IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MURGOR & ODEK, JJA)

CRIMINAL APPEAL No. 94 of 2006

BETWEEN

MUSYOKA MAINGI NGULI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Machakos (Mwera, J.) dated 15th April 2012

in

H.C.CR.C. NO. 31 OF 1999)

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JUDGMENT OF THE COURT

1. The appellant, ***Musyoka Maingi Nguli***, was charged with murder contrary to ***Section 203*** as read with ***Section 204*** of the Penal Code. The Information is that on 8th December 1997 at Yanzonga village in Machakos he murdered ***Lucia Mutio Wambua***. After trial, the appellant was found guilty and sentenced to death. Aggrieved, the appellant has lodged the instant appeal against conviction and sentence.

2. The appeal has severally been listed for hearing before this Court. Firstly on 1st March 2017, then on 2nd October 2017, further on 4th October 2017 and finally today on 4th February 2019. In each instance, the scheduled hearing did not take place as the original Charge Sheet/Information before the trial court was and is not on record. By an order dated 1st March 2017, this Court directed the Prosecution to avail a copy of the Information/ Charge Sheet upon which the trial proceeded at the High Court. By letter dated 7th November 2018, the Office of Director of Public Prosecution advised that the Prosecution copy of the Charge Sheet/Information could not be traced. The absence of the Charge Sheet/Information in the record of appeal has been proffered as a ground of appeal in this matter.

3. During hearing, the appellant was represented by learned counsel ***Mr. E. Ondieki***. The Republic was represented by ***Mr. Moses O'Mirera***, Senior Assistant Director of Public Prosecution.

PLEA and READING OF CHARGE

4. The record shows the appellant was arrested on 8th December 1997 and produced before the trial court for the first time on 9th November 1999. There is no explanation for the two-year delay in producing the appellant before the trial court. It is probable that the appellant was subjected to committal proceedings before he was formally charged as the law then required. Nevertheless, the record shows that plea was taken on 9th November 1999. The charge was read and explained to the appellant who answered as follows:

> *"I understand the charge. It is not true that I murdered Lucia Mutio as charged."*

PROSECUTION EVIDENCE

5. The prosecution evidence was circumstantial. There were no eye-witnesses to the crime. ***Agnes Katumbi Wambua Mulei*** (PW1) gave *viva voce* evidence as follows:

"Lucio Mutio, the deceased was my daughter, the 6th born. She was some 6 years at the time of her death. I know the accused Musyoka Maingi. He was my worker doing all jobs in the farm…...On 8th December 1997, I recall at 7.00 pm when I

was in the kitchen alone, the children had gone to hunt some eatable insects. I prepared supper and called out both children to come and eat. Only Mbaraka and Mutua showed up. Both are older than the deceased. I asked them where Mutio the deceased was. They told me that Mutio was bitten by an ant so she went to sit behind the kitchen. Then Musyoka (accused) came in from the shamba with an unbuttoned shirt. Night was falling and it was raining. I asked the accused where Mutio was since they had been together. He told me he did not know. Then he changed and became hostile/violent and rude to me. I decided to send my sons to call Muli Nzuki – a neighbour, to assist me to search for Mutio. He came and other neighbours followed. I had begun to search for Mutio using a hurricane lamp. All this time the accused was outside the compound…...

We started searching for Mutio in the shamba ultimately we got to a point near Kwa Sulu stream where we came by Mutio's body…... The deceased body lay on its face in the bed of the small stream. The head rested on a stone…. Mutio wore spotted dress. Her pants were not on. The piece of cloth was not right there…. When the post mortem report was

performed I was present…. I was able to observe the body of

the deceased, she bled from her private parts and had injuries on the head and on the face. The deceased underpants were later recovered where the accused's jacket was – that is when the police came the following day."

6. ***Mutua Wambua*** (PW5) the brother to the deceased, testified as follows:

"I recall 8th December 1997 at about 6 pm when I was with my brother gathering white ants. My brother is Mbarak Wambua – elder brother. We were also with Mutio my late sister. We were gathering these ants behind the main house. Mutio was stung by an ant. She ran to the kitchen so that Musyoka (accused) could remove the offending ants. I saw it all. Mutio did not come back in the field. We carried on with our activity. I filled my container. I ran to get another one from a platform in the kitchen. I saw Mutio sitting with Musyoka behind the kitchen…. I saw the two seated

together…. At about 7.00 pm we stopped. We were tired. We

proceeded to the kitchen. In there was our mother. Mutio and Musyoka were not where I had seen them seated. Our mother inquired from us where Mutio was so that we could have supper. I told her that she had run to Musyoka to remove the ant that bit her. We did not know where Mutiso was….."

7. ***Titus Vuva*** (PW2), the area Chief of Kaewa Location testified that upon receiving the report of death of the deceased, the following day 9th December 1997 at 8.00 am he went to the scene and found a jacket some 20 feet where the body lay. The jacket was sleeveless. There was also an underpant seemingly of a child. He said that, he learnt that the jacket belonged to the accused and the underpant belonged to the deceased, and that he saw the deceased had bled from her private parts and she had an injury on the head.

8. During the hearing, the prosecution applied to adduce additional evidence being the jacket and underpants recovered from the scene of crime. The appellant objected to production of these items of clothing as additional evidence. The trial judge dismissed the objection and granted leave to introduce additional evidence being the items of clothing recovered at the scene of crime. Evidence revealed the jacket recovered from the scene was worn by the appellant on the date of crime.

9. In his defence, the appellant gave an unsworn statement. He stated:

"It is alleged that on 8th December 1997 I murdered Lucia Mutio Wambua. That is not true. On this day I woke up to go to the shamba. I returned at 1.00 pm and took lunch. I returned to the shamba until 5.00 pm. I went and stored my tools. Agnes Katumbi (PW1, the deceased's mother) sent me to the shop with Ksh. 200/=. I came back at 6.45 pm. People were gathered in the compound. I gave Agnes her shopping. One old man Muswii came where I was. He had a stick. He hit me on the back. I fell down. Other people joined in beating me. I was tied up and taken to the chief's camp at Kathiani. The following day I was taken to Machakos Police Station and later charged. I had nothing to do with the death of Lucia."

10. The trial judge upon evaluating the evidence found the appellant guilty and sentenced him to death as by law provided. The judge expressed:

"So who murdered Lucia? In the view of the court, the accused did. He was last seen with her on the fateful evening. He disappeared with her from the spot the two were seated and he alone came back to the house moments later. He did not say where she was and this court did not believe the accused had gone shopping and that he was not with Lucia.

Not after too long that very evening, a search for the child ended with discovering her dead on a nearby river bed. She had a cracked skull and was raped……And his jacket was found nearby the deceased underpants. He had been wearing it. All these lead to the conclusion that the accused defiled and then killed Lucia. In sum, the charge is proved as laid and the accused is duly found guilty and convicted of it. He will suffer death as by law established."

GROUNDS OF APPEAL

11. Aggrieved by the conviction and sentence, the appellant has lodged the instant appeal. In a supplementary memorandum of appeal dated 9th July 2018, the appellant has listed the following compressed grounds of appeal:

(i) The trial court erred in confirming conviction without a charge sheet.

(ii) The court erred in convicting on identification that was not free from error.

(iii) The court erred in putting weight on the testimony of PW1 who was not credible.

(iv) The court erred in relying on circumstantial evidence that did not meet the required standard.

(v) The trial violated Sections 72 (3) (b) and Section 77 of the repealed Constitution as read with Article 25 (c) and Article 50 (2) of the 2010 Constitution.

(vi) The court erred in failing to appreciate there was no mens rea.

(vii) The medical report was not properly admitted in evidence.

(viii) The court erred by failing to allow the appellant to mitigate.

(ix) The death sentence meted upon the appellant is unlawful, cruel and degrading.

APPELLANT'S SUBMISSION

12. The appellant filed written submissions and list of authorities. It was submitted that the proceedings before the trial court were a nullity because the Charge Sheet/Information was not in the record of appeal; that the integrity of court records must be upheld at all times; the absence of the charge sheet renders the trial a nullity because the Information is the foundation of any criminal trial, prosecution and sentencing.

13. On merits of the appeal, it was urged that the appellant was convicted on mere suspicion and suspicion by itself cannot be the basis of conviction. It was urged the recovery of the deceased's underpants and appellant's jacket at the scene of crime do not implicate the appellant; that villagers suspected the appellant because he had an unbuttoned shirt; that an unbuttoned shirt cannot link one to a crime; that the recovered jacket and an unbuttoned shirt are not proof of *mens rea*; the trial judge erred in convicting the appellant because his face was not innocent; the appellant had a plausible defence which was believable; the judge erred in admitting additional evidence in the middle of the trial; and the appellant's right to fair trial was violated by midstream introduction of additional evidence in the form of the recovered jacket and underpants.

14. On the death sentenced meted to the appellant, it was submitted that the sentence was unlawful as the appellant was not given an opportunity to mitigate. Counsel cited the case of **Francis Karioko Muruatetu & another -v- Republic [2017] eKLR** to support the submission that the death sentence meted on the appellant was unlawful. In concluding his submission, counsel urged us to acquit the appellant due to absence of the charge sheet on record; it was urged that the instant case is not fit for re-trial because 22 years has lapsed and witnesses may not be found and memory may have faded.

RESPONDENT'S SUBMISSION

15. The respondent opposed the appeal. It was urged that the Information/Charge Sheet was before the trial court at the time of taking plea. The Information was read to the appellant and he stated that he understood the charge and pleaded not guilty. At the time of taking plea, and when the charge was read, the appellant was represented by counsel. On particulars of the charge, it was submitted that the trial judge at paragraph one of the judgment reproduced the charge *to wit* ***"the accused person was charged under S. 203 as read with S. 204 Penal Code in that on 8.12.97 at Yanzonga village, Machakos he murdered Lucia Mutio Wambua."***

16. The State in summation submitted that it was manifestly clear the charge was read, plea taken and the appellant understood the particulars of the Information and charge facing him. The plea was taken before a competent court, read in open court and the accused was represented by counsel. The judgment contains the charge and the integrity of the court record is paramount. It was urged that although this Court directed the Prosecution to produce the charge sheet, the Prosecution was neither required nor expected to produce the original charge sheet because the original is ordinarily in the court file in the custody of the Deputy Registrar.

17. On the merits of the instant appeal, the State submitted that the appellant was the last person to be seen with the deceased when she was alive; that there is cogent and credible circumstantial evidence that the appellant was with the deceased; the recovery of the appellant's jacket and deceased's underpants at the scene of crime corroborates the case against the appellant. On the contestation that the trial judge erred in admitting additional evidence, counsel submitted that the trial court delivered its ruling on 26th July 2001 after the appellant objected to admissibility of the additional evidence; the court granted leave to admit the appellant's jacket and the deceased's underpants that were recovered from the scene; and that no interlocutory appeal was filed challenging the trial court's ruling. In the absence of an interlocutory appeal, it is not open to the appellant to challenge the admissibility of the additional evidence namely the items of clothing recovered at the scene of crime.

18. On the death sentence, the State conceded the appellant was not given an opportunity to mitigate. Nonetheless, in the interest of justice, it was urged that there is overwhelming evidence against the appellant and such evidence should convince this Court not to order a mistrial or

retrial. It was urged that this Court should not interfere with the death sentence meted out as there are aggravating circumstances such as defilement of the deceased and loss of life of a six-year-old child. In concluding its submissions, the State urged us to find the conviction of the appellant very safe and a retrial not necessary.

ANALYSIS

19. This is a first appeal from the judgment of the High Court. By dint of ***Section 379*** of the Criminal Procedure Code and in accordance with the decision in **Okeno -v- R [1972] EA 32**, we are expected to subject the entire evidence to a fresh examination. Our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that the trial court had the advantage of seeing and assessing the demeanour of the witnesses.

20. A vital issue for our determination is the appellant's contestation that the proceedings before the trial court were a nullity because the Information/ Charge Sheet is not in the record of repeal. We have considered the contestation. The disputation is neither about a defective Charge Sheet nor is it that the Charge Sheet or Information was not before the trial court at commencement of trial, but that the Charge Sheet/Information is not in the record of appeal before this Court.

21. We have examined the record. The record shows the Charge Sheet/Information was before the trial court and the appellant did take plea and the charge was read to him in open court. In our analysis of the record, the entire criminal proceedings took place when the charge sheet was before the court; the appellant understood the nature of the charge he was facing; the trial court in its judgment reproduced the charge; up to and until the date of judgment, the appellant understood the charge and nature of proceedings that was taking place. The entire trial from plea to conviction was before a competent court and the appellant was represented by counsel.

22. In **Samuel Karani -v- Republic [2009] eKLR**, this Court proceeded to hear and determine an appeal in the absence of the charge sheet on record. This Court extensively expressed itself as follows:

> **"Mr. Orinda Senior Principal State Counsel, on the other hand, submitted that the absence of the charge sheet would not be prejudicial to the appellant, that record shows that the charge was read; that the appellant did not plead guilty and that the date of the arrest is clear from the evidence of witnesses.**
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> **It is true that the charge sheet was missing from the record of appeal filed in the superior court. Mr. Anampiu who appeared for the appellant in the superior court told the court:**
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> **"The original charge sheet has disappeared and we are unable to trace it. I am otherwise ready to proceed."**
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> **Mr. Muteti learned State counsel informed the superior court that he had written to District Criminal Investigating Officer (D.C.I.O) to supply a copy but he was not given a copy because the police file itself was unavailable. He applied for a court order whereupon the court ordered the D.C.I.O. to avail a copy of the charge sheet. However, a copy of the charge sheet could not be obtained and ultimately the State counsel asked the superior court to fix a hearing date for the appeal as the record was sufficient for hearing and determination of the appeal. Mr. Anampiu agreed saying: -**
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> **"I agree we can fix it for hearing."**
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> **The appeal was ultimately heard and nothing was said about the missing charge sheet either in the respective counsel's submissions or in the judgment. When Mr. Ndirangu raised the issue in this Court for the first time we ordered the Senior Resident Magistrate, Nkubu, Meru and D.C.I.O. Meru to take urgent steps to trace the whereabouts of the original charge sheet or a copy thereof but neither of them could trace it.**
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> **The record of the subordinate court shows that there was a charge sheet in which the appellant and another were charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code and plea on those charges was taken and that on the day of the trial the plea was taken again. On both occasions the appellant and the co-accused pleaded not guilty. Further the judgment of the subordinate court contains the substance of the charges. It states thus: -**
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> **"The two accused persons, Samuel Karani and David Muteithia are charge (sic) with two counts of robbery with violence c/s 292(2) of the Penal Code. On 30/5/98 at 3.00 a.m. at Kiria Kenene, jointly with others not before the court the two are alleged to have robbed two brothers Silas Mbaabu and Japhet Gikunda of various items including cash, T.V., radio cassette, cigarettes and during the robbery they used actual violence on the victims."**
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> **In addition, the two complainants gave evidence which established that they were robbed of various goods by a gang of robbers.**
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> **Section 134 of the Criminal Procedure Code (CP Code) requires that the offence alleged to have been committed should be specified on the charge or information. That provision was complied with in this case.**
>
> **The only problem is that the copy of the charge was not included in the appeal file. The Criminal Procedure Code, however, does not specify the documents to be included in the appeal file on an appeal from subordinate court to the High Court. Section 350 (1) the Code merely states that the petition shall be accompanied by a copy of the judgment or order appealed from. There is reference in S. 350 (2) to "documents connected with the appeal" and "record of the proceedings" but no specific provision that the charge should be incorporated in the appeal file. Nevertheless, it is clear from Rule 61(4) as read**

with Rule 61(2) of the Court of Appeal Rules that for purposes of an appeal from the superior court in its appellate jurisdiction to this Court the record of appeal should contain a copy of the charge amongst other documents. We have observed above that the record of appeal does not contain the copy of the

charge. It is submitted that the absence of the charge is prejudicial to the appellant as it denied them a fair trial. Section 77 of the Constitution which guarantees a fair trial to a person charged with a criminal offence requires, among other things, that the accused should be informed of the charge in a language that he understands, that he should be given adequate time and facilities for preparation of his defence; he should be given the services of an interpreter free of charge and that he should be allowed to attend the trial.

Those provisions were evidently observed at the trial by the subordinate court. Furthermore, we are of the view that, there was substantial compliance with rule 61(4) as the judgment of the subordinate court containing the substance of the charges is incorporated in the record of appeal and that the absence of the charge has not caused any prejudice to the appellant. We reject ground four of the grounds of appeal."

23. In this appeal, the appellant's submission on absence of the charge sheet in the record of appeal is in *pari materia* to the contestation in **Samuel Karani -v- Republic** (supra). We note the absence of the Charge Sheet/Information in the record of appeal is an event that has taken place at compilation of the record after conviction and sentence. This is a post-conviction administrative issue that has no bearing on the fairness of the trial and criminal proceedings before the learned judge. The appellant has not demonstrated to our satisfaction how the absence of the charge sheet in the record of appeal prejudiced him either during trial or in this appeal. We are convinced the absence of the Charge Sheet/Information on record did not and has not prejudiced the appellant to lead us to find for a mistrial or nullity in the criminal proceedings. Persuaded by the merit of the decision of this Court in ***Samuel Karani v Republic*** (supra), the contestation that the absence of the charge sheet rendered the trial a nullity is unmeritorious.

24. Another issue urged by the appellant relates to admissibility of additional evidence. The appellant contends that the trial judge erred in its ruling of 26th July 2001 granting leave to the prosecution to adduce additional evidence being the jacket and underpants recovered at the scene of crime. In opposing this ground, the State submitted no interlocutory appeal was lodged against the ruling of the trial court granting leave to adduce the additional evidence.

25. In **Mawathe Julius Musili -v- Irshadali Sumra & others, Petition No. 16 of 2018** at paragraphs 94 and 95 of its judgment, the Supreme Court observed that when no appeal is lodged against a ruling by a trial court, the issue in dispute is settled by judicial decision. In **Anuar Loitiptip -v- IEBC & 2 others, SC Petition Nos. 18 & 20 of 2018,** the Supreme Court held that failure to launch a notice of appeal against a specific interlocutory decision would deem that party having waived the right to challenge the decision. It was further held that in determining the questions arising from rulings on interlocutory applications, an appellate court can only do so if the appellant has filed a Notice of Appeal on the interlocutory ruling. In **Nguruman Limited -v- Shompole Group Ranch & Another [2014] eKLR,** a five judge bench of this Court held that where there is no notice of appeal filed against a ruling, the Court lacks jurisdiction to grant any relief against the said ruling.

26. As correctly pointed out by the respondent, the appellant did not lodge an interlocutory appeal against the ruling of the trial court granting leave to adduce additional evidence. In the absence of an interlocutory appeal and bound by dicta of the Supreme Court, the appellant cannot at this stage challenge the admissibility of additional evidence. We have no jurisdiction to consider the ground of appeal.

27. On the merits of the appeal, the appellant was charged with the offence of murder, this required the prosecution to prove the essential elements of the offence. A crucial element is the fact that a person died and that the death was as a result of an act or omission on the part of the appellant. (See **Reuben Ombura Muma & another -v- Republic [2018] eKLR)**.

28. In this matter, the evidence that led to conviction of the appellant is circumstantial. There was no eye witness to the crime. The leading case on circumstantial evidence is **REP –v- KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135,** where the Court held:

"In order to justify the inference of guilt, the inculputory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

27. In order to test whether the circumstantial evidence adduced by the prosecution meets the legal threshold it must meet the principles set out in the case of **ABANGA alias ONYANGO -v- REP CR. A NO.32 of 1990(UR)** where this Court stated thus:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

29. We agree with the appellant's submission as was stated in **Neema Mwandoro Ndurya -v- Republic [2008] eKLR** that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.

30. What is the circumstantial evidence in this matter? PW5 testified that the appellant was the last person seen with the deceased when she was alive. The trial judge established as a fact that the appellant was the person last seen with the deceased. Being the person who was last seen with the deceased before she died, the appellant is duty bound to give explanation of how the deceased met her death, or alternatively how they parted company.

31. On the doctrine of "last seen with deceased", we quote from the Nigerian case of **Moses Jua -v The State (2007) LPELR-CA/IL/42/2006** where the court, while considering the *„last seen alive with?* doctrine held:

> **"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."**

32. In yet another Nigerian case of **Stephen Haruna -v- The Attorney-General of The Federation (2010) 1 iLAW/CA/A/86/C/2009** , it was opined thus:

> "**The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."**

33. In **Ramreddy Rajeshkhanna Reddy & Anr. -v- State of Andhra Pradesh, JT 2006 (4) SC 16** the Indian court held:

> **"That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration."**

34. In the instant matter, the prosecution adduced evidence which established the deceased was last seen alive in the company of the appellant. PW5 categorically testified that the deceased was with the appellant at around 7.00 pm. The appellant denied this and stated he had gone shopping. It is the word of the appellant against that of PW5. It now behooves this Court to look for corroboration or other evidence implicating the accused. We are satisfied that the recovery of the appellant's jacket and the deceased's underpants at the scene of crime is sufficient corroboration that implicates him. By ***Section 110 (1)*** of the **Evidence Act** the burden of proving any fact especially within the knowledge of an accused person lies on him.

35. In this appeal, it was urged that the appellant has a plausible and believable defence. The defence is that the appellant had gone shopping and therefore had nothing to do with the death of the deceased. The trial judge found the alleged shopping by the appellant was not believable. PW1 in her testimony never mentioned she had sent the appellant to go shopping. Likewise, PW5 testified that at all material times the appellant was with the deceased. How can one explain the presence and recovery of the appellant's jacket at the scene of crime? The jacket places the appellant at the scene of crime and corroborates the testimony of PW5 that the appellant was the last person seen with the deceased when she was alive. We agree with the trial judge that the defence proffered by the appellant is not believable.

36. The appellant further urged that the trial court erred in admitting the medical report and that *mens rea* had not been proved. We have considered these grounds of appeal. Even if the medical report were to be excluded and held inadmissible, the overwhelming circumstantial evidence on record against the appellant satisfies us that the conviction of the appellant was safe.

37. For the foregoing reasons, we are satisfied the trial judge correctly evaluated the evidence on record and properly convicted the appellant for murder.

38. On death sentence meted to the appellant, the record clearly shows the appellant was not given an opportunity to mitigate. The State has conceded as much. In **Joseph Kaberia Kahinga and Others -v- The Attorney-General, Constitutional Petition No. 680 of 2010, [2016] eKLR,** the High Court correctly stated it would amount to the violation of accused persons' right to fair trial as provided under **Article 50 (2) of the Constitution** if the Court does not receive and consider mitigating factors and other statutory and policy pre-sentencing requirements. Comparatively, in **Mithu -v- State of Punjab, Criminal Appeal No. 745 of 1980,** the Indian Supreme Court held that "a law that disallowed mitigation and denied a judicial officer discretion in sentencing was harsh, unfair and just."

39. In **Sango Mohamed Sango & another -v- Republic Criminal Appeal No. 1 of 2013 [2015] eKLR,** this Court observed that although ***Sections 216*** and ***329*** of the **Criminal Procedure Code** were couched in permissive terms, this Court has held over time that it is imperative for the trial court to afford an accused person an opportunity to mitigate and the trial court should record the mitigation factors. This applies even when the accused person has been convicted of an offence where the prescribed sentence is death. (See also similar decisions in **Henry Katap Kipkeu -v- Republic, CR. APP. No. 295 of 2008** and **Dorcas Jebet Ketter & Another -v- Republic, CR. APP. No. 10 of 2012).**

40. Guided and persuaded by the foregoing judicial decisions, we reiterate that even if the sentence to be meted is minimum or mandatory, an accused person must be given an opportunity to mitigate. In the instant matter, given the absence of mitigation on record, we are inclined to interfere as we hereby do, and set aside the death sentence meted upon the appellant.

41. The final orders of this Court are that this appeal has no merit as regards conviction of the appellant. On sentence, we set aside the death sentence meted on the appellant and remit the matter to the High Court for mitigation and sentencing. For avoidance of doubt, the appellant shall remain in custody until further orders from the sentencing court after mitigation.

Dated and delivered at Nairobi this 10th day of May, 2019

E.M. GITHINJI

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR