IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MAKHANDIA & MUSINGA, JJA.

CRIMINAL APPEAL NO. 40 OF 2016

KYALO MWANGANGI.....1ST APPELLANT

BERNARD MUSYOKI MULWA.....2ND APPELLANT

MUTISYA NGULU.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being An Appeal against the Judgment of the High Court of Kenya at Machakos (Ngugi

& Thuranira, JJ) Dated 10th December, 2012

in

HC.CR.A. 59 of 2012*)*

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JUDGEMENT OF THE COURT

This is a second appeal arising from the Judgment of **Joel Ngugi & B.T. Jaden, JJ**. Dated 10th December, 2013.

The background to the appeal is that, the three appellants were charged before the Senior Principal Magistrate's Court at Kitui, with the offence of Robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars were that, on the 13th January, 2006, at around 1.00am at Sooma village, Kavuta sub-location, Itoleka Location in Kitui District, within Eastern province, the appellants jointly with another not before Court, while armed with dangerous weapons namely, *pangas* and *rungus,* robbed **Isaack Kimeu Syengo** of cash Kshs. 1,100, 20kg of maize, 10Kgs of cooking fat, 2 jackets, one radio cassette make National, one pair of bed sheets all valued at Kshs. 11,750 and immediately before or immediately after the time of such robbery, used actual violence to the said **Isaac Kimeu**. The appellants denied the offence prompting a trial in which the prosecution called eight (8) witnesses in support of the charge, while the appellants were the only witnesses for their respective defences.

The brief facts of the appeal are that, on the 16th January, 2006, at around 1.00am, **Isaac Kimeu Syengo** (PW1) and his daughter, **Judy Kimeu** (PW2), were asleep in separate rooms in PW1's house. They heard movement outside the house. On checking, and with the help of bright moonlight, PW1 noticed presence of at least four persons strategically positioned at each door and windows. He sensed these were assailants because they were armed. He raised an alarm to attract help from neighbours but none came. Apparently, infuriated by PW1's scream for help, the assailants smashed the main door open using a huge object identified later as a huge stone. They gained entry. One whom PW1 identified as **Mutisya Ngulu**, the 3rd

appellant, and whom he knew very well before as a brother in law, was the first to enter PW1's room, armed with *a panga*. The 3rd appellant cut PW1 on the elbow, head and neck with the *panga* demanding for money. Soon, two other assailants joined the 3rd appellant slashing PW1 further, also while demanding for money. He directed them to his shirt from where they managed to get Kshs. 1,100/=.

The intruders ransacked the house in search for more money, failing which they left for J**udy's** room, smashing the door, open to gain entry. With the help of the torch lights the intruders were flashing around the room supported by bright moon light from outside, PW2 was able to identify the 3rd appellant as a person she had been seeing in the neighbourhood for close to two years and more particularly because he was a frequent customer at her mother's *mandazi* kiosk. It was PW2's evidence that the 3rd appellant took her by the hand and led her outside the house demanding that she shows him where PW1 may have hidden money during which time she also identified him with the help of bright moon light.

While outside the house, they were joined by two other assailants, whom PW2 also identified with the help of bright moon light as **Kyalo Mwangangi,** the 1st appellant who was the 2nd accused at the trial and **Benard Musyoki Mulwa,** the 2nd appellant who was the 3rd accused at the trial. PW2 testified that she knew the 1st appellant as a relative, while the 2nd appellant was an acquaintance who for three years had lived at a neighbour's house; that she spent quite some time with the assailants outside her father's house, who were not convinced that she did not know where her father had hidden money, before leading her back to her room and locking her in from the outside.

The assailants then returned to PW1's room, inflicted more injuries, frog matched him outside his house demanding that he shows them where he had hidden money and on failing to get any more money on him, slashed him severally and left him for dead as they fled.

Meanwhile, PW3, **Simeon Mutua Muthengi**, a neighbour of PW1, while on his way back from checking on his charcoal kiln, heard noise from PW1's compound. He approached the fence and hid eight (8) metres away from PW1's compound. He was able to hear and recognize all the voices of the persons who were conversing in PW1's compound as voices of persons who were from the neighbourhood and whom he knew before. He recognized all the four assailants as they filed passed him headed away from PW1's compound, each carrying some luggage including a brief case and a sack as the persons whose voices he had heard shortly before. PW3 reported the incident to his neighbours, **Francis Kiima Kimwana** PW4, and **Cosma Ngei Syengo,** PW5, on that same night. They all left for PW1's compound where they found him injured and rushed him to hospital. A report of the incident was subsequently made to the police. The appellants were arrested by members of the public, handed over to the police and subsequently arraigned in court and prosecuted for the offence they faced at the trial.

Put on their defences, they all denied involvement in the commission of the offence they faced.

At the close of the trial, the trial magistrate assessed and analyzed the record and drew out the following conclusions:

> ***"The court notes that it is possible to identify and even recognize a person known to one in the night if there is bright moonlight like it was in this case. The accused identified by PW1 and PW2 were all known to them and were not strangers whose identification could have been mistaken in the circumstances. Even if the identification of the first accused by PW1 could have been mistaken, it could not be again mistaken*** (sic) ***by PW2 who was a victim of the same robbery, till on the issue of identification even if PW2 who was a victim mistakenly identified accused 1, 2, and 3, then the evidence of PW3, Simeon Mutua, could not be that of another mistaken identity. He was not a victim of the robbery but curiosity and his bravery made him go close to the robbery scene and even changed his positions to avoid the imminent danger he could have fallen into should the robbers had spotted him. He hid next to a fence and to a path where he closely saw and identified all the accused including another one who was not arrested since these were all people known to him. These robbers were all the three accused whom he clearly knew for a number of years. His evidence was that there was moonlight which was very bright which enabled him to clearly see the accused persons. The same moonlight was mentioned by***

both PW1 and PW2. PW3 even went ahead and woke up PW4 and gave him the names of the accused. I am satisfied that the circumstances of identification of all the three accused were favourbale enough to PW1, PW2 and PW3 to positively identify the accused whom they knew. The behavior of the accused during the robbery also reveal that they also knew well their victims by name and even possibly knew where they expected the money could be kept. I have considered the evidence in totality and the unsworn evidence by each accused which does not shake the prosecution's case. I am satisfied that the accused did participate in the robbery as a group and were properly identified as such. I therefore find the prosecution's case proved beyond any reasonable doubt and I consequently convict each accused as charged of robbery with violence under section 215 of the CPC."

The appellants appealed against that decision to the High Court raising various grounds of appeal. The first appellate court Judges after taking into consideration the case of **Okeno Versus Republic [1972] EA 32** and **Kariuki Karanja Versus Republic [1986] KLR 190,** on the role of a first appellate court, re-evaluated and re-analyzed the record and found that on the evidence on the record, the offence of robbery with violence had been committed against PW1. The core issue left for them to determine was whether the appellants had sufficiently been placed at the scene of the robbery as the perpetrators of the said robbery against PW1. The Judges then appraised themselves of the principles that guide the court when receiving and acting on evidence of identification /recognition as a basis for either finding or sustaining a conviction. It was the Judges' view, and correctly so in our view, that matters of identification or recognition in connection with the commission of an offence especially at night, call for caution in receiving such evidence, because of the grave possibility of a miscarriage of justice arising occasioned by misidentification.

In support of the above approach, the Judges took into consideration the principles of law enunciated in the case of **Roria versus Republic [1967] EA 583** for the proposition that it is possible for a witness to be honest but mistaken and for a number of witnesses to be all mistaken*;* **Kiarie versus Republic [1984] eKLR 739** and **Charles Maitany versus Republic [1986] 1KLR 198** for the caution that courts are enjoined to exercise the greatest caution and circumspection before convicting on the basis of testimony of identification especially where the evidence of a single identifying witness is involved.

The Judges also took into consideration the guidelines set out in the case of **Regina versus Turnbull [1976] 3WLR 445**.

Applying the above threshold to the record, the Judges drew out the following conclusions on the matter:

"19 In the instant case, we are persuaded that after exercising circumspection, the evidence of recognition given by Judy Kimeu (PW2) as corroborated with the evidence of Simeon (PW3) and Cosmas (PW5) is sufficiently watertight to establish the guilt of the appellants beyond reasonable doubt, and that it is the three appellants who attacked Isaac and Judy on the 13th January, 2006, at around 1.00am."

The reasons the Judges gave for drawing out the above conclusion was that "***the evidence of the identifying witnesses was one of recognition and not mere identification."***

Applying the threshold in the case of **Anjononi Versus Republic [1980] KLR 59,** that evidence of recognition was more reliable, more satisfactory and more assuring than identification of a mere stranger, the Judges had this to say on the evidence re-evaluated and reassessed:-

21. Judy was quite categorical that she identified the 3rd appellant first when she was in her bedroom when the 3rd appellant opened the door and summoned her to come to where he was standing. She testified that there was a combination of light from the flashlight and the moonlight beaming through the window. What is more, the 3rd appellant held her by the hand and led her outside the house. There, they spent quite some time in close quarters as the appellants tried to establish if Judy knew where money had been hidden. Judy also testified that

there was a bright moon outside and through its illumination, she was clearly able to see the 1st and 2nd appellants. Again, she spent quite a little bit of time with them as they asked her questions about where the money was hidden. As outlined above, Judy knew each of the appellants for a long time prior to the incident and this greatly reduces the possibility of error.

22. Simeon corroborated Judy's identification evidence and offered (sic) his own independent account about how he identified each of the three appellants on two separate occasions. He first recognized the 3rd appellant through voice recognition as he listened to them talk about the possibility that money was hidden near a pit latrine. At the time, he was merely eight meters away.

When relocated and hid near the path as the assailants fled, he was able to see each of the appellants from a mere four meters away.

23. This identification by recognition evidence is buttressed by the fact that both Simeon and Judy informed Cosmas who the assailants were at the opportunity by calling them by name. The immediacy of these reports greatly diminishes the possibility that the identification of the appellants was an afterthought. We think there is a perfectly explanation as to why it took more than three days for the complainant to make his report to the police. He was admitted to hospital after the attack. Indeed, it is a ridiculous argument that a negative inference should be drawn from the delay by the complainant to make a report to the police under these circumstances.

24. In our view, therefore, the identification evidence was free from error and was sufficiently corroborated to be safe to sustain the conviction."

Turning to complaints that crucial witnesses were not called to testify, the Judges relied on the case of **Bukenya & another versus Uganda [1972] EA 549**, for the holding, *inter alia* that, the prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Secondly, that the court has the right and the duty to call witnesses whose evidence appears necessary for the just decision of the case; and thirdly, that where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. The Judge also relied on the case of **Peter Wekesa & another versus Republic Criminal Appeal No, 144 of 1995**, for the holding, *inter alia,* that testimony of members of the public who may have participated in arresting an accused person is only essential where the arrest (s) is triggered not by the description, identification or pointing out of an accused by a witness, but by an informer who was not at the scene of the crime.

Applying the above threshold to the record before them, the Judges ruled that the prosecution had tendered in evidence witnesses who were necessary to establish the truth; that the failure to tender the evidence of the members of the public who variously participated in the appellants arrests was neither prejudicial to the prosecution case nor the appellants' defences, as the evidence on the record had demonstrated clearly that the appellants were arrested following the descriptions given of them by PW1, 2 and 3, witnesses who had recognized them at the scene of the robbery; and on that account dismissed the appeal, confirmed the convictions and sentences handed down against appellants by the trial magistrate.

Undeterred, the appellants are now before this Court on a second appeal raising substantive three grounds of appeal, with the fourth ground seeking resentencing should their convictions be sustained. It is the appellants' complaints that the learned Judges of the High Court erred in law:

(1) By failing to appreciate the law as it pertains to evidence of identification.

(2) By failing to adequately or at all to exhibit an independent legal mind and re-evaluate the evidence on the record a fresh.

(3) By relying heavily on unproved/wrong evidence that was not tendered during trial which occasioned a miscarriage of justice.

The appeal was canvased by way of oral submissions. Learned counsel **Miss Wanjohi** instructed by the firm of Hussein Mwae & Associates, appeared for all the appellants, while the learned Senior Assistant Director of Public Prosecution, **Mr. O'Mirera Moses** appeared for the State.

Supporting the appeal, **Miss Wanjohi**, relied on the case of **Republic versus Turnbull** (supra), and submitted that the identification of the appellants at the scene of the robbery was not safe and free from error because, the incident happened at night. It was also sudden and not anticipated. PW1 and PW2 must therefore have been terrified. Further, the said witnesses did not state how long the incident took or time that they had the appellants under their observations for them to positively identify them. In counsel's view, the circumstances described above were not conducive to positive identification of the assailants. It was also counsel's submission that PW2's failure to give a description of the assailants to the persons who came to the scene soon after the robbery and to the police was another factor negating positive identification of the assailants at the scene of the robbery.

On the role of a first appellate court, Counsel faulted the Judges for the failure to properly appreciate the circumstances under which the incident occurred as already highlighted above, to reconcile, contradictions in the prosecution's case; to call members of the public who arrested appellants, who in counsel's view, were crucial witnesses, and to properly reevaluate the appellants defences, all of which factors in counsel's view were fatal to the prosecution case.

On sentence, **Miss Wanjohi** urged us to bear in mind the change in jurisprudence on the death penalty as a mandatory sentence as expounded in the **Francis Karioko Muruatetu and another versus Republic [2017] eKLR (supra),** and set aside the death sentence handed down against the appellants by the trial court and affirmed by the first appellate court and substitute it with an appropriate sentence.

To buttress the above submissions, **Miss Wanjohi** relied on the case of **Republic versus Turnbull & others** (supra); **Erick Otieno Arum versus Republic [2006] eKLR**; and **Francis Karioko Muruatetu** (supra), all in support of their submissions that the circumstances prevailing at the scene of the robbery were not conducive to positive identification of the assailants; that the first appellate court judges failed to properly discharge their mandate as already highlighted above; and that sufficient cause has been laid for resentencing of the appellants should their convictions be affirmed.

Opposing the appeal, **Mr. O'Mirera Moses** submitted that, the offence of robbery with violence was proved beyond reasonable doubt; that both courts below concurred on the positive identification of the assailants at the scene of the robbery as

PW1 identified the 3rd appellant, while PW2 identified all the assailants with the help of bright moon light and the torch lights the assailants were flashing around; that both PW1 and PW2 described vividly the roles each of the identified assailants played in furtherance of the robbery committed against PW1; that PW1 and 2's evidence that there was bright moon light was sufficiently corroborated by the evidence of PW3 who heard the assailants, whom he knew very well before as neighbours, converse in PW1's compound. He also saw them leaving PW1's compound and immediately gave their names to PW4 and 5 who accompanied him (PW3), to PW1's home where they found PW1 robbed and injured; and lastly, that PW1 reported the incident to the police station four (4) days later, because he had been hospitalized for four days following the injuries he sustained during the robbery, which in counsel's view did not in any way operate to discredit PW1's evidence.

Relying on the case of **Anjononi versus Republic** (supra), counsel reiterated that the circumstances prevailing in this appeal were conducive to positive identification of the assailants. The prosecution case was therefore water tight and the two courts below were justified in relying on that evidence as the basis for convicting and affirming those convictions.

On sentence, counsel left it open for us either to remit the matter back to the High Court for resentencing or discharge that mandate ourselves; in light of the guidelines given by the Supreme Court in **Francis Karioko Miruatetu** case (supra).

In response to the respondent's submissions, **Miss Wanjohi** urged us to resentence the appellants instead of remitting the matter back to the High Court for that exercise, considering that no life was lost; the appellants who mitigated at the trial have been in custody for thirteen (13) years which, in counsel's view, was sufficient punishment for the offence committed.

This is a second appeal. By dint of **Section 361 (1) (a)** of the **Criminal Procedure Code**, only matters of law fall for our determination unless it is demonstrated that the two courts below failed to consider matters they should have considered or looking at the entire case, their decisions on such matters of fact were plainly wrong in which case this Court will consider such omission or action as matters of law. See **Karingo – vs – R, *[*1982] KLR 214**, where it was held, *inter alia* that, a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on no evidence. See also the case of **David Njoroge Macharia– vs-R, [2011] eKLR,** in which**,** it was restated, *inter alia* that, under ***Section 361*** of the *Criminal Procedure Code***:**

> ***"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings.(***See also ***Chemagong vs. Republic (1984) KLR 213)."***

We have considered the record on our own in light of the above rival submissions. The issues that fall for our determination are the same as those raised above by the appellants.

It is not disputed that the appeal arises from the exercise of jurisdiction by a first appellate court. In ***David Njuguna Wairimu V Republic [2010] eKLR*** the court spelt out the duty of a first appellate court as follows:

> ***"*The duty of the first appellate court+ is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision" (emphasis ours).***

See also **Dinkerrai Ramkrishan Pandya vs. R [1957] EA 336,** wherein, the predecessor of the Court made observations on the role of a first appellate court as follows:-

> ***"the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong....when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanor, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."***

Applying the above threshold to the appellants' complaints that the Judges failed to discharge their mandate properly as was by law required of them, it is not disputed that the core issue for determination before the first appellate court was whether, on the record as laid before the Judges, the appellants had been placed at the scene of the robbery. This called for the application of the principles that guide a Court of law when considering evidence on identification/recognition of an accused person in connection with

the offence charged. The position in law as demonstrated by case law reviewed above by the Judges is that, where a court of law has been invited to either find or sustain a conviction based on evidence of either identification/recognition of an accused person, such invitation calls for caution in receiving such type of evidence because of the grave possibility of a miscarriage of justice being occasioned through misidentification.

As already observed, the Judges reviewed principles of case law on identification/recognition of an accused person at the scene of an offence and drew out guiding principles which they applied to the record in the determination of the appeal before them as already highlighted. It is the same threshold that we have been invited to reapply to the record in determinations of this appeal and which we have reapplied.

It is therefore our finding that, from the evidence on the record, PW1 and PW2 spent a long time with the assailants who were demanding for money. The witnesses therefore, had sufficient time to recognize them as both the witnesses and the assailants were undisputably neighbours and therefore knew each other very well, a position not controverted by the appellants. The evidence adduced on record therefore leaves no doubt in our minds that from the accounts given by PW 1, 2& 3 who were the eye witnesses in this appeal, the appellants and the witnesses were in close proximity to each other. The possibility of the witnesses recognizing the appellants who they knew very well prior to the attack could not be ruled out especially, in circumstances where the lighting was sufficient for such purpose.

In **Kiarie v Republic** (supra), the Court provided guideline for a Court when determining as to whether to sustain or depart from a factual finding by the courts below.

> ***"The Court of Appeal on a second appeal may upset a finding of fact by the trial or the first appellate court where there is misdirection but such misdirection must be of such a nature and the circumstances of the case must be such that if it were a trial by Jury, the Jury would not have returned their verdict had there been no misdirection. It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken".***

In this appeal, the two courts below believed the testimonies of PW1, 2 and 3 who they found credible. The Judges were also satisfied that these witnesses were not only at the scene of the robbery, but were neighbours to the assailants and both parties therefore were known to each other very well. With the exception of the 3rd appellant who alleged that PW1 had a grudge with him over PW1's disagreement with his (PW1) wife, who was related to the 3rd appellant, there was no justification for PW2 and 3 framing the appellants in the commission of the robbery against PW1. In light of the above reasoning, we find no basis for departing from that concurrent factual finding position of the two courts' below. We are therefore satisfied as were the two courts below, that the witnesses properly recognized the appellants at the scene of the robbery; that the circumstances of recognition prevailing at the scene of the robbery were conducive for positive recognition of the appellants; and that the appellants were therefore placed at the scene of the robbery. We therefore find it safe to reaffirm their convictions.

Turning to the last complaint that the learned judges erred in relying on unproven wrong evidence that was not tendered during the trial which allegedly occasioned a miscarriage of justice to the appellants, it is our finding that, particulars of such unproven evidence erroneously taken into consideration by the Judges was never pointed out to us by counsel. The assertion is therefore dismissed as being baseless.

As for the appropriate sentence, both counsel are in agreement that we cannot ignore the current jurisprudential trend resulting from the Supreme Court's decision in ***Francis Karioko Muruatetu & Another v Republic (***supra), in which the Supreme Court provided guidelines, having declared the mandatory nature of the death sentence as unconstitutional. This is not the first time this Court is being confronted with such a request to intervene in matters of death sentences either handed down by trial courts on a first trial as the only lawful sentence for the offence committed by affected appellants, or alternatively, as affirmed on first appeal by a first appellate court. We find it prudent to highlight a few cases on this emerging jurisprudential trend for purposes of the record.

In **Juma Anthony Kakai vs. Republic, Nairobi Criminal Appeal No. 48 of 2015,** the following observations were made:

> ***"However, we must take cognizance of recent developments in the Law in this area and apply it to the present case, particularly because the same is advantageous to the appellant. In its recent decision in Francis Karioko Muruatetu and another vs Republic, (2017) eKLR the Supreme Court of Kenya, pronounced that the mandatory aspect of the death sentence as the only lawful sentence was unconstitutional. The Court therefore effectively removed the fetters placed on the courts' discretion when passing sentence in cases which hitherto carried the death penalty as the only lawful sentence upon conviction. This decision allows us to interrogate whether the death sentence herein should be maintained. We observe that the appellant was a first offender although when he was offered an opportunity to mitigate he offered none. This is understandable in our view because death sentence was the only one provided by the law, the court had no discretion to pass another sentence even if the interest of justice would not be met due to the circumstances of the appellant or under which the offence was committed. Say for instance a first offender or even a youthful offender who had just passed the threshold of the age of minority, or where the offenders in the cause of committing the offence did not cause any injury or serious threat to the life or limb of the complainant and they stole items of insignificant value, in all these circumstances the court had no discretion for persons charged with the offence of robbery with violence to pass any other sentence. Luckily the Supreme Court decision has cured that imbalance in criminal law by restoring judicial function of sentencing in capital offences"***

In **Julius Mutei Muthama versus Republic,** Nairobi Criminal Appeal No. 189 of 2016, the following observation was made:

> ***"25. We are well aware that the Judgment by the trial court was delivered long before the Supreme Court pronounced itself on the Constitutionality of death sentence in Francis Muruatetu & Another versus Republic [2017] eKLR.*** In that matter, the Supreme Court held inter alia:
>
> ***"The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared Unconstitutional. For avoidance of doubt, this order does not disturb the validity of the death sentence contemplated under Article 26 (3) of the Constitution.***
>
> ***26. The Supreme Court further held that in a murder trial, the mitigating submission of an accused person must be taken into consideration before sentence is pronounced. The count having found that the appellant had not been given an opportunity by the trial court to make mitigating submissions, remitted the matter to the High Court for rehearsing on sentence only"***

In this appeal, it is not disputed that the appellants mitigated before the trial court, but it was treated as in inconsequential for the reason that the death penalty was the only lawful sentence capable of being handed down against the appellants upon their conviction for the offence they faced as at the time of their trial. This is no longer the position as demonstrated above. In the **Muruatetu case** (supra), the Supreme Court examined comparative jurisprudence on consequential orders and in the end stated thus:

> ***"Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing."***

In this appeal, the factors to be taken into consideration are the value of the property robbed from PW1 which was minimal, notwithstanding that such value was no justification for the commission of the robbery against PW1; the fact that no life was lost; that the appellants mitigated at the trial and were indicated as having been first offenders. They have also been in custody for thirteen (13) years from the date of sentencing by the trial upon conviction.

In light of the above, we find this is a proper case for resentencing. A sentence of twenty (20) years' imprisonment would be sufficient punishment for the offence committed against PW1. To that end, we set aside the death sentence handed down against the appellants by the trial court and affirmed by the 1st appellate court, and substitute it with a sentence of twenty (20) years imprisonment from the date of sentence at the trial.

It is so ordered.

Dated and delivered at Nairobi this 21st day of June, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR