



REPUBLIC OF KENYA



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**Thoya & 3 others v Republic (Criminal Appeal 50, 53, 54 & 55 of 2021
(Consolidated)) [2023] KECA 925 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 925 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 50, 53, 54 & 55 OF 2021 (CONSOLIDATED)
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

**KARISA MAITHA THOYA ALIAS NDISO 1ST APPELLANT
SAID KARISA MAITHA ALIAS MOTO 2ND APPELLANT
BKM 3RD APPELLANT
CKKM 4TH APPELLANT**

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Malindi (R. Nyakundi)
delivered on 19th October 2021 in High Court Criminal Case No. 20 of 2016)*

JUDGMENT

1. Karisa Maitha Thoya alias Ndiso, Said Karisa Maitha alias Moto, BKM, and CKKM (hereinafter the 1st, 2nd, 3rd and 4th Appellants) were the 1st to 4th accused persons in Malindi HC Criminal Case No 20 of 2016, in which they were charged with, and convicted of the offence of murder, and each sentenced of twenty (20) years imprisonment in judgment delivered on October 19, 2021 by the High Court at Malindi (Nyakundi J). The particulars of the offence were that on November 24, 2016 at Duke Village in Chamari sub location, Magarini division within Kilifi County, jointly with others not before Court murdered Jeremiah Komoro Guyo. The said Appellants have appealed to this Court against the said conviction and sentence.



2. This being a first appeal, the duties of this Court are set out in the case of *Okeno vs Republic* [1972] EA 32 as follows:

' An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs Republic* (1957) EA (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala Vs R* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs Sunday Post* [1958] EA 424.'

3. The evidence as presented by the prosecution witnesses during the trial in the High Court in this regard was that on November 21, 2016 at 10.00 pm Pastor Joshua Nyamawi (PW1) conducted a church service in his church, which was built on his property about ten (10) metres from his house. He then left the congregants, who slept in the church that night, and went to his house. In the course of the night, he went outside to answer to the call of nature, and saw a person's legs behind a tree about 3 meters away, and recognised the person as Karisa Thoya, the 1st Appellant. The 1st Appellant after telling PW1 that he had told him that his family should not attend PW1's church, raised a panga (machete) at PW1. After a struggle, PW1 wrested the panga from the 1st Appellant and called out for assistance from the members of the church. The sons of the 1st Appellant, namely one Baraka and Fikira who were in the church came to PW1's aid, and requested him to release the 1st Appellant. PW1 then reported the incident and took the panga to the village elder who referred the matter to the Chief, who in turn summoned the 1st Appellant to appear before him.
4. A day before the 1st Appellant was to appear before the Chief on November 24, 2016, PW1, while collecting timber from a nearby forest was informed that the children of the 1st Appellant had damaged his property and were looking for him, and was advised not to go to his house. PW1 reported the matter to the Chief who called the police who came to PW1's home with the Assistant chief. PW1 also stated that the people who had gone with him to get timber were attacked and were injured, being Fikiri, the child of the 1st Appellant, Mariamu, Mwalimu Kalama and Jeremiah Komoro who was seriously injured on the head and taken to Marafa Hospital where he passed away on November 25, 2016. PW1 stated that he knew the 1st Appellant and informed the Court that the 2nd Appellant was the son of, and the 4th Appellant was the grandson of the 1st Appellant. On cross examination and re-examination, he stated that he was told by Fikiri that the 1st Appellant was not at the scene when his house was burnt.
5. Mariam Abura Guyo (PW2) a sister to the deceased testified that on November 24, 2016 at 4.00 pm, while at home with her mother, the deceased and the wife of the deceased, she saw two boda boda (motorcycle) riders go to the home of PW1, which was 50 meters from their home, and that one boda boda had three people while the other one had two people, who she named and identified as Moto, the 2nd Appellant, and Karisa, the 4th Appellant. Further, that there was a 3rd person with them called Godana, and that the 3rd Appellant, whose name she did not know was one of the riders. PW2 then saw Moto (the 2nd Appellant) set the fire to the house, after which the 2nd Appellant and Godana came to her home and beat PW1 and using clubs on the head and shoulders, and the deceased was also beaten and hit on the head. Further, that the other attackers were stopping people who were coming to rescue



- her brother. PW2 then she lost consciousness and when she came to, she was at Marafa Health Centre. She stated she did not see the 1st Appellant on that day.
6. Salama Pasiora, the widow to the deceased who testified as PW3 confirmed that on the November 24, 2016 at 4.00pm she was at home with PW2, the deceased and her mother-in-law, when she had screams and shouts that the house of PW1 was being burnt, and saw people running from the church. She stated that five people then came and beat PW2 and the deceased, and that she ran off to her brother-in-law's house where she slept that day. Further, that she was newly married and had stayed at the home for 5 months, and did not know the people who attacked them. When she went back to the house the following day she was informed that her husband had died. She told the Court that the people who attacked them did not want their children to go to PW1's church.
 7. A clan elder in the area, Lennox Fondo (PW4), recalled that on November 22, 2016 at 12 pm in the night, he received a report from PW1 and two (2) members of his church that the 1st Appellant was armed with a panga within the church premises, and that they brought the said panga and he identified it in Court. PW 4 asked them to come back on November 23, 2016, when they went to the Chief who summoned the 1st Appellant, and a meeting scheduled on November 25, 2016. He told the trial Court that the children of the 1st Appellant burnt the church building and attacked the deceased, and on cross-examination stated that he was not present during the attack. Joseph Soso (PW5), the Chief of Chamari Location, confirmed receiving the complaint from PW1 about the attack by the 1st Appellant and a panga from PW4 on November 22, 2016 at 9.00am and that he summoned the 1st Appellant to show cause. On November 24, 2016 at 4.00pm he received a phone call that the 1st Appellant's sons attacked and entered PW1's homestead and burnt the houses therein, and that he then telephoned the OCS Magarini and Administration police. PW5 visited the scene in the company of the police and observed the burnt house, and saw the deceased, and his sister and Kombe, who were victims of the attack and arson and escorted them to Marafa health centre, where the deceased succumbed to death while undergoing treatment. On cross examination, he stated that he did not see the Appellants at the scene when he visited.
 8. The case was investigated by Chief Inspector, Justus Kibo (PW 6) who recalled that he received a phone call on November 25, 2016 from an Administration Police officer, informing that there had been an assault around Chamari in Duke Village and one of the witnesses, Jeremiah Guyo had passed on while receiving treatment at the hospital. He also stated that a panga was handed over to him by the chief and he kept it as an exhibit, and also stated that it came from the village elder Lennox. PW6 confirmed that none of the Appellants were arrested at the scene and that their names emerged from the investigations. Additionally, that the 1st Appellant was arrested when he came to the police station on November 25, 2016 to make a report that his house had been burnt in an arson attack, while the 3rd and 4th Appellants were arrested when they came to the police station on their own after fearing for their safety.
 9. The 1st Appellant, Karisa Maitha (DW 1), gave sworn evidence and told the Court that he used to be self-employed, was married with three wives and 34 children and about 40 grandchildren. He stated that on November 24, 2016, he was at Duke village and he knew the deceased and had no grudge with him prior to the incident, and learnt of his death while at the burial of a neighbour. He denied that he was disarmed of a panga by PW1, who he stated he saw on November 4, 2016 at 8.00pm when ambushed by someone he did not know while on his way home. DW1 also testified that his houses and motorcycle were burnt by arsonists on the night of November 24, 2016, and he reported the matter of the arson to the police.
 10. The 2nd Appellant, Said Karisa Maitha, testified as DW 2 and denied killing the deceased and stated that he was at home when he came and found that houses had been burnt down and the police were



- present. He stated that the 3rd and 4th Appellants were his brothers and he denied being involved in the murder. The 3rd Appellant, BKM testified as DW 3 and gave sworn evidence to the effect that the offence was committed on November 24, 2016 while he was in Malindi town, that he received a phone call from Maitha Thoya that his house had been burnt and went to verify the arson, and denied being in the company of other young men on a mission to kill the deceased. Further, nobody mentioned his name as having been at the scene, and he denied seeing the deceased or the other Appellants during that period. He later learnt that the residents of the area were looking for the children of Mzee Karisa to kill them and he went to report the matter to the police station.
11. The 4th Appellant, CKK, testified as DW 4 and gave unsworn testimony to the effect that on November 24, 2016, he was at Kosovo and left the farm at 6.00pm. on his way he met people unknown to him and they said that the children of Karisa should be killed for the deeds they had committed. He went to Arasi and spent the night there, and on November 25, 2016, he returned to Gongoni and found their houses burnt. He stated that they were arrested and placed in custody for an offence they did not commit.
 12. Mwewa Ali (DW5) testified that the 1st Appellant was her husband, the 2nd Appellant her son and the 4th Appellant her grandson. She stated that people came and burned her and her sons' houses while the 1st Appellant was in a burial ceremony where he slept. That when the 1st Appellant came back to the home in the morning and found that the houses had been burnt, he went to Marereni to report the incident and while there he was arrested. DW5 denied that the 1st Appellant had refused them to go to church. Martha Chuma (DW6), a daughter of the 1st Appellant, also stated that the he had not prevented them from going to the church, and reiterated that the 1st Appellant had gone to a burial when the incidents of arson occurred. She stated that she did not know who committed the offence and was not at the scene of the murder.
 13. After hearing the witnesses, the learned trial Judge found that the death of the deceased was proven vide the evidence of PW1 to Pw6; that the injuries on the deceased were unlawfully inflicted; that the Appellants caused the death of the deceased in execution of a common intention in terms of section 21 of the *Penal Code*, being to prevent their family members from attending PW1's church. It was found that the unlawful acts that caused the death of the deceased were with malice aforethought as the attack was aimed at his head. The appellants' defences of alibi were rejected because the prosecution's evidence that established they were at the scene of the crime was not shaken. The trial Judge, after convicting the Appellants for their joint common intention and unlawful acts of causing death of the deceased, proceeded in the judgment to deliver the verdict on sentence, and found that the 3rd and 4th Appellants could not benefit under Section 191 of the *Children's Act*, for reasons that the severity of the offence was a compelling and an aggravating factor. After taking into account the decision by the Supreme Court in *Francis K Muruatetu v R (2017) eKLR*, the trial Judge sentenced each of the Appellants to 20 (twenty) years imprisonment.
 14. Being dissatisfied with the said conviction and sentence, the Appellants lodged the instant appeal, and have raised six (6) grounds in supplementary grounds of appeal dated November 14, 2022 filed by their advocate, where they fault the learned trial Judge for failing to find that the offence of murder was not proved beyond reasonable doubt; disregarding the Appellants' alibi evidence; failing to find that the prosecution's evidence was contradictory and inconsistent; ignoring to find that the crucial witnesses were not called to testify; failing to find that the 3rd and 4th Appellants constitutional rights were infringed when they were kept in police custody and/ or in remand prison with adults from November 26, 2016 till January 18, 2017; and meting out an extremely punitive, harsh and excessive sentence without conducting a sentence hearing and/or inviting submissions from both the Appellants and the Respondents on sentence.



15. We heard the appeal on February 14, 2023, and the 1st and 4th Appellants were present appearing virtually from Malindi prison, while the 2nd and 3rd Appellants who were also present, appeared virtually from Manyani Prison. All the Appellants were represented by learned counsel, Ms Aoko. The Respondent was represented by learned Prosecution Counsel, Ms Mwaura, who was holding brief for Ms Keya, Principal Prosecution Counsel. Ms Aoko highlighted written submissions dated January 30, 2023 while the Ms Mwaura highlighted written submissions dated July 25, 2023 filed by Mr Keya.
16. The three main issues urged in the submissions were firstly, whether the prosecution proved their case against the Appellants beyond reasonable doubt, secondly whether there was violation of the 3rd and 4th Appellants' constitutional rights, and lastly whether the sentence meted was legal and excessive. On the issue of proof of the prosecution case, Ms Aoko, while placing reliance on the case of *Muchene vs R (2002) 2 KLR 367*, submitted that that there was no eye witness evidence of the murder of the deceased; and that there was no evidence of malice aforethought on the part of the Appellants, given that their homes were also burnt during the incident. Counsel pointed out that the PW1's version of the incident that occurred on November 21, 2016 was different from the incident that occurred on November 24, 2016. To counsel, there was a break in the chain of events between 21st and November 24, 2016; and that the prosecution failed to link the incident of 21st November with the one that occurred on 24th November.
17. Further, it was argued that PW2 was a single identifying witness whose evidence was not corroborated and that there were difficult circumstances for positive identification because the incident happened within a short time; PW2 was also assaulted and passed out then she woke out when the incident was over. While citing the case of *Wamunga vs R (1989) KLR*, counsel posited because the circumstances for identification were difficult, the conviction could not stand. In addition, that PW2's evidence had mentioned Godana who was not charged with arson. According to counsel, the Appellant's alibi to the effect that they were not at the scene of crime, was not dislodged by the prosecution; that the 1st appellant's alibi evidence was corroborated by his wife; that PW3's evidence was to the effect that Godana hit the deceased; that there was no explicit evidence as to the exact time of commission of the offence thereby making the prosecution evidence unreliable. Lastly, that crucial witnesses were not called to testify, in particular, that PW1 had indicated to court that Fikiri and Borabu were injured in the incident on November 24, 2016 but they were not called to testify; that there was mention of Godana as one of the perpetrators as well as mention of an informant called Kanze who were not presented before the court. While placing reliance on the case of *Bukenya vs Uganda (1972) EA 549*, counsel urged that the non-inclusion of the mentioned persons, weakened the prosecution case.
18. Ms Mwaura on her part urged that the death of the deceased and the cause of death were proven by the post mortem report as well as eye witness testimony. According to the counsel, there was direct and circumstantial evidence to the effect that the Appellants caused the death of the deceased; that the evidence of and PW2 placed the Appellants at the scene of crime. It was added that the 1st Appellant had an altercation with PW1 days before the incident and this attack was a circumstance that linked the 1st Appellant to the crime, and the case of *R vs Richard Itweka Wabiti (2020) eKLR* was cited for the proposition that the prosecution evidence met the test for circumstantial evidence. On proof of malice aforethought, counsel urged that the Appellants had a common intention; that their act of hitting the deceased on the head with rungs and bottles was proof of malice aforethought.
19. The case of *Anjononi & Others vs R (1980) KLR* was also cited by the learned prosecution counsel to urge that the evidence of identification by way of recognition was reliable as the Appellants were persons known to PW1 and PW2, and it was submitted that the trial Court considered the Appellants'



alibi defence, however the circumstantial evidence of PW1, 3, 4 and 5 as well as PW2's direct evidence defeats the evidence of alibi.

20. We have considered the arguments made by both counsel on the proof that the Appellants committed the offence of murder of the deceased, and we note that the fact of death of the deceased was not disputed, and a postmortem report produced during the trial indicated the cause of his death to be a head injury leading to internal haemorrhage. On the evidence that linked the Appellants to this cause of death we agree with the submissions by the Appellants' counsel the circumstantial evidence relied upon by the prosecution was weak and tenuous and did not meet the threshold set by various decisions including *Abanga alias Onyango vs Republic, CR App No 32 of 1990 (UR)* and *Sawe vs Republic [2003] KLR 364*, namely, that the circumstances should be of a definite tendency unerringly pointing towards guilt of the accused and that the inculpatory facts should not only be inconsistent with the innocence of the Appellant but there should be no co existing circumstances which could weaken or destroy the inference of guilt.
21. We hold so for the reason that the evidence of PW1 on the events of November 21, 2016 was that the 1st Appellant intended to harm PW1 and not the deceased, and no evidence was adduced by PW1 connecting the 1st Appellant or other Appellants with the deceased or his death, which occurred days later on November 24, 2016. While the events of November 21, 2016 may have been indicative of some malice towards PW1, that evidence must also be examined and analysed in light of the other ingredients required to be proved as regards the murder of the deceased, including the cause of death, and the accused person's role in the causation, and proximity to the death. It is our view that even when viewed together with the other evidence adduce during the trial, it does not lead to an inescapable conclusion that the 1st Appellant was involved in the death of the deceased, particularly as he was not placed at the scene of the offence which occurred three days later.
22. We are of the view that the evidence that linked the Appellants with the deceased's death was the direct evidence of PW2 and PW3. PW2 in this respect testified as follows:

' They beat me up. Moto and Godana beat me using clubs. They hit me on the head and shoulder. My brother Jeremiah was there. They beat him. They hit him on the head. Godana and Moto are the ones who beat him. The others were stopping people from coming to the rescue of my brother. I lost consciousness and I do not know what happened thereafter.'

23. PW2 in her testimony stated that Moto was the 2nd Appellant and that the others present were Karisa, (the 4th Appellant) who she identified by name and two riders whose names she did not know, and she identified one of them as the 3rd Appellant in Court during the hearing. PW3 who was also present during the attack on the deceased, testified that 'people' who she did not know, carried out the attack. The factors to be taken into account in identification were set out in *R v Turnbull [1976] 3 All ER 549* as follows:

' The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance; in what light; was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance.'



24. In the present appeal, the attack on the deceased was carried out in daylight at 4.00pm, PW2 had ample time to see and recognise the 2nd and 4th Appellants from the time of burning of the pastor's house to the time they came to her home and she saw the 2nd Appellant and Godana hit the deceased, and before she was hit and lost consciousness. Her evidence as a single identifying witness is therefore reliable, and we are satisfied that the circumstances of identification were favourable and free from possibility of error, and that having positively recognised and placed the 2nd and 4th Appellants on the scene, their conviction was safe on this account. In this respect we are also guided by the holding by the Court of Appeal in the case of *Wamunga vs Republic* (1989) KLR 424 that:

' Where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.'

25. However, as regards the 1st and 3rd Appellants, we find that they were not recognised nor identified by either PW2 or PW3 at the scene, and no identification parade was carried out to confirm that they were among the persons seen at the scene. We therefore find that the 1st and 3rd Appellants were not positively identified as among the persons who attacked the deceased beyond reasonable doubt. It is also notable that PW2 specifically stated that she did not see the 1st Appellant on the day of the attack.

26. On the issue of violation the constitutional rights of the 3rd and 4th Appellants, Ms. Aoko submitted that the 3rd Appellant was 16 years whereas the 4th Appellant was 17 years as of the date when they were remanded, and cited was section 143 and Article 53 (2) of the *Constitution*, for the proposition that there is need for the judiciary to protect the rights of children in conflict with the law. It was therefore proposed that the 3rd and 4th Appellants be released. Counsel also raised the issue of the illegality of pre-trial detention of the 3rd and 4th Appellants for more than 24 hours, and cited was the case of *Fappyton Mutuku Ngui vs R (2014) eKLR*. Ms Mwaura's position was that the trial Court was cognizant of section 191 of the Children's Act and that there were circumstances that permitted the departure from applying the provisions of the section.

27. Article 53(2) of the *Constitution* provides that a child's best interests are of paramount importance in every matter concerning the child, including when the child comes into contact with the criminal justice process, and also specifically provides in Article 53 (1)(f) that every child has a right not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time, and separate from adults and in conditions that take account of the child's sex and age. In addition, section 191 of the Children's Act contains specific provisions on sentencing of children as follows:

1. In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—
 - a. 'By discharging the offender under section 35(1) of the Penal Code (Cap. 63);
 - b. By discharging the offender on his entering into a recognisance, with or without sureties;
 - c. By making a probation order against the offender under the provisions of the *Probation of Offenders Act* (Cap 64);



- d. By committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;
- e. If the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
- f. By ordering the offender to pay a fine, compensation or costs, or any or all of them;
- g. In the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;
- h. By placing the offender under the care of a qualified counsellor;
- i. By ordering him to be placed in an educational institution or a vocational training programme;
- j. By ordering him to be placed in a probation hostel under provisions of the *Probation of Offenders Act* (Cap 64);
- k. By making a community service order; or
- l. In any other lawful manner.'

28. The above positions are reiterated in the Judiciary's Sentencing Guidelines, which provide in paragraph 20.2 that a death penalty or imprisonment cannot be imposed on child in conflict with the law can, however, be committed to a rehabilitation school or a borstal institution, and provided the following policy directions on paragraphs 20.9 to 20.12:

- ' 20.9 Courts must be guided by the *Children Act* at all times when dealing with children.
- 10. The paramount objectives when dealing with children in conflict with the law should be reformation, social integration, rehabilitation and restorative justice. The order imposed should thus be the one best suited to realize this objective.
- 11. Custodial orders should only be imposed as a matter of last resort when dealing with children. Committal of juveniles to rehabilitation schools or borstal institutions should be reserved for cases in which non-custodial measures have failed. Section 191 of the *Children Act* offers a wide range of rehabilitative orders that the court should consider.
- 12. Paragraph 7.15 (iii) of these guidelines in favor of non-custodial orders for children should be applied in all cases.
- 13. The overarching consideration is the child's best interest and thus the individual circumstances of the child should be considered.'

29. It is not contested that the 3rd and 4th Appellants were minors at the time of the trial, and that they were 16 and 17 years old as per the age assessment report and as indicated by the prosecutor during the trial on January 10, 2017. The record shows that the 3rd and 4th Appellants were kept in police custody from the time of arraignment on December 20, 2016 until December 28, 2017 when the trial Court made an order on December 28, 2017 that the minors be remanded at Malindi Children's Remand Home, and soon thereafter, all the Appellants were released on bond on January 18, 2018. As regards



the sentence meted on the 3rd and 4th Appellants, we find that since the 3rd Appellant was not positively identified during the attack, and the evidence adduced was that the 4th Appellant, although present at the scene, was not one of the persons seen assaulting the deceased, the finding by the trial Court that there were compelling and substantial circumstances to depart from the provisions of section 191 of the *Children Act* on account of the severity of the offence was in error. We therefore do find that the 3rd and 4th Appellant's trial and sentence was in violation of their rights as guaranteed by Article 53 of the *Constitution* and section 191 of the Children's Act. The 3rd and 4th Appellants have in this respect been incarcerated for a period of about two years and are no longer minors. In the circumstances, we find that an order for retrial will neither be fair nor just.

30. On the issue of the legality and severity of the sentence imposed by the trial Court, Ms Aoko urged the sentence was not proportional because the responsibility of each and every Appellant for the offence of murder was not spelt out by the prosecution, especially given that the 1st Appellant was not adversely mentioned and there was no evidence that he committed acts that resulted in the death of the deceased. The counsel also took issue with the failure by the trial Court to conduct a sentence hearing as per the Sentencing Policy Guidelines; and the lack of a pre-sentencing report. Ms Mwaura on her part was of the opinion that the trial Court applied itself to the principles in *Francis Mutuatetu vs R (2017) eKLR* and meted the appropriate sentence of 20 years on the Appellants.
31. We have found that the 1st Appellant and 3rd Appellants were not positively identified as having participated in the deceased's death, and therefore their appeal against both conviction and sentence must succeed. We have also found that the 3rd and 4th Appellants sentences was contrary to the provisions of Article 53 and section 191 of the Children's Act. This leaves us with the sentence imposed on the 2nd Appellant, and while we note in this respect that the trial Court did take into account the decision in *Francis Muruatetu vs Republic (supra)* in imposing a sentence of 20 years imprisonment on the 2nd Appellant instead of the mandatory death sentence provided under section 204 of the Penal Code, we are concerned that the Appellants were not given an opportunity to mitigate. The record shows that the defence closed its case on April 20, 2021, judgment was reserved and delivered on October 19, 2021 and which we have already noted included the findings on both conviction and sentence, and thereafter sureties were discharged on November 1, 2021. There is no record as regards what happened on the date of delivery of the judgment, and whether or not the Appellants or prosecution were present on the date of delivery of the judgment, or given an opportunity to give views on the sentence.
32. Section 323 of the *Criminal Procedure Code* in this regard provides that upon conviction of an accused person, he or she should be given an opportunity to address the Court as to why sentence should not be passed upon him according to law. However, that the omission to do so shall not affect the validity of the proceedings. The Judiciary's Sentencing Guidelines also provide as follows in paragraph 23:
 1. The court should schedule a hearing in which it receives submissions that would impact on the sentence. Whilst the pertinent information is typically contained in the reports, the hearing provides the court with an opportunity to examine the information and seek clarity on all issues.
 2. The sentencing hearing also provides the offender with an opportunity to cross-examine on any adverse information that would be prejudicial to him/her. This is in keeping with the spirit of the *Constitution* which guarantees the offender the right to adduce and challenge evidence.'



33. The purpose of the sentence hearing is to give an opportunity to the accused person, prosecution and victims to be heard after a conviction, particularly on any mitigating circumstances that warrant a lenient sentence, aggravating circumstances that warrant a stiffer penalty than would be ordinarily imposed, or on the impact of the offence on the victims. The sentencing hearing is therefore crucial in guiding the Court on appropriate and proportionate sentence. It is not therefore evident in this respect what factors guided the trial Court in imposing the sentence of 20 years imprisonment. In our view, even in cases where there is mitigation, it is expected of the trial Court to state what aspects of the mitigation were considered and how their consideration impacted on the sentence, one way or the other. It is the consideration of the mitigating circumstances that may inform the appellate Court whether or not the discretion was judicially exercised. In other words, it is not enough to simply state that mitigation has been considered.
34. In the circumstances we partially allow the 2nd Appellant's appeal on this ground, and remit the issue of the sentence back to the trial Court pursuant to Rule 33 of the *Court of Appeal Rules*. The said Rule grants this Court the following general powers after hearing an appeal:
- a. 'To confirm, reverse or vary the decision of the superior court;
 - b. To remit the proceedings to the superior court with such directions as may be appropriate; or
 - c. To order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs.'
35. We accordingly allow the appeals by the 1st and 3rd Appellants and partially allow the appeals by the 2nd and 4th Appellants. Our final orders are as follows:
1. 'We hereby quash the conviction for the offence of murder of the 1st Appellant namely Karisa Maitha Thoya alias Ndiso, and that of the 3rd Appellant, namely BKM, and set aside the sentence of twenty (20) years imprisonment imposed on the 1st and 3rd Appellants for the said conviction. The 1st and 3rd Appellants shall be set free forthwith unless otherwise lawfully held.
 2. We hereby uphold the conviction for the offence of murder of the 4th Appellant, namely CKKM, but set aside the sentence of twenty (20) years imprisonment imposed on the 4th Appellant for the said conviction, and substitute therefore a sentence of time served. The 4th Appellant shall accordingly be set free forthwith unless otherwise lawfully held.
 3. We hereby uphold the conviction of the 2nd Appellant, Said Karisa Maitha alias Moto, for the offence of murder, and set aside the sentence of twenty (20) years imprisonment imposed on the 2nd Appellant. We hereby remit the matter of the sentence to be imposed for the conviction the High Court at Malindi for rehearing before a judge other than Nyakundi J, to hold a sentence hearing of the 2nd Appellant and impose an appropriate sentence on of the 2nd Appellant, Said Karisa Maitha alias Moto, for the offence of murder, and set aside the sentence of twenty (20) years imprisonment imposed on the 2nd Appellant. The Deputy Registrar of this Court shall send a copy of this judgment to the Deputy Registrar of the High Court at Malindi, who shall place the judgment and file for Malindi HC Criminal Case No 20 of 2016 before the Presiding



Judge of the High Court at Mombasa for appropriate action and directions in compliance with the orders we have given in this judgment.

36. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 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

