Chengo & 2 others v Republic (Criminal Appeal 71, 72 & 75 of 2021) [2024] KECA 940 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 940 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 71, 72 & 75 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JULY 26, 2024

BETWEEN

RAJABU KAINGU CHENGO ..... 1ST APPELLANT

SARANGI KATANA NDOKOLANI ..... 2ND APPELLANT

KARANI KEA NDUNDA ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 28th October 2021 in High Court Criminal Case No 22 of 2015)

JUDGMENT

1. The appellants, Rajabu Kaingu Chengo, Sarangi Katana Ndokolani and Karani Kea Ndunga, were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the particulars being that, on 3rd October 2015 at Mkwajuni village, Bura Sub-Location, with others not before Court, they murdered Kazungu Karabu Nzao.

2. In support of its case, the prosecution called 10 witnesses.

   On 30th September, 2015, one Mwaka, a sister to the 1st appellants, disclosed to PW4, Kombe Manyeso, an elder brother to the deceased, and his wife, that the deceased had alleged that PW4 had conceived a child with Mwaka. PW4 relayed the information to the deceased and the deceased decided to confront Mwaka whom they found at a river washing clothes. While Mwaka was explaining, the deceased slapped her and she went away crying. After PW4 returned home, he was confronted by the 1st appellant and his brother, one Paulo, accompanied by their uncle, one Mwaringa, and forcefully taken to Mwaka's home where they assaulted him before taking him to Marafa Police Station where he was placed in

custody. Upon his release on the following day, he learnt that the deceased had been taken to Malindi Hospital, and that he had died.

3. Robert Karisa (PW1) was the deceased's nephew. On 3rd October 2015, he was with his mother, Jamarine, and his wife, Mahenzo Ngonyo, when the deceased, who had been away for three days, came to charge his cell-phone at PW1's home. It was PW1's evidence that, while the deceased was talking to PW1's mother, the 1st appellant, in the company of Clinton Ngondu, Bamtondo and another youth known to him but whose name PW1 was unable to recall, armed with clubs (rungus), accosted the deceased; that they demanded to know where the deceased had been and started pushing the deceased towards the road demanding that he accompanies them to meet Kombo Manyeso (PW4) and thereafter to the Assistant Chief. On the road, another group comprising of more than 20 men armed with pangas and clubs joined them shouting, 'mkate' (cut him), and the group, which comprised of one Paulo, pounced on the deceased. PW1 confirmed seeing the 1st appellant assaulting the deceased. It was his evidence that the deceased ran towards the home of PW2, Ngumbao Katana, before he fell down bleeding on the head. The deceased, who was still alive, was taken to the local dispensary and later transferred to Malindi Hospital, and then to Mombasa where he died.

4. PW2, Ngumbao Katana, was on the material day asleep in his house when, at around 6:45am, he heard shouts from the direction of a nearby road about 100 metres away. When he came out of the house, he saw the deceased being chased by a big crowd of people numbering about 20 carrying clubs and pangas. In the group, he identified his nephews, the 1st and 2nd appellants, who were carrying clubs. The group passed him while chasing the deceased. According to PW2, he was able to identify the two appellants clearly when the group was returning from the scene bragging that they had finished the deceased. On visiting the scene, he found the deceased lying down facing up and bleeding from the injuries, but still alive. Unable to contact the village elder, he proceeded to report the incident to the Assistant Chief, after which the deceased was taken to a local dispensary and later transferred to Malindi and eventually to Mombasa where he died. In cross-examination, he clarified that he did not see the 1st and 2nd appellants when the deceased was being chased, but only identified them when they were returning from the scene.

5. That morning, PW2's son, Samwel Kombe Ngumbao, who testified as PW3, heard the shouts, "kill him, kill him" and witnessed a crowd in hot pursuit of the deceased. In the crowd, he identified the 1st and 2nd appellants, who were armed with a club and a panga respectively. The group caught up with the deceased 100 metres from PW3's house, and he saw the 1st and 2nd appellants amongst others assaulting the deceased. When they were done with their mission, he saw the group, including the said two appellants pass by their home. He then gathered courage and proceeded to the scene where he found the deceased bleeding with injuries on the back and head. The deceased was then taken to the dispensary and later transferred to Malindi, and then to Mombasa where he died.

6. PW6, Kadhua Safari Kapishi, was at her home at about 7:00 am when he saw five people amongst them the 1st appellant, one Ngulu, Paulo and Bamtonjo. By then, the group was not carrying anything. About half an hour later, she received information from one Rajabu that the deceased had been assaulted when he declined to be taken to the village elder.

7. PW9, Nyevu Charo Kitete, confirmed receiving the information of the assault on the deceased and, upon reaching to the scene, she found the deceased lying face down. She was one of the people, including PW5, who accompanied the deceased to Malindi Hospital for treatment.

8. On 30th September 2015, PW7, Chengo Karisa, the area Assistant Chief, received a complaint from the 1st appellant and Mwaka Hussein that the latter had been assaulted by the deceased and PW4 after she turned down their sexual overtures. According to the report, the deceased started spreading rumours

that PW4 had conceived a child with Mwaka and, when PW4 confronted the deceased with the said allegations, the deceased and PW4 followed her to the river where PW4 insisted on knowing the source of the rumours. Before Mwaka could respond, the deceased slapped her. After hearing the complaint, PW7 took Mwaka to the dispensary for treatment and referred them to Marereni Police Station.

9. On 3rd October 2015, PW7 received a call from one Ngolo Kainga Chango that the deceased had been arrested. He then asked PW5 to find out what had happened but, shortly thereafter, PW5 reported to him that the deceased had been badly beaten and was in critical condition, and that he was seeking ambulance services. PW7 directed PW5 to seek assistance from Kalimboni dispensary. He later learnt that the deceased had been transferred to Malindi Hospital and later to Mombasa where he succumbed to his injuries.

10. PW5, Thomas Yeri-Kombe, the village elder, was visiting a fellow village elder on 3rd October 2015 at 6am when he was called by PW7, who instructed him to go to the area where the deceased was being assaulted. On his way to his house, PW5 met the 1st and 2nd appellants in the company of Paulo, Clinton, Kasena and other members of their family armed with clubs. On inquiring the whereabouts of the person they had arrested, the 1st appellant informed him that they had finished with the deceased, and left him at the scene. PW5 proceeded to the scene where he found the deceased bleeding. On instructions from PW7, he went to seek transport from the local dispensary, and the deceased was taken by an ambulance to the dispensary and later transferred to Malindi and thereafter to Mombasa where he died. He later learnt from PW7 that the 1st appellant had lodged a complaint of assault on Mwaka by the deceased. He was also informed by PW4 that he had been arrested and taken to Marafa Police Station, but was released after the person who lodged the complaint failed to show up.

11. On 16th October 2015, PW8, Dr. Angore Gilbert, conducted a post-mortem examination on the deceased's body as identified by the relatives and a police officer. He noted deep cut wounds on the parietal region of the head, wounds on the ear and penetrating wound to the head. In his opinion, the deceased's death was due to the deep penetrating wound to the scalp secondary to internal bleeding.

12. PW10, Chief Inspector Gachago, testified on how he participated in investigating the offence. From his investigations, the three appellants were positively identified as the perpetrators of the murder. Based thereon, the appellants were arrested and charged with the offence.

13. At the close of the prosecution case, each of the appellant was placed on his defence. In his sworn testimony, the 1st appellant stated that, on 3rd October 2015, he was at home preparing to go to work when he heard screams; that, on proceeding to the place from where the screams emanated, he saw people surrounding a pick-up vehicle which was later driven away; that he was informed that the deceased was a victim of the mob assault after he was suspected of being a thief; and that he later heard that the deceased died. He denied being at the scene of the murder and stated that the evidence of PW1 and PW2 was untrue. Although he admitted that Mwaka had reported to the family of the assault on her, he maintained that the culprit of the assault was not the deceased.

14. The 2nd appellant's sworn evidence was that, on 3rd October 2015 at about 8:00 am, he was carrying out his work as a wine tapper when he was informed that the deceased had been assaulted. According to him, he did not even know the deceased. He denied being at the scene and stated that the evidence linking him to the death of the deceased was untrue. On his part, the 3rd appellant stated in his unsworn statement that he received information at his work place in Ngomeni that there was a fight at home and that the deceased was being assaulted because he had assaulted their younger sister, Hussein Mwaka. He denied being at the scene and alleged that the clan elder had a grudge with him, and that he fabricated the case against him.

15. In his judgement, based on the evidence of PW8 as well as the evidence of PW1, PW2, PW3, PW4, PW5 and PW6, the learned Judge found that there was no doubt that the deceased died; that, from the evidence adduced, it was proved that the assault resulted in grievous harm whose outcome was the death of the deceased; that malice aforethought could be inferred from the evidence of PW1, PW2 and PW3; that the appellants' alibi defences lacked material and better particulars; and that the prosecution evidence created a causal link between the commission of the crime and the appellants' active participation therein.

16. The learned Judge found that the charge of murder contrary to Section 203 of the Penal Code was proved beyond reasonable doubt against the appellants jointly and severally. After considering the mitigating circumstances, and based on the case of Francis Muruatetu v R [2017] eKLR, the learned Judge sentenced each of the appellants to twenty one (21) years imprisonment.

17. Dissatisfied with the said decision, the appellants filed separate appeals being Criminal Appeal Nos. 71, 72 and 75 of 2021. The appeals, though not consolidated, were heard together. Since the appeals arise from the same decision, we have decided to deliver one judgement in respect of all the appeals.

18. When the three appeals came up for hearing on the GoTo Meeting virtual platform on 18th March 2024, the 1st appellant, Rajabu Kaingu Chengo, was represented by learned counsel, Ms. Aoko, the 2nd appellant, Sarangi Katana Ndokolani, was represented by learned counsel, Mr. Wamotsa and the 3rd appellant, Karani Kea Ndunda, was represented by learned counsel, Mr. Adalla. Learned counsel, Ms. Fuchaka, appeared for the respondent. While Mr. Wamotsa and Mr. Adalla relied entirely on their written submissions, Ms. Aoko and Ms. Fuchaka briefly highlighted their written submissions.

19. The 1st appellant's grounds of appeal were that the trial court erred in law and in fact: by failing to find that the offence of murder was not proved beyond reasonable doubt; by failing to conduct a sentence hearing thereby leading to an excessive sentence and/or miscarriage of justice; and in meting out a sentence that was extremely punitive, harsh and excessive.

20. Elaborating on the said grounds, reliance was placed on the written submissions dated 7th February 2024 and filed by Ms. Aoko Otieno in which, while conceding that the deceased died, the cause of death was disputed. It was submitted that there were discrepancies regarding the cause of death since PW8's opinion was that the injuries were inflicted by a sharp object while the evidence by PW1, PW2, PW3, PW4 and PW5 was that the appellants were armed with clubs; that the said witnesses could not have witnessed the incident since, from their testimonies, they were 100 metres away; that the case heavily depended on circumstantial evidence, and yet there were several missing gaps in the prosecution's case, and that the chain of events were broken by the inconsistencies in the testimonies of the prosecution witnesses; and that the alleged "confession" to PW2 was not admissible and that, taken together, the evidence created doubt in the prosecution's case, which ought to have been resolved in favour of the 1st appellant.

21. It was contended that, without there being any description of the 1st appellant's features provided, the circumstances being that the deceased was being chased, and which were not conducive to positive identification, the witnesses could not have positively identified the 1st appellant or the weapon he was carrying. We were urged to disregard the alleged "confession" to PW2 as it was not corroborated, and was not made in accordance with the confessional rules. Sarkar on Evidence pp32-33; Toper v R (1952) AC 489; Abanga alias Onyango v R Cr App No 32 of 1990; and Sawe v R [2003] KLR 364, were cited to highlight the circumstances under which circumstantial evidence may be relied upon to sustain a conviction.

22. It was further submitted that, the prosecution did not prove malice aforethought on his part. According to counsel, the learned Judge erroneously imputed motive on the part of the 1st appellant. The case of Lubambula v R [2003] KLR 683 was cited to highlight the importance of motive in the chain of presumptive proof. In addition, counsel cited the case of *David Kipkemboi Ngetich v R Nakuru Cr App No 276 of 2006*, submitting on the relevance of motive to contextualise the circumstances in which the offence was committed.

23. Citing the case of Bernard Kimani Gacheru v R [2002] eKLR, it was contended that, although sentencing is in the discretion of the court, the sentence must depend on the facts, and in accord with the Judiciary Sentencing Policy Guidelines, which require sentences to be proportionate to the offending behaviour. In this case, it was submitted that the sentence was not proportionate, and that it was arbitrary, manifestly harsh and excessive in the circumstances since a sentence hearing was omitted; that there were no aggravating circumstances; that the appellant was a first offender; that the age of the 1st appellant was not taken into account; that recent jurisprudence which punishes such offences with sentences of between 7-10 years, was not taken into account; and that the time spent in custody was not mentioned or considered. The 1st appellant cited the case of Abdalla Mwanza v R [2018] eKLR, submitting that the life expectancy ought to be considered in sentencing. Based on the Judiciary Sentencing Policy Guidelines, it was submitted that a sentence hearing ought to have been conducted without which there was a risk of a harsh or excessive sentence.

24. It was noted that (by court, or do you mean "submitted" or "contended"?) in this case, the sentence was meted out the same day the judgement was delivered in the absence of pre- sentence report, and that mitigation was allegedly done a day before judgement was delivered in the absence of defence counsel when the court was not properly constituted; and that this was in violation of the 1st appellant's rights under Article 50 of *the Constitution*. The 1st appellant cited the cases of Ephas Fwamba Toilli v R [2009] eKLR; and Mathew Kiplalam Chepkieng v R [2019] eKLR to support his submission that the sentence ought to have been for a term of 10 years.

25. In view of the foregoing, we were urged to allow the appeal, quash the conviction, set aside the sentence and set the appellant at liberty.

26. The 2nd appellant's grounds of appeal were: that the trial court failed to find that the post mortem report did not meet the legal and evidential burden for admission in evidence, and was unsafe to be relied on in convicting the 2nd appellant; that the trial court erred in law and in fact by finding that the 2nd appellant was identified by eye witnesses when the evidence on record was purely circumstantial; that the trial court wrongfully disregarded the 2nd appellant's alibi defence based on an improper evaluation and analysis of the evidence on record as a whole; that the conviction of the 2nd appellant by the trial court was based on evidence not placed before the trial court; that the trial court erred in law and fact by failing to find that the there was no evidence of identification of the body of the deceased to the doctor who conducted the post-mortem examination.

27. These grounds were amplified by the submissions dated 18th December 2023 and filed by Ms. Wamotsa Wangila Advocates, who contended that the learned Judge erred in finding that the 2nd appellant was seen by PW1, PW2, PW3 and PW5. Yet, PW1 did not mention the 2nd appellant in his entire testimony. On the other hand, while PW3 mentioned the names of the 1st and 2nd appellant, he did not identify them in court, and hence his testimony did not link the 2nd appellant to the commission of the offence. Similarly, although PW5 mentioned that the 2nd appellant was amongst the people who told him that they had finished the deceased. He did not identify the 2nd appellant in court. According to the 2nd appellant, the court was obliged to make a finding as to whether the person whose name was mentioned

as Sarangi was the same person as the 2nd appellant. It was noted that PW2, the only witness who identified the 2nd appellant in court, did not see him assaulting the deceased, and that his evidence should have been weighed against the evidence of PW1 and PW3, who did not identify the 2nd appellant in court.

28. It was submitted that, had the trial court properly analysed and evaluated the evidence, it would have found material contradictions and inconsistencies in the testimonies of PW2, PW3 and PW5 as to the weapon that the 2nd appellant had. It was contended that the evidence of PW2, who was the only witness to identify the 2nd appellant in court, was circumstantial as he did not see the 2nd appellant assault the deceased. By not warning himself on the dangers of convicting on circumstantial evidence of a single identifying evidence, it was submitted that the learned Judge erred.

29. It was further submitted that the learned Judge wrongfully disregarded the 2nd appellant's alibi defence; that the learned Judge erred by failing to find that the prosecution did not discharge the legal and evidential burden of production of the post mortem report since PW8 who produced it was not the doctor who conducted the examination, and that his testimony did not meet the mandatory requirements of sections 33, 72 and 77 of the *Evidence Act*; that PW8 ought to have gone further and explained the circumstances under which he knew that the report was made by Dr Sheri, the custody of the report and from whom it was received; that the police officer who identified the body for examination was not called as a witness, and that the investigation officer did not give any evidence on the post mortem report, which he did not identify in court. According to counsel, failure by the prosecution to apply for the post mortem report to be produced was fatal to the case, and the report was irregularly produced. Reliance was placed on the decision of this Court in Sibo Makovo v R [1997] eKLR, highlighting the need to lay a foundation for production of the document by a person other than the maker thereof.

30. In conclusion, it was submitted that the evidence placed before the trial court was not sufficient to convict the appellant as it fell short of proving he committed the offence beyond reasonable doubt. We were urged to quash the 2nd appellant's conviction and set aside the sentence.

31. The 3rd appellant's grounds of appeal were that the trial court erred in convicting the 3rd appellant when there was no evidence direct, circumstantial or otherwise linking him to the killing of the deceased; that the trial Judge erred in law and fact in reaching a conclusion that was not supported by evidence on record; that the trial court erred in law and fact in relying on weak circumstantial evidence without any corroborative evidence to convict the 3rd appellant; that the trial court erred in both law and fact in finding that the case against the 2nd appellant was proved beyond reasonable doubt; and that the trial court erred in sentencing the appellant to a sentence that was too hash in the circumstances.

32. On behalf of the 3rd appellant, Karani Kea Ndunda, the submissions dated 14th February 2024 were filed by Boaz Adalla Advocate. For the reasons that will soon be apparent in this judgement, we do not intend to rehash those submissions, which we have considered.

33. In response to the foregoing submissions, the respondent relied on the written submissions dated 13th February 2024 and drawn by Ms. Winnie Atieno Otieno, Principal Prosecution Counsel and those dated 15th December 2023 drawn by Mr. Birir Kimaiyo, Senior Principal Prosecution Counsel. In summary, it was submitted that the evidence against the appellants was both direct and circumstantial. On the authority of the case of PON v R [2019] eKLR, it was submitted that circumstantial evidence is as good as any other evidence if properly evaluated. On the test for conviction based on circumstantial evidence, counsel cited the case of Ahamad Abolfathi Mohammed and Another v R [2018] eKLR. Counsel also submitted that, based on Hyam v DPP [1974] AC; Ernest Asami Bwire Abanga alias Onyango v R Cr App No 32 of 1990; and John Mutuma Gatobu v R [2015] eKLR that, from the

totality of the evidence of the fact that the deceased had slapped a relative of one of the appellants, and that the appellants viciously attacked the deceased, was proof that the appellants knew that it was highly probable that the act would result in his death. It was the respondent's submission that the prosecution's case was clear, consistent and corroborated by the witnesses' narrations, that there were no contradictions that shook the prosecution's case, but if there were any inconsistencies, they did not vitiate the prosecution's evidence.

34. In view of the foregoing, we were urged to dismiss the appeal.

35. We have considered the submissions made as well as the material on record. This being a first appeal, we are legally enjoined to subject the evidence adduced to a scrutiny, re- evaluate it afresh and come out with our own findings, but always bearing in mind that we had no advantage of hearing or seeing the witnesses as they testified before the trial court and give allowance for that handicap. The predecessor to this Court in Pandya vs. Republic [1957] EA 336 is supportive of these principles in which the Court pronounced itself as follows:

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

36. In this case, the three appellants were charged with the murder of the deceased. The particulars were that they jointly with others not before the Court murdered the deceased. In cases where accused persons are jointly charged with an offence, the trial court should endeavour to make a finding on the roles played by each of the accused in the commission of the offence. In his judgement, the learned Judge expressed himself as follows regarding the roles played by the appellants:

> "Having examined and carefully weighed all the evidence by (PW1), (PW2), (PW3) and (PW5) clearly they saw the accused persons assault the deceased. As for (PW5) his testimony is categorical that the accused persons in company of others not before Court while armed with clubs and pangas informed him that they had finished killing the deceased. At no time from the evidence of (PW1), (PW2), (PW3) and (PW5) can one say that their visual recognition of the accused was impaired by the prevailing circumstances or distance. Their respective testimonies were never impugned during cross-examination nor contradict each other in any way. In this matter, the witnesses (PW1), (PW2) and (PW3) identified the accused persons immediately at the scene and did report this fact to the police very shortly thereafter as confirmed by (PW10)."

37. While the above statement would not be objectionable in cases where the accused persons are together at the time of the commission of the offence, where the accused persons' roles are demarcated in terms of time and space, the trial court must clearly connect them with the offence by making findings on how their respective actions or omissions linked them to the offence. This Court in Antiphace Herman

v R [2000] KLR set aside the conviction of the appellant against whom the evidence was simply that he was arrested while running away. In so doing, the Court expressed itself as follows:

> " None of the witnesses who gave evidence in the Magistrate's court identified the appellant and his co-accused (one Dominic Kiango Mutheu) as the actual thieves. The arrest of the two came to be as a result of the appellant and his co-accused running away when they saw a group of people coming towards them. These people chased the two and arrested them with the help of Tanzanian civilian group known as "Sungu Sungu" traditional guards. It was one Emmanual Longoto (P.W.2) who stated that the one of the accused persons (it is not clear whether it was the appellant on his co-accused) offered to free the cattle if he was paid Tanzanian shillings 80,000/=. As pointed out the accused persons were arrested after a chase. In such state of affairs, the appellant's defence in the Magistrate's court was that he was at the market in question where he saw some cattle being offered for sale. He saw some people carrying weapons. He ran away along with others. He was running towards his house. His co-accused followed him and he was arrested along with him (sic) and taken to Kenya. He said no one believed his story. The appellant said he was in the business of selling old clothes. In short his defence was that he had nothing to do with the stock theft and that he was arrested whilst running away along with others from a group of armed persons... On first appeal to the superior court, that court failed to evaluate the appellant's version of events although the superior court set down, somewhat sketchily, the appellant's version of events. The superior court also failed to consider the evidence of the co- accused. That is where in our view the superior court erred. It is incumbent upon the first appellate court to properly evaluate the whole defence of the appellant as brought out in the lower court. Failure to do so, when it is possible that the appellant's version may well be true, is fatal to the conviction. In those circumstances we allow the appeal, quash the conviction and set aside the sentence as meted out to the appellant and order the appellant's immediate release unless otherwise lawfully held."

38. From the record, we are unable to tell the reasons and the circumstances under which the 3rd appellant was arrested in connection with the offence. In those circumstances, his evidence that his arrest was instigated by the differences he had with the village elder may well have some basis.

39. The failure to connect the accused persons with the offence charged may well justify this Court's intervention as it would be a failure to properly evaluate the evidence since section 169(1) of the Criminal Procedure Code provides that:

> Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

40. This Court had occasion to deal with a similar issue in Charles Wanyonyi & Others v Republic Kisumu Criminal Appeal No. 134 of 2004 where it held that:

> " Something needs to be said about the contents of the judgement of the learned trial Judge. It is to be observed that he carefully set out the evidence adduced by the prosecution and the defence of each appellant. Having done so it was expected that he would proceed to analyse and resolve the issues involved, giving reasons for his decision. This appears to have been omitted as the learned Judge merely relied on the evidence of PW1 and suddenly came to

the conclusion that the appellants were guilty. We are not introducing any new issue here since this is what is provided for by section 169(1) of the Criminal Procedure Code (Cap. 75 Laws of Kenya)."

41. However, we must point out that the failure by the trial court to evaluate the evidence is not necessarily fatal to a conviction. The first appellate court, as we have stated above, is under a legal duty to re-evaluate the evidence and if it finds that there was sufficient evidence on record to convict the appellant, the conviction will still stand.

42. While in his judgement the learned Judge found that PW1, PW2, PW3 and PW5 clearly saw the appellants assault the deceased, PW1's evidence was that the people who picked the deceased from his home were the 1st appellant in the company of Clinton Ngondu, Bamtondo and another youth known to him, but whose name he was unable to recall. He did not mention the 3rd appellant. He also did not identify the 3rd appellant in court as the person whose name he could not recall. PW2's evidence was that he saw the deceased being chased by a big crowd of people numbering about 20 carrying clubs and pangas and in that group were the 1st and 2nd appellants. Likewise, he did not mention the 3rd appellant.

43. On his part, PW3 heard the shouts, "kill him, kill him" and witnessed a crowd comprising of the 1st and 2nd appellants, who were armed with a club and a panga respectively in hot pursuit of the deceased. Later, he saw the group, including the said appellants again pass by their home. No mention was made of the 3rd appellant. In the same vein, PW5's evidence was that, while on his way to investigate the report received from PW7, he met the 1st and 2nd appellants in the company of Paulo, Clinton, Kasena and other members of their family armed with clubs and, on inquiring the whereabouts of the person they had arrested, the 1st appellant informed him that they were finished with the deceased, and left him at the scene. PW5 did not mention the 3rd appellant. None of the witnesses identified the 3rd appellant as having been at the scene. The arresting officer was not called to explain the circumstances under which the 3rd appellant was arrested. Although the investigating officer's evidence was that PW5's statement was that he met the appellants coming from the scene, PW5 did not mention the 3rd appellant. His evidence that all the three appellants went to pick up the deceased was not supported by the evidence of PW1, who only mentioned the 1st and 2nd appellants. In cross examination, he admitted that he could not tell what motive the 3rd appellant had in assaulting the deceased. While it is not every case that the arresting officer must be called as a witness, where, as in this case the evidence regarding the role of an accused person is scanty, failure to call the person who arrested the accused may be fatal to a conviction. This was this Court's position in Said Awadhi Mubarak v Republic [2014] eKLR in which it was observed that:

> " ...very crucial witnesses were not called by the prosecution to testify in this case. These were the people who arrested the appellant. These crucial witnesses would have explained the circumstances and reasons for the arrest of the appellant. Since they were not called to testify, we do not know the circumstances and reasons for the arrest of the appellant. In the case of Bukenya -vs- Uganda [1972] EA 549, the Court of Appeal held that a failure to call crucial witnesses by the prosecution entitles the court to make an adverse conclusion against the prosecution case, and acquit the accused person. In our view, the failure by the prosecution to call crucial witnesses herein weakened their case to an extent that they failed to prove the case against the appellant beyond reasonable doubt as required in criminal cases. The gap created by the failure of the prosecution to call important witnesses is a doubt whose benefit we must give to the appellant, which we hereby do."

44. Having scrutinised the evidence on record, we are unable to find any evidence linking the 3rd appellant to the offence charged.

45. As regards the case against the 1st and 2nd appellants, it was contended that no prosecution witness saw the 1st appellant assault the deceased since PW1 and PW2 who alleged that they saw the 1st appellant assaulting the deceased were 100 metres away and did not state the weapon of the assault or which parts of the body were being attacked. It is on record that the 1st and 2nd appellants were identified by PW1, PW2, PW3 and PW5 as the people who picked up the deceased, pursued him when he was trying to escape and, when they caught up with him, they, with others, assaulted him thereby inflicting fatal injuries. We bear in mind that evidence constituting a chain of events leading up to the commission of an offence is admissible as "res gestae" forming the same set of transactions (see Geoffrey Nguku v Republic [1982-88] 1KAR 818). In Mwendwa v Republic [2006] 1KLR 133, the Court held that:

> "To prove a case based on circumstantial evidence only, every element making up the unbroken chain of evidence that would go to prove the case must be adduced by the prosecution. And that the said chain must never be broken at any stage"

46. In our view, there was an unbroken chain of transactions between the time the deceased was picked up from PW1's home till his assault and thereafter when the 1st and 2nd appellants were seen returning from the scene bragging that they had finished the deceased.

47. Whereas the appellants contended that the alleged "confession" to PW2 was not admissible, similar information was relayed to PW5. In our view, that information did not amount to inadmissible confession, but was an admissible admission. The Supreme Court extensively distinguished the two in the case of Republic v Ahmad Abolfathi Mohammed & Another [2019] eKLR in which it set out to define what amounts to a confession, and an admission and the application of sections 25A and 111 of the *Evidence Act* in relation thereto. The court held as follows at paragraphs 38 to 40 of the judgement;

> "(38) It can be surmised therefore, that a confession is a direct acknowledgement of guilt on the part of the accused while an admission is a statement by the accused, direct or implied, of facts pertinent to the issue which, in connection with other facts, tends to prove his guilt, but which, of itself, is insufficient to found a conviction.
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> 39. These distinctions can therefore be summarised as follows:
>
> 1. A confession untainted by any legal disqualification may be accepted as conclusive in itself of the matters confessed. An admission however, pursuant to section 24 of the *Evidence Act*, is not conclusive proof of the matters admitted though it may operate as an estoppel.
>
> 2. A confession is a direct admission of guilt while an admission amounts to inference about the liability of the person making the admission in the cause.
>
> 3. A confession always goes against the person making it. An admission may sometimes be proved by or on behalf of the person making the admission as stated in Section 21 of the *Evidence Act*.

4. Confessions are made in criminal cases while admissions are made in both criminal and civil cases.

5. Confessions must be voluntary but admissions need not be voluntary.

6. Confessions can only be made by the accused, admissions can be made by any person.

40. From the foregoing, it is one thing to make a statement giving rise to an inference of guilt and another thing to confess to a crime. It is therefore evident that the distinction between a confession and an admission as applied in criminal law is not a technical refinement but one based on a substantive difference of the character of the evidence deduced from each. This is also buttressed by the fact that the law relating to admissions is distinctly set out in Part II (Sections 17-24) of the *Evidence Act* and that on confessions is outlined separately in Part III (Sections 25-32) of the same Act."

48. The distinction between an admission and a confession was also made in Ram v State CAIR [1959] ALL 518 thus:

> " The acid test which distinguishes a confession from an admission is that where conviction can be based on the statement above, it is a confession and where some supplementary evidence is needed to authorize a conviction, then it is an admission."

49. In this case, we find that the statement "we have finished him" taken alone was not sufficient to base a conviction, but could be relied upon together with some other evidence to do so. Accordingly, we form the view that it was not a confession, but an admission and, therefore, admissible.

50. It was also submitted that malice aforethought was not proved. However, there was evidence that the deceased had assaulted a close relative of the 1st and 2nd appellants, Mwaka, and the incident reported to PW7, who referred them to the police. Apparently, after the assault on Mwaka, the deceased disappeared for three days, and it was upon his return that the 1st and 2nd appellants apprehended him, and the assault on him ensued. The evidence of PW8 that the cause of death was due to severe head injury with deep penetrating wounds to the scalp with internal bleeding clearly shows that the attack was not merely meant to subdue the deceased and hand him over to the authorities, but was meant to cause him grievous bodily harm. There was evidence that the two appellants were armed with a club and a panga. As was held by this Court in Robert Onchiri Ogeto v R [2004] KLR 19:

> " The prosecution does not have to prove the motive for commission of any crime, neither is evidence of motive sufficient by itself to prove the commission of a crime by the person who possess the motive – see Karukenya & 4 Others vs. Republic [1987] KLR 458. By section 206(a) of the Penal Code, malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm. It can be reasonably inferred that when the appellant stabbed deceased with a knife on the chest he intended to cause death or grievous harm to the deceased. That being the case, we are satisfied that the appellant was properly convicted for the offence of murder."

51. In our view, the weapons employed being a panga and clubs can only lead to an inference that the 1st and 2nd appellants intended to cause grievous harm. Their admission that they had finished the deceased

goes further to reveal their intention. Accordingly, we cannot fault the learned Judge for holding that malice aforethought had been proved.

52. In addition to the foregoing, counsel contended that there were discrepancies regarding the weapons that the 1st and 2nd appellants had. To our mind, the cumulative evidence was that some of the deceased's assailants were armed with clubs while one of them was armed with a panga. Each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that it will be of little effect and does not necessarily mean that the witness is lying, or that his testimony cannot be relied on. The judge must take all the evidence and the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. This Court in the case of John Nyaga Njuki & Others v R [2002] eKLR expressed itself on the issue as follows:

> " In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."

53. Even if the injuries that eventually led to the death of the deceased were inflicted by a sharp object, and the evidence showed that the appellants were armed with clubs, there was evidence that the 1st and 2nd appellants were armed, and were part of the group that assaulted the deceased. In those circumstances, it must be inferred that the two appellants had a common intention with other members of the group. Section 21 of the Penal Code provides:

> Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

54. According to the case of R v Tabulayenka S/O Kirya, [1943] EACA 51:

> " To constitute a common intention to prosecute an unlawful purpose ... it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault."

55. We have carefully considered the discrepancies pointed out and, in light of clear evidence of common intention, it is our view that they do not vitiate the findings made by the learned Judge. Accordingly, we have no reason to interfere with the position taken by the learned Judge based on the evidence before him.

56. The appellants also took issue with their identification. It was contended that, without description of the 1st appellant's features, the circumstances, being that the deceased was being chased, were not conducive to positive identification and the witnesses could not have positively identified the appellants and their weapons. With due respect, this was a case of recognition as opposed to identification. The appellants were well known to the witnesses. In fact, the witnesses mentioned by name, not only the

appellants, but other people who were in the group even though they were not charged. As was held in Anjononi & Others v Republic [1980] KLR 59:

> " recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

57. It is true as submitted by the appellants that the witnesses were not asked to identify the appellants in court. However, as we have stated, this was a case of recognition rather than identification. The witnesses mentioned the appellants by their names and also referred to them as 1st and 2nd accused. There is no doubt from the record as to who the witnesses referred to in their evidence.

58. In addition, the appellants took issue with the fact that the person who produced the post mortem report was not its author. Suffice it to say that no objection was taken by the defence counsel. It is raised for the first time on appeal to this Court. This Court dealt with a similar objection in Robert Onchiri Ogeto v Republic Kisumu Criminal Appeal No. 1 of 2004 in which it expressed itself as follows:

> " The post mortem on the body of the deceased was done by Dr Odingo Stephen. The post-mortem report was produced as exhibit at the trial by Corporal Ambani under section 77 of the *Evidence Act*. One of the grounds of appeal is that the trial court erred in receiving the post mortem report which is inadmissible...Section 77(1) of the *Evidence Act* allows such a document under the hand of a medical practitioner to be used in evidence. By section 77(2) of the *Evidence Act*, the court is allowed to presume that the signature to any such document is genuine and the person signing it held the office and qualification which he professes to hold at the time he signed it. The appellant was represented by counsel at the trial who did not object to the production of the post mortem under section 77(1) of the *Evidence Act* and the court did not see it fit to summon Dr Odingo Stephen for examination. Nor did the appellant's counsel ask for the calling of the Doctor for cross-examination. In our view, the post mortem report was properly admitted as evidence in accordance with the law."

59. In view of the foregoing, we find that nothing turns on this ground.

60. Regarding the allegations that the appellants' alibi defences were not considered, the learned Judge extensively dealt with the same before concluding that:

> " It seems to me that in this case, the evidence stated by the prosecution creates a causal link between the commission of the crime and the active participation of the accused persons. There is in my view little substance in the alibi defence to create a doubt in the mind of the Court that it was not the accused persons who armed themselves to attack and fatally injure the deceased."

61. We find no reason to interfere with that finding, being a finding of fact based on the evidence on record.

62. The appellants submitted that the commission of the offence was not proved beyond reasonable doubt since the case heavily depended on circumstantial evidence, and yet there were several missing gaps in the prosecution's case, and that the chain of events were broken by the inconsistencies in the testimonies of the prosecution witnesses. We take to mind the fact that evidence may be direct or circumstantial. As to what constitutes "direct evidence", section 63 of the *Evidence Act* (Cap. 80) provides that:

> 63. Oral evidence must be direct.

1. Oral evidence must in all cases be direct evidence.

2. For the purposes of subsection (1) of this section, "direct evidence" means—

    a. with reference to a fact which could be seen, the evidence of a witness who says he saw it;

    b. with reference to a fact which could be heard, the evidence of a witness who says he heard it;

    c. with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

    d. with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

63. Black's Law Dictionary (Sixth Edition) defines "direct evidence" in the following words:

> " Direct evidence is a piece of evidence often in the form of the testimony of witnesses or eyewitness accounts. Examples of direct evidence are when a person testifies that he/she - saw an accused commit a crime, heard another person say a certain word or words, or observed a certain act take place."

64. According to R v Taylor Weaver and Donovan (1928) 21 Cr. App. R 20, "circumstantial evidence" is:

> " ... the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics."

65. Our careful consideration of the evidence on record reveals that the case was not entirely based on circumstantial evidence. According to PW1 and PW3, they saw the 1st and 2nd appellants assaulting the deceased. To our mind, the evidence on which the appellant was convicted was both direct and circumstantial.

66. According to the appellants, the police officer who identified the body for examination ought to have been called as a witness and that, without his evidence, there was no proof of identity of the deceased. We hold that, where an issue is taken by the defence as to whether the body examined by the pathologist was not the deceased's body, it is incumbent upon the prosecution to adduce evidence of how the body was identified. In those circumstances, and after considering the totality of the evidence on record, the Court may well find for the appellant if it is not proved that the body in question was the deceased's. However, where, as in this case, no such issue is raised, the conviction cannot be set aside simply on the ground that the body was not identified since the identity of the deceased was not an issue at the trial. There are cases where the body of the deceased is in unrecognisable state, but that does not necessarily mean that a conviction may not be sustained. However, we hasten to state that, unless it is not possible to identify the body, the prosecution may well be advised to adduce evidence confirming the identity of the deceased.

67. It was urged that the learned Judge failed to conduct a sentence hearing and thereby ended up meting sentence that was extremely punitive, harsh and excessive a hash. From the record, the defence case was closed on 4th June 2020 after which the learned Judge gave a judgement date as 16th June 2020. The record of proceedings indicate that it was delivered on 27th October 2021. After the delivery of

the judgement, it is indicated that the appellants mitigated and the matter was fixed for sentencing on 28th October 2021. The record of the proceedings does not indicate what transpired on 28th October 2021, but the judgement on record which is indicated as having been delivered on 28th October 2021 contains a record of their the mitigation and sentence . We must state that incorporating the mitigation and the sentence in the judgement is clearly irregular since section 323 of the Criminal Procedure Code provides that:

> If the judge convicts the accused person, or if the accused person pleads guilty, the Registrar or other officer of the court shall ask him whether he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect on the validity of the proceedings.

68. Section 329 of the Code provides that:

> The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

69. This is the stage at which an accused person mitigates. It is clear to us that mitigation take place after judgement has been delivered. It is only after mitigation is taken that the sentence can be pronounced. That mitigation is a necessary part of the trial was appreciated by the Supreme Court in Muruatetu & Another v Republic [2017] eKLR, in which it expressed itself as follows:

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

70. The law does not contemplate a situation where the sentence forms part of the judgement. As was held by this Court in Henry Katap Kipkeu vs. Republic [2009] eKLR:

> " Before we conclude this judgment we must say something about the manner the learned Judge dealt with the sentence. We note that the learned Judge sentenced the appellant to death in his main judgment without recording mitigating factors, if any. This was not proper. As we have stated previously, after the judgment is read out and in case of a conviction, the court must take down mitigating circumstances from the accused person before sentencing him/her.

71. We must state that, where the law, particularly one guiding criminal process, sets out stages to be followed in a criminal trial, the stages, where couched in mandatory terms, ought to be scrupulously and strictly complied with. The Court will take a dim view of the proceedings where a mandatory stage in the proceedings is bypassed. However, in this case there was substantive compliance with the procedure. It is clear that mitigation was taken and a date for sentence given. The proceedings also indicate that the conviction was on 27th October 2021, and that the matter was fixed for sentencing the following day. The formal judgement, which seems to have been issued on 28th October 2021 ought to have restricted itself to the conviction. However, the judgement substantially complied with section 169 of the Criminal Procedure Code. It certainly contained more than was necessary, but cannot be said to have been deficient. This Court in Henry Katap Kipkeu vs. R (supra), while holding that it is inappropriate to incorporate the sentence in the judgement, was of the view that:

> " apart from the error in sentencing the appellant in the main judgment we decipher no other error on the part of the learned Judge. He was right in convicting the appellant since, as we have already stated, the appellant's conviction was inevitable as it was based on very sound evidence."

72. Likewise, we find no error in the manner in which the judgement was drafted save for the incorporation of the sentence in the main judgement which we finding curable under section 382 of the Criminal Procedure Code.

73. It was also contended that mitigation was done in the absence of the defence counsel, and hence the court was not properly constituted and in violation of the appellants' rights in Article 50 of *the Constitution*. Though the record of the proceedings is somewhat jumbled up, what is clear is that the judgement was delivered on 27th October 2021 while mitigation was taken the following day, 28th October 2021. From the judgement, it is clear that it was delivered in the presence of the appellants. No mention is made of the defence counsel. We must deprecate the conduct of criminal proceedings in the absence of counsel on record and as the Supreme Court held in Muruatetu & Another v Republic [2017] eKLR, the principles of fair trial apply to the process of mitigation. We must stress that trial courts should ensure that at all stages of the proceedings, the principles of fair trial are adhered to.

74. However, the date for the delivery of the judgement was issued in the presence of the defence counsel, who was aware of the date of delivery of the judgement, but failed to attend. The appellants ably gave their mitigating circumstances without raising the issue of the absence of their counsel. There is nothing wrong in accused persons mitigating on their own where they have been guided by their counsel on how to go about it. In this case, the appellants seemed to have been content with mitigating on their own. In our view, nothing substantially turns on this issue.

75. The next issue is whether the sentence imposed was harsh and excessive in the circumstances. In S v Malgas 2001 (1) SACR 469 (SCA), it was held at para 12 that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court

is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'."

76. Likewise, in Mokela v The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> " It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

77. The position was stated even more succinctly by the predecessor of this Court in the case of Ogola S/O Owoura v Reginum (1954) 21 270 where it was held that:

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James V R., (1950) 18 E.A.C.A 147:
>
> > It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
>
> To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. V Sher shewky, (1912) C.C.A. 28 T.L.R. 364.'"

78. This Court in Bernard Kimani Gacheru v R. [2002] eKLR expressed a similar opinion when it held that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist..."

79. For the considerations to be taken into account in sentencing, this Court in Thomas Mwambu Wenyi v R [2017] eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira v State of Maharashtra [2012] 2 S.C.C 648 where it was held:

> " Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive

for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

80. We have considered the decision of the learned Judge on sentencing in this case and find nothing to persuade us that the learned judge's exercise of discretion was improper. In his detailed and well-reasoned decision, he considered all the relevant facts and did not consider any irrelevant one. His decision on the sentence was well within the law. We find no reason to disturb his decision. We find the finding in Bernard Kimani Gacheru v R (supra) on all fours with the instant case. In that case, the Court found that:

> " In the appeal before us, the learned trial Judge made comprehensive notes on sentence. He took into account everything that was urged before him by the appellant's advocate. He did not disregard any material factor, nor did he take into account any matter immaterial. Similarly, he did not act on any wrong principle. The very same matters that the appellant urged before us were urged before the learned trial Judge and he took all of them into account...The sentence was entirely in the discretion of the learned trial Judge and we are satisfied that he exercised that discretion properly and on the facts before him. The sentence he gave was well deserved and was not manifestly excessive. We have found absolutely no reason to interfere with it..."

81. Regarding failure to undertake sentencing hearing, paragraph 4.2 of the Judiciary Sentencing Policy Guidelines, 2023 provides that:

> 4. 2.1. Prior to scheduling a sentencing hearing, the court should confirm whether the accused person has received the requisite reports within a reasonable time to be able to prepare for the sentencing hearing. The court should schedule a hearing in which it receives submissions that would impact on the sentence from all relevant persons and agencies. Whilst the pertinent information is typically contained in the pre-sentence reports, and particularly probation reports in accordance with the *Probation of Offenders Act*, Cap 64, the hearing provides the court with an opportunity to examine the information and seek clarity on all issues.
>
> 4. 2.2 The sentencing hearing also provides the offender with an opportunity to submit on any adverse information that would be prejudicial to him/her. This is in keeping with the spirit of *the Constitution* that guarantees the offender the right to a fair hearing.

82. We find nothing implicit in the said paragraphs that mandate that sentencing hearing be undertaken in all cases. We are however aware of part IXA of the Criminal Procedure Code, which deals with Victim Impact Statements. Section 329B provides that:

> This part applies in relation to an offence that is being dealt with by any court, where the offence results in the death of, or actual physical bodily harm to, any person.

83. The section is qualified by section 329D(1) which provides that:

> The giving of a victim impact statement is not mandatory.

84. In Conclusion, under the said Guidelines and the Criminal Procedure Code, failure to conduct a sentencing hearing is not of itself fatal as long as the trial court has given the accused person an opportunity to mitigate.

85. We have re-evaluated the evidence on record as presented before the learned Judge. We find merit in the 3rd appellant's appeal which we hereby allow. We set aside his conviction and quash the sentence imposed upon him and hereby set him at liberty unless he is otherwise lawfully held. We, however, find no merit in the 1st and 2nd appellants' appeals which we hereby dismiss. Consequently, the judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 28th October 2021 is hereby upheld.

86. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF JULY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA Crb,FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR