



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK. JJ. A)

CRIMINAL APPEAL NO. 203 OF 2014

BETWEEN

DAVID ONGATA OPIYO.....1<sup>ST</sup> APPELLANT

WILLIAM AYUGI.....2<sup>ND</sup> APPELLANT

TILLENY ODHIAMBO.....3<sup>RD</sup> APPELLANT

POO.....4<sup>TH</sup> APPELLANT

SILAS ONYANGO ODONGO.....5<sup>TH</sup> APPELLANT

TIBERIOUS ODODA NYANGIRO.....6<sup>TH</sup> APPELLANT

PETER OTIENO ONYANGO.....7<sup>TH</sup> APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Homa Bay, (E. Maina, J) dated 18<sup>th</sup> September, 2014*

in

**H.C.CR. C. No. 15 of 2012 Formerly H.C.CR.C. No. 71 of 2010)**

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JUDGMENT OF THE COURT

The appellants were jointly charged in the High Court at Homa Bay, with two counts of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars in the information in respect of the 1<sup>st</sup> count were that on the night of 16<sup>th</sup> and 17<sup>th</sup> August, 2010 at Dhogunda beach, Usao Sub-Location in Suba District within Nyanza Province, jointly with others not before court they murdered **Lameck Olima Ochieng**, hereinafter “1<sup>st</sup> deceased”. In the second count, it was alleged that the appellants on the same night and place murdered **Felix Ouma Odhiambo**, hereinafter “2<sup>nd</sup> deceased”. They all denied the charges. However, before the trial began, an application was made by Ms. Ongeti for Director of Public Prosecutions (DPP) under Article 157 (b) of the Constitution to discontinue charges against the 4<sup>th</sup> appellant, who was 4<sup>th</sup> accused during the trial, and a minor at that, who had escaped from Manga Children’s Home where he was being held pending trial which application was allowed. The 7<sup>th</sup> appellant who had been charged separately had his case consolidated with the case leading to this appeal.

We should also point out at this juncture that a member of this bench handled the preliminary aspects of the case whilst in the High Court. In particular, he took the plea. When this fact was brought to the attention of the parties and we asked whether it was proper for the said Judge to sit on this appeal, they returned a unanimous verdict that there was no need for the said Judge to recuse himself. That after all, what the said Judge did was to take a plea of not guilty. It was on that understanding that the appeal proceeded to hearing.

In a bid to prove its case against the appellants, the prosecution lined up a total of 15 witnesses. A panoramic view of their evidence is as follows:

**Edwin Okoth Ongiti (PW1)** a fisherman was on the material night fishing on a boat at Dhogunda beach when he saw a boat pass him with two people screaming in the boat which was about 10 metres from his. Though he did not talk to the people, he heard them scream “please do not kill us; forgive us”. He left his boat and went to hide in the bushes so as to have a better view of what was happening. One of the people was being beaten. He was able to recognize the 1<sup>st</sup> appellant whom he had known since childhood and as they were both fishermen. He was categorical that he saw the 1<sup>st</sup> appellant in the boat where people were screaming even though he could not tell how many people were in that boat. He then saw the 2<sup>nd</sup> appellant, whom he also knew as a fellow fisherman, assault the 1<sup>st</sup> deceased with a spear whilst the 1<sup>st</sup> appellant held a torch. The 1<sup>st</sup> appellant then hit the 1<sup>st</sup> deceased with a stone. He did not see the other appellants. He was able to identify or recognise the two appellants courtesy of the powerful torches they were holding. He got scared and went home. On returning to the scene the following morning, he found that two people had been killed. He identified a spear in court as the one that had been used by the 2<sup>nd</sup> appellant to assault the 1<sup>st</sup> deceased.

**Chrispine Okumu Owiny and Lawrence Otieno Odenga, (PW2) and (PW4)** respectively, were fishermen as well. On the material night they were fishing at Dhogunda beach when they saw two boats moving in line with theirs. The two deceased persons were in one of the boats. There was moonlight and they also had a torch. The occupants of the first boat were the 1<sup>st</sup> appellant, his brother and the 2<sup>nd</sup> appellant who greeted them. They were able to identify the 3<sup>rd</sup> and 7<sup>th</sup> appellants who were also in the boat. They knew all these people since childhood. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 7<sup>th</sup> appellants demanded to know what they were doing there and whether they were fishing with chemicals. They also demanded to be given fish but when they were, refused the 1<sup>st</sup> appellant started beating one **Erick Ayien** who was with them in the boat. The 1<sup>st</sup> appellant was armed with a rungu, the 2<sup>nd</sup> appellant a panga and the 3<sup>rd</sup> appellant and another masked man in the boat had spears. They all dived into the water for safety and found their way out and hid in a hyacinth growth about 11 metres away, where they were able to see what was happening. They witnessed the attack on the deceased persons. One **Okeyo** who was in one of the boats remarked to the deceased that they had finally found them and that is when the people in both boats started beating up the deceased. The beating lasted for almost 3 hours after which the deceased persons were removed from the boat and placed on the lakeshore where they were continuously assaulted until the 2<sup>nd</sup> deceased became unconscious.

The 1<sup>st</sup> deceased who was still talking and pleading with them to spare their lives was then put back in the boat that had the masked man, and taken to the seas. An argument arose when they returned on shore without the 1<sup>st</sup> deceased whether to kill the 2<sup>nd</sup> deceased to which the 1<sup>st</sup> appellant, the masked man and the 3<sup>rd</sup> appellant agreed that it was safer to finish him off. They then took a stone which they put inside their boat and left with the 2<sup>nd</sup> deceased but when they returned he was nowhere to be seen. The appellants then dispersed. The witnesses left the hiding place and reported the incident to the 1<sup>st</sup> deceased’s wife and together they went and reported to the assistant chief. PW2 was able to recognise the said appellants with the aid of the bright moonlight and the powerful torches that the appellants had.

**Dick Otieno Ochudho, (PW3)** was on the material night out fishing in the same beach when at around 2:00am he heard screams from people about 50 metres from where he was. He was able to identify the people who were screaming as the deceased persons with the aid of moonlight and light from the torches of the appellants. He recognized the 1<sup>st</sup> appellant who had a panga as he beat up the deceased. He knew the 1<sup>st</sup> appellant as they used to play football together and further identified the 3<sup>rd</sup> and 7<sup>th</sup> appellants whom he knew very well as they came from the same village. He also identified the 4<sup>th</sup> and 6<sup>th</sup> appellants. He also noticed that the 2<sup>nd</sup> appellant had a spear. The 3<sup>rd</sup> appellant struck the 1<sup>st</sup> deceased with a rod while the 4<sup>th</sup> and 7<sup>th</sup> appellants used rungu. The 1<sup>st</sup> deceased pleaded with the appellants to spare their lives but to no avail.

When the 1<sup>st</sup> deceased suddenly went quiet and his screams could no longer be heard, he concluded that he was dead. The 6<sup>th</sup> appellant and one Daniel Miyungo who was called by the 2<sup>nd</sup> appellant were the management officials of the beach. After deliberations, they agreed to take the deceased deep into the lake. The 6<sup>th</sup> appellant brought a rope which they tied to a stone and placed it in the boat carrying the 2<sup>nd</sup> deceased. The appellants left in the two boats but only the boat carrying the appellants returned to the shore. He reported the incident to the deceased’s wife and mother. He gave them the names of the persons who took the deceased person at sea as the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> appellants and others who had not been arraigned in court.

**Ibrahim Okal Ojoki, (PW5)** was asleep in his house near the beach when at about 2 a.m. he was awoken by screams on the lakeshore. He went out to inquire about the screams and received information that it was the 1<sup>st</sup> deceased being beaten by about five people. He knew the 1<sup>st</sup> deceased as they were village mates. He was also able to recognize his voice since they had fished together for a long time. There was moonlight and torch light from the appellants hence he was able to clearly see what was happening. The 1<sup>st</sup> deceased was subsequently taken away but he was still alive and talking.

**Mary Adhiambo Olima, (PW6)** was the 1<sup>st</sup> deceased’s wife. She identified the deceased’s body on 24<sup>th</sup> August, 2010 at Homa Bay District hospital where the post-mortem was conducted by **Dr. Ayoma Ojwang, (PW13)** on the body. The findings with regard to the cause of death of the 1<sup>st</sup> deceased was internal bleeding and head injury. Similarly, **Maurice Odhiambo Grado (PW11)** a step brother to the 2<sup>nd</sup> deceased was summoned on the same day to Homa Bay hospital where he identified the body of the 2<sup>nd</sup> deceased for purposes of post mortem. The doctor’s opinion as to the cause of death was drowning.

**George Orwa Ochieng (PW7)**, a brother to the 1<sup>st</sup> deceased and former area councillor was asleep on the material night when he was awakened at 4:00am by his two brothers who informed him that the deceased had been attacked. He woke up other people and they all went to the beach but could not find anybody. He then went to the home of the beach chairman, **Karidus Miinda** who reminded him to read two bible verses; Luke 17:2 and Mathew 18:6 which he later learnt were about drowning somebody in the lake with a stone. The 1<sup>st</sup> deceased had confided in him that some people were out to kill him in connection with his fishing habits and in particular mentioned the appellants.

On the material night, **Samuel Ooko Ogae, (PW8)** was in the same boat as the deceased persons fishing. The other boat had PW2, PW4 and one Erick Ochieng. At about 2:30am two boats approached them and the occupants demanded to be given money and fish and when they refused the appellants started pelting them with stones and he dived into the lake for safety. He recognized five of those people as his torch was on and the moon was bright as well. He was able to recognize the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants in that boat. He hid in the hyacinth for 45 minutes as the water was not deep and saw the appellants beat the deceased persons before leaving with them in their boat into the lake. The 1<sup>st</sup> appellant had a spear, the 2<sup>nd</sup> appellant had a stone and the 3<sup>rd</sup> appellant had a panga. When the assailants left, he reported the incident to the deceased's family and area councillor with whom he went to the police station and recorded a statement.

**Peter Ouma Olale, (PW9)** was another fisherman. On the same day he started fishing at around 9:00pm. At about 2:00am he heard screams. Since he was a bit far, he opted to move closer to where the screams were coming from. It is then that he recognized the 1<sup>st</sup> deceased's voice since they were village mates. He too recognized the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> appellants as among the people who were assaulting the 1<sup>st</sup> deceased. He knew them as they were from the same village. The 1<sup>st</sup> deceased eventually passed on. However, the 2<sup>nd</sup> deceased was still alive. He heard them deliberate on whether to kill him or not. The chairman of the beach argued that if he were to be left alive, he would give them problems and suggested that the deceased be taken to deep waters and drowned in their boat using a stone. One **Olumbe** then brought a stone and tied it with a rope and put it in the boat. **POO** who absconded from the trial then stabbed the 2<sup>nd</sup> deceased with a spear. They then left for the deep waters with the deceased with stones in the boat. He was gripped with fear and left. He reported to the police officers what had transpired.

**William Omogi Kingi, (PW10)** the area assistant chief was awoken from sleep at about 5:30am by PW4 who reported that they had been attacked and suspected that the deceased persons had been murdered. Before PW4 left, the 1<sup>st</sup> deceased's wife and brother also came and they all left for the beach. They found no one on the beach. They proceeded to the home of the beach chairman but did not find him. While leaving, they were menacingly approached by the 1<sup>st</sup> and 2<sup>nd</sup> appellants who were not happy with their presence on the beach. Members of the public then joined in the fracas and chased them away. The 2<sup>nd</sup> appellant ran and hid in a neighbour's house. He later learned that the deceased persons had been murdered and their bodies dumped in the lake. He too confirmed that he had known the 1<sup>st</sup> and 2<sup>nd</sup> appellants from childhood.

Senior Sergeant **Sammy Ngeiywa**, the investigating officer testified as PW12. At the time he was stationed at Mbita police station. On 17<sup>th</sup> August, 2010 at about 9:35am he was on duty when he was informed by the Officer Commanding Police Station about murders at Dhogunda beach. Together with Chief Inspector Marcus and other police officers they proceeded to the scene where they learned that two people had been killed. They carried out their investigations and were able to arrest six suspects among them the 1<sup>st</sup> and 2<sup>nd</sup> appellants. They received information on 19<sup>th</sup> August, 2010 that the 1<sup>st</sup> deceased's body had been found floating in the lake and brought to the shore. His hands were tied with an old fishing net and the body had deep cuts on the head and right upper arm. The 2<sup>nd</sup> deceased's body was retrieved on 20<sup>th</sup> August, 2010 and when brought to the shore, it was observed that a huge stone had been tied to the head. The bodies were ferried to Homa Bay hospital mortuary. A spear and a panga were recovered from the 1<sup>st</sup> appellant.

Put on their defences, the appellants chose to give sworn statements but called no witnesses save for the 5<sup>th</sup> appellant who called his wife as a witness. The 1<sup>st</sup> appellant stated that he was in his house on 17<sup>th</sup> August, 2010 resting since he was sick when he heard people coming towards his house. He went outside and found the Assistant Chief who told the councillor that he was one of the fishermen from Dhogunda. He was taken to a vehicle and taken to Mbita police station without being told what was happening. He also did not know what had happened. He had never gone fishing with his co-appellants. Although he knew the 1<sup>st</sup> deceased he did not know the 2<sup>nd</sup> deceased and he learnt of the 1<sup>st</sup> deceased's death when the information was read to him.

The 2<sup>nd</sup> appellant was on his way home from work on 17<sup>th</sup> August, 2010 when he saw a group of people he did not know. They started throwing stones at him and so he escaped to a neighbour's house where he was rescued by the police. He knew his co-accused but never fished with them on that night. He could not call his wife to testify that he was home because she was dead.

The 3<sup>rd</sup> appellant was at home on 17<sup>th</sup> August, 2010 with his brother eating when he was arrested by the chief and police officers. He was at home on 16<sup>th</sup> August, 2010. The 4<sup>th</sup> appellant was arrested on 19<sup>th</sup> August, 2010 by the chief and police while hiding in the 5<sup>th</sup> appellant's house. He was at home on 16<sup>th</sup> August, 2010. He recalled that there was bad blood between him and a relative of the 1<sup>st</sup> deceased who led the police to his arrest. He was home on the material night asleep with his wife and did not at any point leave the house as he was nursing injuries he had sustained in a motorcycle accident.

DW1, was the wife to the 5<sup>th</sup> appellant. It was her testimony that she was at home on the material night with her husband, the 5<sup>th</sup> appellant and he did not leave the house at all. That the 5<sup>th</sup> appellant could not even walk as he was nursing injuries he had sustained in an accident. The 6<sup>th</sup> appellant heard about the deceased's murders on 17<sup>th</sup> August, 2010 but did not bother as it did not involve him. He went for work at Rodi the following day and stayed there for two weeks. He was arrested at Kochier. On 16<sup>th</sup> August, 2010 he was at Karachuonyo.

The learned Judge in her considered judgment held that there was no doubt that the appellants killed the deceased. Nine (PW1-PW9) prosecution witnesses were eye witnesses who were out fishing on the material night with the exception of PW5 when the incident occurred. They identified the assailants who were well known to them as they were all fishermen who hailed from the same village and for some, they even played football together. There was enough light from the moon and torches being used by the assailants. At some point the assailants approached the witnesses' boats and conversed with them at close proximity. The witnesses were able to recognize the assailants visually and through their voices. They all saw the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> appellants beat the deceased persons. Accordingly, the learned Judge was satisfied that the circumstances prevailing were sufficient for positive identification including the bright moonlight and light from the torches, the visual recognition being fortified by voice recognition. The learned Judge went on to state that there was no reason for the crime to be made up against the appellant. The witnesses remained steadfast during vigorous cross-examination. PW5 was not telling the truth and his testimony was at variance with the other witnesses. The post-mortem reports confirmed that the deceased persons died as a result of an

unlawful act. When an argument ensued on what was to be done to the 2<sup>nd</sup> deceased who was still alive, the 6<sup>th</sup> appellant was called. He brought a rope from his house which was placed in the boat with the deceased persons together with a stone brought by the 1<sup>st</sup> appellant and the boat was then driven deep into the lake. The 5<sup>th</sup> appellant was an accomplice to the crime even though his wife gave evidence that he did not leave the house on the material night due to an injury.

Regarding malice aforethought the learned Judge took the view that in the circumstances of the case it was clear that the appellants intended to cause the death of the deceased persons. They beat them mercilessly with crude weapons. The act of tying the 1<sup>st</sup> deceased with a rope and a stone on the 2<sup>nd</sup> deceased's head before tossing them into the lake was sufficient proof that they intended to kill them. The degree of injuries inflicted on the deceased was enough to kill them without even drowning.

Consequently, the learned Judge convicted all the appellants minus the escapee for the murder of the deceased. Upon conviction and consideration of the appellants' mitigation, the learned Judge sentenced the said appellants to death for the murder of both deceased. However, since death sentence could not be enforced twice on the appellants the sentence of death in respect of the 2<sup>nd</sup> deceased was left in abeyance and correctly so.

Aggrieved by the conviction and sentence on both counts, the appellants filed this appeal citing six grounds; that the trial Judge erred in law and fact in holding that the evidence on identification was sufficient; failed to appreciate the evidence on record about the previous grudges or disagreements between the appellants and several of the prosecution witnesses; failed to consider the evidence tendered by the prosecution that was favourable to the appellants; failed to consider and or take into account the evidence tendered by each appellant in their defence; that the judgment, findings and decision of the High Court was wholly against the weight of the evidence on record; and finally that the sentence imposed on each appellant was manifestly excessive, unconstitutional and against the relevant international instruments and covenants.

When the appeal came up for hearing, **Mr. Onsongo**, learned counsel appeared for the appellant; whereas his counterpart **Mr. Kakoi**, Principal Prosecution Counsel appeared for the State. They all relied on their respective written submissions that they had filed in court and preferred not to highlight.

Mr. Onsongo submitted that the incident giving rise to this appeal occurred at night and the two sources of light were moonlight and torches. PW2 did not name the people who assaulted the deceased in his statement or mention their names to the assistant chief being the first person in authority he encountered and reported the incident to. The witnesses were never in very close proximity with the attackers and their testimony created an impression of doubt. They were unreliable for making different statements about the same incident at the same time. PW5's evidence was at variance with the other prosecution witnesses and the same exonerated the appellants. That the prosecution did not prove its case to the required standard. The court did not give reasons as to why the evidence of PW5 was unbelievable. The learned Judge erred in making conclusions not borne out by evidence on record. Alibi defence advanced by the appellants was not considered. Counsel went on to submit that the court shifted the burden of proof of alibi to the appellants whereas a person who puts forward such a defence does not in any way assume the burden of proving the same. Counsel finally submitted that should we not find merit in the appeal on conviction, we should at least interfere with the sentence. The trial court did not appreciate that it had discretion while sentencing the appellants. He urged us to set aside the death sentence and substitute the same with a suitable sentence taking into account the mitigating factors on record and the period of imprisonment already served by the appellants.

Opposing the appeal, Mr. Kakoi submitted that the prosecution called a total of 13 witnesses who placed the appellants at the scene of crime and linked them to the offences. In particular, PW1 – 9 all placed the appellants at the scene of crime. There was moonlight and light from torches which the witnesses used to identify the appellants. They each vividly described the role played by each appellant in the commission of the offence and how they were able to identify them. They were people they knew very well as they hailed from the same village and some even played football together. The appellants also approached their boats and conversed with them at a close proximity. The circumstances were therefore favourable for positive identification. On sentencing, counsel submitted that though the death sentence was no longer mandatory, there were no mitigating factors in the circumstances of this case that would warrant this court to interfere with the sentence imposed by the High Court.

This being a first appeal, the appellants have a legitimate expectation that we will subject the entire evidence adduced before the trial court to a fresh and exhaustive evaluation and analysis while bearing in mind that we neither saw nor heard any of the witnesses and so due allowance should be given for the same. This mandate is reiterated in rule 29(1) of the Court of Appeal Rules that obligates us to re-appraise the evidence and draw inferences of fact on the guilt or otherwise of the appellants. The appellants are entitled to have our own consideration and view of the evidence as a whole and our own decisions thereon. **In the case of Issac Ng'ang'a alias Peter Ng'ang'a Kahiga v Republic, Criminal Appeal No. 272 of 2005** this Court observed that:

***“In the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.”***

We have considered the record of appeal, the submissions made by counsel and the law. The issues for our determination are whether the appellants were properly identified; whether the prosecution case was proved beyond reasonable doubt; and whether this Court should exercise its discretion and review the sentence imposed on the appellants.

As regards identification, our perusal of the record leaves us in no doubt that visual recognition was the cornerstone of the appellants' convictions. The prosecution eye witnesses save for PW5 all claimed to have seen the appellants together with other people not before the trial court beat up the deceased. The appellants were well known to the witnesses as fellow fishermen, village mates and some had even played football together. At some point some of the appellants spoke to some of the witnesses when they demanded for fish. This encounter was no doubt in close proximity. Further, some of the witnesses got scared and ran to the hyacinth and hid. It is from the safe hiding place that was not far from the scene of crime that they were able to witness the heinous acts of the appellants on the material night unfold.

The source of light was moonlight and torch light being used by the appellants. According to their testimony the moon was bright. In any event they could not have been fishing in total darkness. The bright moon coupled with powerful torchlights in the possession of some of the appellants, which they turned on and around willy nilly at times towards the deceased and amongst themselves gave the witnesses ample opportunity for them to see and recognise the appellants. The witnesses were consistent in cross examination on the sequence of events on the material night including the identity of the appellants and the weapons they used. It cannot be said that the witnesses formulated a story so consistent as to implicate the appellants for something they had not done. The witnesses had no reason to lie to court.

In the case of **Cleophas Otieno Wamunga v Republic [1989] eKLR**, this Court while dealing with the complexities of an identification of an assailant in difficult circumstances stated:

***“It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction”.*** Emphasis ours.

Further, in **Lesarau v R, 1988 KLR 783**, this Court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. In **R v Turnbull, (1976) 3 All ER 551**, Lord Widgery CJ observed that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger. He went on to state;

***“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”***

Similarly, the difference in approach between identification and recognition was expressed thus by Madan J.A in **Anjoni & 2 Others v Republic [1980] eKLR**;

***“This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)”***

Having reminded ourselves of the dangers of mistaken identity and or recognition we are satisfied that in the present circumstances, the appellants were recognized not by one or even two but by nine eye witnesses who all placed them at the scene of the crime. The chances of all nine witnesses having been mistaken is remote and as such we find, just like the trial court, that the appellants were positively identified by recognition by the nine witnesses. There was no need for identification parades as correctly held by the trial court, since this was a case of recognition and not visual identification of a stranger.

On whether the prosecution proved its case beyond reasonable doubt, the prosecution called a total of 13 witnesses to prove its case. The trial court chose to believe all these witnesses with the exception of PW5. The court observed the demeanour of PW5 and came to the conclusion that he was not a witness of truth. This is a factual finding on the credibility and demeanour of a witness by a trial court which we must pay homage to. Nothing has been brought to our attention to warrant our interference with that finding. In the case of **Republic v Oyier [1985] KLR 553**, this Court laid down the principle that:

***“The first appellate court cannot interfere with the findings by the lower court which are based on the credibility of witnesses unless no reasonable tribunal could make such findings or it was shown that the trial magistrate erred in his findings or that he acted on wrong principles.”***

As already observed, the trial court which had the occasion to observe the eye witnesses when they testified formed an impression that they were truthful and therefore credible. We have no reason to interfere with that assessment. The trial court also observed that malice aforethought had been proved by the act of tying the 1<sup>st</sup> deceased with a rope and a stone on the 2<sup>nd</sup> deceased's head before throwing them into the lake which act was sufficient proof that they intended to kill them. They had earlier told the deceased persons that they had found them meant that the incident was premeditated. They also had knowledge that what they did would cause the death of the deceased persons as demonstrated by the fact that they placed a stone in the boat with the intention of drowning the deceased. The degree of injuries inflicted on the deceased was enough to kill them without even drowning.

We are satisfied that the trial Judge properly acted on the evidence tendered before her. She correctly analyzed it and applied the correct principles of law to the facts at each and every stage of the analysis. She did not misapprehend any issues raised and drew out the correct conclusions on each of the issues identified for determination by her. There is no doubt therefore that the offence was proved beyond reasonable doubt against all appellants.

Having so found, we also determine that the mere fact that the learned Judge in her judgment started with the conclusion before analysing the evidence as alleged by the appellants was not fatal nor prejudicial in the circumstances of this case. Judicial officers have different and individual styles of crafting judgments and rulings. The learned judge complied with the provisions of section 169 of the Criminal Procedure Code albeit in a different style. She summarised the evidence, drew out issues for determination, determined the issues and gave reasons for her determinations.

With regard to the sentence, Section 204 of the Penal Code provides that **“Any person convicted for murder shall be sentenced to death.”** The Supreme Court in **Francis Karioko Muruatetu & another v Republic (2016) eKLR**, stated:

**“Consequently, we find that 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. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty.”** Emphasis ours.

Additionally, the Supreme Court stated at para 111 of the said judgment that:

**“It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein ...”** Emphasis ours.

The Supreme Court held that due process is made possible by a procedure which allows the court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. It laid down the following principles on re-sentencing with regard to mitigating factors in a re-hearing,

**“To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge: age of the offender; being a first offender; whether the offender pleaded guilty; character and record of the offender; commission of the offence in response to gender-based violence; remorsefulness of the offender; the possibility of reform and social re-adaptation of the offender; and any other factor that the Court considers relevant.”**

Further, the Supreme Court stated that:

**“Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:**

**“Sentences are imposed to meet the following objectives:**

- 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.**
- 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.**
- 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**
- 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.**
- 5. Community protection: To protect the community by incapacitating the offender.**
- 6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”**

**The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.”**

Although the Supreme Court did not outlaw the death sentence, in deciding whether or not to impose death sentence it was held in **Bachan Singh v The State of Punjab (Bachan Singh)**, Criminal Appeal No. 273 of 1979 AIR (1980) SC 898, a decision cited in the **Muruatetu case** (supra) that:

**“It is only if the offense is of an exceptionally depraved and heinous character, and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the Court may impose the death sentence.”** Emphasis ours.

Similarly cited was the decision of the Privy Council in **Spence v The Queen; Hughes v the Queen (Spence & Hughes)** (unreported, 2 April 2001) where Byron CJ was of the view that:

**“In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty.”** Emphasis ours.

In the present case, we find that the manner in which the appellants committed the offence was heinous, gory and gruesome. The appellants mercilessly beat up the deceased persons with pangas, rungas and swords and as if that was not enough, they tied the 1<sup>st</sup> deceased up in ropes and drowned him in the lake. Similarly, they tied a huge stone on the 2<sup>nd</sup> deceased's head that made him drown in the lake. No human being deserves this kind of torture and inhuman treatment. Given these set of circumstances in which two innocent lives were lost, we are reluctant and not inclined to exercise our discretion in favour of the appellants to review the imposed sentence downwards. The sentence of death was deserved for each of the appellants.

For the foregoing reasons, the appellants' appeal lacks merit and is accordingly dismissed in its entirety.

**Dated and delivered at Kisumu this 3<sup>rd</sup> day of July, 2019.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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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.**