



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A)

CRIMINAL APPEAL NO. 92 OF 2016

PATRICK WANYAMA MUDOGO.....1ST APPELLANT

REUBEN OCHANGO KAFUNA.....2ND APPELLANT

SAMWEL CHUNE SITOKI3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya

at Eldoret, (Ngonye Macharia, J.) dated 3rd July, 2014

in

HCCRC. NO. 51 OF 2002)

JUDGMENT OF THE COURT

[1] The three appellants Patrick Wanyama Mudogo; Reuben Ochango Kafuna and Samwel Chune Sitoki were jointly charged with four others of four counts of murder contrary to **Section 203** as read with **Section 204** of the Penal Code.

The 1st, 2nd, 3rd and 4th counts related to the murder of **Joseph Kariuki, MW, AAA** and **JAA** respectively.

The appellants and the four co-accused were alleged to have murdered the four deceased persons on the night of 10th and 11th January, 2002.

[2] The appellants and the four co-accused pleaded not guilty to the offence. After a trial in which the prosecution called 14 witnesses, the three appellants were convicted by the High Court of the four charges and each sentenced to death. The four co-accused were acquitted.

The three appellants have now appealed to this Court against the conviction and sentence.

[3] The deceased in counts III and IV were children of **John Alusiola Sitok (PW1) (John Alusiola)** and his wife **Rose Kageya John (PW4) (Rose)**. AAA was aged 11 years while J was aged 7 years. John had other children including **EIA (PW3) (EA)** who was 13 years old at the time of the alleged offences.

Joseph Kariuki – deceased in count I was aged 19 years. He was the son of a brother of **Anastasia Nyambura Kariuki (PW11) (Anastasia)**. MW the deceased in count 1 was aged 9 years, she was the daughter of Anastasia and **Kepha Nyando Kelis (PW14) (Kepha)**.

[4] In about the year 2000, John Alusiola sold a part of his land (*about 1¹/₂ acres*) to Kepha. In about 2001, Kepha and his wife Anastasia constructed a house on the land they had bought. Kepha and his wife were living in Nairobi. They brought Joseph Kariuki (*deceased in*

count I) to the farm. Joseph Kariuki was living in the house with MW (deceased in count II) who was to enrol in a local primary school. There was a television set in the house. Kepha employed the 1st appellant as a casual worker in the farm. The 1st appellant is a son of a neighbour of John Alusiola. The 1st appellant was living at his home. The 2nd appellant, Reuben Ochango is a son of a neighbour of John Alusiola. The 3rd appellant, Samwel Chune Sitoki is a brother to John Alusiola.

The other four co-accused are also neighbours of John Alusiola. The three children of John Alusiola used to live with the mother of John Alusiola. The house of the mother of Alusiola is about 100 metres from John Alusiola's house. John Alusiola's children used to go to the house of Kepha to watch television in the evenings.

[5] The prosecution case was briefly as follows:

On 10th January, 2002, at about 6pm EA and her sister and brother (*A and J – deceased*) went to the house of Kepha to watch television. They found Kariuki, M (*both deceased*) and 1st appellant in the house. The 1st appellant was slaughtering a chicken which he cooked and asked EA to prepare ugali. She refused and the 1st appellant chased her away. She left the house at about 9pm leaving her siblings in the house and went to sleep in her grandmother's house. Her siblings did not go home on that night. On the following day, she was questioned by her father about the whereabouts of the children. She explained that she left them in the house of Kepha. John Alusiola went to the house of Kepha. He found the 1st appellant sharpening a panga and inquired about the whereabouts of his children. The 1st appellant informed him that the children had gone with Kariuki to Phoebe's house to buy milk. The house was locked. John Alusiola went to Phoebe's house. He was informed that Kariuki had not been there since the previous day. John Alusiola told the 1st appellant that he suspected that Kariuki had disappeared with the children and asked him to accompany him to the police station to report. The 1st appellant declined.

[5.2] John Alusiola reported about the missing children at **Lumakanda Police Station** on 13th January, 2002. On 14th January, 2002 at about 4.30pm, **John Liloba Wafula (PW6)** took his parents' cattle to Lumakanda river. He saw human legs floating in the river and reported to his mother and the report eventually reached John Alusiola who went to the river and saw also floating human legs. He reported the discovery to the police. **Chief Inspector Albert Tawaya (PW13)**, the Ag. District Criminal investigating officer; **Sgt Onesmus Mutunga (PW10)**; **Wilson Kirui (PW2)**, a scenes of crime officer went to the river and retrieved three bodies which were submerged in the water. The three bodies were wrapped in a blanket which was tied with a manila rope. Barbed wire was nailed to the bodies. The scene was about 500 metres from Kepha's house. Two of the bodies were identified as those of A and J, John Alusiola's children. The other body was identified as that of MW – Anastasia's child.

Police visited the house of Kepha. It was locked. The padlock was forced open. The house had been disturbed. There was cooked ugali and remnants of chicken which had been eaten. The television set, sewing machine, bicycle and other household items were found missing.

[5.3] The 1st appellant was arrested as a suspect and taken to the police station. On 16th January, 2002, upon interrogation he revealed the names of other suspects including the 2nd and 3rd appellants and the co-accused who were all neighbours. The 3rd appellant (*Samwel Chune Sitoki*) was arrested. On 17th January, 2002, the 1st and 3rd appellants led police to the recovery of the body of Joseph Kariuki. The body was recovered in the same river. It was nailed to a fencing post. Later, the 3rd appellant led to the arrest of the 2nd appellant, Reuben Ochango in Vihiga.

[5.4] On 18th January, 2002, **Dr Cleophas Kubasu** performed post-mortem on the four recovered bodies. He formed the opinion that the cause of death of Joseph Kariuki, JA and AA was due to strangulation. As for MW, the Doctor found that her spinal code was cut, the neck was twisted and she had sustained cervical fracture and fracture of the spine. The doctor formed the opinion that the cause of her death was due to cardio-pulmonary arrest secondary to fractured spinal cord.

[6] The 1st appellant was the 2nd accused at the trial. He testified on oath briefly as follows:

He was a neighbour of John Alusiola and was employed by Anastasia as a casual worker. On 6th January, 2002, Anastasia told him that she would bring visitors to pray for her child, MW. She revealed to him that she was a "Free Mason". On 9th January, 2001, at about 3pm Anastasia went to the house with three men who were wearing black clothes. Anastasia asked him to slaughter a chicken and prepare food for her visitors. The three children of John Alusiola were in the house. Joseph Kariuki and MW were also in the house. Later Joseph Kariuki told EA to leave because she had refused to split firewood. At about 6.30pm he was given permission by Anastasia to leave and he went to his house and slept.

On the following morning he went to Anastasia's house and found it locked. As he was sharpening an axe, John Alusiola went there and told him that his children did not go back home. The 1st appellant went back to his house and he was arrested on 13th January, 2002. He was forced by the police to reveal the names of his two brothers and the co-accused who were neighbours. He stated that the bodies of the children were found in the river but denied that he is the one who showed the police where the bodies were, and that he was not involved in the killing.

[7] The 3rd appellant, Reuben Ochango Kafuna was the 4th accused at the trial. He gave sworn evidence that his home is about one kilometre from the home of John Alusiola; that he joined in the search of John Alusiola's children and was present when the bodies were removed from the river and that he does not know how the children died.

[8] The 3rd appellant Samwel Chune Sitoki was the 3rd accused at the trial. He stated in his sworn testimony that John Alusiola was his elder brother; that he was in his house on the night of 10th and 11th January, 2002; that on the morning of 11th January, 2002, his brother told him that his children had not returned home and asked him to help look for the children; that he told him that the children used to go to Kepha's house to watch TV; that he went to the river when the bodies were discovered and that he could not have killed the children of his

brother.

[9] The High Court, (**Ngenye-Macharia, J.**) appreciated that the prosecution case was dependent on circumstantial evidence and cited the case law for the applicable principles. The learned Judge reviewed the evidence and made findings amongst others, that;

“(i) 1st appellant was in the company of the deceased persons on 10th January, 2002.

(ii) the 1st appellant informed Inspector Albert Tawaya of the motive of the murder of Joseph Kariuki was to facilitate robbery and that the children were murdered so that they could not disclose what had happened.

(iii) a theft did in-fact occur in the house of Kepha.

(iv) The 1st appellant mentioned all other co-accused.

(v) 1st appellant revealed where the bodies were dumped and showed the police the site.

(vi) 2nd appellant fled his home to Vihiga after the bodies were retrieved which disappearance sufficiently corroborated what 1st appellant told Sgt Onesmus Mutunga and C.I. Albert Tawaya.

(vii) 3rd appellant informed police where the body of Joseph Kariuki was dumped and also showed the police where the other bodies had been dumped.”

After the trial, the respective counsel for the accused made extensive written submissions. On the basis of the circumstantial evidence the appellants were ultimately convicted. Nevertheless, the High Court acquitted the four co-accused on the ground that they were only mentioned by the 1st appellant and there was no corroborating evidence.

[10] Mr. Miyianda for the 2nd appellant has in the supplementary memorandum of appeal raised a ground of appeal thus:

“The learned Judge erred in law in not declaring the whole proceedings mistrial having proceeded with the trial without assessors.”

The 1st and 2nd appellants who are represented by **Mr. Nabasenge** have raised the same ground of appeal in the supplementary memorandum of appeal and in the written submissions that they filed just before the hearing of the appeal.

[11] **Section 262** of the Criminal Procedure Code (CPC) provided that all trials before the High Court shall be with the aid of assessors. The trial started before **Dulu, J.** with the aid of three assessors on 16th June, 2004. On that day, John Alusiola gave evidence but it was adjourned before cross-examination was completed. The trial resumed before **Gacheche, J.** on 10th April, 2006 when the trial started *de novo* with the aid of assessors. The learned Judge heard eight witnesses between 10th April, 2018 and 25th October, 2006. Thereafter, Gacheche J. was transferred and on 28th May, 2007, **Kaburu Bauni, J.** ordered the trial to start *de novo*.

[12] The trial started *de novo* before Mohammed Ibrahim, J. (*as he then was*) on 11th October, 2007 when John Alusiola gave evidence for the second time. However, the trial was adjourned before he completed his evidence. In the meantime, The Statute Law (*Miscellaneous Amendments*) Act – No 7 of 2007 deleted some provisions of the CPC including **Section 262** relating to trial with the aid of assessors with effect from 15th October, 2007.

When the trial resumed on 1st November, 2007, all the assessors were absent. By a ruling dated the same day, the learned Judge considered the law and said in part:

“The law has been changed. I have consulted the counsel and all the accused have accepted that this case can proceed from where Justice Gacheche had stopped.”

Thereafter, the learned Judge received the evidence of six witnesses and the prosecution closed its case. The case was adjourned several times at the instance of the advocates for the accused to enable them make submissions of no case to answer. In the meantime, Mohammed Ibrahim, J. was transferred.

[13] On 29th July, 2010, the matter came up before Angawa, J who ruled that assessors should not have been discharged and that the trial before Mohammed Ibrahim, J. was a mistrial.

[14] The case was thereafter listed for hearing before **Azangalala, J.** (*as he then was*). It was adjourned on several occasions for various reasons including the non attendance by counsel, witnesses and assessors.

[15] On 3rd July, 2012 the case was listed before **Mshila, J.** for hearing only one assessor was present. Counsel for the accused including **Mr. Miyianda** signed a consent order that the presence of assessors be dispensed with and the counsel proceeded to make submissions of no

case to answer. On 18th July, 2012, the learned Judge ruled that all the accused had a case to answer and received the evidence of two of the accused persons including the 1st appellant's defence.

[16] Mshila, J. was transferred before the completion of the defence hearing. **Ngenye-Macharia, J.** took over and explained the provisions of **Section 200** of the CPC to the accused and their counsel and after all accused had elected that the case proceeds from where it had stopped, the learned Judge made the order to that effect and proceeded to receive the evidence of the accused persons in defence and to deliver the impugned judgement.

In the judgment, the learned Judge appreciated that the trial had taken unnecessarily too long and attributed the delay to frequent transfer of Judges and the delay in typing proceedings taken by the previous Judges. The learned Judge found the 1st, 2nd and 3rd appellants guilty and convicted each of the offence as charged.

[17] In arguing the appeal, the appellants' counsel cited several authorities of this Court to support the proposition that a trial commenced with the aid of assessors has to be continued with the aid of assessors notwithstanding the repeal of the provisions of the Criminal Procedure Code relating to trial with the aid of Assessors.

In **George Karanja Mwangi v. Republic** [1982 – 88] 1KLR 567 it was held:

“...the exclusion of assessors during the material part of factual evidence meant that a part of the trial had not been held with the aid of assessors as required by s. 262 of the Criminal Procedure Code, and constituted a fatal irregularity, necessitating the quashing of a conviction and an order of retrial...”

In **Bob Ayub v. Republic** [2010] eKLR where the assessors were excluded from the trial after the repeal of the provisions relating to trial with aid of assessors, the Court declared the trial a nullity and said in part:

“...still the law is clear that when the trial started on 14th October, 2005, the provision of assessors was still part of the law and if repeal of that law was carried out after the trial had begun then the provisions of Section 23(3) of the Interpretation and General Provisions Act Chapter 2, Laws of Kenya were to be applied and the trial should have continued with the aid of assessors to the end.”

In **Brian Kariuki v. Republic** [2013] eKLR, the Court relied on the provisions of **Section 23(3) (e)** of the Interpretation and General Provisions Act in declaring a trial conducted partly with the aid of assessors and partly without the assessors after the repeal a nullity.

In **Charo Karisa Salimu v. Republic** [2016] eKLR, the prosecution and defence agreed to dispense with the assessor after the trial court discharged the assessors. The Court held that the trial Judge committed an error of law by assuming that parties had the right and the court had the discretion to disperse with the assessors after the repeal of the law. The Court held the trial to be a nullity relying on the provisions of **Sections 23(3) (b)** and **S. 23(3) (e)** of the Interpretation and General Provisions Act.

[18] **Section 23(3)** of the Interpretation and General Provisions Act provides:

“Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not –

(a) ... or

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed, or

(c) ...or

(d) ...or

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege; obligation, liability penalty, forfeiture or punishment as aforesaid, and such investigations, legal proceeding or remedy, may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made”. (emphasis added).

[19] A repeal is an annulment of the repealed provision as illustrated by para. 1296 of the **Halsbury's laws of England, Fourth Edition Re-issue** Vol. 44(1) which states:

“To repeal an Act is to cause it to cease to be part of the corpus juris or body of law. To repeal an enactment contained in an Act is to cause it to cease in law as part of the Act containing it. The general principle is that, except as to transactions past and closed, an Act or enactment which is repealed is to be treated thereafter as if it had never existed. However, the operation of the principle is subject to any savings made, expressly or by implication, by the repealing enactment, and in most cases is subject to the general statutory provisions as to the effect of the repeal”.

Section 23(3) of the Interpretation and General Provisions Act, is such statutory provision as to the effect of the repeal.

[20] Section 3(1) of the CPC provides:

“All offences under the Penal Code shall be inquired into and otherwise dealt with according to this Code”.

Further, Section 382 of the CPC provides:

“Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on an account of error, omission or irregularity in the complaint, summons, warrant, charge proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice, the court shall have regard to the question whether the objection would or should have been raised at an earlier stage in the proceedings.” (emphasis added).

[21] Section 322(1) of the CPC, before the repeal required the trial Judge after the close of the case to sum the evidence and require each assessor to state his opinion. Section 322 (2) provided that the Judge by giving judgment was not bound to conform to the opinion of the assessors. Those provisions were repealed and re-enacted thus:

“322(1) when the case on both sides is closed, the judge shall then give judgment.

(2) if the accused is convicted the judge shall pass sentence on him according to law”.

[22] An assessor is defined in the Black’s Law Dictionary Ninth Edition *inter alia*, as a “*person who advises a judge or magistrate about scientific or technical matters during a trial*”. In relation to a trial with assessors, a judge was the ultimate judge of fact and law and was not bound to accept the opinion of the assessors although their opinion may have had an impact, on the judge’s decision. (See George Karanja Mwangi v. Republic (supra)).

[23] The repealing Act came into effect on 15th October, 2007 and by Section 9 of the Interpretation and General Provisions Act it is deemed to have come into operation on that day. The question which arises is whether the repeal had a retrospective effect. There is a general presumption against retrospectivity so that substantive rights of parties are determined according to the law which existed when the action was commenced. However, enactments and repeals which concern merely procedural law and not substantive law affecting legal rights normally take effect retrospectively. In paragraph 1287 of Halsbury’s Laws of England (supra) the authors’ state:

“The general presumption against retrospection does not apply to legislation concerned merely with the matters of procedure; on the contrary provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of parliament. For this, purpose procedure includes matters to do with remedies, defences, penalties, evidence and restrictions on vexatious litigants. Thus procedural enactments affect proceedings pending at the commencement unless the contrary opinion appears...”

[24] The Criminal Procedure Code as its name indicates is a procedural law governing criminal trials and as Section 3(1) thereof provides, all trials under the Penal Code are to be held in accordance with the Code. It is the exclusive statutory and procedural law applicable to trials under the Penal Code.

The provisions of the Interpretation and General Provisions Act are general provisions and as Section 23(3) provides it applies where there is no contrary intention. Without attempting to construe the provisions of Section 23(3) thereof, as it relates to substantive rights it is clear that in all decisions relied upon, the courts merely referred to the provisions and applied them without the benefit of full arguments on applicability of those provisions to the CPC and also without an exhaustive analysis on whether or not trial with the aid of assessors was a substantive right or of the mischief that the repeal intended to cure.

[25] In our respectful view, the applicable and exclusive procedural law governing trials in the High Court was the Criminal Procedure Code. Section 3(1) thereof was not repealed. Section 322 was repealed and re-enacted leaving no room for the opinion of assessors and freeing a trial judge from sitting with assessors and giving him authority to proceed to give judgment after the conclusion of the trial. Those provisions show that Parliament by the repeal intended to reform the procedural law on trial by aid of assessors and the repeal to take effect retrospectively.

Further, the trial was completed after the promulgation of the 2010, Constitution. The entire trial met the threshold of fair hearing within the provisions of Article 50(1) and 50(2) of the Constitution.

[26] In the light of the foregoing, we are satisfied that the appellants were afforded a fair hearing by a competent court and as prescribed by the existing procedural law at the time of the trial. The ruling of Ibrahim Mohammed, J. which has not been appealed against as to the effect of the repeal is in our view the correct position in law. The contention that there was a mistrial is thus rejected.

[27] In other grounds of appeal raised by the 1st appellant he contends, among other things, that, Section 200(3) of the CPC was not complied with; that the learned Judge failed to appreciate that there was no confession recorded and that the circumstantial evidence was

contradictory. Mr. Nabasenge, submitted that the 1st appellant was convicted because he implicated others; that the 1st appellant denied involvement in the murder and testified that he was tortured and coerced; that whatever the appellant told C.I. Albert Tawaya was not a confession and that circumstantial evidence was not corroborated.

Mr. Mulati for the respondent submitted that the 1st appellant was the last person seen with the deceased persons; that the 1st appellant was arrested first, mentioned the co-accused and led police to where the bodies were recovered; that what 1st appellant told C.I. Albert Tawaya was not a confession but a statement that led to the truth of a fact.

[28] As regards the 2nd appellant, the main ground of appeal is that the learned Judge erred in law and in fact in relying on circumstantial evidence without any basis in law or fact. On behalf of the 2nd appellant, Mr. Miyianda submitted that evaluation of circumstantial evidence should have applied to all accused persons across the board; that the evidence that 2nd appellant took part in the search of bodies was not considered and that there was no evidence that the 2nd appellant disappeared to his home in Vihiga. Mr. Mulati did not comment on the appeal of the 2nd appellant.

[29] The main ground of appeal of the 3rd appellant faults the learned Judge for relying on circumstantial evidence without any basis in law and fact.

Mr. Nabasenge submitted that the learned Judge misapprehended the evidence relating to the recovery of the bodies and that the 3rd appellant was arrested on the directive of Anastasia.

[30] The appellants relied on the cases of **James Mwangi v. Republic [1983] KLR 327** on the principles relating to a case based or dependent on circumstantial evidence. It is true that the prosecution case was dependent on circumstantial evidence. Such evidence to justify a conviction must prove that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other by hypothesis than that of guilt. There must also be no other co-existing circumstances which may weaken or destroy the inference.

[31] As regards the 1st appellant's there was ample evidence that the children of John Alusiola usually went to the neighbouring house of Kepha to watch T.V. in the evenings.

There was evidence of EA that on the evening of 10th January, 2002, EA and her brother and sister (*deceased*) went to the house of Kepha and found the appellant, Joseph Kariuki and MW at the house.

The evidence of the appellant that Anastasia was there in the company of three men and that the 1st appellant left at about 6.30pm was discredited by the evidence of EA who said that she left the home at about 9pm, leaving her brother and sister there.

The 1st appellant admitted in his evidence that all the four deceased were at the home of Kepha. The evidence of the 1st appellant suggesting that Anastasia killed all the four as a sacrifice is incredible.

There was ample evidence that Anastasia was away on the material day. The evidence that the 1st appellant was in the company of the four deceased persons on the night of 10th January, 2002 was overwhelming and was admitted by the 1st appellant.

[32] There was also the evidence of John Alusiola that on the following morning he found the 1st appellant at the home of Kepha and the house was locked. Upon enquiring about the whereabouts of his children the 1st appellant told him that they had gone with Kariuki to Phoebe's house to buy milk. When John Alusiola was told by Phoebe that the children had not been there, he asked the 1st appellant to accompany him to the police station to report that Kariuki had disappeared with the children but the 1st appellant declined. The 1st appellant denied giving that information to John Alusiola. However, the evidence of John Alusiola was consistent on all the occasions he testified. His evidence was credible.

[33] Further, there was also overwhelming evidence that the 1st appellant mentioned the names of the co-accused.

The 1st appellant admitted so but claimed that he was tortured and coerced.

C.I. Albert Tawaya testified that the 1st appellant gave names voluntarily.

According to the evidence of C.I. Albert Tawaya, the 1st appellant told him on 17th January, 2002, that he could take police officers to where the body of Kariuki was. The 1st appellant and the 3rd appellant took the police to the river where the bodies of the three children had been recovered and the 1st appellant showed the location of the body of Joseph Kariuki and that the body was recovered. The appellant denied that he is the one who pointed out the location of the body of Joseph Kariuki.

The evidence of C.I. Albert Tawaya was supported by the evidence of John Alusiola who testified that it is the 1st appellant who showed the police where the body of Kariuki was. This evidence was credible and properly accepted by the trial Judge.

[34] As correctly submitted by the 1st appellant's counsel, what the 1st appellant told C.I. Albert Tawaya regarding the motive and the circumstances under which the four were killed would have been a confession which was not recorded as stipulated by the law.

That evidence was improperly admitted in evidence. The learned Judge erroneously considered the motive of the murders as an element of circumstantial evidence.

[35] However, the circumstantial evidence narrated above was substantial and irresistibly connected the 1st appellant with the murder of the four persons. We are satisfied that the 1st appellant was properly convicted.

[36] The conviction of the 2nd appellant was based on the fact that he disappeared from his home after the bodies of the three children were retrieved from the river.

The learned Judge made a finding that his unexplained disappearance corroborated what the 1st appellant told Sgt Onesmus Mutunga and C.I. Albert Tawaya. It is true the 1st appellant mentioned the 2nd appellant to the two police officers. However, what the 1st appellant said about the 2nd appellant was not recorded as a confession. Had it been a confession, it would have been taken into consideration against the 2nd appellant albeit evidence of the weakest kind (*George Karanja Mwangi v. Republic*) (*supra*). EA did not say that the 2nd appellant was at the home of Kepha on the night of 10th January, 2002. The evidence of John Alusiola shows that he was among the people who helped to retrieve the bodies of the children from the river.

In our view, the circumstantial evidence against the 2nd appellant was weak.

[37] The 3rd appellant was convicted on the basis of the evidence that he and the 1st appellant showed the site where the bodies of the three children were recovered and also showed the police where the body of Joseph Kariuki was.

According to the evidence of Sgt Onesmus Mutunga, it is the 3rd appellant who led police to where the body of Joseph Kariuki was recovered and also took the police to Vihiga where the 2nd appellant was arrested.

According to the evidence of C.I. Albert Tawaya, the police took the 1st and 3rd appellants to the river. The 1st and 3rd appellant then took the police to the place where the three bodies of the children had been recovered and said that the body of Joseph Kariuki was upstream and that it is the 1st appellant who was telling the police about the location of the body and after crossing the river, the 1st appellant pointed at the place where the body was. The witness also said that the 3rd appellant did not make any revelations. According to the evidence of John Alusiola, it is the 1st appellant who showed the police where the body of Kariuki was. The evidence of C.I. Albert Tawaya and John Alusiola was consistent that it is the 1st appellant who showed the police the location of the body of Joseph Kariuki. The evidence of Sgt Onesmus Mutunga is inconsistent with that evidence.

It is clear that apart from being mentioned by the 1st appellant there was no concrete circumstantial evidence against the 3rd appellant. We therefore find that he was not properly convicted.

[38] The current law is that death penalty is not a mandatory sentence. The court has been asked to pass an alternative sentence. However the circumstances of this case were gross and the sentence of death against the 1st appellant is the appropriate and just sentence.

[39] For the foregoing reasons, the appeal of the 1st appellant Patrick Wanyama Mudogo is dismissed in its entirety.

The appeal of Reuben Ochango and Samuel Chune Sitoki, the 2nd and 3rd appellants respectively is allowed. Conviction in each count quashed and sentence in each count set aside.

The 2nd and 3rd appellants shall be set at liberty unless otherwise lawfully held.

DATED and Delivered at Eldoret this 6th day of December, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR