



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR, JA)

CRIMINAL APPEAL NO. 40 OF 2013

BETWEEN

- 1. MATHEWS KHAGADI)**
- 2. MAURICE ODONGO) APPELLANTS**
- 3. M S)**
- 4. TITUS AMALEMBA)**

VERSUS

REPUBLI..... RESPONDENT

(Appeal from a conviction and or Judgement of the High Court of Kenya at Kakamega (Hon. Justice S. J. Chitembwe, J) dated 19/7/2012

in

HCCR. APPEAL NO. 10 OF 2009)

JUDGMENT OF THE COURT

1. The appellants, **Mathews Khagadi, Maurice Odongo, M S** and **Titus Amalemba** were charged with the offence of murder contrary to section 203 of the Penal Code. The particulars of the offence were that on 15th February 2009 at Mumbetsa Village, Shimanyaro sub-location, Kakamega within the former Western Province of Kenya jointly with others not before the court they murdered **Peter Isayi** (the deceased). On 19th July 2012, after a trial, the High Court at Kakamega (**Said J. Chitembwe, J**) convicted the appellants for the offence and subsequently sentenced each one of them to serve twenty (20) years imprisonment.

2. They have appealed to this Court against that decision on the grounds that the trial court failed to properly evaluate the evidence; that it shifted the burden of proof to the appellants; that the appellants alibi defence was not considered; that the 3rd appellant's age was ignored; and that the 1st and 2nd appellant's right to a P3 Form was breached.

3. As this is a first appeal, it is our duty to re-assess the evidence on record and re-evaluate it in order to reach our own conclusions on the matter.

The Evidence

4. The prosecution called seven witnesses. Mary Goretti Ahonga Isayi (PW2) the wife of the deceased stated that she was at home with her husband and her son Valentine (PW3) on Sunday the 15th February 2009 at 4.00 pm; that she went out of the house and heard the first appellant Mathew Khayadi who was in their compound with a panga shout and utter the words “*You Isayi, you will not sleep in your house tonight*”; that suddenly she saw a group of about ten to fourteen people that included the second appellant Maurice Adongo, the third appellant M S and the fourth appellant Titus Malemba; that each one of them had a weapon; that her husband asked their son PW3 to close the door; that the appellants started pushing in and cutting down the door; that the first appellant cut her husband across the mouth; that the appellants then dragged her husband through the back door as they beat and cut him; that the fourth appellant cut the deceased with an axe on the head; that the third appellant also cut her husband on the head; that her husband fell down; that the third appellant started stepping on her husband’s stomach uttering the words “*Die! How many have we killed?*”

5. According to PW2 the attack on her husband lasted between thirty to sixty minutes; she called on the assailants to leave her husband as she cried out and screamed; she then ran off to report to PW1, the assistant chief; upon returning home she saw the body of the deceased which lay outside her house; the body was later taken to Kakamega Hospital mortuary.

6. PW 2 further stated that there was a dispute over the land which her father in law had sold; that the deceased complained when he saw the land being worked on; that the disputed land was approximately half a kilometer away from their home; that on that day, Sunday the 15th February, 2009, her husband did not go to the disputed parcel of land as he had gone to church and returned home thereafter. She also testified that her husband did not attack the 1st appellant on the land.

7. Valentine Isayi (PW3) corroborated his mother’s account of the attack; he stated that he was at home with his parentson Sunday 15th February 2009 at 4 pm; that his mother (PW2) went outside the house and to called him to alert him that there were armed people outside the house; that he went outside the house and found the appellants and two other persons, namely Alexander Kenyatta and Miheso; that his father instructed him to close the door to the house and as he attempted to do so, the appellants overpowered him and gained entry into the house; that the fourth appellant had an axe and hit his father on the leg; that his father fell down and the 2nd appellant, 3rd appellant, Alexander Kenyatta and Miheso started hitting him with hoe sticks; that the 3rd appellant picked an axe and hit his father with it on the head; that his father was then dragged outside the house and taken to a sugar plantation adjacent to the house; that the 4th appellant cut his father again on the forehead; that the 1st appellant hit his father on the mouth; that as Kenyatta, the 2nd appellant and Miheso continued beating his father, a scuffle ensued between the 1st appellant and the 2nd appellant that resulted in the 1st appellant cutting the 2nd appellant on the hand; that the 2nd appellant retaliated by beating the 1st appellant with the hoe stick; that the others continued beating his father who had already died; that his brother Phillip (PW4) tried to intervene but the 4th appellant threw an axe at PW4 but missed and the 2nd appellant hit PW 4 with a stick on the leg; that they then dragged his father after he had died and placed his body near his grandfather’s house and left it there and the police later carried the body away.

8. PW3 further stated that he heard the 1st appellant shout at his father and utter the words “*you will not sleep at your house*”. He was also categorical that “*the fight was not in the disputed land*” and that he knew “*who attacked my father.*”

9. Caleb Murunga Mbakaya (PW1) an assistant chief confirmed having received a report of the incident from PW 2. Accompanied by administration police officers and the complainant PW 2, they proceeded to her home where they found the body of the deceased about 150 meters from the house. He

arrested the appellants two of whom had injuries that they claimed were inflicted by the deceased. The body of the deceased was taken to Kakamega Hospital mortuary while the suspects were taken to hospital. Based on his investigations, he established that there was a fight at a disputed parcel of land situated 200 meters from the deceased's home; that the deceased had leased that parcel of land from a person to whom it had been sold by his father; and that the deceased had stopped the accused persons from using that parcel of land.

10. Phillip Matila Isayi (PW4) a son of the deceased stated that he returned home from the shamba, about 50 meters from the house, on 15th February 2009 at about 4.00pm upon hearing screams; he found his father coming out of the back door of the house and a group of armed people, including the appellants, chasing and beating his father; his father was screaming and "*saying he should be forgiven as he had children.*" PW 4 tried to intervene but the 4th appellant threw an axe at him but missed; the 2nd appellant attacked him with a hoe stick and he ran back to the house; he saw the appellants beating his father; he went to the place where his father fell in the sugar plantation behind the house; later his father's body was taken to Kakamega mortuary.

11. At the mortuary, the body of the deceased was identified for purposes of postmortem by the deceased's neighbor Hendi Anyika who testified as PW5. Dr. Dickson Mchana (PW7) produced the post mortem report prepared by Dr. Oreke who performed the post mortem on the deceased's body. That report revealed that the deceased sustained multiple injuries all over his body. Based on that report the cause of death was due to lack of oxygen due to air trapped in the chest following blunt chest trauma.

12. Corporal Jacob Cherotich (PW6), a crime officer, recalled that on 15th February 2009 at about 7.30 pm he was instructed by corporal Obonyo to go to Shimanyiro area where a murder was reported to have taken place; he was accompanied by Police Constable Ouma and on arrival at the scene found a dead body with a deep cut on the head and chin; there was also a crowd; they took photographs of the scene and took the body away. Following investigations, they were given names of the suspects and thereafter handed over the matter to Sargent Muthimba to investigate.

13. In his defence the first appellant Mathew Khayadi Yapesa, stated in his sworn testimony that the deceased was his neighbour; that on 15th February 2009 at about 2.00pm he was working on a farm that had been hired by the 2nd appellant; that he was alone on the farm and was in the process of clearing the farm when he was hit by the deceased with a rungu and fell; that when he woke up the deceased hit him on the hand and broke it; that the deceased again hit him near the elbow and shoulder and he became weak; that the deceased then tied his hands and dragged him towards the river Isiokuri; that he shouted for help and the deceased left him after women screamed and young men who were herding cattle came to his rescue; that the deceased chased away the young men; that the appellant was assisted and taken to Shimanyiro clinic but could not get treatment there as his injuries were serious; that the 3rd appellant who was at the clinic assisted him get a police motor vehicle from Kakamega Police Station; that on reaching the hospital where he was treated he found the 2nd, the 3rd and 4th appellants. In support of his testimony he produced a medical report and X ray taken at the hospital as exhibits. He went on to say that after the treatment he was surprised to be taken to the police station and to be detained there until he was charged 11 days later with the offence of murder. He denied involvement.

14. Morris Odongo Yapesa, the second appellant testified on oath and stated that he is a driver, and that prior to his arrest in connection with this matter he worked for Shinyalu CDF; that the deceased was his uncle; that he leased the disputed parcel of land that measures 6.2 acres from Vihiga Teachers Society on 7th February, 2009 for a term of one year; that he is the one who sent the first appellant Mathew Khayadi to work on that land; that the deceased had leased out the land to other people to graze; that the land was sold by the deceased's father in 1980; that on Sunday 15th February, 2009 he was in church with the deceased and thereafter decided to go and see the work done on the land; that as he approached the farm he heard screams and met two children crying; on enquiring from them why they were crying, they told him that the deceased was assaulting the 1st appellant on the farm; that he reached the farm at 3.00 pm, and to he went where the deceased and the 1st appellant were. On enquiring from the deceased

why he was fighting the 1st appellant, the deceased reacted by cutting him on the head and on the right shoulder with a panga; that the deceased had a panga and a stick; that he rang the assistant chief to seek help to be taken to hospital; the assistant chief advised him to seek medical attention; that he went to Shimanyiro health center where he was referred to Kakamega Provincial General Hospital; that he went there by a police vehicle that was fetched by the 3rd and 4th appellants; that the 3rd appellant accompanied him to the General Hospital where he was treated; that he met the 3rd appellant on the road when going to hospital; He produced medical records in that regard. That after the treatment, the police took him to the police station where he was detained for 15 days before being charged with the offence. He maintained that he was not involved in the death of the deceased.

15. M S S, the 3rd appellant in his sworn statement stated that he is a nephew to the 1st and 2nd appellant and the 4th appellant is his cousin while the deceased was his grandfather; that on 15th February 2009 at about 4.00pm he went to bid farewell to his friend at Shimanyiro market as he was to return to work in Nairobi the following day; that upon his return he met the 1st and 2nd appellants on the road; blood was oozing from their faces; the hand of the 1st appellant also was bleeding. On enquiring from them what had happened, they informed him that the deceased had attacked them, and he assisted them to obtain treatment at Shimanyiro market where a doctor advised them to seek treatment at Kakamega Provincial General Hospital; that he left them at the reception as he went to fetch a vehicle; that he saw a police Land Rover at the market and narrated to the police what had happened and the police officer agreed to take the 1st and 2nd appellants to hospital; that the police asked him to take them to the place where the assistant chief had reported that someone had been killed. Accompanied by the 4th appellant, he took them to the location where they found the body of the deceased which they then carried away. That the police then took him, the 4th appellant, the 1st and 2nd appellants to Kakamega Police Station where he was detained for 13 days before being charged with the offence of murder. According to him he was not at the scene of the incident; did not see the deceased on that day; and was not involved in the assault of the deceased.

16. Titus Malemba Odongo the 4th appellant and son of the 2nd appellant stated in his sworn testimony that on 15th February 2009 he went to church with members of his family, returned home and then went for a hair cut at Shimanyiro market and returned back home; that at about 2.00pm his father the 2nd appellant left home for the farm and returned at about 3.30pm bleeding from the head and shoulder; that he then took him to seek treatment at Shimanyiro Centre but before reaching there he saw the 1st appellant being ferried on a wheelbarrow to the hospital; that together with the 3rd appellant, they went to fetch a motor vehicle and spotted a police vehicle at the market; that they then accompanied the police officer to where the body of the deceased was at a farm; carried it in the police vehicle and then returned to the clinic; and then took the 1st and 2nd appellants to Kakamega where they were detained at Kakamega Police Station before being charged. He denied having participated in the death of the deceased.

17. Based on that evidence, and after considering and ruling out the defence of provocation the trial court was satisfied that the appellants were guilty as charged. The Judge subsequently sentenced each of the appellants to serve 20 years imprisonment. It is against that background that the present appeal has been brought on the grounds already mentioned.

Submissions by counsel

18. Addressing us during the hearing of the appeal, learned counsel for the appellants Mr. Andrew W. L. Mshindi opened his address by asking us to consider the appeal against the backdrop that the dispute between the appellants and the deceased that led to the unfortunate demise of the deceased was a dispute over land and that we should take cognizance of the fact that land in Kenya is a very sensitive issue. He also asked us to keep in mind that the appellants and the deceased were relatives.

19. Mr. Mshindi submitted that the trial Judge did not properly evaluate the evidence for if he had done so he would have concluded that the evidence did not “*irresistibly point to the guilt*” of the appellants. In

that regard he referred us to the decision of this Court in **Rasesh Chhotalal Shah vs. Republic Criminal Appeal No. 23 of 2010.**

20. According to Mr. Mshindi, the trial court erred in finding that the incident took place at the deceased's home when there was overwhelming evidence that the incident took place on the disputed parcel of land; that the evidence pointed to the involvement of many people in "mob justice" that resulted in the death of the deceased and it was therefore not possible to establish how the deceased died; that no weapon was produced and no evidence was tendered on the blow that killed the deceased; that the investigating officer did not testify and the omission by the prosecution to call him was prejudicial to appellants.

21. Citing the House of Lords decision of **Woolmington vs. DPP [1935] A.C 462** Mr. Mshindi stated that in breach of the golden rule that it is the duty of the prosecution to prove the guilt of an accused person beyond any reasonable doubt, the trial court in this case shifted that burden to the appellants; that immediately the appellants asserted that they were not at the deceased's home where the incident allegedly took place, the court should have awakened to the fact that the appellants were setting up an alibi; that the burden of proving the falsity of that defence lay wholly with the prosecution. In that regard counsel referred us to **Karanja vs. Republic [1983] KLR 501** stating that under section 309 of the Criminal Procedure Code, it was incumbent on the prosecution to adduce evidence to rebut the appellants testimony that they were not at the deceased's home.

22. According to counsel, the testimony of the first appellant Mathew Khayadi Yapesa that was supported by PW6 the crime officer, was that he was injured at the disputed parcel of land; that from there he was taken to hospital and the 1st appellant did not at any time go to the home of the deceased; that the conduct of the appellants in assisting the police officers to locate the scene of crime and handing themselves over to the police is incompatible with their guilt.

23. Referring to section 191 of the Children's Act, the decision of this Court in case of **JKK vs. Republic Criminal Appeal No. 118 of 2011 [2013] eKLR**, and Article 53 of the Constitution of Kenya, 2010 counsel submitted that considering a minor cannot be sentenced to death the trial court should have interrogated the ages of the 3rd and 4th appellants as there was varying evidence regarding their ages.

24. Finally, counsel urged that there was an order made by the trial court directing that the appellants be supplied with P3 Form. That order was never complied with; that that was prejudicial to the appellants as the testimony regarding injuries was contradictory and the P3 Form would have helped the defence case.

25. Opposing the appeal, Mr. Sirtuy, learned Principal Prosecution counsel in his concise address began by inviting us to relook at the sentence imposed saying that the learned trial judge did not have the discretion to give a jail term of twenty years in place of the mandatory death sentence.

26. According to Mr. Sirtuy the trial court properly analyzed the evidence that placed the appellants at the scene of crime; PW 2, 3 and 4 gave vivid eyewitness accounts of what transpired; that the defence of provocation raised by the appellants could not be proved; that the defence of alibi raised by the appellants when they asserted that they were not at the scene is inconsistent with their having inflicted injuries; that the trial court properly evaluated the evidence; that it is in any case immaterial whether the offence was committed at the deceased's home or at the disputed land; that the appellants did not remove themselves from the scene and all the circumstances point, irresistibly, to their guilt.

27. In his brief reply regarding the plea by Mr. Sirtuy that the trial court was duty bound to impose the death sentence Mr. Mshindi submitted that in the absence of notice by the prosecution for enhancement of the sentence, this Court should not interfere with the same.

Determination

28. We have considered the appeal, the evidence on record and the submissions by counsel. The issues for determination are whether on the totality of the evidence, including a consideration of the defence of

alibi raised, the guilt of the appellants was established beyond all reasonable doubt. In other words, were the appellants positively identified as the persons who participated in killing the deceased? As a corollary to that, is the question whether the trial court shifted the burden of proof to the appellants and whether the prosecution evidence displaced the defences raised by the appellants. And finally, whether the court considered the ages of the 3rd and 4th appellants.

29. In addressing those issues and deciding whether to uphold or overturn the decision of the trial court, our duty as the first appellate court is as already mention, to reconsider the evidence, re-evaluate it, and to draw our own conclusions. [See **Okeno vs. Republic [1972] E. A. 36**]. In doing so we bear in mind that we do not have the advantage of having observed the witnesses as they testified.

30. We will first address the question of identification. This Court has often stated that where the case against an accused person depends entirely on the correctness of his identification, the trial court must exercise great care and caution before convicting in reliance of such evidence. See **Anjononi and Another vs. Republic [1980] KLR 59** and also **Edwin Chagali Musiega vs. Republic [2015] eKLR**

31. Based on the evidence of PW 2, PW 3 and PW 4 the trial court found, that “*all the four accused persons were at the deceased’s home on the material day*” and that “*it is the accused persons who assaulted the deceased on 15th February 2009 at his home*” and that the deceased died at the scene and “*that the prosecution did prove its case beyond reasonable doubt.*”

32. We have already alluded to the evidence of PW 2, the wife of the deceased. She was categorical that on that fateful Sunday, the 15th February 2009 at 4.00 pm, she was at home with her husband and her son Valentine PW3. When she went out of the house, she found a group of armed people that included the four appellants, who she described as her “*closest neighbours*” and that she witnessed as the appellants pushed through the door, attacked her husband and then dragged him through the back door. She heard the first appellant utter words to the effect that her husband would not sleep in his house that night. She witnessed the first appellant cut her husband across the mouth; the 2nd appellant cut her husband on the head; the 3rd appellant stepping on her husband’s stomach as he uttered the words “*Die! How many have we killed?*” and the 4th appellant cut her husband with an axe on the head. Her evidence was that the attack lasted between thirty to sixty minutes before she ran off to report to the Assistant Chief PW1. These unhappy events took place in an afternoon in broad daylight. PW2 had every opportunity to observe what was going on. Her testimony was not shaken in cross-examination.

33. PW2’s account was corroborated by that of her son Valentine Isayi, a sixteen year old secondary school student at the time who was also at home during the attack. As already noted, his evidence was that he was called by his mother when she stepped out of the house and alerted him that there were people outside the house with weapons. On going out he found the 4 appellants who he mentioned by their names, and two other persons who he also named as Alexander Kenyatta and Miheso; he attempted to block them from entering the house but was overpowered; he witnessed the 4th appellant who was armed with an axe hit his father with it; he also saw the 2nd and 3rd appellants alongside the mentioned Alexander Kenyatta and Miheso assault his father with hoe sticks; he also witnessed the 1st appellant striking his father. He saw his father being dragged out of the house and taken to the sugar plantation behind the house. Like his mother, PW3 heard the 1st appellant warn his father that he would not sleep at his house. His testimony also withstood cross examination.

34. PW4 returned home from a nearby shamba when he heard screams from his home; he saw his father emerging from the house being chased by a group of persons bearing weapons. He attempted to intervene but the 4th appellant threw an axe at him; the 2nd appellant started beating him with a hoe stick forcing him to ran back into the house; he then saw the appellants carry his father away as they continued beating him. He mentioned all appellants by their names.

35. Based on that evidence, we are ourselves satisfied that the three witnesses who knew the appellants well not only as neighbours, but also as relatives, properly and safely identified the appellants. The finding by the trial court inthat regard is based on cogent evidence and we have no basis for interfering

with it. Based on our own re-evaluation and analysis of the evidence on record, we hold that there was overwhelming evidence that it is the appellants who caused the death of the deceased.

36. As for the complaint that the learned trial Judge shifted the burden of proof to the appellants, we readily agree with proposition put forth by learned counsel for the appellants that the burden of proof lay with the prosecution to prove the guilt of the appellants and the defence set up by the appellants did not shift that burden. This Court in Anthony Magua Gituchu v Republic [2011] eKLR cited with approval the holding in Sekitoleko v Uganda [1967] E A 531 that as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else. Neither does the burden of proving an alibi lie on the prisoner. See also the recent decision of this court in David Muturi Kamau vs. Republic [2015] eKLR in which it was held that the prosecution has the burden throughout of negating the alibi. Once the defence of alibi is raised, the court should weigh that defence against the prosecution evidence. See Ganzi & 2 others vs. Republic [2005] 1 KLR 52.

37. The substance of the 1st appellant's testimony is that he was attacked by the deceased at the disputed parcel of land; sustained injuries and proceeded to hospital and then to the police station. In effect, he never set foot at the deceased's home.

38. The 2nd appellant's evidence was that he went to the rescue of the 1st appellant when he heard screams, and was also attacked by the deceased. From there he went to seek treatment. In effect, he too never set foot at the home of the deceased.

39. The 3rd appellant also stated that he met the 1st and 2nd appellants on their way to seek treatment after they were assaulted by the deceased at the disputed parcel of land; that he assisted them and was therefore never at the home of the deceased.

40. The 4th appellant also distanced himself from the home of the deceased. He stated that after attending church on that day he went to get a haircut and then returned home; that his father, the 2nd appellant then left and returned later at 3.00pm bleeding; and that he then arranged to take him to hospital.

41. After reviewing the totality of the evidence the trial court found as a fact that a fight had started at the farm some 200 meters away and that the deceased was murdered at his home. The learned Judge had this to say:

“From the evidence on record, I do find that the 1st accused was working on the disputed land when the deceased tried to stop him. A dispute arose and the deceased went back to his house. The first and second accused were joined by the 3rd and 4th accused and headed to the deceased's home. All the four accused persons were at the deceased's home on the material day as per the evidence of PW2, PW3 and PW4”.

42. Even though the learned Judge did not use the term “alibi” the trial Judge weighed the testimony of the appellants to the effect that they were not at the scene of crime against the evidence of the prosecution witnesses PW2, 3 and 4 and was satisfied, as we are, that there was credible and sufficient evidence placing the appellant's at the scene of crime. There are material discrepancies between the accounts of the events of that day as narrated by the appellants themselves. According to the 1st appellant, he was assaulted by the deceased at the disputed farm, sustained injuries, was assisted to hospital where he found the 2nd appellant. On his part the 2nd appellant stated that he met the first appellant at the disputed farm and witnessed the deceased assault the 1st appellant; that when the 2nd appellant enquired from the deceased why he was assaulting the 1st appellant, the deceased reacted by attacking and cutting the 2nd appellant. The 3rd appellant on his part testified that he met both the 1st and 2nd appellants on the road bleeding from wounds allegedly inflicted by the deceased. Those discrepancies undermine the credibility of the accounts by the appellants.

43. Having ourselves examined the evidence in its totality, we take the view that the learned trial Judge was right to disbelieve the appellants, and to find that the prosecution evidence placed the appellants at the scene. There is therefore no merit in the complaint that the trial court shifted the burden of proof to the appellants or that it failed to consider the defenses put forth by the appellants.

44. As regards the question of the age of the 3rd appellant, the record shows that on 15th June 2009 the 3rd appellant is recorded as having stated “*I am a juvenile. I am 15 years.*” The court then ordered that a medical doctor assesses the 3rd appellant’s age and files a report in court. On 13th July 2009, the record shows that the court enquired from the 3rd appellant whether he was taken for age assessment to which the 3rd appellant responded: “**Yes. I agree. I am above 18 years.**” When the 3rd appellant testified on 22nd March 2010 he stated, “*I am 16 years. I am in form 2 at [particulars withheld] Secondary School.*”

45. In his ruling on sentence given on 31st January 2013, the learned Judge made reference to the court order requiring the 3rd appellant to undergo age assessment by a doctor and to a report by a Dr. Vuhja dated 17th June 2009 that confirmed that the accused was over 18 years of age. The court satisfied itself that at the time the offence was committed the accused was an adult. The reference by the Judge in that ruling to the age assessment relating to the 4th accused as opposed to the 3rd accused is obviously a typographical error as it is clear from the same ruling that it was common ground that the 1st, 2nd and 4th appellants were over 18 years old. It is therefore not correct that the trial court did not consider the age of the 3rd appellant. The issue of the 4th appellant’s age did not arise. In his defence he stated, “*I am 20 years old. I am in form 3 at [particulars withheld] Secondary School*” and the trial Judge made the same observation in his ruling on sentence.

46. There is then the complaint that the 1st and 2nd appellant’s right to a P. 3 Form that was key to ascertaining the nature of the injuries sustained was ignored. The record shows that on 14th July 2009 the court ordered that the appellants be taken to Kakamega Provincial Hospital for treatment and that they be issued with P3 Forms to be filled by a doctor at Kakamega Provincial Hospital. On 6th October 2009 the court again ordered that the accused persons be issued with P3 Forms. Despite making numerous appearances before the court thereafter, the appellants do not appear to have raised the matter before the trial court until 19th September 2011 when in the course of his defence the 1st appellant alluded to the court order given on 14th July 2009 stating that it “*was not done.*” And even then, there was no indication that the appellants were hampered or hindered or prejudiced from conducting their defence on account of the absence the P3 Forms. We do not therefore consider that there is merit in this complaint either.

47. That leaves the question of sentence. This Court in Joseph **Njuguna Mwaura vs. Republic, Cr. Appeal No. 5 of 2008** that reversed the earlier decision in Godfrey **Ngotho Mutiso vs. Republic Cr. Appeal No. 17 of 2008** affirmed that where, as here, a mandatory death sentence is prescribed by law, the trial court does not have a discretion to impose any other sentence. The custodial sentence imposed by the trial court in lieu of the death sentence is therefore illegal. We have the mandate to interfere. See **Musyeki Lemoya vs. Republic [2014] eKLR.** We therefore substitute the illegal custodial sentence with the death sentence.

For all the above reasons, the appellants’ appeals are devoid of merit and are hereby dismissed.

Dated at Kisumu this 19th day of June, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

Copy of the original.

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DEPUTY REGISTRAR