



**Katana & another v Republic (Criminal Appeal 8 of 2019)
[2022] KECA 1160 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1160 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 8 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
OCTOBER 21, 2022**

BETWEEN

HASSAN KAHINDI KATANA ALIAS KINUNGI 1ST APPELLANT

GABRIEL MWAMBOGO TUVA ALIAS JIBRIL 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Chitembwe J.) delivered on 31st August 2016 in High Court Criminal Appeal Nos 33 & 34 of 2015 arising from the original trial in Malindi Chief Magistrate Court Criminal Case 142 of 2014)

Need for legal reforms on constitutional validity of the mandatory death penalty in capital offences other than the offence of murder

The appellants in the instant case had been jointly convicted for the offence of robbery with violence. The court held that the Supreme Court clarified that its decision in 2017 in Francis Karioko Muruatetu & Another v Republic [2017] eKLR applied only in respect to sentences under sections 203 as read with section 204 of the Penal Code and that it did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute. The court further held that there was need for urgent intervention by way of the necessary legal reforms, or determination by the Supreme Court regarding constitutional validity of the mandatory death penalty in such cases as the instant one.

Reported by Kakai Toili

Constitutional Law - constitutional validity of mandatory death sentences - constitutional validity of mandatory death sentences in capital offences other than the offences of murder - where the Supreme Court had already made a determination on the constitutionality of the death sentence in murder cases - whether the decision of the Supreme Court on the constitutional validity of the mandatory death sentence in the offence of murder was applicable to other capital offences.



Criminal Procedure - identification parades - conduct of identification parades - whether an identification parade was necessary where the witness was positively confident at the time of commission of the crime as to the identity of the perpetrator of the offence - what were the circumstances to be considered in determining whether the identification of an accused person by a witness met the positive threshold.

Criminal Law - defences - defence of alibi - where an accused in robbery with violence case pleaded the defence of alibi - what was the nature of the defence of alibi in criminal matters and who bore the burden of proving the falsity of an accused's defence.

Constitutional Law - fundamental rights and freedoms - right to fair hearing - right to legal representation in criminal proceedings - what were the operative circumstance that triggered the necessity of legal representation in criminal proceedings - Constitution of Kenya, 2010, articles 50(2)(g) and (h).

Jurisdiction - jurisdiction of the Court of Appeal - jurisdiction to vitiate a High Court's decision on the basis of an issue that was not raised at the High Court - whether the Court of Appeal could vitiate a High Court's decision on the basis of an issue that was not raised at the High Court.

Brief facts

The appellants were jointly convicted for the offence of robbery with violence contrary to section 295 as read with section 296(2) of the and sentenced to death by the Chief Magistrates Court (trial court). The appellants were dissatisfied with the decision of the trial court and appealed to the High Court on among other grounds; that their defences were not considered and that the death sentence was not safe. The High Court upheld the trial court's decision and held that the death sentence was the only sentence for the offence of robbery with violence.

The appellants are dissatisfied with the High Court's decision and thus filed the instant appeal. The appellants filed the appeal on various grounds including that they were denied the right to a fair trial as the trial proceeded without the appellants being provided and or afforded the assistance of an advocate and by imposing the mandatory death sentence which they argued was an unconstitutional sentence. The appellants therefore, sought for, among other orders, the quashing of the conviction and sentence.

Issues

- i. Whether the decision of the Supreme Court on the constitutional validity of the mandatory death sentence in the offence of murder was applicable to other capital offences.
- ii. What were the circumstances to be considered in determining whether the identification of an accused person by a witness met the positive threshold?
- iii. Whether an identification parade was necessary where the witness was positively confident at the time of commission of the crime as to the identity of the perpetrator of the offence.
- iv. What was the nature of the defence of *alibi* in criminal matters and who bore the burden of proving the falsity of an accused's defence of murder?
- v. What were the operative circumstance that triggered the necessity of legal representation in criminal proceedings?
- vi. Whether the Court of Appeal could vitiate a High Court's decision on the basis of an issue that was not raised at the High Court.

Held

1. The instant matter was a second appeal. By dint of the provisions of section 361 of the, the court was enjoined to consider only matters of law. The court could not interfere with the decision of the superior court on facts unless it was demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.

2. The evidence relating to identification had to be scrutinized carefully, and should only be accepted and acted upon if the court was satisfied that the identification was positive and free from the possibility of error. The



surrounding circumstances had to be considered. The relevant circumstances to be considered in determining whether the identification by a witness met the positive threshold were as follows:

1. The length of time the witness had the accused under observation and in what distance and light.
2. Whether the observation by the witness was impeded in any way.
3. Whether the witness had ever seen the accused before, and if so, how often.
4. The length of time that elapsed between the original observation and the subsequent identification to the police.
5. Whether there was any material discrepancy between the description given by the witness and the actual appearance of the accused.

3. The High Court considered the circumstances of the appellants' identification. The source of information as regarded the presence of the appellants at the hospital was immaterial and of no legal consequence, since the appellants had already been positively identified by PW1 and PW2 during the commission of the offence. An identification parade was not necessary where the witness was positively confident at the time of commission of the crime as to the identity of the perpetrator of the offence, and would only become necessary where the victim of the crime did not know the accused before his acquaintance with him during the commission of the offence or identification was made under difficult circumstances such that the witness could have made a mistake.

4. An *alibi* defence arose when a person charged with an offence said that he was not at the scene of crime at the time the alleged offence was committed and was somewhere else and therefore was not the person who committed the offence. The burden of proving the falsity, if at all, of an accused's defence of *alibi* lay on the prosecution.

5. PW1 and PW2 positively placed the appellants at the scene of the crime, and testified that the date was March 13, 2014, the time was at 10 am and the scene was Ganda on the way to Malindi. That evidence, was not controverted by the appellants' evidence. The appellants' defence evidence did not raise any doubts on the prosecution's case. The High Court did not err in its evaluation of the evidence or make any wrong findings of fact and law in upholding the appellants' conviction.

6. The operative circumstance that triggered the necessity of legal representation in criminal proceedings arising from the examination of articles 50(2)(g) and (h) of the Constitution and decisions of the court was where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person or and the incapacity and inability of the accused person to participate in the trial. It should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since the demanded it.

7. The issue of a violation of the right to a fair trial was not raised by the appellants in their appeal before the High Court, and therefore could not be the basis for vitiating the High Court's decision. Be that as it may, the record of the trial court showed that the appellants indicated they were ready to proceed with the trial, actively participated in the trial and cross-examined all the witnesses, and it was not evident that they suffered any or any substantial injustice. There was no merit in the appellants arguments that their rights to a fair trial on under articles 50(2)(g) and (h) of the were violated.

8. On July 6, 2021 the Supreme Court in (2021) eKLR (Muruatetu II) directed in respect of other capital offences such as treason under section 40(3), robbery with violence under section 296(2) and attempted robbery with violence under section 297(2) of the , that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in that case could be reached. *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (*Muruatetu I*) as it stood could not directly be applicable to those cases.

9. The Supreme Court clarified that its decision in 2017 in the *Muruatetu I* case applied only in respect to sentences under sections 203 as read with section 204 of the and did not invalidate mandatory sentences or minimum sentences in the , the or any other statute.



10. The appellants did not raise the issue of the constitutionality of the death sentence imposed upon them in their appeal to the High Court, and the instant court was therefore precluded from addressing that issue on appeal. By the time the trial court and High Court were delivering their decisions on June 11, 2015 and August 31, 2016 respectively, the Supreme Court had not delivered the decision in *Muruatetu I* on the constitutionality of the mandatory death sentence, which decision was delivered on December 14, 2017, whereupon the appellants filed their memorandum of appeal in October 2018.

11. Under the doctrine of *stare decisis*, which was applied by article 163(7) of the , the court was bound by the decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* (2021) e KLR (*Muruatetu II*). The outcome of the instant case, predicated upon *Muruatetu II*, was unfair and disproportionate, in light of the rationale by the Supreme Court for declaring the mandatory death sentence unconstitutional in *Muruatetu I*. There was need for urgent intervention in that regard by way of the necessary legal reforms, or determination by the Supreme Court regarding constitutional validity of the mandatory death penalty in such cases as the instant one.

Appeal dismissed.

Citations

Cases

1. Arunda, William Oongo (Hitherto referred to as Patrick Oduor Ochieng) v Republic (Criminal Appeal 49 of 2020; [2022] KECA 23 (KLR)) — Applied
2. Francis Karioko Muruatetu & another v Republic (Petition 15 & 16 of 2015; [2017] KESC 2 (KLR)) — Explained
3. Karani v R ([2010] 1KLR 73) — Explained
4. Kinyanjui & 2 others v Republic (Criminal Appeals 976 & 977 of 1986 (Consolidated); [1989] eKLR) — Mentioned
5. Kittiny, William Okungu v Republic (Criminal Appeal 56 of 2013; [2018] KECA 851 (KLR)) — Mentioned
6. Mulinge, Victor Mwendwa v Republic (Criminal Appeal 357 of 2012; [2014] KECA 710 (KLR)) — Applied
7. Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015; [2021] KESC 31 (KLR)) — Explained
8. Musau, Samuel Kilonzo v Republic (Criminal Appeal 153 of 2013; [2014] KECA 372 (KLR)) — Mentioned
9. Mwarisha, Andrea Nahashon v Republic (Criminal Appeal 50 of 2013; [2016] KECA 600 (KLR)) — Mentioned
10. Njiru, Francis Kariuki & 7 others v Republic (Criminal Appeal 6 of 2001; [2001] eKLR) — Explained
11. Njoroge, David Macharia v Republic (Criminal Appeal 497 of 2007; [2011] eKLR) — Applied
12. Republic v Karisa Chengo (Petition 5 of 2015; [2017] eKLR) — Applied
13. Sutse v Republic (Criminal Appeal 158 of 2016; [2022] KECA 678 (KLR)) — Followed
14. Wamunga v Republic (Criminal Appeal 20 of 1989; [1989] KLR 424) — Explained
15. Wangui, Jackson Maina v Republic (Criminal Case 35 of 2012; [2012] KEHC 3013 (KLR)) — Followed
16. R v Turnbull & others ((1976) 3 ALL ER 549) — Mentioned

Statutes

1. Appellate Jurisdiction Act (cap 9) — Section 3(1); — Interpreted
2. Constitution of Kenya, 2010 — Article 2(4)(5); 25(a)(c); 26(1); 27(1); 28, 29, 50(1)(2)(d)(h)(q); 159(1)(2)(a); 160(1); — Interpreted
3. Criminal Procedure Code Act (cap 75) — Section 179(2); 361, — Interpreted
4. Legal Aid Act, 2016 (Act No 6 of 2016) — In general — Cited



5. Penal Code Act (cap 63) — Section 203, 204, 295, 296(2); 297(2); — Interpreted
6. Sexual Offences Act, 2006 (Act No 3 of 2006) — In general — Cited

International Instruments

1. International Covenant on Civil and Political Rights (ICCPR), 1966 — Article 4(3)(d); 14(3)(d);

Advocates

None mentioned

JUDGMENT

1. The 1st and 2nd appellants herein, Hassan Kahindi Katana alias Kinungu and Gabriel Mwambogo Tuva alias Jibril, have filed a second appeal in this court against the judgment of the High Court of Kenya at Malindi delivered on August 31, 2016. They were jointly convicted for the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code* and sentenced to death by the Chief Magistrates Court at Malindi (the trial court) on June 11, 2015. The conviction and death sentence in respect of the offence of robbery with violence was upheld by the High Court of Kenya at Malindi (Chitembwe J) after they filed a first appeal therein.
2. The facts giving rise to the appeal as narrated by four prosecution's witnesses in the trial court, is that the offence was alleged to have been committed on March 13, 2014, and PW1 who was the complainant, was the owner of a motor cycle registration K**** 6* which he was riding at Ganda area on that date at 10 am while in the company of his brother (PW2), when he was attacked by the appellants whom he identified as his former classmates. He testified that a struggle ensued and he wrestled the 1st appellant whereas his brother (PW2) struggled with other 2 persons. However, that his brother was overpowered leading to the motorcycle being ridden away by the attackers. PW3 recalled having witnessed the scuffle between the appellants and PW1 and he saw the appellants fighting PW1.
3. PW1 reported the matter to the police, where he was directed to Malindi hospital and examination by PW4, a clinical officer, who filled a P3 form which he produced as an exhibit, and which revealed that PW1 had injuries on the neck, forehead and both knees. PW2 received information received that there were persons who were arrested for theft of a motorcycle and had been taken to hospital for treatment, who went to the hospital and was able to identify the 1st appellant as one of the persons who attacked him at Ganda. PW2 informed PW1, who also went to the hospital with the police and identified the 1st and 2nd appellants.
4. The trial court was satisfied that the appellants had a case to answer, and the appellants gave unsworn testimony and denied the charges. The 1st appellant stated that he was a victim of mob justice on March 13, 2014 on the allegation that he was a motorcycle thief whereas the 2nd appellant testified court that he was arrested on March 24, 2014 and charged with an offence he knew nothing about.
5. The trial court in its judgement delivered on June 11, 2015 was satisfied that PW1's evidence proved that he sustained injuries and the same were corroborated by the evidence of PW4. The court found that the attackers were 2 in number and the appellants were identified by evidence of recognition as the offence was committed during the day and the appellants were well known to PW1. The court was satisfied that the prosecution witnesses were reliable and honest as opposed to the appellants who were found to be liars. The appellants' defence was rejected as not being truthful whereupon the appellants were convicted of the offence they were charged with and sentenced to death as provided for by the law.
6. The appellants were dissatisfied with the decision of the trial court, and appealed to the High Court on the grounds as amended that they were convicted yet the charge sheet was defective; that their defences



were not considered; that the death sentence was not safe and section 179(2) of the [Criminal Procedure Code](#) was not complied with. The High Court, in its judgement rendered on August 31, 2016, noted that there was no need for the charge sheet to indicate any offensive weapons as there were none, and that the evidence proved that PW1 was robbed of his motorcycle and there was a logbook for the motorcycle marked as exhibit 2. In addition, that the persons who robbed PW1 were persons he knew and that the evidence of the 1st appellant that imputed *alibi* did not raise any doubt on the prosecution case.

7. The High Court also found that the absence of the evidence of the investigating officer did not weaken the prosecution case, and that the death sentence was the only sentence for the offence of robbery with violence. The court therefore concluded that the prosecution proved its case, the conviction of the appellants was proper; and that their appeal lacked merit.
8. The appellants are dissatisfied with the High Court's decision and have raised identical grounds of appeal in their amended supplementary grounds of appeal dated February 10, 2022. The grounds are that the High Court judge erred in law by failing to properly re-evaluate the evidence and draw his own conclusion; by denying the appellants the right to a fair trial as ordained by articles 25(a) as read together with article 50(2)(d), (h) and (q) of the [Constitution](#) by proceeding with the trial without ensuring that the appellants were provided and or afforded the assistance of an advocate; and by imposing the mandatory death sentence which is an unconstitutional sentence as it violates the provision of article 2(4), (5), 25(c) 26(1), 27(1), 28, 29, 50(1), 159(1) and 159(2)(a), 160(1) of the [Constitution](#). Therefore, that the conviction and sentence should be quashed, or in the event the conviction is upheld, that an appropriate sentence be imposed by this court or the matter be remitted to the trial court for the imposition of an appropriate sentence.
9. When this appeal came up for virtual hearing on June 27, 2022, the appellants were present, and were represented by learned counsel Mr Gambo, who was holding brief for learned counsel Mr Ole Kina, while the respondent was represented by learned prosecution counsel Ms Karanja , who was holding brief for learned prosecution counsel Mr Mulama . The appellants' counsel relied on written submissions dated February 10, 2022 filed by Mr Ole Kina, while the respondent's counsel informed the court that she would rely on written submissions dated April 28, 2021 filed by Mr Mulama.
10. As this is a second appeal, the role of this court was succinctly set out in [Karani v R](#) [2010] 1 KLR 73 as follows:-

“ This is a second appeal. By dint of the provisions of section 361 of the [Criminal Procedure Code](#), we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

11. The legal issues raised by the appellants in their grounds of appeal are firstly, whether the High Court erred in its evaluation of the evidence adduced in the trial court, secondly whether the appellants' rights to a fair trial were violated by the lack of legal representation, and thirdly and lastly, whether the imposition of a mandatory death sentence upon the conviction for robbery with violence was legal and constitutional.
12. On the first issue, the appellant's counsel submitted that the central facts in the identification of the appellants were that the appellants and the complainant and PW2 lived in the same village and



attended the same school 20 years before the incident, and PW3 saw the appellants for the first time on the material day, which was not evidence of recognition. It was therefore probable that there was an error in the identification which could have been overcome by conducting an identification parade. Reliance was placed on the holding in this regard in the case of *R v Turnbull & others* [1976] 3 All ER 549. Further, that the contradiction between the testimony of PW1 and PW2 on the manner of identification was resolved by the first appellate judge in favour of the prosecution instead of being resolved in favour of the appellants. In addition, that the first appellate court erred in law by rejecting the appellants' *alibi* defence case, particularly since the 1st appellant testified that he was in Malindi even though the alleged offence happened in Ganda village.

13. In opposition to the prosecution counsel submitted that the case was properly proved and the trial court and High Court made concurrent findings of fact that the appellants were identified; they used force to rob PW1 therefore the elements of robbery were proven. On the issue of a land dispute alleged to have triggered the case, it was submitted that the same was not mentioned anywhere in the evidence before the trial court. It was noted that both the trial court and High Court were not satisfied with the appellants' defences.
14. We will commence our analysis by briefly restating the law on the positive identification of a perpetrator of an offence. This court (Omolo, Bosire & O'kubasu JJ A) stated as follows in *Francis Kariuki Njiru & 7 others v Republic* [2001] eKLR:

“The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see *R v Turnbull* [1976] 63 Cr App R 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. “
15. The relevant circumstances to be considered in determining whether the identification by a witness meets the positive threshold were identified in *R v Turnbull* (supra) and in *Wamunga v Republic*, [1989] KLR 424 as follows:
 - a. The length of time the witness had the accused under observation and in what distance and light.
 - b. Whether the observation by the witness was impeded in any way.
 - c. Whether the witness had ever seen the accused before, and if so, how often.
 - d. The length of time that elapsed between the original observation and the subsequent identification to the police.
 - e. Whether there is any material discrepancy between the description given by the witness and the actual appearance of the accused.
16. In the present appeal, the High Court did consider the circumstances of the appellants' identification, including that the offence took place in broad daylight on March 13, 2014 and that the appellants were previously known to the PW1 and PW2, who recognized them during the commission of the offence, and identified them again on the same day at the hospital. The High Court also noted that the 1st appellant was charged on March 17, 2014, while the 2nd appellant was charged on May 21, 2014, and that the length of time taken to arrest the 2nd appellant was explained by the evidence on record, namely



- that he was hospitalized. We are of the view that the source of information as regards the presence of the appellants at the hospital was immaterial and of no legal consequence, since the appellants had already been positively identified by PW1 and PW2 during the commission of the offence.
17. It is also notable that an identification parade is not necessary where the witness is positively confident at the time of commission of the crime as to the identity of the perpetrator of the offence, and will only become necessary where the victim of the crime did not know the accused before his acquaintance with him during the commission of the offence, or identification was made under difficult circumstances such that the witness may have made a mistake. See the decisions of this court in [Kinyanjui & 2 others v Republic](#) [1989] KLR 60, [Samuel Kilonzo Musau v Republic](#) [2014] eKLR: and [Andrea Nabashon Mwarisha v Republic](#) [2018] eKLR.
 18. An *alibi* defence as that claimed by the appellants, on the other hand arises when a person charged with an offence says that he was not at the scene of crime at the time the alleged offence was committed and was somewhere else and therefore was not the person who committed the offence This court in [Victor Mwendwa Mulinge v Republic](#), this court (Kihara Kariuki (PCA), Musinga & Gatembu, JJ A), while referring to the decision in [Karanja v Republic](#) [1983] KLR 501 that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution, held that "in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought."
 19. In the present appeal, PW1 and PW2 positively placed the appellants at the scene of the crime, and testified that the date was March 13, 2014, the time was at 10 am and the scene was Ganda on the way to Malindi. This evidence, was not controverted by the appellants' evidence. The 1st appellant stated that he was in the vicinity in Malindi on March 13, 2014, when he was set upon by a mob on account of having been suspected for stealing a motorcycle, but did not specify the time of this occurrence. The 2nd appellant did not testify as to his whereabouts on March 13, 2014, and only indicated that he was arrested on March 24, 2014. The High Court considered the appellants' defence evidence, and properly found that it did not raise any doubts on the prosecution's case. We therefore find that the High Court did not err in its evaluation of the evidence or make any wrong findings of fact and law in upholding the appellants' conviction.
 20. On the second issue of whether the appellants' rights to a fair trial were violated by the lack of legal representation, the appellants' counsel placed reliance on the decision by the Supreme Court of Kenya in [Republic v Karisa Chengo & 2 others](#) [2017] eKLR that legal representation to deserving accused persons is an adjunct to the right of a fair trial, and by the Court of Appeal in [David Macharia Njoroge vs Republic](#) [2011] eKLR that substantial injustice results to persons accused of capital offences if they have no counsel during their trials. It was his further argument that the [International Convention on Civil and Political Rights](#) (ICCPR) provides in article 4(3)(d) that legal assistance should be assigned to a party in any case where the interest of justice require, and without payment on the case of a party who lacks the means to pay for it, and that by dint of article 2(5) and article 2(6) of the [Constitution of Kenya, 2010](#) as read together with article 14(3)(d), ICCPR applied to Kenya even without the application of the [Legal Aid Act](#) that came into operation on May 10, 2016. .
 21. This court (Kairu, Mbogholi-Msagha and Nyamweya JJA) had occasion to examine similar arguments in its decision in [William Oongo Arunda \(Hitberto referred to as Patrick Oduor Ochieng\) v Republic](#) (Criminal Appeal 49 of 2020) [2022] KECA 23 (KLR) considered the provisions of article 50(2)(g) of the [Constitution](#) which provides that every accused person has the right to fair trial, which includes the right to choose, and be represented by an advocate, and to be informed of this right promptly; as well



- as the provisions of article 50(2)(h) on the right to a fair trial, which also includes the right to have an advocate assigned to the accused person by the state and at state expense if substantial injustice would otherwise result, and to be informed of this right promptly. The court also examined the decisions in *Republic v Karisa Chengo and 2 others* [supra] and *David Njoroge Macharia v Republic* [supra], which also applied the provisions of the *ICCPR* cited by the appellants' counsel.
22. The holding of the court was that the operative circumstance that triggers the necessity of legal representation in criminal proceedings arising from the examination of the cited articles and decisions, is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or and the incapacity and inability of the accused person to participate in the trial. The court also noted that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since the *Constitution* demands it. Similar sentiments were expressed by this court (PO Kiage, M Ngugi & F Tuiyott, JJA) in *Sutse v Republic* (Criminal Appeal 158 of 2016) [2022] KECA 678 (KLR)
23. In the present appeal, it is notable that the issue of a violation of the right to a fair trial was not raised by the appellants in their appeal before the High Court, and therefore cannot be the basis for vitiating the High Court's decision. Be that as it may, the record of the trial court shows that the appellants indicated they were ready to proceed with the trial, actively participated in the trial and cross-examined all the witnesses, and it is not evident that they suffered any or any substantial injustice. For these reasons, we do not find any merit in the appellants arguments that their rights to a fair trial on under articles 50(2) (g) and 50(2)(h) of the *Constitution* were violated.
24. As regard the last issue on the legality of mandatory sentence of death imposed on the appellants, the appellant's counsel referred to the decisions of this court in *William Okungu Kittiny v Republic* [2018] eKLR and *Jackson Maina Wangui & another v Republic* [2014] eKLR that upheld the constitutionality of the death sentence, to submit that the right to life provided under article 26 of the *Constitution* and the limitation in article 26 (3) that the right to life can only be deprived to the extent authorized by the *Constitution* or other written law, needed to be read together with article 24(2)(b) and (c) of the *Constitution* that a limitation of a right should not derogate from its core or essential element.
25. Therefore, that to the extent that section 296(2) of the *Penal Code* imposes a mandatory sentence it runs afoul of article 25(c) and read together with article 50(2), article 159(1), (2)(a), article 160(1) of the *Constitution of Kenya, 2010* and by dint of article 2(4) of the *Constitution of Kenya, 2010*, should be struck out. In addition, that the analysis by the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (hereinafter "Muruatetu I") where the court was dealing with the mandatory death sentence in section 204 of the *Penal Code* applied in equal measure to the convicts under section 296(2) of the *Penal Code*, and to hold a contrary view would violate article 27 of the *Constitution* on equality before the law, equal protection and equal benefits of the law.
26. The Supreme Court in *Muruatetu I* did declared the mandatory aspect of the death sentence unconstitutional as follows:
- (66) It is not in dispute that article 26(3) of the *Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of the *Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account



due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.”

27. The Supreme Court consequently found section 204 of the [Penal Code](#) is inconsistent with the [Constitution](#) and invalid to the extent that it provides for the mandatory death sentence for murder. However, the court emphasised that its decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment. The appellants urge that the reasons why the Supreme Court found the mandatory nature of sentence of death unconstitutional, namely that it deprived an accused person of the benefit of mitigating circumstances, and the courts of the discretion to impose appropriate sentence on a case-to-case basis, equally applies to them, and that it is discriminatory not to apply this reasoning to mandatory death sentences imposed for the offence of robbery with violence.
28. The question that arises in this respect is whether the fact that the Appellants were charged with a different offence, namely robbery with violence, is a legitimate ground to treat them differently in terms of the mandatory sentence of death, and in light of the holding in [Francis Karioko Muruatetu & another v Republic](#) [2017] eKLR [Muruatetu I](#). We are however constrained from answering this question, although quite valid in our view, for two reasons.
29. Firstly, on July 6, 2021 the Supreme Court in [Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others \(Amicus Curiae\)](#) (2021) e KLR (hereinafter “[Muruatetu II](#)”) directed as follows:

“To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40(3), robbery with violence under section 296(2), and attempted robbery with violence under section 297(2) of the [Penal Code](#), that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.”
30. The Supreme Court in addition clarified that its decision in 2017 in the [Muruatetu I](#) case applied only in respect to sentences under sections 203 as read with section 204 of the [Penal Code](#), and did not invalidate mandatory sentences or minimum sentences in the [Penal Code](#), the [Sexual Offences Act](#) or any other statute.
31. Secondly, the appellants did not raise the issue of the constitutionality of the death sentence imposed upon them in their appeal to the High Court, and we are therefore precluded from addressing that issue on appeal. The High Court in this regard noted that the death sentence was the only sentence provided by law and as a result did not consider the report that the appellants were first offenders, and the 2nd appellant’s plea for leniency. It is notable that by the time the trial court and High Court was delivering their decisions on June 11, 2015 and August 31, 2016 respectively, the Supreme Court had not delivered the decision in [Muruatetu I](#) on the constitutionality of the mandatory death sentence, which decision was delivered on December 14, 2017, whereupon the appellants filed their memorandum of appeal in October 2018.
32. Under the doctrine of *stare decisis*, which is applied by article 163(7) of the [Constitution](#), we are bound by the decision of the Supreme Court in Muruatetu II. We are also mindful of the limits of the exercise of our appellate jurisdiction under article 164(3) of the [Constitution](#) and section 3(1) of the [Appellate Jurisdiction Act](#). It is thus our view that the remedy for the appellants with regards to the issue they



raise and arguments they have put forward on the legality and constitutionality of the mandatory death sentence imposed on them, does not lie with this court, for the reasons we have given.

33. Based on the foregoing, we have no option but to dismiss this appeal in the circumstances. We find it necessary to add that we find this outcome, predicated as it is upon *Muruatetu II*, to be unfair and disproportionate, in light of the rationale by the Supreme Court of Kenya for declaring the mandatory death sentence unconstitutional in *Muruatetu I*. There is need for urgent intervention in this regard by way of the necessary legal reforms, or determination by the Supreme Court of Kenya regarding constitutional validity of the mandatory death penalty in such cases as this.

34. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF OCTOBER 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

