



REPUBLIC OF KENYA



KENYA LAW
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**Kithunga v Republic (Criminal Appeal 14 of 2017)
[2023] KECA 1531 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1531 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 14 OF 2017
F SICHALE, LA ACHODE & WK KORIR, JJA
DECEMBER 15, 2023**

BETWEEN

DISHON MUSAU KITHUNGA APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (Hon. M. Odero, J.) delivered and dated 31st March, 2017 in HCCRC No. 121 of 2010)

Factors to consider in proving the offence of murder

The appeal was against the conviction and sentence of death meted upon the appellant for the offence of murder. The court highlighted the factors to consider in proving the offence of murder as well as the factors to consider in determining the existence of malice aforethought.

Reported by Kakai Toili

Criminal Law – murder - factors to consider in proving the offence of murder – malice aforethought - what were the factors to consider in determining the existence of malice aforethought - Penal Code, Cap 63, sections 203, 204 and 206(a) and (b).

Brief facts

The appellant was charged and convicted at the trial court for the offence of murder contrary to section 203 as read with 204 of the Penal Code. The appellant was thereafter sentenced to suffer death. The trial court in finding the appellant guilty noted that being a trained police officer he acted recklessly and negligently by firing at an unarmed civilian who posed no threat and offered no resistance to him at all.

The appellant being dissatisfied with the judgment and sentence filed the instant appeal on the grounds that the trial court handed down the death sentence without considering the fact that he acted in self-defence; that malice aforethought was not proved by the prosecution; and that the death sentence was unconstitutional as it infringed on the right to life.



Issues

- i. What were the factors to consider in proving the offence of murder?
- ii. What were the factors to consider in determining the existence of malice aforethought?
- iii. Whether the imposition of the death sentence for the offence of murder, as a mandatory legal requirement, was constitutional.

Held

1. The offence facing the appellant was murder contrary to section 203 as read with section 204 of the Penal Code. To prove the commission of the offence of murder, the prosecution must establish the fact and cause of death of the deceased person; that the death of the deceased was as a result of an unlawful act or omission on the part of the accused person; and, that such unlawful act or omission was committed with malice aforethought.
2. The fact that the deceased was dead and the cause of that death was never in dispute. It was the appellant's firearm which discharged the shot that resulted in the demise of the deceased. In other words, the killer bullet could only be traced to the appellant and no one else.
3. The appellant was a police officer who was by virtue of his employment authorized to carry a firearm. In order to prove the offence of murder the prosecution was required to prove malice aforethought on the part of the accused person. Section 206(a) and (b) of the Penal Code provided some of the circumstances for establishing malice aforethought as the intention to cause death or grievous harm or the knowledge that an act or omission might cause death or grievous harm. In assessing whether malice aforethought existed the factors to be considered were;
 1. the nature of the weapon used;
 2. the manner in which it was used;
 3. the part of the body targeted;
 4. the nature of the injuries inflicted either a single blow or multiple injuries; and
 5. the conduct of the accused before, during and after the incident.
4. The appellant was a police officer permitted by law to carry a firearm. The circumstances under which a police officer could deploy his firearm were provided for under the National Police Service Act, 2011. The evidence on record showed that the deceased and his company were not armed. They were just cheerful youths coming from a successful rite of passage of one of their own. On the other hand, the appellant who was armed was in the company of an armed colleague. They knew of the approaching trio and therefore took cover. The appellant shone his spotlight towards the youths and he therefore definitely knew how many they were in number. Armed with a G3 rifle and being in the company of an armed colleague, he was not under any imminent danger as to use the firearm in self-defence.
5. Even though the area was prone to cattle rustling, the act of shooting at a fleeing person denied the appellant the protection granted to him by the National Police Service Act. The evidence adduced did not show that the conditions established by law were met by the appellant prior to the use of his firearm. As a trained police officer entrusted with a gun to guarantee public security and order, discharging his firearm in such a manner was nothing but reckless. The appellant was aware of the possible consequences of discharging a firearm. The fact that he ultimately shot the deceased on the chest could not be said to have been an attempt at immobilizing the deceased but rather, it was meant to cause him grievous harm if not death. Furthermore, the appellant not only fired one shot but four rounds of ammunition at the young men. The appellant indeed had malice aforethought when he caused the death of the deceased.
6. The appellant was sentenced to death. From the record, the trial court handed down the death sentence in its mandatory nature notwithstanding the fact that the appellant had mitigated. The trial court acted in conformity with the prevailing jurisprudence as at March 31, 2017 when the appellant was sentenced. At that time the death sentence was deemed to be mandatory under section 204 of the Penal Code for adult persons convicted for the offence of murder. However, following the Supreme



Court pronouncement in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, that the mandatory nature of the death sentence under section 204 of the Penal Code was unconstitutional, courts had the discretion to mete out sentences appropriate to the circumstances of the particular cases before them. Therefore, the issue raised by the appellant was a matter of law and the court had jurisdiction to address his appeal against sentence. In reviewing the appellant's sentence, the court must take into consideration both the aggravating and mitigating factors.

Appeal against conviction dismissed while the appeal against sentence was allowed; death sentence set aside and substituted with a sentence of fifteen (15) years imprisonment from the date of conviction.

Citations

Cases

Kenya

1. *Gitabi, Veronica & another v Republic* Criminal Appeal 23 of 2016; [2017] KECA 787 (KLR) - (Explained)
2. *Munene, Dickson Mwangi & another v Republic* Criminal Appeal 314 of 2011; [2014] KECA 774 (KLR) - (Explained)
3. *Mungathia, Morris v Republic* Criminal Appeal 121 of 2006; [2007] KECA 341 (KLR) - (Explained)
4. *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR) - (Followed)
5. *Ng'ang'a, Jennifer Wanjiru aka Mama Flora aka Mama Mwangi aka Mama Kabiri v Republic* Criminal Appeal 196 of 2016; [2018] KECA 314 (KLR) - (Explained)
6. *Omar, Ahmed Mohammed & 5 others v Republic* Criminal Appeal 414 of 2012; [2014] eKLR - (Explained)
7. *Wario, Roba Galma v Republic* Criminal Appeal 159 of 2014; [2015] KECA 521 (KLR) - (Explained)

Regional Court

Republic v Tubere s/o Ochen (1945) 12 EACA 63 - (Explained)

Statutes

Kenya

1. Constitution of Kenya article 26(1); Schedule sixth; paragraph 1, 2 - (Interpreted)
2. National Police Service Act (cap 84) section 61; Schedule 6 - (Interpreted)
3. Penal Code (cap 63) sections 203, 204, 206(a)(b)- (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The appellant, Dishon Musau Kithunga, was charged and convicted at the High Court at Nakuru for the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the offence were that on November 20, 2010, the appellant murdered one Julius Kihara Njeru within Minjore village, Kirima location, Laikipia West District of the then Rift Valley Province. The appellant was thereafter sentenced to suffer death.
2. The appellant being dissatisfied with the judgment and sentence of the trial court has appealed to us on the grounds that the trial court handed down the death sentence without considering the fact that he acted in self-defence; that malice aforethought was not proved by the prosecution; and, that the death sentence is unconstitutional as it infringes on the right to life guaranteed under article 26(1) of the *Constitution*.



3. The prosecution called 10 witnesses to build the case against the appellant. Moses Kuria Mbuthi testified as PW1 recalling that on the material day, he and the deceased alongside other male villagers had escorted one of the village boys to face the knife at a hospital located about 8 kms away. The boy was circumcised at about 11.00pm after which they embarked on their journey back home. On the way, one of their motorcycles developed mechanical problems and they stayed behind with the deceased who had a bicycle and PW2 Wilson Njogu. They kept the motorcycle at a nearby home and proceeded on foot as they pushed the deceased's bicycle. Along the way they saw flash light followed by a gun shot. He fled from the scene with PW2. He hid about 300 metres away and later emerged when he heard his brother one Jeremiah Mbuthi looking for him. Upon returning to the scene, he found a multitude including the area chief, two administration police officers, one of them being the appellant, and elders. The deceased had died. He went home and when he visited the scene the next morning the body of the deceased had been removed. He also testified that the area was prone to armed robberies and cattle rustling.
4. PW2 in his testimony corroborated the account of events as narrated by PW1. He further stated that upon the gun being fired, he ran to the home of the boy who had been circumcised and rallied the young men at the home and they found their way back to the scene of the shooting. At the scene, they found the deceased had been fatally wounded. Present were the area chief and two administration police officers.
5. Corporal John Koskei testified as PW3. He produced photographs of the scene processed from an unexposed film submitted to him by Acting Inspector of Police Bernard Lalack.
6. PW4 was Chief Inspector Charles Koilege attached to ballistics section at the DCI Headquarters. He testified that on 25th November 2010 he received two G3 rifles with serial numbers 388687 and 6674798 marked as A1 and A2 respectively. He also received two magazines marked as B1 and B2 and 36 rounds of ammunition marked as C1-C16 and D1-D20. He examined the rifles and established that they were in good condition and used 7.62x51 mm caliber ammunition. He also established that the ammunitions were all capable of being fired and the two magazines had a capacity of 20 rounds and were components of the rifles. Further, that one of the magazines had 16 rounds of ammunition and the other one had 20 rounds of ammunition. He prepared and signed a report which he produced as an exhibit at the trial.
7. Constable Harrison Nderi testified as PW5 stating that on the material day, he was on patrol alongside the appellant. At about midnight, they saw some people approaching. They took cover. One person was riding a bicycle while two others were running alongside him. The appellant then ordered them to stop and immediately discharged his gun. PW5 testified that he emerged from hiding and inquired from the appellant whether he had shot someone and the appellant responded in the affirmative. They then called the area chief as villagers thronged the scene. He stated that on that night, there was moonlight and visibility was good. This witness further testified that the people who were shot at were not armed and that the deceased was shot on the shoulder. He also stated that the appellant had a G3 rifle number 388687. Later police officers from Ol Moran Police Station took away the deceased's body.
8. IP Kazungu Charo testified as PW6 recalling that on November 21, 2010 at 6.45am, he received a report of a shooting incident at Minjore in Kuruma Location. He proceeded to the scene where he found the deceased's body lying next to a bicycle. He stated that the body had a gunshot wound exiting from the chest. PW6 established that the appellant and PW5 were on duty when the appellant shot the deceased. He disarmed the appellant whose gun at the time had 16 rounds of ammunition and also took his uniform. While at the scene, he recovered spent cartridges which he took with him alongside the rifles



and uniforms of the appellant and PW5. He later handed over the recovered items to the DCIO. He also found at the scene a red marvin hat, a whip, a pliers and a panga.

9. CIP Bernard Kwarat who testified as PW7 stated that on November 21, 2010 at about 7.00 am he was at Marwa Police Station when he received information of a shooting at Minjore area. He proceeded to the scene where he found the OCPD and the OCS of OI Moran Police Station who had already secured the scene. He saw the deceased's body lying in a pool of blood and besides the body there were bicycle, a pair of pliers, a panga and a whip. He interrogated the appellant and PW5. The scene was photographed while a search in the area yielded no cartridge or bullet head. He established that the deceased posed no threat to the appellant when he was shot and that the appellant's rifle was short of 4 bullets when it was confiscated. He produced the Arms Movement Register from OI Moran AP Camp, the rifles and magazines of the appellant and PW5 as well as the appellant's ammunition as exhibits.
10. PW8 Simon Nandi, a government chemist, testified that he received 10 exhibits for analysis. He stated that he was tasked to establish whether the exhibits had any gunshot residue and also whether the cotton swabs had only gunshot residue. He confirmed that two of the exhibits had gun powder. The rest of the exhibits did not have gun powder. He produced his report and the exhibits as evidence.
11. PW9 Dr Kirimi Kinyua produced the postmortem report dated November 26, 2010 prepared by Dr Kariuki. He testified that the deceased was 19 years old. His body had a single gunshot wound on the 8th intercostal space on the right-side vertebral line and an exit wound was on the left divide to the front. Internally, there was blood in the abdominal cavity, the liver was torn at the right side while the stomach and spleen had injuries. He concluded that the deceased died as a result of hemorrhage due to gunshot wound to the liver and spleen.
12. PW10 Samuel Gacheru testified that on November 26, 2010 identified the body of the deceased to the pathologist who performed post-mortem on the body in his presence.
13. When placed on his defence, the appellant opted to give sworn testimony. He recalled that on the material day, he was on patrol at Cattle Line alongside his colleague PW5. They then heard people shouting and he saw a lit cigarette. He retreated and told his colleague to take cover. Before he could take cover, a group of men emerged and he shone his torch towards them. The men charged towards him. He shot in the air but the men were not deterred. He then lowered his gun to shoot their legs and that is when the deceased fell down and was hit. The appellant's testimony was that he ran away. Later the area chief came and they went to the scene where they found a pair of pliers, a whip and a panga next to the deceased's body. He stated that the men were about 5 feet from him and he warned them to stop before he fired his gun and that the area was dark with poor visibility. The appellant further testified that he fired three shots in the air in a bid to scare away the men while one shot was fired at the legs. His evidence was that the area known as Cattle Line was prone to cattle rustling hence their decision to patrol the area.
14. The trial court in finding the appellant guilty noted that being a trained police officer he acted recklessly and negligently by firing at an unarmed civilian who posed no threat and offered no resistance to him at all. The court found that the prosecution had established all the ingredients of the offence of murder against the appellant.
15. This appeal was virtually canvassed before us on July 24, 2023. Mr Gopichandra appeared for the appellant having filed written submissions dated July 17, 2023. Ms Torosi appeared for the respondent having filed submissions dated July 19, 2023.

Counsel sought to rely on their respective written submissions alongside brief oral highlights.



16. Submitting on the 1st ground of appeal, counsel for the appellant urged that the trial court ought to have considered whether the alleged act or omission on the part of the appellant was unlawful. Counsel submitted that the appellant who was authorized to possess a firearm deployed it in circumstances permitted in law. According to counsel, the evidence on record established that the locus in quo was prone to cattle rustling hence on the fateful night, the appellant was apprehensive of being attacked. Counsel urged that in the foregoing circumstances, the appellant's reaction and action were logical. Counsel proffered that the appellant's defence of self-defence was therefore sound. The cases of *Abmed Mohammed Omar & 5 others v Republic* [2014] eKLR and *Morris Mungathia v Republic*, Cr Appeal No. 212 of 2006 were cited as outlining the principles of the defence of self-defence.
17. Turning to his contention that malice aforethought was never proved, counsel submitted that the trial court ought to have taken into account the fact that the appellant labored under the misconception of the potential danger posed by the youths.
18. Finally, counsel submitted that the death sentence meted upon the appellant was severe, unwarranted and an infringement of the right to life guaranteed under article 26(1) of the *Constitution*. Counsel relied on the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR to urge that the death sentence for murder suspects was unconstitutional. In the end, counsel urged us to allow the appeal, quash the conviction and set aside the sentence.
19. Ms Torosi on her part commenced her submissions by urging us to evaluate the evidence in its entirety as expected of this Court when discharging its mandate as a first appellate court. Counsel pointed out the elements of murder and proceeded to identify the various aspects of the prosecution evidence that served to establish the said elements. Counsel urged that all the elements of murder were proved against the appellant and that his conviction and sentence should remain undisturbed. Counsel also argued that the trial court properly analysed and dismissed the appellant's claim that he acted in self-defence. She consequently asked us to dismiss this appeal in its entirety.
20. This is a first appeal hence we are obligated to delve into and reconsider the evidence as presented before the trial court. In doing so, we analyse the evidence, and evaluate it in light of the applicable legal, statutory and constitutional standards and principles before arriving at our own independent decision. In doing so, we must however be conscious that it is only the trial court that heard the witnesses and observed their demeanor. This jurisdiction has been continuously emphasized by this Court in its judgments including in *Dickson Mwangi Munene & another v Republic* [2014] eKLR where it was stated that:

“This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record.”
21. We have duly reviewed the record of appeal and the rival submissions by counsel on record for the parties. In our view, the issue raised in this appeal is whether the prosecution proved the offence of murder against the appellant, and if so, whether the appellant has raised matters of law in respect of the death sentence imposed on him to warrant our interference with it.
22. The offence facing the appellant was murder contrary to section 203 as read with section 204 of the *Penal Code*. To prove an offence of murder, the prosecution must establish the fact and cause of death of the deceased person; that the death of the deceased was as a result of an unlawful act or omission



on the part of the accused person; and, that such unlawful act or omission was committed with malice aforethought. In *Roba Galma Wario v Republic* [2015] eKLR, those ingredients were condensed as follows:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

23. In this case the fact that the deceased was dead and cause of that death were never in dispute. This was acknowledged in the testimony of witnesses for the prosecution and the defence. Specifically, the evidence of PW9 was to the effect that the deceased died as result of hemorrhage due to a gunshot wound to the liver and spleen. The deceased’s body was identified for the post-mortem procedure by PW10 who was the deceased’s uncle.
24. The next issue is whether the appellant unlawfully caused the deceased’s death. PW1 and PW2 testified that they were in the company of the deceased on the material day. While on their way home from the circumcision of one of their own, they came into contact with someone wielding a torch and a gun. The man directed his spotlight at them followed by the firing of the gun. PW2 reacted to the events by hiding in a nearby bush whereas PW1 ran home. PW1 and PW2 later came back to the scene where they found the area chief alongside police officers. The deceased’s body lay on the ground with a gunshot wound.
25. PW5 on his part testified that they were on a routine patrol with the appellant when they came into contact with the deceased in the company of two others. The appellant ordered the trio to stop as he simultaneously fired his rifle. PW5 then inquired from the appellant whether he had shot someone and the appellant responded in the affirmative. They then called the area chief.
26. In his defence, the appellant confirmed the evidence of PW5 but explained that he had ordered the deceased and his company to stop but they defied the order. This prompted him to fire in the air but the trio continued to charge towards him. He fired at the legs of the advancing group and that is when the deceased fell down and a bullet hit him on the chest. From the foregoing evidence, there is no doubt that it was the appellant’s firearm which discharged the shot that resulted in the demise of the deceased. In other words, the killer bullet can only be traced to the appellant and no one else.
27. What therefore remains is the determination of the question as to whether the appellant had malice aforethought. In answering this question, it must be appreciated from the outset that the appellant was a police officer who was by virtue of his employment authorized to carry a firearm. It is important to stress that in order to prove the offence of murder the prosecution is required to prove malice aforethought on the part of the accused person. In that regard, it was stated in *Jennifer Wanjiru Ng’ang’a v Republic* [2018] eKLR that:

“For a homicide to constitute the offence of murder under section 203 as read with 204 of the *Penal Code*, the offender must be shown to have caused the death by an unlawful act or omission and “of malice aforethought.””

28. Section 206(a) and (b) of the *Penal Code* provides some of the circumstances for establishing malice aforethought as the intention to cause death or grievous harm or the knowledge that an act or omission might cause death or grievous. In assessing whether malice aforethought existed the factors to be considered as stated in *Republic v Tubere s/o Ochen* (1945) 12 EACA 63 are the nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted



either a single blow or multiple injuries; and the conduct of the accused before, during and after the incident.

29. In regard to this appeal, the appellant was a police officer permitted by law to carry a firearm. The circumstances under which a police officer can deploy his firearm are provided for under the *National Police Service Act, 2011* (“Act”). As provided under section 61 of the *Act* the use of a firearm by a police officer is circumscribed as follows:

- “(1) Subject to subsection (2), a police officer shall perform the functions and exercise the powers conferred by the *Constitution* and this Act by use of non-violent means.
- (2) Despite subsection (1), a police officer may use force and firearms in accordance with the rules on the use of force and firearms contained in the Sixth Schedule.”

30. Paragraphs 1 & 2 of Part A of the Sixth Schedule of the *Act* specifically provides the instances when police officers may use force as follows:

- “1. A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result.
2. The force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders.”

31. Paragraphs 1 & 2 of the Sixth Schedule proceeds to give the conditions to be met before firearms can be used as follows:

- “1. Firearms may only be used when less extreme means are inadequate and for the following purposes—
 - a. saving or protecting the life of the officer or other person;
 - b. in self-defence or in defence of other person against imminent threat of life or serious injury;
 - c. protection of life and property through justifiable use of force;
 - d. preventing a person charged with a felony from escaping lawful custody; and
 - e. preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.
2. An officer intending to use firearms shall identify themselves and give clear warning of their intention to use firearms, with sufficient time for the warning to be observed, except—
 - a. where doing so would place the officer or other person at risk of death or serious harm; or



- b. if it would be clearly inappropriate or pointless in the circumstances.
 3. A police officer shall make every effort to avoid the use of firearms, especially against children.”
32. The appellant’s case was that he acted in self-defence. The law applicable where a police officer alleges that he used his firearm in self-defence was stated by this court (differently constituted) in *IP Veronica Gitabi & another v Republic* [2017] eKLR as follows:

“In our view in light of the above express provisions of the *National Police Service Act* regarding use of force and firearms by the police in self defence, there is no room for invoking section 17 of the Penal Code and applying the principles of the Common Law on self defence. The provisions of the Act are a complete and exhaustive code and demand that a police officer must resort to non-violent means as the first option and to use force only when non-violent means are ineffective. In addition, even where the use of force is justified, the officer does not have a carte blanche in the use of force. The Act demands that the force used must be proportional to the objective to be achieved, the seriousness of the offence and the level of resistance, and still, only to the extent necessary. When it comes to use of firearms, the Act makes that a last resort option.

To determine whether a police officer has used force or a firearm as required by the Act therefore cannot be a subjective issue. The court must evaluate all the circumstances surrounding the use of force or firearm so as to determine, for example, whether force was used as a last option; whether it was proportionate to the threat that confronted the police officer...”

33. In the appeal before us, the evidence on record show that the deceased and his company were not armed. They were just cheerful youths coming from a successful rite of passage of one of their own. On the other hand, the appellant who was armed was in the company of an armed colleague. They knew of the approaching trio and therefore took cover. The appellant shone his spotlight towards the youths and he therefore definitely knew how many they were in number. Armed with a G3 rifle and being in the company of an armed colleague, it does not appear to us that he was under any imminent danger as to use the firearm in self-defence. Contrary to the appellant’s testimony that he fired at the young men as they charged towards him, the testimony of PW1 and PW2 was that they were all running away when the deceased was hit. Their evidence that the deceased was shot from the back was supported by that of the pathologist. Even though the area was prone to cattle rustling, the act of shooting at a fleeing person denies the appellant the protection granted to him by the Act. The evidence adduced does not show that the conditions established by law were met by the appellant prior to the use of his firearm. As a trained police officer entrusted with a gun to guarantee public security and order, discharging his firearm in such a manner was nothing but reckless. The appellant was aware of the possible consequences of discharging a firearm. The fact that he ultimately shot the deceased on the chest cannot be said to have been an attempt at immobilizing the deceased but rather, it was meant to cause him grievous harm if not death. Furthermore, the appellant did not only fire one shot but four rounds of ammunition at the young men. We therefore agree with the findings of the trial court that the appellant indeed had malice aforethought when he caused the death of the deceased.
 34. The next issue is whether matters of law have been raised in respect to the appellant’s sentence in order to warrant our interference with it. The appellant was sentenced to death. It is clear from the record that the trial court handed down the death sentence in its mandatory nature notwithstanding the fact that



the appellant had mitigated. We are aware that the trial court acted in conformity with the prevailing jurisprudence as at March 31, 2017 when the appellant was sentenced. At that time the death sentence was deemed to be mandatory under section 204 of the Penal Code for adult persons convicted for the offence of murder. However, following the Supreme Court pronouncement in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, that the mandatory nature of the death sentence under section 204 of the *Penal Code* is unconstitutional, courts now have the discretion to mete out sentences appropriate to the circumstances of the particular cases before them. It therefore follows that the issue raised by the appellant is a matter of law and we therefore have jurisdiction to address his appeal against sentence.

35. In reviewing the appellant's sentence, we must take into consideration both the aggravating and mitigating factors. In mitigation, the appellant stated that he was 56 years old with 5 school going children and that his family depended on him. He also stated that he was of ill-health and expressed remorse for the offence. The prosecution also indicated that the appellant was a first offender. During trial, it was also evident that the appellant was operating in an area prone to cattle rustling. On the other hand, a young man unnecessarily lost his life. Taking all these factors into account, we are of the considered view that a jail term of 15 years would be an adequate punishment for the appellant.
36. In conclusion, the appeal against conviction is dismissed while the appeal against sentence is hereby allowed. The death sentence is hereby set aside and substituted with a sentence of fifteen (15) years imprisonment from the date of conviction.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2023.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

