**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MWERA, WARSAME, KIAGE, GATEMBU & J. MOHAMMED JJ.A)**

**CRIMINAL APPEAL NO 5 OF 2008**

**JOSEPH NJUGUNA MWAURA ……1ST APPELLANT**

**PETER NJOROGE KAMAU……2ND APPELLANT**

**PATRICK MURIGI KIBIA……3RD APPELLANT**

**AND**

**REPUBLIC……RESPONDENT**

***(being an appeal from the judgment of the High Court of Kenya at Nairobi (Ojwang & Dulu) dated 21st February 2008***

***In***

***H.C.Cr. A Nos. 129, 133 & 134 of 2006)***

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**JUDGMENT OF THE COURT**

The appellants, **JOSEPH NJUGUNA MWAURA**, **PETER NJOROGE KAMAU** and **PATRICK MURIGI KIBIA,** (hereinafter referred to as the 1st, 2nd and 3rd appellants respectively), were each convicted of two counts of the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The brief facts giving rise to these charges were that on the night of 14th October 2004, while **GEORGE MWAURA MUIRURI (PW1)** was asleep in his house, he was roused from sleep by the sound of dogs barking. He went out of his house, where he met with a group of five people, who entered his house and demanded that he give them money. He had none, and he told them that they could ask his son **ALEXANDER THUO MWAURA (PW2),** who lived nearby, if he had any.

They proceeded to PW2's house, where PW1 asked him to open the door. The robbers again asked for money, and PW2 gave them Kshs 7,000.00 which he had. The robbers asked for more money and PW2 led the robbers into the bedroom so that he could search for more money. At this point, PW2 saw the 1st appellant, and was later able to identify him as one of the intruders. PW1 remained in the sitting room of the house, and one of the robbers was guarding him. PW1 managed to slip out of the house while the

robber was distracted, as he was unplugging electronics. PW1 ran away to the neighbours', alerted them of the on-going robbery, and then went to the police.

When the robbers realised that PW1 had escaped, they too left the scene of the crime. The appellants were arrested in November 2004, when PW1 informed **CPL. LAWRENCE WERU (PW7)** that he had seen the people who had robbed him on the fateful night. He and **PC MOSES THURANIRA (PW3)** went where they were directed to by PW1 and they arrested the 1st appellant. The 1st appellant was found in possession of a mobile telephone. This mobile telephone was produced during trial as an exhibit, and was identified by PW1 as belonging to him.

During trial, PW1 and PW2 were categorical that they were able to identify the appellants as some of the people who had robbed them. PW1 testified that there was light not only from the torches, but also from the light in PW2's house which enabled him see the robbers. PW1 recognised the appellants as they were neighbours. PW2's further evidence was that the robbers had torches, which they flashed about, and as a result, there was enough light to see the appellants.

After conclusion of the trial, the magistrate was satisfied that the appellants were properly identified. The trial magistrate concluded that:

***"Were these conditions favourable to identification ["] In the particular circumstances of this case, I would say these conditions were favourable to proper identification. If [it is considered that] PW1 and PW2 were not that terrified by the attack and also that the robbery appeared to be leisurely and unhurried then with the torchlight and later with the lantern light it was quite possible to clearly see the people involved in this robbery. Coupled with these conditions was the fact that the robbers were people well known to both PW1 and PW2. They were neighbours, and the identification was immediately followed by recognition."***

In addition, the trial magistrate considered the fact that the 1st appellant was found in possession of a mobile telephone, which had been identified by PW1, due to the initials he had inscribed on it, as being his. At the conclusion of the trial, the trial magistrate formed the opinion that the prosecution evidence was incontestable and that it had been proved that the appellants, together with others who had not been brought before the court, were the ones who robbed PW1 and PW2. Consequently, the trial magistrate found the appellants guilty of two counts of robbery with violence and sentenced them to death as provided for in section 296 (2) of the Penal Code.

The appellants appealed to the High Court through learned counsel, Ms Njuguna and Mr Muriuki. They faulted the trial magistrate's reliance on the identification evidence and stated that it was not sound, and could not be relied on, as the witnesses were terrified during the attack and that as a result, the circumstances were not conducive to proper identification.

Ms Gateru for the State opposed the appeal and argued that the appellants had been properly identified at the scene of the crime, and that the mode of identification was by way of recognition, which is more reliable than the ordinary identification of a stranger.

The first appellate court, after considering the arguments proffered by the appellants, disagreed that the identification evidence was unsound. It dismissed the appeals, upheld the conviction and affirmed the sentences imposed on each of the appellants. The court also made an order that the sentence in respect of the 2nd count would remain suspended, pending the execution of the sentence imposed on the first count.

The appellants now bring this second appeal, which we find raises four points for our determination.

The first issue that lies for our determination is whether the identification of the appellants was proper. Mr Odhiambo, learned counsel for the appellants, submitted that since the robbery took place during the night, the circumstances for identification of the appellants were difficult. In his view, the trial court and the High Court did not warn themselves of the danger of convicting on this evidence. He further faults the two courts below for not warning themselves of the danger of convicting on the evidence of a single witness.

Mr Kioko, learned counsel for the State, responded by submitting that the identification was sound as there was enough light from the torches and the lantern light from PW2's house, which enabled them to see clearly. He further argued that in respect of the 2nd appellant's identification, both PW1 and PW2 identified him as one of the robbers. In addition, this was also a case of recognition, as the appellants were known to both PW1 and PW2.

Related to the issue of the identification evidence, the appellants allege that the first appellate court failed in its duty to re-evaluate and reconsider the evidence on record. In this regard, counsel considers that the only thing that the High Court did was to summarise the evidence without analysis, which constitutes a fundamental error. He cites as an example the fact that there were two sets of witness statements produced during the trial which issue was not addressed by the first appellate court. In response, counsel for the State urged us to find that the re-evaluation was proper, and that the Court need not use the words 're-consider, revaluate and analyse' in order to fulfil their duty.

It is commonplace that the first appellate court is mandated to reconsider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses, before making a determination of its own. See ***Okeno v R [1972] EA. 32***, ***Mohamed Rama Alfani & 2 Others Vs Republic***, ***Criminal Appeal No. 223 of 2002***. Failure to properly re-evaluate the evidence on record would be a serious omission on the part of the first appellate court, and may warrant interference by this Court.

Did the first appellate court fulfil its duty in this case" We hold the opinion that it did. It is clear from the record that the first appellate court dwelt at length on the identification evidence accepted by the trial court. The court considered '***the learned Magistrate's focus on the impact of the combination of torches and a lantern, and the scope of visibility'*** and was unable to agree with the appellants that the conditions for identification were unfavourable. In addition, after evaluating the evidence adduced, the High Court found that the 1st appellant had been found with PW1's cell phone, which had only recently been stolen, and was of the view that in view of the doctrine of recent possession, the 1st appellant, having failed to explain where he got the mobile phone from, must have stolen it from PW1 on the night of the robbery.

The allegation that the first appellate court merely summarised the evidence on record is not tenable. After all, there is no set format for re-evaluation of evidence, and as Mr Kioko for the State has pointed out, the court need not use the words re-evaluate, reconsider and analyse, in order to fulfil its duty. See ***David Njuguna Wairimu V Republic [2010] eKLR*** where the court, relying on the holding of the Court in ***Okeno v R (supra)*** held that:

***"[The duty of the first appellate court] is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything***

***objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision" (emphasis ours).***

We find that the first appellate court properly addressed itself to the identification evidence and came to the correct conclusion. The identification evidence against the appellants was sound, and both the trial court and the first appellate court were correct in basing the guilt of the appellants on it.

The appellants' third complaint regards the charge sheet. Mr Odhiambo put forth his argument on the charge sheet on two fronts. The first is that the charge as framed was defective as the appellants were charged under section 296 (2) of the Penal Code. According to counsel the appellants should have been charged under section 295 as read with section 296 (1) and (2) of the Penal Code because it is section 295 of the Penal Code that defines robbery.

In his view, sections 296 (1) and (2) merely prescribe the punishments for the offence of robbery and the offence of robbery with violence. In addition, counsel urged that the charges as framed did not conform to the rules of framing charges, which are contained in section 137 of the Criminal Procedure Code, and in particular that ***'if the offence charged is one created by enactment [it] shall contain a reference to the section of the enactment creating the offence.'***

To illustrate his point, Mr Odhiambo drew a parallel with the offence of murder, which is charged under section 203 as read with section 204 of the Penal Code. He therefore submitted that the proper practice is that both the offence and the punishment for the offence ought to be contained in the charge sheet.

The second prong of Mr Odhiambo's argument is that charging the appellants under what he terms as the 'punishment section', resulted in the violation of his clients' right to a fair trial, and thus contrary to section 77 of the former Constitution. He therefore contends that the appellants' rights were violated and that his clients were denied a fair trial. In particular, he urges that section 77 (2) (b), which provided that ***'every person charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged,'*** was violated because the appellants did not know of the nature of the offence that they were charged with.

He further contended that the violation of section 77 (2) (b) of the former Constitution is a major defect that goes to the root of the trial and as such, the entire trial is unconstitutional. In addition to this, counsel considers that the charges as framed amounted to a violation of section 77 (8) of the former Constitution which provides that ***'no person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefor is prescribed, in a written law….'*** Counsel argued that the appellants were charged under the punishment section only, and not under the section that defines the offence.

In response, Mr Kioko, who was of the opinion that the charge sheet was in no way defective, argued that there is no reason that the current format of the charge sheet should be interfered with. In his view, section 295 of the Penal Code only defines the offence of robbery but does not create it. He urged that the offence of robbery with violence is created under section 296 (2) and in effect, that is the correct provision of law under which an accused person ought to be charged.

He therefore urged us to find that the charge sheet as framed sets out the charges and the full particulars of the offence. He further rejected the appellants' submission that their right to a fair trial was infringed, or that they were not aware of the charges against them, and contended that every one of

them was called upon to plead to the charges and the particulars, and therefore knew what was facing them.

This issue has been dealt with by this Court before in ***Simon Materu Munialu V Republic [2007] eKLR (Criminal Appeal 302 of 2005)***. This Court was confronted with the issue whether a charge sheet citing only section 296 (2) of the Penal Code was sufficient. This Court in that appeal considered the submission that section 295 of the Penal Code creates the offence of robbery, but held that:

***'…the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion.***

***In our considered view, section 137 of the Criminal Procedure Code would be complied with if an accused person is charged, as the appellant was, under section 296(2) because that section 137 requires one to be charged under the section creating the offence and in the case of robbery with violence under section 296(2), that section creates the offence by giving it the ingredients required before one is charged under it and it also spells out the punishment. We reject that ground of appeal." (emphasis added)***

Similarly in ***Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal Appeal No 353 of 2008)*** the Court was again confronted with a similar situation. In that appeal, the appellants had submitted, as have the appellants in the present appeal, that section 296 (2) of the Penal Code does not create an offence but merely makes provision for the punishment for robbery with violence. The Court had this to say on the issue:

"***Mr. Musomba submitted that unless the aforequoted sub-section (section 296) is read with section 295 of the Penal Code, then reliance on section 296(2), above, without more will not disclose the commission of an offence. Section 295 of the Penal Code defines the offence of robbery. Section 296(1) and 292(2) of the Penal Code, have a common marginal note, namely "punishment of robbery". In this country marginal notes are as a general rule, read together with the section. By the ejusden (sic) generis rule, section 296 (1) and 296 (2), have to be read together. Section 296(1), above, provides that a person who commits the felony of robbery is liable to imprisonment for fourteen years. So that when dealing with the offence under section 296(2) of the Penal Code one has to read the statement of the offence as referring to the aggravated circumstances of the offence, or the robbery provided for under section 296(1) of the Penal Code."***

The Court then stated that section 295 of the Penal Code is merely a definition section, and held that:

***'Sections 296 (1) and 296 (2) of the Penal Code deal with the specific degrees of the offence of robbery and have been framed as such.'***

We agree that this is the correct proposition of the law. Indeed, as pointed out in ***Joseph Onyango Owuor & Cliff Ochieng Oduor v R (Supra)*** the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.

The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides ***that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal***. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge.

This is a second appeal, and as was observed in ***Boniface Kamande & 2 Others V Republic [2010] eKLR (Criminal Appeal 166 of 2004):***

***"On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it."***

We find that none of these conditions apply in the appeals before us. There is nothing to warrant interference with the convictions of the trial court, which were affirmed by the first appellate court.

What remains for us now is to address the final issue raised regarding the constitutionality of the sentence imposed on the appellants. Section 296 (2) of the Penal Code provides that:

***(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, <u>he shall be sentenced to death</u>.***

The appellants, after being convicted of the offence of robbery with violence, were sentenced to suffer death as provided in law. The gist of Mr Odhiambo's submissions was that under the Constitution of Kenya, 2010, the sentence of death is now outlawed. He contends that the death sentence is outlawed under various international instruments such as the Universal Declaration on Human Rights and the International Convention on Civil and Political Rights. Mr Odhiambo argued that these instruments are now applicable in our country, and as such, they form part and parcel of Kenyan law.

Mr Odhiambo considers that the death penalty is abhorrent under the Constitution first, because it provides for the protection of the right to life, and secondly because the death sentence amounts to degrading and inhuman treatment.

Counsel further considers that the sentence of death is an unwarranted punishment for the offence of robbery with violence, and that the appellants ought to have been given a chance to mitigate and this mitigation taken into account before sentencing.

Mr Kioko on his part had a contrary view. He submitted that the penalty of death is allowed under Article 26 (3) of the Constitution which provides that a person may be deprived of the right to life to ***'the extent authorised by this Constitution or other written law.'***

In addition, he submitted that the penalty of death is specifically prescribed for various offences, among them section 40 which provides for the offence of treason, section 204 which provides the punishment for the offence of murder, section 296 (2) which provides for robbery with violence and section 297 (2) which provides for the offence of attempted robbery with violence.

Counsel further submitted that while it is true that there are various international instruments which do outlaw the death penalty, and while it is true that these instruments now form part of our law, they cannot be said to override our Constitution.

As regards Mr Odhiambo's submission that the sentence imposed by the trial court was severe and unwarranted, this being a second appeal, we do not have jurisdiction to entertain matters of fact, and under section 361 of the Criminal Procedure Code, severity of sentence is a matter of fact. We therefore do not accept the proposition that the sentence of death was too severe a sentence to be granted by the trial court.

We do not have mandate to hear an appeal on sentence, unless a sentence has been enhanced by the High Court, which is not the case here, or unless the subordinate court has no power under the law to pass that sentence. We also have jurisdiction to hear and determine questions on constitutional matters as these are matters of law.

If we understand Mr Odhiambo correctly, and we think that we do, his position is that as a result of our new, more progressive Constitution, courts in this country no longer have the power to sentence convicts to death; that the sentence of death is now unlawful, first because it is a violation on the right to life, and secondly because it amounts to cruel and inhuman treatment.

Article 26 of the Constitution of Kenya, 2010 provides that:

***26. (1) Every person has the right to life.***

***(2) The life of a person begins at conception.***

***(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.***

By virtue of Article 2 (5) and 2 (6) of the Constitution, international treaties and covenants to which Kenya is a party, as well as the rules of international law form part of our law. We wish to state from the outset that while international instruments and the norms of international law do form part and parcel of our law, they do so only in so far as they are not inconsistent with the Constitution. This is provided at Article 2 (4) which states that ***'Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency…'***

At the time of passing sentence against the appellants, the repealed Constitution was in place, and it provided for the right to life in the following terms:

***71. (1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.***

The import of this is that the argument by Mr Odhiambo on the unconstitutionality of the death sentence does not hold water. Clearly, the Constitution envisages a situation in which the right to life can be curtailed, a fact recognised by the Court in ***Godfrey Ngotho Mutiso v R [2010] eKLR (Criminal Appeal 17 of 2008).***

The situations in which a person's right to life may be curtailed are contained in the following sections of the Penal Code: section 24 which provides that the punishments which may be inflicted by a court include the death sentence, section 25 (1) which provides that ***'Where any person is sentenced to death, the form of the sentence shall be to the effect only that he is to suffer death in the manner authorized by law'.***

As we have stated before, the sentence of death is imposed on those found guilty of the following offences: administering an oath to commit a capital offence, murder, treason, robbery with violence and attempted robbery with violence. These offences are provided for in the Penal Code.

Since the Constitution, both in the former epoch and the current, clearly envisages that the right to life is not absolute, the state can limit it in accordance with any written law. The law in this case is the Penal Code.

Indeed some of the international instruments envisage a situation where the right to life may be curtailed in furtherance of a sentence imposed by a court of law. Article 6 of International Covenant on Civil and Political Rights provides that:

1. ***Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.***
2. ***In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime…. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.***

Kenya has been party to this Covenant since May 1972. This country, however, is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights which aims at the abolition of the death penalty. This is instructive because it points out that under our law as it stands, the death sentence continues to be a valid sentence that can be passed by a court of law.

We wish to borrow the words of the court in the ***Godfrey Mutiso v R*** Case:

***The appellant has not challenged Kenya to abolish the death penalty in preference to unqualified right to life and we have no information that this country has any intention of joining the countries of the world which have heeded the United Nations call to abolish capital punishment. Suffice it to say that an opportunity had arisen in the debate raging for the last two decades relating to a new Constitution which is due for a referendum on 4th August, 2010. The abolition of the death penalty is not one of the provisions in the proposed constitution and is not a contentious issue. As the draft was arrived at through a consultative and public process, it could be safely concluded that the people of Kenya, owing to their own philosophy and circumstances, have resolved to qualify the right to life and to retain the death penalty in the statute books.***

Our present Constitution was sanctioned by the people of Kenya by way of a referendum on 4th August 2010, and the voice of the people was loud and clear: that they wished to retain the limitation on the right to life, which now presents itself in Article 26 (3).

Death as a penalty has been sanctioned by the Constitution. We believe that as the Court before us in ***Godfrey Mutiso v R*** correctly held: '***the death penalty remains a lawful sentence in Kenya and appears set to remain so for a long time to come***.'

To suggest that the Articles of the Constitution outlaw the death penalty is, with respect, a great danger to the people of Kenya and that is a remarkable departure from the tenets of constitutional interpretation. We think we have said enough to show that the death penalty is, contrary to the appellants' arguments, grounded in the Constitution.

The appellants have also alleged that the sentence of death as envisaged by the law amounts to cruel and inhuman punishment. We noted that the advocate for the appellants did not frame his arguments on this issue with reasonable precision. We must restate that a person seeking intervention of the court must ensure that he or she sets out, to a reasonable degree of precision, the nature of his grievance, the provisions of law said to be infringed, and the manner in which they have been violated.

Presumably, Mr Odhiambo is relying on Article 25 of the Constitution which provides that:

***25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited––***

***(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;***

As well as Article 29 (d) (e) and (f) of the Constitution of Kenya 2010 which provides that:

***29. Every person has the right to freedom and security of the person, which includes the right not to be—***

***…***

***(d) subjected to torture in any manner, whether physical or psychological;***

***(e) subjected to corporal punishment; or***

***(f) treated or punished in a cruel, inhuman or degrading manner.***

We must now consider whether the death sentence as envisaged under our law amounts to cruel and inhuman or unusual punishment which is prohibited by the Constitution.

Black's Law Dictionary (9th Edition) defines torture as '***the infliction of intense pain to the body or mind to punish, to extract a confession or information or to obtain sadistic pleasure***,' and cruel and unusual punishment as '***punishment that is torturous degrading, inhuman, grossly disproportionate to the crime in question or otherwise shocking to the moral sense of the community.'*** Inhuman treatment is defined as ***'physical or mental cruelty that is so severe that it endangers life or health'***.

Based on these definitions cruel, inhuman and degrading punishment is that which is done for sadistic pleasure, in order to cause extreme physical or mental pain, and that is disproportionate to the crime, so that it causes moral outrage within the community.

We do not think that the death sentence falls within these definitions. The death sentence is not done for

the sadistic pleasure of others. It cannot also be said to be shocking to the moral sense of the community due to the fact, as we have stated above, that it has now been endorsed by the people of Kenya through the referendum, and by the fact that it continues to exist in our statute books with constitutional underpinning.

We also do not consider that the deprivation of life as a consequence of unlawful behaviour is grossly disproportionate. In Kenya, death is a penalty for what can be considered as the most serious of crimes. It is a proportionate punishment for the offences committed, which in many cases result in the loss of life, and the loss of dignity for the victims. For example, in the present appeal, the victims of the crimes were roused from their sleep in the middle of the night, and faced with the threat of harm, and even death if they did not comply with the demands of the intruders. This was a violation of their right to dignity, and from all accounts, was a cruel act.

Among the purposes of punishment are retribution, so that equal harm is done to the offender, and securing justice for the victims of the crime. In addition, the punishment must serve as a deterrent, and in this case, the punishment fits the crime.

The main authority that the appellants rely on to support their arguments is the case of ***Godfrey Ngotho Mutiso v Republic (supra)*** to support their submission that the death penalty is unconstitutional, and amounts to cruel and inhuman punishment.

In that appeal, this Court was faced with determining the question as to whether the death sentence as a penalty for the offence of murder, as contained in section 204 of the Penal Code, was mandatory and whether because of its mandatory nature, it amounted to cruel and inhuman punishment. The court, after evaluating the position in various jurisdictions, found that nowhere in the Constitution was it stated that the mandatory sentence for the offence of murder was death. The court then held that:

***On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognises the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the constitution, which as we have said, makes no such mandatory provision.***

Relying on this case, Mr Odhiambo contends that the appellants were not given an opportunity to mitigate and that the sentences imposed on them were highhanded and unwarranted. With respect, this is not the case. The record shows that each of the appellants was given an opportunity to mitigate which was documented by the trial magistrate as follows:

***Court***: ***All accused treated as 1st offenders***

***Accused 1: I am very sick. Truly I was not involved in this case. I pray for leniency. I have got TB and I am very sick.***

***Accused 2: I did not commit this offence.***

***Accused 3: I also did not commit this offence.***

The court then recorded the sentence as follows:

***There is only one mandatory sentence that is prescribed by the law that is to be meted out against a person convicted of an offence under section 296 (2) of the Penal Code. This is the mandatory sentence of death.***

The allegation that the appellants were not accorded an opportunity to mitigate is therefore very far from the truth. The question therefore lies as to whether there is any other sentence available as penalty for the offences that the appellants have been convicted for.

In ***Godfrey Ngotho Mutiso (Supra)*** the court was of the opinion that the findings it had made with regard to sectin 204 of the Penal Code could extend to other capital offences. It stated that:

***We have confined this judgment to sentences in respect of murder cases, because that was what was before us and what the Attorney General conceded to. But we doubt if different arguments could be raised in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2) and attempted robbery with violence under section 297 (2) of the Penal Code. Without making conclusive determination on those other sections, the arguments we have set out in respect of section 203 as read with section 204 of the Penal Code might well apply to them.***

The import of this decision is that mitigation is now required to determine the appropriate sentence in cases where there had been convictions for capital offences. In effect, the holding in this case introduced sentencing discretion to judicial officers in murder cases. Decisions by this Court are generally binding, but we do have the power to depart from those decisions where we consider that in the circumstances, it is correct to do so. The Court will also not follow a case that it considers per incuriam. See ***Dodhia v National Grindlays Bank Ltd [1970] EA 195***.

A look at all the provisions of the law that impose the death sentence shows that these are couched in mandatory terms, using the word '***shall'***. It is not for the Judiciary to usurp the mandate of Parliament and outlaw a sentence that has been put in place by Kenyans, or purport to impose another sentence that has not been provided in law. It has no jurisdiction to do so, and in the words of the Nyarangi J in ***The Owners of Motor Vessel "Lillian S". v Caltex Oil Kenya Ltd [1989] KLR 1***:

***"Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."***

It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction. The authority of the court is determined by the existence or the lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a court will cross before it embarks on its decision making function.

In our understanding, courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act. Even under the new Constitutional dispensation, this court cannot properly or legitimately review the decisions of the people of Kenya, made during the referendum, or those of the legislation when those decisions are lawful. To say otherwise would be to act in complete contravention of the Constitution.

As judges, our mandate is fidelity to the Constitution and to the law. we cannot interpret the Constitution and other statutes whimsically where no discretion or window has been provided. The right to life under Article 26 of the Constitution of Kenya, 2010 has been fashioned in a specific manner to provide, or include, specific circumstances where life is limited, that is, to the extent is provided by law.

In our view, to say that there are other alternative sentences to the mandatory imposition or application of the death sentence is a pedantic and preposterous interpretation of the spirit and the letter of the Penal Code and the Constitution of Kenya, 2010. If the people of Kenya intended in their wisdom, and their collective will to outlaw the death sentence, then nothing could have been easier to do.

We hold that the decision in ***Godfrey Mutiso v R*** to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences. Our reading of the law shows that the offences of murder contrary to section 203 as read with 204 of the Penal Code, treason contrary to section 40 of the Penal Code, administering of oaths to commit a capital offence contrary to section 60 of the Penal Code, robbery with violence contrary to section 296 (2) of the Penal Code and attempted robbery with violence contrary to section 297 (2) of the Penal Code carry the mandatory sentence of death.

The Court cannot purport to be ahead of the people of Kenya or Parliament. The best the Court can do is exercise judicial authority conferred upon it in accordance with Article 159 of the Constitution, and interpret and apply the law in the manner envisaged. We draw inspiration from the words of Stamp LJ in ***Blackburn vs Attorney General [1971] EWCA Civ 7*** where he stated that:

***"Parliament enacts laws; and it is the duty of this Court in proper cases to interpret those laws when made; but it is no part of this Court's function or duty to make declarations in general terms regarding the powers of Parliament, more particularly where the circumstances in which the Court is asked to intervene are purely hypothetical."***

This position draws from the famous American case of ***Marbury v. Madison 5 U.S. 137, 1 Cranch 137 (1803)*** where Justice Marshall stated that:

***"It is emphatically the province and duty of the judicial department to say what the law is."***

It is not the role of judges to engage in wandering and wilderness interpretation of what the law ought to be. To do so would be going outside the province of Article 159 and 259 of the Constitution of Kenya, 2010. It would also amount to deciding and designing the correct size of the clothes and shoes that the people of Kenya wear. As judges, we must be satisfied with the privilege and honour bestowed upon us by the people of Kenya. We must avoid the temptation or invitation to be 'anti-death penalty crusaders' when the law and the Constitution decree otherwise. That business is well and clearly articulated by certain organisations and individuals. We note that these are well represented in all spheres of life, and judges are not included.

We are aware that in the recent past, there have been no executions of the death sentence, and that the President of Kenya, in 2009, exercised the prerogative of mercy under section 27 of the former Constitution and commuted the sentences of death row convicts to life imprisonment. We however are not convinced that the death sentence is not a fit punishment to be meted out and carried out as provided for in the law.

Should Kenyans decide that it is time to remove the death sentence from our statute books, then they shall do so through their representatives in Parliament. In the meantime, the sentence of death shall continue to be imposed in case of conviction where the law provides.

In the end, we find that these appeals are devoid of merit, and it fails in its entirety.

**Dated and delivered at Nairobi this 18th day of October, 2013.**

**J. W. MWERA**

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**JUDGE OF APPEAL**

**M. WARSAME**

**……**

**JUDGE OF APPEAL**

**P. KIAGE**

**……**

**JUDGE OF APPEAL**

**S. GATEMBU-KAIRU**

**……**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**……**

**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original**

**DEPUTY REGISTRAR**