IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, MAKHANDIA & KANTAI JJA

CRIMINAL APPEAL NO. 46 OF 2016

BETWEEN

HENRY MULAMBA BWIRE .....APPELLANT

CALEB OMONDI PAMBA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Busia (**Tuiyot, J**.) Dated 20th November, 2014 in Busia H.C. RA. No. 11 of 2012)

JUDGMENT OF THE COURT

The appeal arises from the Judgment of the High Court at Busia (**F. Tuiyot, J.)** dated 20th November, 2014.

The background to the appeal is that, the appellants were charged jointly with others with the offence of Murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were that, on 31st August, 2012 at Nangoga Village in Namboboto Location in Busia County, the appellants jointly with others murdered **Dennis Wandera Ouma**. The appellants denied the offence prompting a trial in which the prosecution tendered evidence through six (6) witnesses to prove the information.

The evidence in support of the prosecution case was that, **Regina Nabwire** (PW1), who was the mother to the deceased stated that on the material night of 31st August, 2012, she was in her house when at around 10.00 p.m. she heard people talking outside. They knocked at her door four (4) times asking her to open the door but she refused to open. She recognized the voices of the appellants whom she knew very well both as neighbours and relatives. When PW1 refused to open her door, the group left for the house of **Joseph Oluoch Ouma,** PW4, a son to PW1 and a brother to the deceased. His house was in close proximity to that of PW1. PW1 could hear the conversation between **PW4** and the appellants' group very well. She heard appellants tell PW4 that they had beaten the deceased and left him at the house of **Peter Kudundi** as he was unable to walk.

Maurice I. Ouma (PW2), stated that he was in his house on the material date of 31st August, 2012 when at 11.00 PM, PW1 his young brother **PW4** and **Jared Makokha PW5** also a brother of his came and informed him that they had received a report from the appellants that the deceased had been beaten and seriously injured by people and abandoned on the road near the home of **Peter Kudundi.** The three brothers left for the scene which they located with the help of a torch **PW4** had with him. The scene was on a road a few meters from the home of **Peter Kudundi** as had been reported to PW4 by the appellants and another.

Joseph Oluoch Ouma (PW4) stated that he had just retired to bed at around 9.00pm on the material date of 31st August, 2012, when he heard dogs barking outside. He peeped through a hole in his door and saw three people outside his mother's (PW1) house. He opened the door. The three approached him. He was able to recognize the appellants. The 3rd companion had a cape on. PW4 was therefore not able to recognize him. The trio informed PW4 that the deceased had been beaten and badly injured by people and abandoned on a road near the home of **Peter Kudundi.**

Jared Mulamba Ouma (PW5) on the other hand stated that he was in his house on the material night of 31st August, 2012, when he was phoned by his brother PW4 and informed that the appellants and another had been to his home (PW4) and reported to him that their brother the deceased had been beaten and injured and was on a road near the home of **Peter Kudundi.**

The three brothers, PW2, 4 and 5 left for the mentioned road and with the help of a torch that PW4 had with him located the deceased on the

road near the home of **Peter Kudundi** as had been reported to PW4 by the appellants and another. The three brothers gave concurrent evidence that the deceased was wearing a rain coat and an underwear. His trousers were on his shoulder. He had been injured with stab wounds on both ears. He was also bleeding from the head and on the right ear. He also had injuries on the lower limb. They carried him to his house where he received first aid from PW1. He informed them that he had gone to the home of **Rose** to collect wooden door frames when he was attacked by the appellants and many others. All the three witnesses stated that the deceased named the appellants to have been among the persons who assaulted him on the material night, although the police failed to indicate so in the statement of PW2, but did indicate so in the statements of PW4 and 5. It was also the testimony of the three brothers that they were unable to secure transport to take the deceased to hospital. He therefore died the following morning at 5.00 a.m before being taken to hospital.

Following the death of the deceased, a report was made to the area chief and subsequently to the police. Police visited the deceased's house and collected the body before visiting the scene of the assault in the company of the chief, PW6 and other police officers. They recovered a belt from the house of **Peter Kudundi** which the three brothers identified as belonging to the deceased as they used to see the deceased using it. They also recovered a *fimbo* belonging to the deceased in the compound. They also observed that the grass outside the house was disturbed which according to them was evidence that there had been a struggle in the compound of **Peter Kudundi**.

The body was taken to the Hospital mortuary where a postmortem was carried out on it by **Dr. Mitei**. The post mortem report was however produced in evidence on behalf of **Dr. Mitei** by **Dr. Rabare Niya PW3,** who had worked with **Dr. Mitei** for two years and was therefore familiar with **Dr. Mitei's** hand writing. The Doctor's observations were that, externally there were bruises on the left and right thighs, left forearm, anterior chest, right clavicle, lateral to the left eye, on the left forehead and on the left lower limb. Internally, there was fibrinous adhesions in the right lower lung suggestive of a healed chest infection. There were also bruises on the head and a haematoma below the scalp. In the Doctors opinion the cause of death was due to multiple injuries, secondary to repeated blunt trauma secondary to beatings.

SGT **John Gatiri** (PW6) a police officer then stationed at Funyula Police Station, recalled that on 1st September, 2012 he was on duty at the above named police station when **David Ouma, PW4, PW5** and **Mark Ouma** while in the company of the area assistant Chief, **Juma** came and reported the murder of the deceased. He booked the report in the OB, interrogated the reportees before accompanying the OCS Inspector **Tarus** and the reportees to the house of the deceased where they found the deceased's body lying on a bed. PW6 observed a swollen head, fresh cut wound near the right ear, fresh cut on his left leg and bruises all over the body. There were indications that he had been whipped repeatedly all over the body. They removed the body into the police vehicle and then left for the mortuary.

Nothing was recovered from the spot where the deceased was picked up from by his brothers. They left for the nearby home of **Peter Kudundi** which they found deserted. They recovered a belt from the house identified by the reportees as belonging to the deceased and a broken stick. Acting on information received, the appellants and the others were arrested and arraigned in court for the murder of the deceased.

When put to their defences, the 1st appellant **Henry Mulamba Bwire** gave sworn evidence. It was his testimony that he is a **boda boda** operator married to two wives **Christine Ouma** and **Sarah Ouma Mungabe,** with six children. He recalled that on the material date of 31st August, 2012, he left **Sarah's** house early in the morning and went about his *Boda boda* business within Funyula Town. He came back to the same house of **Sarah** that evening at around 5.00 P.M**,** had supper and retired to bed and never left his house till 5.30am the next day when he left for his place of work at Funyula Market. He denied being in the company of two others who went to the home of PW1 first and then to the home of PW4 to report to him that the deceased had been injured and was on the road. Neither did he go to the home of **Rosemary** where the incident occurred. He also never met the deceased nor any of the other persons he had been charged jointly with on that date. He learned of the allegations when the charges were read to them in court. He confirmed in cross-examination that he was well known to both PW1 and PW4 who were both his neighbours and relatives and that they had no issues between them.

The 2nd appellant **Caleb Omondi Pamba** also gave sworn evidence. It was his testimony that he is an orphan and was at the material time working as a blacksmith while residing in the house of his uncle **Fredrick Kudundi**. He recalled that on the material date of 31st August, 2012, he reported to his place of work and went about his chores until 6.00 p.m. when he closed his business and left for his uncle's home. Upon arrival, he had supper with his aunty and children and then retired to bed at 8.00pm. He never left his uncle's house till 6.00a.m. the next day. He never witnessed any incident on the previous night. Neither, did he go to the homes of PW1 and PW4 on the material night as alleged by PW1 & PW4. He was therefore a stranger to charges levelled against him at the trial.

The appellants called witnesses in support of their respective defences. **Fredrick Kudundi** (DW8) gave evidence in support of the 2nd appellant's defence. DW8 recalled coming home on that date of 31st August, 2012, at around 10.00pm and found when the 2nd appellant had already retired to bed. DW8 locked the gate and maintained both in his evidence in chief and cross-examination that no one left his compound for the whole of that night.

Sarah Auma Mungabe gave evidence in defence of the 1st appellant. It was her testimony that her husband the 1st appellant was a *Boda boda* operator. She recalled the 1st appellant leaving home at 6.00 am on 31st August 2012 for routine *boda boda* chores at Funyula. He came back home at 5.30pm. She prepared supper which they ate at 7.30 p.m. and then retired to bed at about 8.00pm. At no time did he leave the house that night till the next day of 1st September, 2012 when he left for work as usual.

At the conclusion of the trial, the trial court analyzed the record in light of the rival submissions of the respective parties, identified issues for determination and proceeded to make findings thereon that the prosecution case was dependant on circumstantial evidence and the deceased's dying declaration; that the circumstantial evidence revolved around the testimonies of PW1 and 4; that PW1 had said that she recognized the voices of the appellants as the persons who knocked at her door on the night of 31st August, 2012; that PW4 on the other hand heard people talking outside his mother's (PW1's) house and on peeping through a hole in his door and with the help of moonlight, he saw three persons' approach from the direction of his mother's house towards his house. He opened the door and when he came out of his house he only recognized the appellants as the 3rd person was wearing a cape; that PW4 had a conversation with the appellants whom he knew very well both as neighbours and relatives. On that account, the trial court found the evidence of PW1 and 4 credible, and concluded as follows, with regard to the evidence of PW1:

"This court has no doubt that PW1 was familiar with the voices of A2 and A5 as the two were well known to her and they had interacted and that of PW4."

And with regard to the evidence of PW4 thus:

"This Court also believes that PW4 did not make up the evidence as he was candid enough to admit that he was unable to identify the 3rd person. This Court reaches a decision that A2 and A5 visited the compound of PW1 and PW4 on the night of 31st August, 2012 at about 10.00pm."

On the condition of the deceased when PW2, 4 &5 found him, the trial court stated as follows:

"In remarkably consistent testimony the three witnesses described their brother's condition. He wore a coat but had no trouser on. His trousers were on his shoulder and the lower part of his body was only covered by his underwear. He was struggling to stand on his own but could not do so. He had multiple injuries all over his body. The three carried him and after making some stops they reached the home of the deceased. On reaching his home the three asked PW1 and others to administer first aid on him as they sought transport to take him to hospital; that the deceased died on the morning of 1st September, 2012."

In response to the appellants' contention that the deceased died at the scene of the assault and that in fact the three brothers found him already dead, the trial court made observations thereon as follows:

"The evidence of PW2, PW4 and PW5 is that Dennis was alive, albeit critically injured, at the time they picked him when they took him home was supported by PW1. Why else would PW1 administer first aid on him. Would she be administering first aid on a dead body of her son? I hold that the account of the prosecution that the deceased died on the morning of 1st September, 2012 is believable."

Turning to the evidence on the dying declaration, the trial court made observations that the deceased talked to PW1 as she administered first aid to him and told her that his attackers were many but he recognized five whom he did not name to PW1. The trial court therefore concluded that the statement of the deceased to PW1 did not implicate anybody.

Upon analyzing the evidence of PW2, 4 and 5, the trial court concluded as follows:

"[48] The evidence of the three witnesses which I have just quoted was not debunked in cross-examination. They are consistent in material particulars. That, the deceased spoke to them at about 2.00a.m. and told them that he had been attacked by many people who included 'Perkins" "Mulamba" and "Caleb". That this happened at the house of Rosemary a wife to Peter Kudundi. The statement was made by the deceased who was laboring under severe injuries and extreme pain. He would shortly thereafter succumb to the injuries. Surely his death was imminent and he was under expectation of death. The statement was in respect to the circumstances of the incident that led to his death. I would hold, as I now do, that the statement made by the deceased was a dying declaration in terms of the provisions of section 33 (a) of the Evidence Act.

[49] But let me, as promised, revisit the evidence of PW2, he conceded that the names of the assailants were excluded in his statement to the police. It would be expected that such critical evidence be included in the statement of a witness who is recording a statement soon after the happening of an incident and whose memory would, presumably, be fresh. This court would have otherwise doubted this aspect of the evidence of PW2 had it not been adequately supported by the evidence of PW4 and PW5. Again I do not think that it was a material departure that the evidence of PW2, PW4 and PW5 was that the deceased mentioned 3 (three) names while the evidence of PW1 was that he said that he knew 5(five) of his attackers. The conversation of the deceased with the trio was at different times from that of his conversation with PW1. Another reason that gives some credence to the dying declaration is that on the day following the assault, PW6 in the presence of PW2, PW4 and PW5 found a small piece of belt in the compound of Peter Kudundi (DW11) and his wife Rose (Rosemary). Was there no truth in the statement of the deceased that he was attacked and injured while in the house of that couple.?

Turning to the legal threshold for sustaining a dying declaration as a basis for conviction, the trial court reviewed the case of **Pius Jasunga S/O Akumu versus R. [1954] 21 EACA 333** for guiding principles namely, that caution must be exercised when accepting a dying declaration as a basis for a conviction. Secondly, corroboration for a dying declaration is not mandatory but there is need for the court to examine the circumstances under which the dying declaration was made and satisfy itself that the deceased could not have been mistaken as to the identy of the accused. Thirdly, it is generally unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused person and not subjected to cross-examination.

Upon applying the threshold for admitting evidence of a dying declaration to the evidence adduced against the appellants through PW1,2,4 and 5, the trial court concluded as follows:

[52] As against A2 and A5, this court has already accepted as believable the evidence of PW1 and PW4 that the two visited them in the early part of the night of 31st August, 2012 and informed them that the deceased had been beaten and was lying seriously injured on the road side. Is it not too much of a coincidence that the deceased named a Mulamba and a Caleb as amongst his assailants when the middle name of A2 is Mulamba and a name of A5 is Caleb? Is it not too much of a coincidence that A2 and A5 correctly directed PW4 to the place where the deceased lay injured? Does it make sense that A2 and A5 could have seen the deceased critically injured and offered no help? All these questions put together beg, was A2 and A5 not amongst the persons who assaulted the deceased on the night of 31st August, 2012?"

Turning to the defences put forth by the appellants, the trial court made observations that both defences were in the nature of *alibis* and upon reviewing the case of **Wangombe versus Republic [1980] KLR 149;** and **Victor Mwenda Mulingi versus Republic [2014] eKLR,** ruled that it is now trite law that the burden of proving the falsity, if at all of an accused's defence of *alibi* lies on the prosecution. Secondly, that a trial court should bear in mind the stage of the proceedings at which an accused person raises his *alibi* and determine whether it was raised at the earliest opportunity to afford the prosecution an opportunity to test it and therefore rule out the possibility of an inference being drawn against an accused person, that it was raised only as an afterthought.

Applying the above threshold to the rival positions before it the trial court drew out the following conclusions:

> ***"This court in testing the alibis of the two accused persons and in weighing them against the other evidence will bear in mind that the defence was not put forward at the investigation stage or prior to the close of the prosecution case. They could therefore not be authenticated by the investigators or the prosecution. If the court is to believe the Alibis of the 2 accused persons, then it must be satisfied that they were not an afterthought."***

Upon revisiting the *alibi* defence of the 1st appellant as supported by the testimony of DW9 the trial court concluded as follows:

> ***"Comparing this evidence with that of the prosecution case, I must also bear in mind that this is the evidence of a man and wife made in defence of a man facing a murder charge and which defence was raised for the first time when it could not be authenticated by the investigators or by the prosecution. It seems to me, and I so hold, that the strength of the dying declaration which implicated a Mulamba and the evidence that A2 (whose middle name is Mulamba) was seen in the compound of PW1 and PW4 at about 10.00pm on the night of 31st August, 2012 outweighs the Alibi defence set up by A2."***

Turning to the evidence of the dying declaration as against the 2nd appellant, the trial court made observations as follows:

> ***"On his part, DW8 told court that on that day he returned to his house at 10.00pm by which time A5 had gone to bed. He then added:***
>
> ***"I never saw him that evening.***
>
> ***DW8 could not therefore vouch the accused's story that he was at Muoko throughout in the night of 31st August, 2012. I find it rather curious that the defence chose not to call Fredrick's wife or adult child who are said to have been with the accused on the night. That alibi is rather pale in the face of the strong prosecution evidence. Just like for A2, the prosecution has discharged it onus in respect to A5."***

Turning to the issue as to whether the prosecution discharged its burden of proof, the trial court stated as follows:

> ***"[57] Denis Wandera Ouma died on the morning of 1st September, 2012. The opinion of the Doctor who conducted a post-mortem on his body was that the cause of his death was multiple injuries secondary to repeated blunt trauma secondary to beating. The prosecution has proved beyond reasonable doubt that the deceased was beaten on the night of 31st August, 2012. The prosecution has also proved beyond reasonable doubt that A2 and A5 were amongst the people who assaulted and inflicted the fatal wounds on the deceased. The postmortem confirmed that the injuries sustained by the deceased were serious. The assailants, no doubt, intended to kill or seriously injure him. In the end the deceased succumbed to the injuries. There is no evidence that the assailants were provoked into attacking the victim. It is the finding of this court that A2 and A5, with others who we may never know, murdered the deceased on 31st August, 2012. I do hereby convict A2 and A5 on the offence of murder contrary to section 203 as read with 204 of the Penal Code."***

The appellants were aggrieved. They are now before this Court on a first appeal substantially raising two grounds of appeal which read as follows: -

> ***"(1) The learned trial Judge erred in law in finding that the case against the appellants was proved beyond reasonable doubt.***
>
> ***(2) That the appellant is fully seeking refuge in the provisions of Article 165(3) (a) (b) 159 (2) (a) (b) and 22(4) of the Constitution of Kenya 2010 bearing in mind the supreme court decision in Francis Karioko Muruatetu & another versus Republic [2017] eKLR.***

The appeal was canvassed by way of written submissions, filed, adopted and orally highlighted by learned counsel **Mr. Okoyo Omondi** for both appellants; and written submissions filed by **Victor Mule** the Senior Assistant Director of Public Prosecution and fully adopted by **Miss Lubanga** holding his brief without highlighting them.

In support of ground 1 of the appeal, **Mr. Omondi** submitted that in convicting the appellants, the trial court relied on the deceased's dying declaration identifying the appellants as the deceased's assailants; that it is the appellants' contention that the alleged dying declaration was never made by the deceased and if at all it was made, then the same amounted to hearsay evidence and was therefore inadmissible in law, let alone to be applied as basis for convicting the appellants.

On the legal threshold for admitting evidence of a dying declaration, **Mr. Omondi** submitted that the threshold is as set out in **section 33(a)** of the Evidence Act; that under the said provision a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence; that under the said provision, statements of admissible facts, oral or written, made by a person who is dead

are admissible where the cause of his death is in question, in instances where they have been made by the person as to the cause of his death or as to any of the circumstances of the transaction that led to his death, and that such statements are admissible whether the person who made them was or was not expecting death when he made the statements.

On the principle of law that guide the Court on admission of a dying declaration, **Mr. Omondi** relied on the decision in the case of **Choge versus Republic [1985] KLR1,** and submitted that the evidence on the deceased's dying declaration relied upon by the trial court as basis for finding the appellants guilty of the murder of the deceased fell short of the threshold set out in the above **Choge case** (supra), because, firstly, all that PW1's evidence amounted to was that the deceased only mentioned that he was assaulted by many people without naming any of the many people. Secondly, only the first appellant's name featured in the names of persons the deceased named to have been amongst his assailants; that although both PW4 and 5 named both appellants as having been among the persons the deceased named as his assailants, there was no mention of the weapons appellants used to inflict the injuries on him, which in **Mr. Omondi's** view created a doubt in the deceased's identification of the appellants to have been among the persons who fatally assaulted him.

In light of the above submissions, **Mr. Omondi** faulted the trial court for relying on the evidence of PW1, 2,4 and 5 as basis for convicting the appellants when the same was unreliable as it was not consistent in all material aspects. In **Mr. Omondi's** view, these inconsistencies were fundamental and therefore created a doubt in the prosecution's case which should have been resolved in favour of the appellants by the trial court and since the trial court failed to discharge that mandate**, Mr. Omondi** invited us to reconcile those discrepancies and resolve the resulting doubt in favour of the appellants, fault the appellant's conviction, set the conviction and sentence aside and substitute thereto with an acquittal and an order that appellants be set at liberty.

It was also **Mr. Omondi's** contention that, the trial court also failed to appreciate that the conduct of the appellants after the incident did not portray any guilty conduct on their part as in **Mr. Omondi's** view, if the appellants were indeed part of the mob that had inflicted the fatal injuries on to the deceased, they would definitely have escaped and not gone to inform the deceased's relatives about the incident.

Mr. Omondi also faulted the trial court for the failure to appreciate the inconsistencies in the material evidence on the timings as to when the said deceased's dying declaration was made. It was **Mr. Omondi's** observations that according to PW1, the dying declaration was made immediately the deceased was brought to his house by his brothers, while according to PW2, 4 and 5, it was made after 2.00 a.m which inconsistency **Mr. Omondi** urged us to find that it was a fundamental one as it went to vitiate the credibility of the prosecution's evidence as tendered through the said witness.

In the alternative to the above submissions, **Mr. Omondi** submitted that should we affirm the convictions against the appellants, then we should be guided by the Supreme Court holding in the case of **Francis Karioko Muruatetu & 2 others versus Republic [2017] eKLR** and find that the death sentences handed down against the appellants by the trial court were not mandatory, temper with them, set them aside and substitute thereto with favourable sentences bearing in mind the age of the appellants and the number of years they have been incarcerated since their arrest.

Opposing the appeal, **Mr. Victor Mule** in his submissions stated that there was no evidence of an eye witness to the incident. The prosecution case therefore depended entirely on the evidence of the dying declaration of the deceased, admissible under **section 33(a)** of the Evidence Act.

In light of the threshold set out in **section 33(a**) of the Evidence Act, **Mr. Mule** submitted that there was sufficient proof in the prosecution's evidence that the deceased made a dying declaration to the prosecution's witnesses PW2,4 and 5 all of whom testified at the trial and corroborated each other. Secondly, the dying declaration related to the deceased's death and was therefore properly appreciated and admitted by the trial court as evidence in support of the prosecution case.

On corroboration for the deceased's dying declaration, **Mr. Mule** submitted that since the statement made by the deceased as to how he sustained the fatal injuries and which injuries were not only visible on his body to all the prosecution witnesses who viewed them as borne out by the narratives in the testimonies of the above witnesses; it fell within the ambit of **section 33(a)** of the Evidence Act and was therefore properly appreciated and admitted in evidence by the trial court.

It was also **Mr. Mule's** submission that, the deceased's dying declaration was also corroborated by the following factors: firstly, it was not a mere coincidence that the appellants and another went to the home of PW1 and 4 and informed them that the deceased had been attacked which turned out to be true. Secondly, the postmortem report indicated clearly that the deceased died from injuries consistent with beatings which confirmed the deceased's dying declaration that he had been assaulted by a mob which included the appellants. Thirdly, at the time the deceased revealed his attackers, he was facing imminent death as he died a few hours later. He could not therefore have lied. He also knew his attackers very well as they were not only from the neighbourhood but they were also related to him as borne out by the testimonies of the key prosecution's witnesses.

Turning to the essential ingredients for establishing an offence of murder **Mr. Mule** invited us to be guided by the provision of **section 206** of the Penal Code on the ingredients for malice aforethought which is the core ingredient in establishing the offence of murder and submitted that the threshold for establishing the ingredient of malice aforethought was met by the prosecution evidence because; firstly, from the nature of the injuries inflicted on the deceased as demonstrated by the uncontroverted evidence of PW1,2,4,5 who observed those injuries physically on the body of the deceased and on the one hand and as corroborated by the evidence of PW3 who produced the post mortem report as an exhibit. Secondly, the content of the postmortem report indicated clearly that the deceased had sustained multiple injuries, secondary to repeated blunt trauma, consistent with beatings, a positon which went to confirm the deceased's dying declaration that he had been assaulted by a mob which included the appellants. On that account **Mr**. **Mule** prayed for the appeal to be dismissed.

This is a first appeal. What the appellants expect of us as a first appellate Court is to subject the entire record to an exhaustive examination and arrive at our own conclusion on the said evidence. We are obligated to weigh the conflicting evidence and draw out our own conclusions on the matter. We are further enjoined not to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions but to make our own independent findings as well as to draw out our own conclusion thereon and decide whether

the findings of the trial court are sustainable or not and give reasons either way. We are also enjoined to bear in our minds that in doing so, we should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses testify and give deference to any impression formed by the trial Judge as to the demeanor of those witnesses. See **David Njuguna Wairimu V Republic [2010] eKLR** and **Dinkerrai Ramkrishan Pandya vs. R [1957] EA 336.**

We have considered the record in light of the above mandate, the rival submissions set out above and the principles of case law relied upon by the appellants in support of the appeal. The issues that fall for our determination are as follows: -

1. ***Whether the prosecution's case against the appellants was proved beyond reasonable doubt.***

2. ***Whether the sentence meted out against the appellants' merits tampering.***

As observed by the trial court, there was no eye witness to the incident. The prosecution case therefore rested entirely on the evidence of the deceased's dying declaration.

The Supreme Court of India in the case of ***P.V. Radhakrishna v State (AIR 1989 SC of Kamataka)*** summarized the principle for admission of a dying declaration in the following words:

> ***"The principle on which a dying declaration is admitted in evidence is indicated in latin malent, "****nemo morturus procsomitur mentri****, a man will not meet his maker with a lie in his mouth."***

See also the case of ***Republic v Andrew [1987] AC 281*** where **Lord Ackner** laid down the following tests on the admissibility of evidence of a dying declaration which may be summarized in our own words as follows: **there is need to determine whether:**

> ***(1)*** **there is any** ***possibility of any concoction or distortion in the narrative.***
>
> ***(2) The event forming the narrative was so unusual, startling or dramatic that it gave rise to a likelihood of the victim misapprehending the correct position and therefore made in error; and lastly***
>
> ***(3) The statement must be closely connected with the event causing the death of the deceased.***

In the case of ***Choge V. Republic [1985] KLR 1****, reviewed by the trial court and also relied upon by* ***Mr. Omondi*** *in his submissions,* the Court of Appeal set out the threshold for the admissibility of a dying declaration in the following passage:

> ***"The general principle on which a dying declaration is admitted in evidence is that in a dying declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such a dying declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."***

The predecessor of the court of appeal in the case of ***Pius Jasunga S/O Akumu v Republic [1954] EACA 333*** succinctly held as follows:

> ***"The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval....it is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (Republic v Eligu S/O Odel & Another [1943] 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration."***

Counsel for the appellants has argued that the evidence of PW1,2,4 and 5 on whose evidence the trial court relied to sustain the deceased's dying declaration was inconsistent hence not safe to sustain a conviction. In regard to the testimony of PW1, counsel submitted that the deceased did not name the appellants as the people who assaulted him. As for PW 2, it was submitted that the 2nd appellant was not mentioned though the deceased named the others and the weapons used. For PW 4, that the deceased is said to have mentioned the appellants to have been among the persons who inflicted injuries on him but did not mention the weapons used by the appellants in the course of the inflicting of those injuries; and finally in regard to PW 5, that the appellants were apparently mentioned as the assailants.

The position in law on alleged existence of contradictions and inconsistencies in the prosecution case is as was stated in **Joseph Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993**, *inter alia* that in any trial there are bound to be discrepancies and an appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences. See also **Josiah Afuna Angulu Vs. Republic, Cr. Appeal No. 227of 2006 (UR),** and **Charles Kiplangat Ng'eno Vs. Republic: CR. Appeal No.77 of 2009 (UR)** for the holding, *inter alia* that, where contradictions and inconsistencies are alleged to exist in the prosecution case, the duty of the Court is to reconcile these and determine whether these operate to vitiate the prosecution's case or otherwise.

In light of the above guiding principles and applying them to what the appellants' counsel identified above as contradictions in the evidence

of the above prosecutions witnesses, it is our view, that it was not mandatory for the deceased to use the exact words and details to each and every witness. What the deceased uttered and each witness separately and individually heard and related in their own way of expressing it to the court was proper and acceptable as it was within the law.

Our reasons for finding so are that, there is nothing on the record to doubt PW2,4 and 5s' evidence that when they found the deceased on the road he talked to them. Secondly, when they reached his house after a long struggle, he was also able to talk and communicate. There is therefore sufficient demonstration that he expressed himself sufficiently audibly for the witnesses to comprehend the message he intended to convey to them. There is also nothing on the record to suggest that any of the witnesses probed or induced the deceased to name the appellants as his assailants. The information was therefore voluntarily given. There was also no evidence of any concoction or any distortion of whatever message the deceased relayed to the said witnesses. It is therefore our finding that the information on the dying declaration was relayed to the police and then the trial court by the witnesses as conveyed to them by the deceased as the declarant. The circumstances under which it was related were properly appreciated by the trial court. We find no reason to interfere.

It is also our view that the fact that the deceased did not specify the weapons used by the appellants to inflict the fatal injuries on him did not of itself operate to discredit the deceased's dying declaration. Of crucial importance to the prosecution evidence in our view, was for the trial court to properly appreciate and which we find and affirm that indeed the trial court did properly appreciate and correctly so in our view, that the dying declaration was in relation to the cause of the deceased's death namely beatings by a mob among them the appellants. The dying declaration was therefore properly admitted in evidence especially when the deceased repeated the same narrative at different times to the witnesses as demonstrated above. The trial court also believed the prosecution testimonies as truthful. We have no reason to doubt that belief as the trial court had the benefit of observing the witnesses testify and made an informed impression of their deaminors.

Turning to the appellants' *alibi* defences, it was correctly appreciated by the trial court, that the burden of displacing those *alibis* lay with the prosecution. It is evident from the record as highlighted above that the trial court analyzed the evidence on the appellants' *alibis* as buttressed by the evidence of witnesses' appellants called in support of those *alibis,* weighed the said evidence against the prosecution evidence of PW1 and PW4 and rejected the appellants' *alibi* for the reasons that, both PW1 and PW4 as confirmed by the appellants themselves knew the appellants very well. PW1 heard their voices outside her house, while PW4 saw them and also talked to them. They informed PW4 that the deceased had been assaulted, a position the deceased confirmed in his dying declaration. In addition, he named the appellants as persons who had actively participated in causing the fatal injuries on him. Contrary to what **Mr. Omondi** suggested of an innocent encounter of the deceased by the appellants, hence playing the role of a good Samaritan, it is our view that the correct position of what transpired at the scene of the assault is as was conveyed to PW2,4, and 5 by the deceased in his dying declaration.

We therefore find no reason to interfere with the conclusions reached by the trial court on the weight attached to the appellants' *alibi* defences, as the trial court's basis for rejecting the appellants' *alibi defences* as already highlighted above were well founded both on the evidence on the record and also upon a proper appreciation and correct application of the law for sustaining an *alibi* defence.

In light of our above assessment and reasoning, we find no merit in the appellants' appeal against conviction. We accordingly dismiss the appellants' appeal against conviction and affirm appellants' conviction as handed down against them by the trial court.

As for the appropriate sentence, we appreciate it is evident from the record that the appellants mitigated after conviction. They were found to be first offenders with no previous criminal records. The trial Court however intimated that it had no choice but to follow the decision of the Court of Appeal in ***Joseph Njuguna Mwaura and 2 others vs Republic [2013]*** where it was held that the offence of murder contrary to Section to 203 as read with Section 204 of the Penal Code and all other capital offences carry the mandatory sentence of death.

The above was the correct jurisprudential position in law as it obtained then. Appellants' counsel has urged us not to 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 guide lines *inter alia* as follows:

> ***"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".***

Our take on the above guideline is that, this decision is not a *panacea* for setting aside each and every death sentence that may have either been handed down against an accused person by a trial court or affirmed on appeal. The correct position in law is that each case has to be considered on its own set of facts. This is not the first time the Court has been confronted with such a request. The trend has been either to set aside the death sentence and substitute it with an appropriate sentence of imprisonment for a specified period or remit the matter to the High Court or the trial court for resentencing, in line with sentencing guidelines, or lastly, to affirm the death sentence where appropriate. In **Juma Antony Kakai versus Republic Nairobi Criminal Appeal No. 48 of 2015; and Julius Mutei Muthama versus Republic Nairobi Criminal Appeal No. 189 of 2016** among numerous others, this Court variously set aside the death sentences that had been affirmed in those appeals and substituted them with sentences for a specified period of imprisonment. The relevant factors taken into consideration were among others existence on the record of mitigation by the affected appellants, value of property robbed and nature of injuries suffered by the victims and any other either aggravating or ameliorating circumstances.

Applying the above parameters to the surrounding circumstances in this appeal, we find that injuries resulting in the death of the deceased were inflicted by a mob of which the appellants were part of although there is no doubt the appellants as part of the crowd that inflicted the fatal injuries to the deceased, their individual contribution to the causation of those injuries cannot however be measured not withstanding that, appellants are in law pinned down to full responsibility by operation of the doctrine of common intention, although we find no need to expound on it.

In light of all the above, we find ends of justice in the circumstances of this appeal to warrant the exercise of our discretion to tamper with the death sentence handed down against the appellants by the trial court. Consequently, we allow the appeal against sentence, set aside the death sentence and substitute it with a sentence of Twenty-Five (25) years imprisonment effective the date of sentence by the trial court.

It is so ordered accordingly.

Dated and Delivered at Kisumu this 21st day of November, 2019.

R.N. NAMBUYE

JUDGE OF APPEAL

ASIKE MAKHANDIA

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.