



**Tinya & another v Republic (Criminal Appeal 2 & 16 of 2021  
(Consolidated)) [2025] KECA 1300 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1300 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL 2 & 16 OF 2021 (CONSOLIDATED)  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
JULY 18, 2025**

**BETWEEN**

**MBOGO KATANA TINYA ..... 1<sup>ST</sup> APPELLANT**

**MATESO CHARO TINYA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being appeals from the Judgement of the High Court of Kenya at Malindi  
(Nyakundi, J.) delivered on 16th December 2020 in Criminal Case No. 3 of 2016)*

**JUDGMENT**

1. The appellants, Mbogo Katana Tinya and Mateso Charo Tinya, were jointly charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. It was alleged that, on the 16<sup>th</sup> September 2014 at Tsanzuni Village, Palakumi Location in Ganze District within Kilifi County, the appellants, jointly with others not before court, murdered SKK.
2. At the trial, Mbogo Katana Tinya was the first accused person while Mateso Charo Tinya was the second accused person. After the trial on 16<sup>th</sup> December 2020, the appellants were found guilty as charged and convicted accordingly. They were each sentenced to serve 30 years imprisonment by the High Court at Malindi (Nyakundi, J.).
3. Dissatisfied with the outcome on both conviction and sentence, the appellants filed separate appeals, being Criminal Appeal No. 2 of 2021 in respect of Mbogo Katana Tinya and Criminal Appeal No. 16 of 2021 in respect of Mateso Charo Tinya, both of which were consolidated. Mbogo Katana Tinya is hereafter referred to as the 1<sup>st</sup> appellant while Mateso Charo Tinya is referred to as the 2<sup>nd</sup> appellant.



4. The prosecution lined up 6 witnesses to prove its case. PW1 to PW4 testified before Chitembwe, J. (as he then was), PW5 before Korir, J. (as he then was) while the trial was concluded by Nyakundi, J., who took the evidence of PW6, the defence case and finally rendered judgment.
5. PW1, AS, a female minor aged 12 years, the deceased's daughter, after a voire dire examination, testified under oath that, on 16<sup>th</sup> September 2014, she returned home from school at around 6.30 p.m.; that she found her father (the deceased) seated in a shade near their house; that she then saw some youths surrounding the deceased; that people whom she knew as Mbogo, Mwalimu, Mateso, Kazungu and Charo started chasing the deceased; that Kazungu had a panga while the others had nothing in their hands; that the deceased entered her grandmother's house, and Kazungu followed him; that, when the deceased came out of the house, Mbogo, the 1<sup>st</sup> appellant, picked a stool and hit the deceased on the head and he fell down.
6. PW1 heard Kazungu utter the words "tumulizane na yeye tuondoke", meaning 'let us finish him and leave.'; that Kazungu started cutting the deceased; that the rest of the people, Charo, Mateso and Mwalimu picked sticks and started beating the deceased; that she started screaming, but Mwalimu held her mouth to stop her; and that, after killing the deceased, they all ran away.
7. PW2, SS, was a minor aged 15 years. After a voire dire examination, the court formed the opinion that he would give unsworn evidence. He testified that the deceased was his father; that, on 16<sup>th</sup> September 2014, he arrived home from school and saw five people whom he identified as Kazungu, Mbogo, Mateso, Charo and Mwalimu; that Kazungu had a panga while the rest of the persons had sticks; that they started beating his father, who sought refuge in the house, but that they followed him; that Mbogo picked a chair and hit his father and he fell down; that Kazungu proceeded to cut the deceased with a panga while the rest beat the deceased with sticks and thereafter, they ran away; that the Chief was called, whereupon they took the deceased's body away.
8. PW3, Eunice Jumwa Sammy, the deceased's wife, testified that, on the material day, she was behind their house heading to another house within the compound around 6.00 p.m.; that there were four houses within the homestead and her deceased husband was seated near his house in a shade; that she saw five youths entering her compound, whom she identified as Kazungu, who was carrying a panga, Mbogo, Mwalimu Kasiwa, Mateso Charo and Charo Karisa who carried sticks.
9. It was PW3's further evidence that the five youths surrounded the deceased and started beating him; that, when the deceased was struck with the panga, he ran away and sought refuge in his mother's home, but that the attackers followed him and dragged him outside the house; that Mbogo took a stool and hit the deceased on the head, and he fell down; that she heard Kazungu Katana say 'acha tumalize twende meaning that 'let us finish and leave.'; that her mother in law (PW4) came into the compound when she heard the screams; that the deceased's brother, Garama Kasiwa, came and called the chief and police officers from Bamba Police Station who took away the deceased's body; that Kazungu Katana, Mwalimu Kasiwa, Mbogo Katana and Mateso Charo are all the deceased's brothers, while Charo Karisa was the deceased's nephew. She stated that she was not aware of any grudge that existed between the deceased and his killers.
10. PW4, Sidi Kasiwa Karisa, the deceased's mother, testified that, on the material day, she had gone to answer to a call of nature when she heard screams coming from the house; that she rushed to the house and saw that the deceased had been cut, and that he was lying on the ground; that she saw PW1, PW2, PW3, Kazungu, Mbogo, Mateso, Mwalimu and Charo Karisa, who were still in the compound; that she saw Kazungu cut the deceased while the rest were holding sticks; that she started screaming and



that, by the time people came, the killers had run away; that it was around 6.30 pm and daylight; and that she was not aware of any differences between the deceased and the appellants.

11. PW5, Garama Kasiwa Tinya, a brother to the deceased, testified that, on 16<sup>th</sup> September 2014 at around 7.00p.m., he was called by his brother, Charles Katei Kasiwa, and informed that the deceased had been cut and had passed on; that he was told that five men went into the compound and attacked the deceased; that he telephoned the area Chief, one Julius Mumba, to whom he reported the incident; that he also reported to the OCS, Bamba Police Station, who sent a vehicle to the scene which took the body to the mortuary; that he was given the names of the five assailants and, on 7<sup>th</sup> March 2016, when he saw the two appellants, he alerted the area chief; that he later heard that they were arrested and taken to Bamba Police Station; and that he did not know of any dispute between the deceased and the people who beat him up.
12. PW6, Sr. Sgt. Francis Ronoh, formerly based at Bamba Police Station, was the investigating officer. He testified that he was instructed on 10<sup>th</sup> September 2014 to visit the crime scene; that he was in the company of other police officers; that, when they arrived at the scene, they found women wailing, and that the deceased's body was lying in the homestead; that he noticed that the deceased was bleeding from the head and neck; that the deceased's family members explained the circumstances of the death; that the suspects were identified as Mbogo Katana Tinya, Mateso Charo Tinya and Kazungu Tinya; and that they were told that a panga was used to kill the deceased, but that they did not find it at the scene.
13. PW6 further stated that he drew a sketch plan and took photographs of the scene (PEXH No. 2); that he collected a Giriama stool (PEXH No. 1) from the scene; that he also produced the post mortem report (PEXH No. 10); and that the police were only able to arrest the appellants as the other 3 suspects fled and were never traced.
14. After conclusion of the prosecution case, each of the appellants was put on his defence. Both opted to give sworn evidence.
15. The 1<sup>st</sup> appellant, who testified as DW1, stated that, on 16<sup>th</sup> September 2014, he was in his shop; that, on his way home, he heard screams and, on arrival, he found PW3 and PW4 and other neighbours present; that he learnt that the deceased, who is his brother, had been killed, but he did not know who killed him; that he attended his brother's funeral and was arrested one and half years later in connection with the murder; that the charge against him was a fabrication by PW3 since she had a grudge against him after his livestock trespassed into her farm; and that he had no grudge against the deceased.
16. On his part, the 2<sup>nd</sup> appellant (DW2) testified that, on the material day, he left home at 4.00 p.m. to look for charcoal; that he heard screams from their home; that, when he arrived, he found that his brother had been attacked; that he then left for Mombasa to sell charcoal; that he was arrested while applying for his identity card at Mombasa; that some livestock entered PW3's farm and destroyed the crops; that PW3 may have harboured a grudge on this ground; and that he had nothing to do with the attack or the death of the deceased.
17. Upon conclusion of the trial, the learned Judge (Nyakundi, J.) examined each of the ingredients that the prosecution was required to prove in an offence of murder. He was satisfied that the death of the deceased was proved by the post mortem report. As to whether the death was caused by an unlawful act or omission, the court held that PW1, PW2, PW3 and PW4 all testified that the deceased was within his homestead on 16<sup>th</sup> September 2014 at about 6.00 p.m. but that, for unknown reasons, the appellants and others who were not charged, violently attacked him a panga and clubs; that PW1 to PW4 explained that the deceased was cut on the forehead, back, shoulder and occipital region, which



- instantly occasioned his death; that from the post mortem report, the deceased's body had visible injuries, and that he died out of excessive bleeding from major vessels and possible cervical vertebrae fracture; that all this evidence demonstrated that the death of the deceased was caused by an unlawful act or omission.
18. Further that the manner in which the weapons were used, the part of the body that was targeted, the gravity of the injuries and the conduct of the appellants during and/or after committing the crime, indicated that they (the appellants) committed the murder with malice aforethought.
  19. As to the identification of the appellants, the court was satisfied that PW1, PW2 and PW3 saw them attack the deceased, and that they also properly described them; that the witnesses described the role each of the appellants played in causing the death of the deceased; and that, as a result, it was concluded that they were responsible for his death.
  20. The trial court concluded that the prosecution had proved its case beyond reasonable doubt. The appellants were convicted accordingly and each sentenced to served 30 years imprisonment.
  21. Aggrieved with the decision, the appellants filed a joint Amended Grounds of Appeal dated 22<sup>nd</sup> January 2025 faulting the learned Judge for erring in law and in fact:
    - i. by failing to consider the time served in remand during sentencing;
    - ii. by failing to consider all the mitigating factors given during sentencing; and
    - iii. by failing to consider the fact that no psychiatric report was produced in court speaking to their mental status.
  22. This being a first appeal, issues of fact as well as issues of law fall for consideration. In addition, we are, under rule 31(1) (a) of this *Court's Rules*, 2022 enjoins us to subject the evidence adduced before the trial court to fresh and exhaustive examination but, in so doing, bear in mind that we neither saw nor heard the witnesses testify, and so are required to give due allowance for that.
  23. This duty was well articulated by this Court in *Erick Otieno Arum vs. Republic* (2006) (KECA) 385 (KLR) as follows:

"It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e.) a first appellate court also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same."
  24. We heard the appeal virtually on 10<sup>th</sup> February 2025. In attendance were learned counsel Ms. Oluoch Lwambi, who appeared for the appellants, and learned Prosecution Counsel Ms. Mutua. Both counsel relied on their respective parties' written submissions dated 24<sup>th</sup> January 2025.
  25. At the outset, we wish to make an observation that it is expected, as a cardinal rule that the submission that a party makes must be confined to the grounds of appeal raised. Where a party goes on to submit on matters that do not support the grounds of appeal, or submits on matters that ultimately raise new grounds of appeal, certainly, the Court cannot delve into such new matters. It will simply confine its determination to the grounds of appeal raised.



26. We have made this observation in view of the fact that this is the scenario we are faced with. In their joint written submissions, the appellants restricted themselves to issues raised in the grounds of appeal. In contrast, the submissions by the respondent raised additional issues which would constitute new grounds of appeal other than those raised by the appellants. For this reason, we shall only highlight issues that strictly touch on the grounds of appeal raised by the appellants.
27. We have considered the record of appeal, the submissions of the respective parties and the law. It is our view that the issues that arise for determination are: whether failure to produce a psychiatric report prejudiced the appellants; and the propriety of the sentence.
28. As to the ground that the learned Judge erred in law and in fact by failing to consider the fact that no psychiatric report was produced in court speaking to their mental status, the appellant submitted that the trial Judge did not consider that there was no psychiatric report produced in court despite the appellants having been subjected to mental health assessment; that this contravened Section 162(1) of the *Criminal Procedure Code* which stipulates that, where there is reason to believe that an accused person is of unsound mind and incapable of making his/her defence, the court must inquire into their mental condition; that the failure to produce the psychiatric report in court deprived the court of the ability to evaluate their fitness to stand trial; and that this violated their rights under Article 50(2) of the *Constitution*. Reference was made to the decision of this Court in *Leonard Mwangemi Munyasia vs. Republic* (2015) KECA 382 (KLR) where the issue of mental assessments in murder trials was elaborated.
29. The respondent did not make a submission on this issue at all. However, it submitted that the prosecution proved its case beyond reasonable doubt and urged us to uphold both the conviction and sentence.
30. We have understood the appellants to be challenging the fact that since a psychiatric or a mental assessment report was not produced before the trial court, this meant that their mental status and awareness as at the time of the commission of the offence was in question. We take note of the fact that we were unable to trace any medical report speaking to the mental status of the appellants prior to their taking pleas. Interestingly though, PW10, the investigating officer alluded to the fact of the appellants having been subjected to a mental assessment test. But since no medical examination report is in the record of appeal or was produced in court, we shall proceed on the basis that the appellants were not subjected to a mental health assessment examination.
31. To begin with, the universal presumption in law is that a person is of sane mind unless the contrary is proved. Section 11 of the *Penal Code* provides that:
- Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.
32. The law further provides for the defence of insanity under Section 12 of the *Penal Code* as follows:
- A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.



33. The import of Section 11 of the *Penal Code* is that every person is presumed to be of sound mind and responsible for his or her actions at all times, including when he or she is alleged to have committed an offence. However, even though Section 11 recognizes sanity as the normal or usual condition of human beings, it is factual that sometimes the human mind can be afflicted by disease that renders a person incapable of understanding his or her actions. Thus, the presumption that all human beings are of good mental health status is rebuttable, hence the defence of insanity. This is the import of Section 12 of the *Penal Code*.

34. Section 12 must, however, be read together with Section 9(1) of the *Penal Code* so as to properly appreciate the defence of insanity. Section 9(1) reads:

Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

35. It therefore follows, and as has been held by this Court, that for the defence of insanity to stand, it must be proved that, at the time of the commission of the offence charged, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to law. We therefore agree with the decision of this Court that was cited by the appellants of *Leonard Mwangemi Munyasia vs. Republic* [2015] eKLR where it was stated:

“Under the rule insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. In such circumstances, the accused person will not be entitled to an acquittal but under section 167(1)(b) of the *Criminal Procedure Code* he would be convicted and ordered to be detained during the President’s pleasure because insanity is an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners.

... The test is strictly on the time when the offence was committed and no other.”

36. It is settled law, though, that the burden of proof in establishing the defence of insanity lies with the defence to prove that he suffered a mental disease that prevented him from knowing that what he/she was doing was wrong. In this regard, this Court in the case of *C N M vs. Republic* [1985] eKLR rendered itself thus:

“...where an accused raises the defence of insanity, the burden of proving insanity rests with the accused, because a man is presumed to be sane and accountable for his actions until the contrary is shown. But while this burden rests with him, it is not such a heavy one as rests on the prosecution, and indeed after considering the evidence it is to be decided on the balance of probability, whether it seems more likely that due to mental disease the accused did not know what he was doing at the material time, or that what he was doing was wrong, and so could not have formed the intent to kill the deceased.”

37. The same principle was restated by the Court in *BGKM vs. Republic* [2015] eKLR as follows:

“24. We agree with the trial court that the burden lies on the accused to prove, on a balance of probabilities, that he was insane before he committed the offence.



The case of *Marii v/s Republic* [1985] KLR 710 emphasized that approach, thus: -

‘The burden on the Accused to prove insanity is not as heavy as the one on the prosecution. The burden is discharged by proving on a balance of probabilities that it seemed more likely that due to mental disease the Accused did not know what he was doing at the material time or that what he was doing was wrong, and so could not have formed the intent to kill the deceased.’

25. With respect however, before an accused is called upon to discharge the burden, he must put forward the defence of insanity. That requirement was set by this Court in the *PMI case* (supra) when it posed the question:

‘The accused not having raised the defence of insanity under section 12 of the *Penal Code* at the trial, was the trial judge entitled to make a special finding of insanity. Or, is it exclusively for the accused to raise the defence of insanity?’”

38. In the same vein, in *Wakesho vs. Republic* (2021) KECA 223 (KLR), this Court held as follows on the defence of insanity:

“Insanity would only be a defence if it was proved that at the time of the commission of the offence charged, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he was charged with or was incapable of knowing that it was wrong or contrary to law. The test was strictly on the time when the offence was committed and no other.”

39. As demonstrated in the afore-cited cases, the defence of insanity is concerned with an accused’s state of mind at the time he/she committed the offence.
40. Section 162(1) to (5) of the *Criminal Procedure Act* make provision for the situational analysis of what the court is expected to do and what it should consider when it has reasons to believe that an accused person is of unsound mind, and for that reason determine whether or not to proceed with the trial or, if it proceeds with the trial, the proper sentence to be meted out. For instance, the court is obligated to enquire as to the soundness of mind of an accused and, if it finds that the accused was of unsound mind at the time that the offence was committed, make a special finding to that effect; and where the accused cannot follow the proceedings, make necessary orders as provided thereunder.
41. As earlier observed, from the record before us, we are unable to find a mental assessment report in respect of both appellants. We are therefore not able to determine if the trial court ought to have considered the report or not. Be that as it may, none of the appellants raised the defence of insanity before the trial court, and neither was it a recurring issue at any point during the proceedings. There was also no reference to a history of mental illness or any other factor suggestive of mental incapacity of the appellants. In short, there was absolutely no evidence before the trial court upon which it could have been concluded that the presumption of sanity had been rebutted or dislodged. How then was the trial court supposed to have brought itself to judicial notice that there was an apparent issue of the appellants’ mental health status?
42. In their defence, the appellants denied being at the scene of crime. They placed themselves elsewhere, namely their individual places of work. In our view, their respective defences did not suggest that, at



the time of the commission of the crime or even during the trial, their mental status was in question. The trial court rightly observed that the evidence of PW1-PW3 placed them and others who were not charged at the scene of crime. The direct evidence of those witnesses was not dislodged by the appellants.

43. Further, one Kazungu was identified as the person who cut the deceased with a panga while the appellants and others not before court, ensured the deceased's life was ended by hitting him with clubs. There was no question of mistaken identity since the appellants and the other perpetrators were not strangers to the prosecution witnesses. They were brothers to the deceased. Therefore, without belabouring much on this point, we reach the same finding, as this Court did in *Karisa Masha vs. Republic* (2015) KECA 191 (KLR) as follows:

“It is therefore clear to us that in this appeal, the question of the mental status of the appellant relates only to the time of his trial, not the time of commission of the offence. Under the *Criminal Procedure Code* those are two separate and distinct issues that attract different kinds of procedure. Having found that the appellant did not suffer from any mental incapacity at the time of the commission of the offence, in our opinion the trial court cannot be faulted for concluding that from the circumstances in which the appellant killed the deceased, malice aforethought could be inferred under section 206 of the *Penal Code*. (See *Ekaita v. Republic* (1994) KLR 225). In particular, taking into account the dangerous nature of the weapon that the appellant used, the part of the body of the deceased that was targeted, the nature of the injuries that were inflicted and the degree of force used by the appellant, the conclusion by the trial court cannot be faulted. (See *Stephen Njenga Wanjiru v Republic*, CR APP NO. 108 OF 2013).”

44. From the foregoing analysis, we find no merit in the appellants' ground that, by virtue of the fact that a mental assessment report was not produced in court, the court was not in a position to deduce or determine the extent of their culpability in the commission of the offence. Accordingly, this ground of appeal fails.
45. On the issue of sentence, the appellants complain that the trial court failed to consider the time they spent in remand custody prior to sentencing as provided for under Section 333 (2) of the *Criminal Procedure Code*, the decision of this Court in *Ahmad Abolfathi Mohammed & Sayed Mansour Mousavi vs. Republic* (2018) KECA 743 (KLR) and the *Judiciary Sentencing Policy Guidelines of 2023* settle the appellants' contention that their mitigation was not taken into account before they were sentenced; and that, for this reason, the sentence meted out should be set aside and for the period of imprisonment to be reduced.
46. Again, we note that the respondent did not submit on the issue of sentence.
47. As to whether the appellant's mitigation was considered, the learned Judge delivered himself as follows:

“The question for this court is what would be appropriate sentence for the offence? I have weighed both the aggravating factors and balancing them with the mitigation offered by the convicts. All in all, I am persuaded that the aggravating (sic) with regard to the gravity of the offence, the consensus upon which the deceased was killed is predicated on a plan, to execute the heinous crime.

I am therefore of the considered view that under the guidelines on sentencing laid down in *Francis Muruatetu v R* (2017) eKLR, each of the accused is sentenced to a tenor imprisonment of 30 year.”



48. On 27<sup>th</sup> November 2020, each of the appellants were given an opportunity to mitigate. The 1<sup>st</sup> appellant had this to say:

“I pray for leniency. I seek a lesser sentence. I have stayed in remand for years. I am aged 24 years old.”

While the 2<sup>nd</sup> appellant said:

“I seek forgiveness and leniency. I pray that I am the main bread winner. The family depends on me I pray for early release. I have been in remand custody for 5 years.”

49. The above chronology is a testament that the learned Judge did not only accord the appellants an opportunity to mitigate, but that he also considered their respective mitigations before rendering his verdict on sentence. Thus, the ground of appeal by the appellants that their mitigation was not considered is without basis and we dismiss it.

50. Finally, we delve into whether the learned Judge considered the time the appellant spent in remand custody to constitute part of their sentence. Section 333(2) of the *Criminal Procedure Code* provides as follows:

Subject to the provisions of Section 38 of the *Penal Code* Cap 63 every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

51. We also take to mind *The Judiciary Sentencing Policy Guidelines, 2023* at Clauses 2.3.18 and 2.3.19, which provide as follows:

18. Section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offences that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.

19. Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody in identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated – and courts should make an enquiry particularly with unrepresented offenders for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.

52. The charge sheet indicates that the appellants were arrested on 7<sup>th</sup> March 2016. On 8<sup>th</sup> May 2018, the bond terms were reviewed, but there is no indication that they were able to meet the terms. Therefore, they remained in remand custody throughout the trial period from 7<sup>th</sup> March 2016 until the date of sentencing which is 16<sup>th</sup> December 2020. By dint of Section 333 (2) of the *Criminal Procedure Code*, the trial court was obliged to consider the period already spent in custody of 3 years 9 months and 13



days. We therefore partially find merit in the appeal on sentence to the extent that the days spent in remand custody should have been considered to constitute part of the 30 years imprisonment period.

53. In the upshot, we find that the appeal is without merit and is hereby dismissed save that it partially succeeds in respect of sentence. Consequently, we hereby uphold the Judgment of the High Court of Kenya at Malindi (Nyakundi, J.) delivered on 16<sup>th</sup> December 2020 save that the period the appellants were in remand custody as tabulated above shall be taken to constitute part of their respective sentences.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF JULY, 2025.**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARB, FCIARB.**

.....

**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

.....

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

