dated 31st October 2024 citing the cases of Okeno v Republic (1972) EA 32; and David Njuguna Wairimu v Republic [2010] eKLR, highlighting the mandate of the 1st appellate court's; Sigilani v Republic (2004) 2 KLR 480 for the proposition that the principle of the law governing charge sheets is that an accused should be charged with an offence known in law, and submitting that the charge sheet in question does not have a list of all the items stolen and their prices, and that it was prepared and executed by a police officer from Voi Police Station; Julius Kitsao Manyeso v Republic - Malindi Criminal Appeal No. 12 of 2021 (UR); Evans Nyamari Ayako v Republic [2017] eKLR; and Justus Ndung'u Ndung'u v Republic [2022] eKLR, submitting that life imprisonment is unconstitutional due to its indeterminate nature, which renders it inhumane and violates the right to dignity; and, finally, Hamisi Bakari & Another v Republic [1987] eKLR, submitting that the sentence meted was manifestly excessive and harsh, and that there was no aggravating circumstances to warrant a life sentence. She urged us to allow the appeals in their entirety, quash the conviction, set aside the sentence and set the appellants at liberty.

30. In her response, learned Principal Prosecution Counsel, Ms. Nyawinda Kernael, filed written submissions dated 12th November 2024 citing the cases of Anil Phukan v State of Assam (1993) AIR 1462 for the proposition that a conviction can be based on the testimony of a single eye witness; R v Turnbull & Others (1973) 3 ALL ER 549, submitting that the identification of the appellants was "credible and water tight in perspective of the other corroborating evidence"; and Republic v Mwangi [2024] KESC 34 (KLR), submitting that severity of sentence is a matter of fact and not of law, and that it goes beyond the remit of this Court on 2nd appeal. She urged us to dismiss the appeals in their entirety.

31. The jurisdiction of this Court on a second appeal, as is the case here, has been the subject of judicial pronouncement in various cases, such as Stephen M'Irungi& Another v Republic [1982-88] 1 KAR p.360 where it was held:

> " Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

32. We also agree with what this Court had to say in Samuel Warui Karimi v Republic [2016] eKLR:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts

below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

33. In view of the foregoing, we form the view that the two appeals stand or fall on our holding on the following five (5) issues on points of law, namely: (i) whether the identification parade conducted in respect of the 1st appellant was within the law; (ii) whether certain witnesses who the 1st appellant wished to be recalled were not recalled; (iii) whether the 1st appellate court failed in its duty to re-analyse and reconsider the evidence thereby drawing wrong conclusions; (iv) whether the learned Judge erred in law by upholding the appellants' conviction on a charge allegedly declared unconstitutional by the High Court of Kenya in 2016 in Nairobi Petition No 618 of 2010 – Joseph Kaberia Kahinga & 11 Others v Attorney General [2016] KEHC 3130 (KLR); and (v) whether the learned Judge was at fault by upholding the life imprisonment sentence said to have been declared unconstitutional by this Court in Julius Kitsao Manyeso v Republic (supra).

34. On the 1st issue as to the propriety of the identification parade, the 1st appellant submitted that PW1 was shown to him before the identification parade was conducted in violation of the Police Force Standing Orders.

35. On the authority of Anil Phukan v State of Assam (1993) AIR 1462; and R v Turnbull & Others (1973) 3 ALL ER 549, the learned State counsel submitted that a conviction can be based on the testimony of a single eyewitness; and that, taking into consideration the other corroborating evidence, the identification of the appellants was credible and watertight.

36. Upholding the evidence of the 1st appellant's identification by PW1, the learned Judge had this to say:

> " 14. The said Nicodemus Ndunda Makau was also identified by PW1 at an identification parade held on October 19, 2018, and he elected not to ask questions in court to the parade officer PW1 IP Faith Chesire and instead stated that – "I will not proceed with cross-examination of this witness. I have no questions to her". The voluntary choice of this appellant not to cross-examine PW11, which was his legal and constitutional right, left the evidence of his identification at the parade to stand unshaken and thus believable."

37. Having foregone the opportune moment to challenge the propriety of the identification parade at his trial, this ground of appeal and the related issue of mixed law and fact come too late in the day. In any event, we find nothing to fault the learned Judge for upholding the evidence of identification on which, among other ingredients of the offence, the 1st appellant was convicted. In effect, this ground fails.

38. Turning to the 2nd issue as to whether certain witnesses who the 1st appellant allegedly wished to be recalled were not recalled, the 1st respondent did not pursue or substantiate this ground. In the circumstances, we can only conclude that the same was abandoned, and that nothing turns thereon.

39. On the 3rd issue as to whether the 1st appellate court failed in its duty to re-analyse and reconsider the evidence thereby drawing wrong conclusions, counsel for the appellant submitted that had the learned Judge done so, he would have arrived at a different conclusion and allowed the appeal.

40. It is noteworthy that counsel does not go beyond her rather general statement. For instance, she does not point out which of the findings of fact by the two courts below are founded on no evidence, or are based on misapprehension of the evidence. Neither has she demonstrated that the two courts below acted on wrong principles in making their findings (see Samuel Warui Karimi -V Republic__// (supra)).**

41. Learned Principle Prosecution Counsel did not submit on this particular issue, but went to a great length to analyse the ingredients of the offence with which the appellants were charged and convicted.

42. Having considered the impugned judgment, we take to mind the fact that the learned Judge took time to re-analyse and re- evaluate the evidence adduced before the trial court. Paragraphs *9* to *18* (both inclusive) of his judgment speak for themselves. They clearly demonstrate the attention paid by the learned Judge in this regard and, consequently, this ground fails.

43. Turning to the 4th issue as to the alleged unconstitutionality of the charge for which the appellants were convicted, it is not lost on us that this ground of appeal was raised for the first time on second appeal to this Court. Be that as it may, it would be remiss of us not to pronounce ourselves on this pertinent issue even if to merely clarify the law.

44. In this regard, counsel for the appellant submitted that there was no appeal proffered by the Attorney General from the judgment of the High Court of Kenya at Nairobi in Joseph Kaberia Kahinga & 11 Others v the Attorney General (supra) and that, therefore, the decision still stands; and that, in the circumstances, the appellants' conviction cannot hold.

45. Likewise, the learned Principal Prosecution Counsel made no submission in response to this issue, leaving it to the Court to draw its own conclusions.

46. In the case of Joseph Kaberia Kahinga & 11 Others v Attorney General (supra) relied on by learned counsel for the appellants, the High Court held that Sections 295, 296(1), 296(2), 297(1) and 297(2) of the *Penal Code* do not meet the constitutional threshold of setting out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery with such particularity as to enable those accused to adequately answer to the charges and prepare their defences; and suspended pending trials for appropriate law reform measures to be taken by the AG, Kenya Law Reform and Parliament with a direction to give the court a report in 18 months.

47. The gist of the learned Judges' pronouncement was tantamount to a recommendation coupled with directions requiring law reform and change in legislation within a specified period of time "... clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery with such particularity as to enable those accused to adequately answer to the charges and prepare their defences". The learned Judges implied that any charge, conviction and sentence for robbery would be unconstitutional unless and until legislative reforms to categorise the various degrees and aggravating circumstances of robbery. Put differently, the learned Judges expressed the judicial opinion that no such charges or convictions should be preferred until such law reform is undertaken, a position that was the mainstay of the learned counsel's submissions.

48. Without stretching the argument beyond the task at hand, our simple albeit respectful view is: that the decision aforesaid amounts to no more than a recommendation for law reform to remove the perceived "ambiguity and inconsistency inherent in the said sections"; that the learned judges' decision is by no means binding on this Court so us to obligate the Court to put on hold all appeals coming before it until such reforms in law take place; that this Court exercises its appellate jurisdiction in accordance with *the Constitution*, statute law as is and Rules of the Court; that the Court is only bound by the judicial decisions of the Supreme Court in appropriate cases in accord with the immutable doctrine of stare decisis; and that, in any event, the constitutional challenge on the appellants' charge and conviction is raised for the first time on 2nd appeal to this Court.

49. This Court has had occasion to consider the effect of raising an issue on appeal for the first time. In Kenya Commercial Bank Ltd v Osede [1982] eKLR, Hancox, JA. observed:

> " ...that where the right of appeal is statutory, it is to be confined to points of law raised before and decided by the trial judge."

50. In the same case, Stephenson, LJ. had this to say on the matter:

> " It (has) been clear for nearly a century and perhaps more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of Appeal had no jurisdiction to decide a point which had not been subject of argument and decision in the county court."

51. That said, it is not lost on us that it is on very rare occasions that a new point of law would merit the attention and scrutiny of this Court on 2nd appeal. in Wachira v Ndanjeru (1987), KLR 252, this Court spoke to the bar when Platt J.A observed as follows:

> " ...the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case." [Emphasis added]

52. We have taken the liberty to pronounce ourselves on the 4th issue aforesaid to ensure that full justice is done between the parties. Moreover, our consideration of this issue did not involve any fact not investigated and tested at the trial. Be that as it may, having carefully considered the appellants' submissions and the cited authorities, we form the respectful view that the related ground of appeal also fails.

53. On the 5th and final issue as to whether the learned Judge upheld the life imprisonment sentence, which the appellant contends had been declared unconstitutional by this Court, counsel for the appellant submitted on the authority of Julius Kitsao Manyeso v Republic (supra) that mandatory life imprisonment is unconstitutional due to its indeterminate nature, which renders it inhumane and violative of the right to dignity.

54. On the authority of Hamisi Bakari & Another v Republic [1987] eKLR, counsel submitted that there are significant extenuating circumstances in this appeal to warrant setting aside of the life imprisonment and imposing a sentence of a lesser term.

55. In reply, the Principal Prosecution Counsel addressed herself to the issue as to whether the sentence was harsh and excessive in the circumstances. Citing the case of Republic v Mwangi (supra), counsel submitted that the sentence meted on the appellants was lawful, and that there was no basis on which this Court should interfere therewith.

56. We take to mind this Court's mandate on a second appeal as conferred by Section 361(1) (a) of the *Criminal Procedure Code*, which provides:

> " 361 (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a

matter of law, and the Court of Appeal shall not hear an appeal under this section—

(a). on a matter of fact, and severity of sentence is a matter of fact."

57. Pronouncing itself on this issue, this Court in MGK v Republic [2020] eKLR had this to say:

> " 16. As regards the sentence, under section 361(1) of the *Criminal Procedure Code*, severity of sentence is a matter of fact and therefore not a legal issue open for consideration by this Court on second appeal."

58. In view of the foregoing, this Court is not mandated to pronounce itself on 2nd appeal on the severity of the life sentence meted on the appellants and, consequently, this ground of appeal also fails.

59. Having carefully considered the record of the two appeals, the grounds on which they are anchored, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the consolidated appeals fail and are hereby dismissed. Consequently, the judgment of the High Court of Kenya at Voi (Dulu, J.) delivered on 30th June 2023 be and is hereby upheld. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL, 2025

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR