Muranga & 2 others v Republic (Criminal Appeal 74, 112 & 113 of 2022 (Consolidated)) [2023] KECA 626 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 626 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 74, 112 & 113 OF 2022 (CONSOLIDATED)

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

MAY 26, 2023

BETWEEN

YUSUF CHIVATSI MURANGA ..... 1ST APPELLANT

SIMON MWACHIRO BADI ..... 2ND APPELLANT

CHARLES NGALA MUNDU ALIAS BEJA ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the judgment of the High Court of Kenya at Malindi (Nyakundi, J) delivered and dated 30th September, 2021 in HCCR. Appeal No. 8 of 2018)

JUDGMENT

1. The appellants herein, Yusuf Chivatsi Muranga, Simon Mwachiro Badi and Charles Ngala Mundu alias Beja, were charged before the Malindi High Court in Criminal Case No. 8 of 2018 with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars were that on 11th June, 2018 they jointly murdered Ali Shariff.

2. The prosecution's case was that on the night of 11th June, 2018, the deceased and his wife, PW2, were sleeping in their house with their solar lights on when they were attacked by three armed people. Among the people who attacked them, PW2 was able to identify the 1st accused who held a torch and a panga. She however did not identify the 2nd and 3rd accused at the scene. The said attackers cut the deceased and when PW2 tried to raise alarm, the 1st accused cut her on the leg before she hid herself under the bed. While under the bed, she saw streams of blood. After the assailants left, she realised that the deceased had sustained cut wounds on the upper and lower limbs but was conscious. It was her evidence that the deceased mentioned the names of the assailants as Yusuf Chivatsi, Mwachiro Badi and Charles. Before the incident, during the day, the deceased had returned from a walk and informed

PW2 that he had been chased but did not mention the names of those who chased him though he did not eat that evening.

3. The screams of PW2 alerted her relatives and neighbours including the deceased's father who arrived and called PW4 to assist in taking the deceased to the Malindi Hospital using PW4's vehicle. However, upon arrival at the Hospital the deceased was pronounced dead. One of those who were alerted by the screams was PW3, a neighbour who went to the scene where he found the deceased on the floor with cut wounds on the upper and lower limbs. At the scene were PW2, who had sustained injuries and the deceased's father. While they were carrying the deceased outside the house, the deceased, who was then conscious mentioned that he had been attacked by Yusuf, Charles Ngala and Mwachiro.

4. That the deceased was injured that night was confirmed by the evidence of PW1 who received information from PW2 that the deceased had been wounded at home. At the scene he found the deceased conscious and the deceased mentioned his assailants as Yusuf Chivatsi, Mwachiro Badi and Charles. After they realised that the deceased had passed away on their way to the Hospital, it was PW1's evidence that they proceeded to the Police Station to make a report.

5. PW6 was the one on duty when the report was made at the Police Station and upon receipt of the report he proceeded to Malindi Sub-county Hospital where he found the deceased's body with multiple deep injuries. He also witnessed the post- mortem examination which was carried out by Dr Angote. In the company of his colleague IP Gertrude, he arrested the 1st Appellant based on the information received from the investigation officer, PW5.

6. According to PW5, the investigating officer, upon carrying out investigations and recording of statements, he made a decision to charge the accused persons. He produced as exhibits, Identification Parade Form, P3 Form and Post- mortem Form.

7. When placed on his defence, the 1st appellant, in his unsworn statement, stated that he was asleep when he heard screams at about 6.00am coming from the direction of the deceased's home. He was then informed by his neighbour that the deceased had been taken to the Hospital and he returned home. He denied any involvement in the offence. As for the 2nd appellant, his unsworn statement was that on 11th June, 2018 he was at home when he heard screams from the deceased's home. He was unaware of the circumstances that led to the death of the deceased as he was not involved in the offence. The 3rd appellant's statement was that on 11th June, 2018, he was at home when he heard screams from the deceased's home. He was informed that the deceased had been taken to the Hospital and he returned home. He denied any involvement in the murder.

8. In his judgement, the Learned Judge of the High Court relied on the evidence of PW1, PW2 and the post-mortem report and found that there was no dispute that the deceased was dead. Based on the evidence of PW1, PW2 and PW3, he found that there was evidence that the deceased was fatally assaulted at his homestead on 11th June, 2018 at about 7.00pm since the deceased suffered multiple injuries. He also relied on the post- mortem report which revealed that the deceased sustained deep penetrating wounds to the head and temporal lobe exposing brain matter and was of the opinion that the cause of death was as a result of severe deep cut wounds to the head secondary to multiple injuries to the body. According to the Learned Judge, this was evidence that the force employed was meant to do grievous harm hence the death was unlawfully caused. The Learned Judge further found that, considering the fact that the assailants were armed as indicated by the evidence of PW1, PW2 and PW3, malice aforethought could be inferred from the circumstantial evidence, the nature of the injuries, the type of weapon used, the body parts targeted and the conduct of the perpetrator before, during and after the commission of the offence. Based on the evidence adduced, the Learned Judge found that malice aforethought had been proved.

9. The Learned Judge, based on Philip Nzaka v R [2016] KLR, found the dying declaration by the deceased as testified by PW1, PW2 and PW3, admissible to positively identify the accused persons as the perpetrators of the murder. It was his finding that since the defence failed to controvert the prosecution evidence on causation, and participation of the appellants in the murder of the deceased, the standard of proof beyond reasonable doubt had been discharged against the appellants. He proceeded to convict the appellants and sentenced them to 25 years in prison.

10. Aggrieved by that decision the appellants lodged separate appeals before this court being Criminal Appeal Nos. 74 of 2022 by Yusuf Chivatsi Muranga, the 1st appellant herein, Criminal Appeal No113 of 2022 by Simon Wachira Badi, the 2nd Appellant herein and Criminal Appeal No. 112 of 2022 by Charles Ngala Mundu aka Beja, the 3rd Appellant herein. However, all the appeals were heard together as they arose from the same Judgement.

11. In their grounds of appeal, the appellants contended that the learned trial judge erred in law by failing to consider the massive contradictions and invariances in the prosecution case; by failing to consider that the prosecutor failed to avail some of the crucial witnesses; by failing to consider that the sentence imposed was harsh and manifestly excessive; in failing to consider that the prosecution did not prove its case to the required standards of the law; and by failing to consider their defences.

12. At the hearing, hosted *vide* this Court's virtual platform on 25th January, 2023, Learned Counsel, Ms Nzamba appeared for the Appellants while learned prosecution counsel Mr Mwangi Kamanu held brief for Ms Ongeti for the Respondent. Both counsels wholly relied on their written submissions which they had filed.

13. It was submitted on behalf of the Appellants that the trial Court relied upon the evidence of PW1, PW2, PW3, without keenly scrutinizing their evidence. According to the Appellants, the witnesses' evidences were full of contradictions and variances which breached section 163(1)(c) of the *Evidence Act*. In this regard reference was made to the evidence of PW1, PW2 and PW3 on the identification of the assailants, the time of the incident and the period the incident took, which it was contended were contradictory.

14. It was further noted that there were contradictions in the evidence of PW1 and PW3 on one hand and PW2 on the other as to the nature of injuries sustained by PW2. Based on the decision in *Abdalla Bin Wendo v Republic* (1930) EACA 166, *Demkeriram Kishan Pandya v Republic* Cr. App No. 106 of 1950 EACA 93 and *Kazungu Mramba Mweni v Republic* Cr App No. 220 of 2007, it was submitted that the evidence was unreliable.

15. It was further submitted that the incident took place at night in the dark hence the circumstances for positive identification were difficult hence the trial court ought to have warned itself that mistakes were possible even by people with such familiarity like relatives and friends.

16. The Appellant noted that though the prosecution had indicated that it was going to call 9 witnesses, it instead chose to present a total of 6 witnesses and thus omitting 3 witnesses without any explanations. On the authority of the case of *Bukenya and Others v Uganda* [1972] EA 549, the Court was urged to draw adverse inference on the failure by the prosecution to call the other witnesses and to find that by not calling the said witnesses the Appellants were denied the right to cross-examine them contrary to Article 50(2)(k) of the *Constitution* as read with Section 154 of the *Evidence Act*. On the authority of *Edward Msenga v Regnam* [1942] EACA, it was submitted that the trial Judge had the mandate of calling all the prosecution witnesses for the purposes of achieving a fair trial and fair hearing even if the Appellants did not request to have them called.

17. On sentence, it was submitted that long term incarcerations lead to no goals and achieves no objectives of the society or justice and violates Articles 45(1) of the *Constitution of Kenya 2010* since it leads to family disintegration, discrimination in the society hence creating a gap between the Appellants and the society in general. Reliance was placed on the case of *S v Janson* 1999 (2) SACR 368(C) at page 373 (g)-(h). It was therefore submitted that 25 years imprisonment is manifestly harsh and excessive taking into account the factors to be taken in consideration in sentencing as set out in the case of *Francis Karioko Muruatetu & others v Republic* [2015] eKLR. The Court was urged to consider the fact that the Appellants were first offenders and have since reformed and reduce their sentences in the event that the conviction is upheld.

18. In response, it was submitted on behalf of the Respondent that this was not just the evidence of identification of a perpetrator, it was the evidence of recognition. It was submitted that the dying declaration of the deceased was admissible pursuant to Section 33(a) of the *Evidence Act*, Reliance was placed on the decision of this Court *Philip Nzaka Watu v Republic* (2016) eKLR.

19. It was submitted that the court in imposing the sentence took into account the decision of the Supreme Court in the *Muruatetu Case* as well as the provisions of section 333(2) of the *Criminal Procedure Code* and the time the suspects had spent in custody. The Court, according to the Respondent, therefore properly applied itself in sentencing the appellants.

20. The Court was therefore urged not to interfere with the sentence meted on the appellants.

Analysis And Determination

21. We have considered the issues raised in this appeal.

22. This being a first appeal, our mandate is to subject the entire evidence adduced before the trial Court to a fresh analysis evaluation and scrutiny, while bearing in mind our limitation of not having had the opportunity to see or hear the witnesses and to test their demeanour, and to give due allowance for same. See *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2 EA 212.

23. Gleaning from the submissions of Ms Nzamba for the appellant's and Ms. Ongeti for the State, the determination of this appeal rests upon three issues. These are firstly, whether the prosecution proved that the death of the deceased was caused by the appellants in light of the contradictions and inconsistencies in the prosecution evidence; secondly, whether the failure by the prosecution to call all the witnesses intended to be called violated the Appellants' right to cross- examine those who were not called; and thirdly, whether the sentence imposed on the appellants was harsh and excessive in the circumstances. We say this because the death of the deceased and whether it was lawful have not been contested in this appeal.

24. As regards the first issue, the decision of the Learned Judge of the High Court has been challenged on the ground that it was based on inconsistent and contradictory evidence of the prosecution witnesses. In the case before the trial court, PW1 testified on three different occasions. Her first testimony was on 20th September, 2019 when at the material part she stated that the attackers entered their house at 7pm and that they had torches which they pointed at her eyes and the deceased hence PW1 was not able to identify each one of them. She however witnessed the attack on the deceased in an incident that took 3 hours. When she was recalled on 9th October, 2019, PW2 stated that the deceased was conscious when they were leaving the house for hospital and she heard him say that he was assaulted using pangas by Mwachiro Charles and Yusuf. In her statement, amongst those who entered the house she only identified the 1st Appellant herein. She at first stated that the incident took 5 hours then corrected herself and stated that it took 1½ hours. She was then stood down and continued with her testimony

on 27th February, 2020. On that day, she stated that she was able to identify the 1st appellant and that the deceased mentioned Charles Ngala, Yusuf and Mwachiro.

25. Learned Counsel for the Appellant relied on PW1's statement that she was not able to identify each one of the attackers to mean that she did not identify any of the attackers. In our view, in undertaking the duty to analyse and re-evaluate the evidence as expected of us, we must take a holistic view of all the evidence on record. Accordingly, statements of witnesses ought not to be considered in isolation particularly where the allegation is that there are inconsistencies and contradictions in the evidence given by the same witness. Taking that approach, it is our view that there is no contradiction in PW2's evidence when she says at one point that she was not able to identify each one of the attackers and later on saying that she was only able to identify the 1st appellant amongst the three attackers. To our mind PW1's statement simply meant that though there were three attackers, she was unable to identify all of them but identified one of them, the 1st Appellant. Accordingly, nothing turns on that point.

26. As regards, the inconsistencies in the evidence of PW1, PW2 and PW3 regarding the time when the incident took place and the period it took, it must always be borne in mind that minor discrepancies in evidence of witnesses are common. A distinction must be made between evidence that contradicts another piece of evidence and mere discrepancies. The former occurs where one piece of evidence says the opposite of what the other piece of evidence has stated while the latter happens where there are trifling variances in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains. While the former may render the testimony unbelievable, the latter does not. What is expected of a Judge in dispensing justice is to take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. As was held by this Court in *John Nyaga Njuki & Others v Republic* [2002] eKLR:

> " 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."

27. In our view the alleged contradictions and inconsistencies are minor and do not materially affect the evidence.

28. It was contended that though the prosecution indicated that it intended to call 9 witnesses, only 6 witnesses were called hence the Appellants were deprived of their right to cross- examine those who were not called contrary to Article 50(2)(k) of the *Constitution*. Accordingly, we were urged to draw adverse inference on the failure by the prosecution to call all the witnesses.

29. The general legal position in this matter was restated in the case of *Paul Kanja Gitari v Republic* [2016] eKLR where this Court expressed itself as follows:

> " It is of course trite that there is no number of witnesses required for the proof of a fact. See Section 143 of the *Evidence Act*. However, it has long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the

court to draw an inference that had such witnesses been called, their evidence would have been adverse to the prosecution case. See *Bukenya & Others vs Uganda* [1972] EA 549."

30. That decision, however, states that such inference is only to be made where the prosecution calls evidence that is barely adequate. As regards the failure to call the alleged vital witnesses, section 143 of the *Evidence Act* provides that:

> No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

31. Accordingly, whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it be shown that the prosecution was influenced by some oblique motive. Therefore, the prosecution is not duty bound to call all persons involved in the transaction and the failure to call them is not necessarily fatal unless the evidence adduced by him is barely sufficient to sustain the charge. See *Keter v Republic* [2007] 1 EA 135 and *Sahali Omar v Republic* [2017] eKLR:

32. In this case, we do not know the nature of the evidence that the other three witnesses were intended to adduce since their witness statements, if any, do not form part of the record. If their testimonies were covered by those witnesses who were called, then there would have been no need to call them. The Learned Trial Judge was satisfied with the evidence that was adduced and from that evidence adduced, it seems that apart from PW2, no one else was present at the time the incident took place. It is therefore clear that the other witnesses who arrived at the scene after the incident could only testify as what they found and what they heard either from the deceased or PW2. Though present, PW2 did not identify any of the appellants apart from the 1st appellant and the case against the appellant is hinged on the denying declaration of the deceased to which we shall return shortly.

33. We however do not agree with the Appellants that the failure to call all the witness violated their rights under Article 50(2)(k) of the *Constitution* to cross-examine the said witnesses. That article provides for the rights of an accused person to fair trial and includes the right to adduce and challenge evidence. It would, in our view, apply to situations where evidence is adduced against the accused and not merely where a statement has been recoded against him.

34. We must however say that where the prosecution does not intend to call a person from whom a statement was recorded, the prosecution ought to tender that witness to the defence so that the defence can decide whether to call that person as its witness or not. See *David Kariuki Mutura v Republic* [2005] eKLR, *Benjamin Mugo Mwangi & another v Republic* [1984] eKLR and *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR,

35. In light of lack of sufficient material placed before us regarding the nature of the evidence that the three people mentioned intended to adduce, we are unable to draw adverse inference on the failure by the prosecution to call them.

36. In this case, apart from the evidence of PW2 as regards the presence of the 1st Appellant during the attack, the case against the 2nd and 3rd Appellants was based purely and wholly on the dying declaration of the deceased. Under section 33(a) of the *Evidence Act*, when the statement is made by a person as to the cause of his death, or as to any circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of

his death comes into question. In *John Matu Gichuru v R*. Nairobi Court of Appeal Criminal Appeal No. 53 of 1997 the Court had this to say:

> " The statements of the deceased were dying declarations. The question is: what weight could be placed on such statements so as to lead to a conviction of murder? The learned judge, unfortunately, did not consider the fact that there were three assailants and that the attack took place at night. There could be a case of mistaken identity. The learned judge also failed to warn himself explicitly to the effect that dying declarations have limited value; that there was no testing thereof by cross-examination or that the deceased may have been mistaken or that he may have referred to another 'Matu'. In respect of dying declarations we would quote, as did the Court of Appeal for Eastern Africa, the following passage from the judgement of that Court in *Jasunga Akumu v R* (2) [1954] EACA at 334:
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> > " The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from FIeld On Evidence (7th Edition) has repeatedly been cited with approval:
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> > > " The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and...the particulars of violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed...The deceased may have stated his inferences from facts concerning which he may have committed important particulars, from not having his attention called to them."
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> In the case of *Okale v Republic* [1965] EA 555 the Court of Appeal for East Africa said (after reference to Jasunga Akumu case) at page 558:
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> > " Particular caution must be exercised when an attack takes place in darkness when identification of an assailant is, usually more difficult than in daylight (R vs. Ramazani bin Mirandu (1934) I EACA 107; *R v Muyovya bin Msuma*); The fact that the deceased told different persons that the appellant was the assailant is evidence of consistency of his belief that such was the case: it is no guarantee of accuracy.'
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> > It is a fact that the deceased was stabbed at night. Whilst he gave an elaborate version of the alleged events to his father on 24th January, 1996, when his health was deteriorating, on 18th January, 1996 (six days earlier) the deceased simply told PW6 that "it was Matu". It is possible that having come out of the Club (presumably having had some alcoholic refreshment) he could have been mistaken about the identity of the assailant. There are no other factors which can lead us to believe that the deceased's dying declaration was such as to point a finger at the appellant only and in these circumstances, the benefit of doubt must go to the appellant. Counsel for the respondent, Miss Kamau, in our view, quite properly, did not support the conviction. She conceded that the dying declaration was not properly elaborated and was not corroborated, which corroboration, though not strictly necessary, is a rule of practice. The dying declaration fell short

of the standard of proof required in criminal trials. It cannot be said that the appellant was identified, beyond reasonable doubt, as the assailant.".

37. This position was adopted in *Choge v Rep* [1985] KLR 1 where it was observed as follows:

> " The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."

38. We have considered the judgement by the Learned Trial Judge and while we agree that corroboration, as a matter of law is not necessary, our jurisprudence is that it is prudent, as a matter of practice to consider whether or not there was corroboration. The Learned Trial Judge seemed to have been swayed by an Indian decision where it was held that there is neither a rule of law nor practice that dying declaration cannot be acted upon without corroboration. That position is not supported by local authorities. Accordingly, the Learned Trial Judge failed to warn himself explicitly to the effect that dying declarations have limited value; that there was no testing thereof by cross-examination or that the deceased may have been mistaken. This was particularly crucial in a case such as this one where the Appellants were well known to both the deceased and PW1 and while PW1 was only able to recognise the 1st Appellant, yet the deceased who was badly injured purported to have recognised all the Appellants. From the evidence of PW1 it would seem that the deceased had ran into trouble that afternoon and this must have weighed heavily on his mind to the extent that he did not eat. In those circumstances and as the incident occurred at night it is not possible to state with certainty whether the people he mentioned were those who attacked him that night or those who had chased him earlier in the day.

39. We therefore find that whereas the deceased's dying declaration as regards the participation of the 1st appellant in the attack was corroborated by the evidence of PW2, there was no corroboration of the same as against the 2nd and 3rd appellants and the Learned Judge failed to exercise the necessary caution in reception into evidence of such declaration. We therefore agree with the 2nd and 3rd Appellants that as regards the evidence against them, the Learned High Court Judge erred in law in failing to consider that the prosecution did not prove its case to the required standards of the law. Accordingly, we find the conviction of the 2nd and 3rd Appellants unsafe.

40. On the allegation that the Learned Judge erred in law by failing to consider their defences, we with respect agree that the learned trial Judge did not sufficiently deal with the defence of the appellants. According to the 1st Appellant, he was at home asleep when at about 6.00 am he heard screams from the deceased's home. Upon stepping outside the house he met a neighbour who informed him that the deceased had been taken to the Hospital and he returned home.

41. The Learned Trial Judge in his judgement found that the defence failed to controvert the prosecution evidence on causation, and participation of the accused persons in the murder of the deceased. He further found that the Appellants' defences were wanting and a mere sham.

42. We on our part have analysed and re-examined the evidence on record in light of the evidence by PW1 that the 1st Appellant who was carrying a torch and a *panga* and his face was not concealed. The 1st Appellant was the one who cut her left leg and she knew him as a neighbour. We agree with the Learned Trial Judge that the defence was a sham. We therefore do not find any substance in this ground of appeal.

43. On the sentence, the trial court was exercising a discretion. in *Shadrack Kipkoech Kogo v R*. Eldoret Criminal Appeal No. 253 of 2003 this Court stated thus:-

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R* (1989 KLR 306)."

44. The circumstances under which this Court, and any appellate court for that matter, interferes with the exercise of the discretion by the trial court in imposing a sentence were restated by this Court in *Bernard Kimani Gacheru v R*. [2002] eKLR as follows:

> " 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, anyone of the matters already stated is shown to exist. The position was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola S/o Owoura V Reginum* (1954) 21 270 as follows:-
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> > " 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:
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> > > " 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."' Ogola s/o Owoura's case has been accepted and followed by this Court and the High Court on matters of sentence for many years. What was stated there still remains good law to-date...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 and for these reasons, we order this appeal to be and is hereby dismissed in its entirety."

45. In this case, the Appellants were liable to be sentenced to death but in light of the decision in *Muruatetu Case*, (*supra*), the Learned Trial Judge imposed 25 years imprisonment. We have no reason to interfere with that sentence since we have not been persuaded that the said sentence was 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. We have been urged to interfere with the sentences on the ground that they are lengthy. However, even if we were of the view that the same are lengthy or heavy and that had we been sitting as the trial court we might ourselves have not have passed that sentence, that alone is not sufficient ground for interfering with the discretion of the trial court.

46. In the premises, we allow the appeal by the 2nd and 3rd Appellants, set aside their conviction and quash their sentences. They are set at liberty unless otherwise lawfully held. However, the appeal by the 1st appellant fails both on conviction and sentence and is dismissed in its entirety.

47. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MAY, 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR