



**Okongo & another v Republic (Criminal Appeal 37 of 2017)
[2022] KECA 1419 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1419 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 37 OF 2017
PO KIAGE, M NGUGI & F TUIYOTT, JJA
DECEMBER 16, 2022**

BETWEEN

MARK ONGORO OKONGO 1ST APPELLANT

ALPHAC SAR NGUKA OCHIENG 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Homa Bay (H. Omondi, J) dated February 6, 2017 in HCCRC No 7 OF 2014)

JUDGMENT

1. The appellants, Mark Ongoro Okong'o and Alphacsar Nguka Ochieng were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The information against them stated that on the 13th day of January, 2014 at Nyamonye village, Karading sub-location in Riana division of Ndhiwa District within Homa Bay County, they murdered Swineton Otieno Oyugi.
2. The case against the appellants was heard before Majanja J. He was however, transferred before he could complete the judgment, and it was written by Omondi J (as she then was). In the judgment dated February 6, 2017, the court found the appellants guilty as charged. The learned Judge found that the prosecution evidence proved the case against the appellants beyond reasonable doubt, and dismissed their respective defences as a sham. Both appellants were sentenced to death, the penalty prescribed under section 204 of the Penal Code.
3. Aggrieved by both their conviction and sentence, the appellants filed the present appeal by their memorandum of appeal dated August 25, 2020 in which they raise five grounds of appeal. Having elected to drop their fifth ground of appeal relating to their alibi evidence, these are that the trial court erred in law and fact in convicting them of the offence of murder: when all the ingredients of the offence were not proved; the appellant (sic) was not at the scene of crime nor did he participate



in the commission of the offence; on the evidence of a single identifying witness; there were a lot of contradictions and inconsistencies in the evidence; and that the writing of the judgment did not comply with section 169 of the Criminal Procedure Code, hence prejudicing the appellants.

4. The appellants ask this Court, should it not allow their appeal, to reduce their sentence from the death penalty to reasonable sentences in light of the Supreme Court decision in Francis Karioko Muruatetu & Anor -vs- Republic (2017) eKLR.
5. The events leading to the death of the deceased and the arraignment of the appellants emerged from the evidence of six prosecution witnesses. On the night of January 12, 2014, three thatched houses belonging to Peter Ongoro, Jackson Odedo and another were set on fire in Nyamonye village. The houses belonged to neighbours of the deceased, among them his uncle and his brother, Peter Ongoro (PW2). Following the fires, the area Assistant Chief scheduled a baraza (meeting) for January 13, 2014 at 10.30 a.m. under a tree behind Teresa Ajwang Oyugi's (PW1's) home.
6. At the appointed time, villagers began to gather to wait for the Assistant Chief to convene the meeting. Among those present were Teresa Ajwang Oyugi, her daughter, Maureen Akoth Onyango (PW4) and her son, Swineton Otieno Oyugi (the deceased).
7. On the other side of the road from where the Assistant Chief's meeting was scheduled, another group comprising young men from the area were also gathering to hold a parallel meeting. According to PW1, the parallel group comprised Bernard Ogola Agendi, Phillip Ochieng (Phillip) and Mark Ongoro Okong'o, the 1st appellant. By half past midday the Assistant Chief had not arrived.
8. Led by Phillip, the group meeting across the road from PW1 advanced towards the group which was waiting for the Assistant Chief. Phillip grabbed the deceased by the collar, and he stood up. Phillip asked the deceased why he had burnt down his house. Before the deceased could answer, Phillip hit him on the neck and head, then pushed him, causing him to fall down. The 1st appellant then held the deceased down and tied his hands and legs with a rope. The 1st appellant and Bernard Ogola then each picked a piece of wood which they used to hit the deceased on the back and neck.
9. PW1 testified that after Phillip, Bernard Ogola and the 1st appellant struck her son, she shouted "Why are you killing my son? What is it that he has done?" The 1st appellant asked what she was saying and asked for her to be brought so that they could kill her also. The 2nd appellant, who was behind her, asked, as she started running away, "Where is she? Let me get her so I can have sexual intercourse with her". PW1 fled the scene, outpacing the 2nd appellant who was chasing her, and locked herself inside her house.
10. A few minutes later, PW1 decided to return to the scene to see what had happened, meeting her daughter, Maureen Akoth on the way. About 4 meters from the scene, she saw the people who had attacked the deceased covering his body with twigs, then they fled from the scene. The piece of wood which had been used to assault her son had been left behind. She noted that the deceased's head was swollen; he was lying with his head facing down; had vomited blood and was badly beaten on the back.
11. PW1 identified the appellants as among the people who beat up the deceased. They were her neighbours and she had known them since their childhood. She stated in cross-examination that the 1st appellant was among the three people she saw beating her son. The 2nd appellant was the one who had chased her from the scene while threatening to rape her.
12. Peter Ongoro Oyugi (PW2), was a brother of the deceased. On the night his house was set on fire, the deceased was one of the people helping to put out the fire. He confirmed that the area Assistant Chief had called a meeting which was to start at 10.00 a.m., though PW2 did not know the agenda.



- He testified that a separate group of villagers comprising Oyugi Mirege, Tom Ndede, Phillip Ochieng and the 1st appellant were also having a separate meeting. He had been sent away from that meeting when he attempted to join it.
13. PW2 did not attend the meetings but at about noon, while he was at his home, he heard his mother's voice shouting that "A human being should not be killed like a dog." He also heard her saying "Ongoro is tying Otieno like a dog and Ogolla and Ochieng are killing him." When he went to the scene, he found the deceased lying down, and there was a lot of blood on the ground. He was dead. PW2 saw two pieces of wood on the ground. He also saw his mother, his sister Maureen Akoth, the appellants and Ogola at the scene, but Ogola left shortly thereafter.
 14. The 2nd appellant, whom PW2 referred to as Alphacsar, was chasing his mother and asking why she was calling out Ogola's name. He also noticed that the 1st appellant was pulling his sister Maureen by the hair, so he intervened and took his mother and sister away from the scene. Like PW1, PW2 identified one of the pieces of wood in court as one which he had seen at the scene. He did not see the appellants beating the deceased.
 15. No. 88825 PC Peter Mbugua (PW3) visited the scene where he was informed that the deceased was killed by members of the public on suspicion that he was among those responsible for burning of the three houses. He found the body of the deceased covered with twigs, and upon removing the twigs, found that the deceased's legs and hands had been tied from behind. The body had head injuries, and there was a pole beside the body. Among those mentioned as being the assailants were Ogola (who was at large) and the appellants. He was also shown a piece of wood said to have been used in the assault, which he presented in court in evidence.
 16. The evidence of Maureen Akoth (PW4), a sister of the deceased, was that she was present at the meeting called by the Assistant Chief. She corroborated the evidence of her mother, PW1, that while they were waiting for the Assistant Chief to start the meeting, a separate group which had gathered across the road approached the venue where the deceased was seated. Phillip asked the deceased why he had decided to set fire to his house, and the deceased responded that Phillip "was imagining something he did not know."
 17. PW4 saw Phillip hitting the deceased on the neck. When the deceased fell down, PW4 saw the 1st appellant hold the deceased's hands and tie his hands and legs using a rope. PW4 identified the 1st appellant as among the assailants, stating that she knew him very well as a neighbor. She saw him beating the deceased on the chest using a stick. She also named the 2nd appellant as one of the people she saw assaulting the deceased.
 18. It was PW4's testimony that she saw her mother, PW1, who was nearby begin screaming, asking why they were killing her son. PW4 ran towards the deceased whom she noticed had blood coming out of his mouth and realized that he was already dead. PW4 and her mother were screaming, and she heard the 2nd appellant ask for her mother saying that he wanted to rape her. The 2nd appellant pulled her by the hair and threatened to kill her if she continued screaming, so she and her mother left the scene for their home.
 19. A post mortem examination on the deceased was conducted by Dr. Kevin Osuri (PW6), who also produced the post mortem report in evidence. According to the report, the deceased had multiple bruises and a deformed skull with multiple fractures. He also had multiple long bone fractures- both femurs were fractured at the mid shaft, and the humerus was also fractured. The deceased's nasal bridge was broken, and the lungs had a massive collection of blood. The cause of death was head injury and massive haemothorax.



20. When placed on his defence, the 1st appellant gave an unsworn statement in which he denied committing the offence. He stated that on the material day, he was at his place of work from 7.30 a.m. until 11.00 p.m. when he left for his rented house at Riat. He did not get to hear about Swinerton's murder until February 9, 2014 when he met the deceased's mother who was looking for his brother named Ogola. Later on, police picked him up on the pretext that he was to help them in finding Ogola. Instead they took him to the home of the deceased's mother from where he was bundled into a waiting motor vehicle and taken to the police station.
21. In his sworn statement of defence, the 2nd appellant denied being at the scene where the murder of the deceased occurred. He maintained that there was no evidence from PW1 linking him to the fatal assault on the deceased. He did not know how the deceased met his death. He suggested that there was confusion as to who was involved in the killing because his last name is Ochieng and pointed out that the other person who had been mentioned was Phillip Ochieng. He could not recall where he was on January 12, 2014 but he had left home on January 9, 2014 to do construction work in Ombo, Homa Bay. He did not know what happened and was shocked at the charges which were preferred against him. On January 13, 2014, he was at Ombo with one Maina and went to his home about a week after the incident.
22. While the 2nd appellant had indicated that he would call a witness, one Eric Ochieng, and was granted an adjournment to enable him do so, he ultimately closed his case without calling any witnesses.
23. The appellants filed written submissions dated January 25, 2021 in support of their appeal. Their submissions were briefly highlighted by their learned counsel, Mr. Mshindi, at the hearing before us.
24. The appellants contend that the learned Judge erred in convicting them for the offence of murder when all the ingredients of murder were not proved. With regard to the involvement of the 1st appellant, it is submitted that while PW1 stated that the 1st appellant beat the deceased with a stick, she also testified that she later ran away and hid; that PW2 stated that he did not see the 1st appellant hit the deceased; and that the investigating officer (PW3) could not tell who beat the deceased as he was beaten by a mob, and he did not mention the appellants in his statement.
25. As for the involvement of the 2nd appellant, it is submitted that he was not mentioned as among the people who had attended the meeting of the young men and was not involved in the planning, and that he only appeared from elsewhere. They submit, further, that PW1 had testified that the 2nd appellant did not beat her son, and that he only chased her.
26. The appellants further submit that the cause of the death of the deceased was not established. It is their submission that PW6 stated that he could not tell what caused the head injury as he did not indicate the weapon. In their view, the failure to indicate the murder weapon is fatal in proving the cause of death conclusively. The appellants rely on the case of *Kitsao Kaingu Kazee & Anor vs Republic* [2007] eKLR in which, they submit, the Court of Appeal sitting in Mombasa acquitted the appellants because of a superficial post mortem report.
27. The appellants further challenge their conviction on the basis that the trial court relied on conflicting and contradictory evidence. They submit that PW1, PW2 and PW4 differed in their evidence implicating the 2nd appellant. They contend that PW1 stated that everyone ran away as she was being chased which means that PW4 was not around to see who attacked the deceased. Further, that PW1 insisted even in her evidence in chief that the 2nd appellant did not beat the deceased. Reliance for their submission is sought in the case of *Hamisi Shee Mwadzimeza v Republic* (2016) eKLR.



28. It is the appellants' contention further that the trial court erred in relying on the evidence of a single identifying witness, PW4, to identify the appellants. They cite the decision in *Maitanyi vs. Republic* (1986) eKLR 198 and *John Muriithi Nyagah v Republic* [2014] eKLR for the proposition that the evidence of a single identifying witness must be examined with considerable circumspection before a conviction is founded on it. Intriguingly, in what appears to be a burst of religious fervour, the appellants cite scripture, Numbers 35:30; Deuteronomy 17:6 and Mathew 18:15-16 on the need for more than one witness to testify to the truth of a matter.
29. The appellants' final ground of appeal is based on the contention that though the matter was heard by Majanja J, the judgment was written by Omondi J (as she then was). It is the appellants' contention that the judgment did not meet the requirements of section 169 of the Criminal Procedure Code; that no points of law or the offence or an analysis of the evidence was indicated in the judgment, which denied the appellants a fair hearing. Support for this submission is sought in the case of *James Nyanamba v Republic* [1983] eKLR.
30. Finally, the appellants submit that, in the event that their appeal against conviction fails, they should be re-sentenced in accordance with the decision in *Muruatetu*.
31. The respondent opposes the appeal in written submissions dated June 30, 2022 which were highlighted by learned prosecution counsel, Ms. Vitsengwa. The respondent argues that the ingredients of the offence of murder were proved. It is the respondent's case that malice aforethought was established against the appellants; that the deceased sustained head injuries; the appellants had, in the company of others, tied his hands behind his back and also tied his legs with a rope; that they used weapons and inflicted grievous harm on the deceased.

According to the respondent, in their assault, the appellants targeted the deceased's head and chest.
32. Regarding the identification of the assailants, the respondent submits that the witnesses positively identified the appellants as among those who attended the parallel meeting and those who descended on the deceased and assaulted him. The respondent notes that the assailants had a common intention, the 1st appellant not having denied tying the deceased before he was assaulted. Further, that the 2nd appellant did not deny chasing the deceased's mother, nor did he deny placing twigs on the deceased's body after the assault.
33. It is the respondent's submission that the testimony of PW1 and PW4 clearly established that both appellants acted together with other persons when they confronted the deceased, accused him of burning their houses, tied his legs and his hands behind his back and proceeded to inflict violence on him.
34. Regarding the death of the deceased, the respondent submits that the post mortem report produced by PW6 concluded that the cause of death was "head injury and massive haemothorax".
35. To the 2nd appellant's contention that he was not at the scene of crime, the respondent submits that PW1, PW2 and PW4 had testified that the 2nd appellant was among the persons who assaulted the deceased. PW1 had further stated that the 2nd appellant threatened to rape her and even chased her, and PW2 confirmed this evidence and placed the appellant at the scene of crime. Further, that PW4 in her testimony told the court that she saw the 1st appellant, Ochieng, Ogola and the 2nd appellant at the scene, and she also identified him at the dock.
36. In the respondent's view, the prosecution witnesses were consistent in their recall of the events leading to the death of the deceased. Such contradictions as there were, if any, were minor and did not shake



the substance of the prosecution case. The respondent relies in support of this submission on the case of *Joseph Maina Mwangi -vs.- Republic* Criminal Appeal No. 73 of 1993 in which this Court stated:

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of *Criminal Procedure Code* viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”

37. Regarding the challenge to the judgment on the basis of section 169 of the *Criminal Procedure Code*, the respondent submits that the provision was duly complied with. It is submitted that the offence the appellants were charged with is contained at page 45 of the record; that paragraph 18 of the judgment contains the points of law, while the preceding paragraph contain the analysis of the evidence presented in court.
38. With respect to the sentence imposed on the appellants, the respondent submits that though the appellants relied on the Muruatetu decision, the case does not apply in the circumstances. That the learned Judge did not mete out the sentence of death against the appellant due to its mandatory nature. On the contrary, the appellants were given a chance to mitigate; that their mitigation was duly considered; but that the trial court took into account the cruel manner in which the deceased met his death and concluded that the appellant deserved a mandatory sentence as provided by the law. The respondent submits that, in the event that this Court is inclined to disagree with the trial court, it should be guided by the factors set by the Supreme Court in Muruatetu for consideration in re-sentencing.
39. We have considered the record of the trial court and the judgment appealed from, the appellants’ grounds of appeal, as well as the respective submissions of the parties with respect to the appeal. We bear in mind that as a first appellate court, we are under a duty to re-evaluate the evidence presented before the trial court and reach our own conclusions. In doing so, we bear in mind that we did not see or hear the witnesses- see *Okeno v Republic*[1972] EA 32.
40. We note that in this case, the judgment was written by Omondi J (as she then was), even though the entire case, including the defence case, was heard by Majanja J. We have not been able to discern the reason why, though Majanja J had been transferred from Homa Bay, the record of proceedings was not placed before him for the purposes of writing the judgment. We note, however, that on October 31, 2016, upon the court indicating the rights of an accused person under section 200(3) of the *Criminal Procedure Code*, each of the appellants expressly stated that they had no objection to the judgment being written by Omondi J.
41. We have noted, also, the appellants’ ground of appeal premised on alleged non-compliance with section 169 of the Criminal Procedure Code, as well as the submissions thereon. We are, however, not satisfied that this ground has merit. Our reading of the judgment shows that the court was fully cognizant of, and indeed set out, the offence that the appellants faced; it further set out the prosecution evidence, as well as the appellants’ respective defences. The court then went on to analyse the prosecution evidence, as well as the appellants’ defences, which it noted were alibi defences. It, however, observed, at paragraph 20 of the judgment, that the defences were a sham, easily demolished by the prosecution evidence. We are satisfied that this ground of appeal has no merit.
42. We turn now to consider the more substantive grounds of appeal: whether the prosecution adduced sufficient evidence to establish the offence of murder and to justify the appellants’ conviction; whether there were contradictions and inconsistencies that weakened the prosecution case; and whether the trial court erred in relying on the evidence of one identifying witness.



43. In order to establish the offence of murder, the prosecution must place before the trial court evidence that establishes the death of the deceased, the cause of death, and that the accused committed the unlawful act which caused the death of the deceased; and that the accused persons committed the act with malice aforethought-see *Anthony Ndegwa Ngari v. Republic* [2014] eKLR.
44. The evidence of PW1, PW2, PW3 and PW4 was that several houses were torched on the night of January 12, 2014 in Nyamonye village. Some of the houses that were torched belonged to an uncle and brother of the deceased. The area Assistant Chief was informed and he scheduled a baraza for January 13, 2014 at 10.30 a.m. under a tree behind PW1's home. A number of people gathered for this meeting, among them the deceased, his mother (PW1) and his sister (PW4)
45. Another group, which included the appellants, held a parallel meeting across the road from where the deceased and his relatives were. It would appear that this other group was ill-intentioned from the outset- when the deceased's brother, PW2, attempted to join the group, he was informed that he should not attend the meeting.
46. The evidence of PW1 and PW4 shows that soon after 12 p.m., the Assistant Chief having failed to attend the meeting that he had convened, Phillip Ochieng, Ogola, and the appellants walked to the other meeting with the express purpose of attacking the deceased. We say express purpose because immediately upon arrival, Phillip, who seems to have evaded arrest and prosecution, asked the deceased why he had burnt his house. The deceased stood up but was struck by Phillip on the neck, and he fell down.
47. The 1st appellant was at hand, armed with a rope: he held the deceased's hands, tied them behind his back, and also tied his legs. Thus hog-tied, the deceased was at the mercy of his assailants who then proceeded to assault him with horrifying savagery. This evidence emerged from the testimony of PW1 and PW4. PW3, who removed the body of the deceased from the scene, confirmed that when the police removed the twigs that had been used to cover the deceased's body, he had his hands tied behind his back, and his legs were also tied.
48. Section 206 of the *Penal Code* defines malice aforethought as follows:
- “Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances
- a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - c. an intent to commit a felony;
 - d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”



49. In the oft-cited case of *Republic vs. Tubere s/o Ochen* [1945] 12 EACA 63 it was held that in determining whether malice aforethought has been proved the following elements should be considered:

“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 stab/wound or multiple injuries; the conduct of the accused before, during and after the incident.”

See *Daniel Nzioka Mbuthi & another v Republic* (2021) eKLR and *Ibrahim Maramba Mukabane vs. Republic* (2020) eKLR.

50. In this case, the post mortem report on the deceased showed that he died from a head injury with massive haemothorax, He had multiple bruises; his skull was deformed from the beating; and he had multiple fractures of the long bones in his body- both femurs and the humerus. His nasal bridge was also broken. The evidence of PW1 and PW4 was that he had been beaten with pieces of wood or poles by the appellant and others who had evaded arrest. PW3 found the poles used in the assault at the scene, and produced them in court. There can be no doubt about the death of the deceased, or that those who caused his death did so with malice aforethought. As his mother, PW1, cried in her anguish as the deceased's assailant beat him, they did so as though they were beating a dog.

51. The appellants have challenged their conviction on the basis that there were inconsistencies in the prosecution evidence, and that the court relied on the identification evidence of one witness. We are, however, unable to find any merit in this argument. The events leading to the death of the deceased took place in broad daylight, at about 12.30 p.m. The protagonists in this tragedy were neighbours: PW1's testimony was that she knew the appellants since they were children. She saw them move from the place where the young men of the area were holding a parallel meeting and attack her son. She spoke to them. The 2nd appellant chased her from the scene: not content with the psychological harm he and his accomplices were inflicting on her with the assault on her son, he compounded it by threatening sexual assault on her.

52. PW2 had seen the appellants holding their parallel meeting with others. They had chased him away. Though he had not seen them assaulting the deceased, he had returned to find them at the scene, threatening his mother and sister, PW1 and PW4, and pulling PW4's hair; and he had removed his mother and sister from the scene. PW4 was there from the beginning. She saw the young men, neighbours whom she knew well, led by Phillip, approach and attack the deceased. She saw the 1st appellant tie the deceased's hands and legs with a rope; she saw him, Ogola and Phillip, as well as the 2nd appellant, assault the deceased. She also saw the 2nd appellant chasing her mother with threats of sexual violence.

53. Our evaluation of the above evidence does not show any contradictions or inconsistencies in the prosecution evidence. However, even had there been such inconsistencies, we are not satisfied that they would have been sufficient to dent the prosecution case against the appellants. In *Joseph Maina Mwangi vs. Republic* [2000] eKLR, the Court held that:

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the *Criminal Procedure Code*, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”



54. As for the manner of dealing with any discrepancies that may be observed in the evidence, this Court in *Samuel Wambua Muthoka v. Republic* [2017] eKLR stated as follows:

“The position in law on such alleged existence of inconsistencies, contradictions and discrepancies in the prosecution case is as was stated in the case of *Njuki & 4 others versus Republic* [2002] 1KLR 771, namely, that where such allegations are raised, the obligation of the Court is to determine as to whether the said discrepancies, contradictions and inconsistencies are of such a nature as would create doubt as to the guilt of the accused. Where they do not, then they are curable under section 382 of the *Criminal Procedure Code*.”

55. In his submissions before us, counsel for the appellants, Mr. Mshindi, noted the alleged contradictions as being whether the deceased was hit by a mob, whether the 1st appellant hit the deceased with a stick and escaped, and whether the 2nd appellant was at the scene of crime. From the evidence presented before the trial court, there can be no doubt with regard to who was at the scene of crime and who inflicted the fatal injuries. PW1, PW2 and PW4 were consistent in their evidence regarding the events of that day. In finding that the prosecution had established its case against the appellants and there was no doubt about the identity of the assailants, the trial court observed that:

“There could even be no doubt as to who attacked the deceased because the two groups had been standing apart from each other and PW1, PW2 and PW4 had sufficient time from 10.00 am- 12.30pm to see and observe them where they stood and even as they advanced towards them. They described how the attackers first spoke to SWINNERTON asking him why he had decided to burn a house belonging to one of them”.

56. In our view, there can be no doubt regarding the identity of the persons who assaulted the deceased, leading to his death. The appellants’ challenge of their conviction on this ground must fail. Accordingly, we find no merit in the appellants’ appeal against their conviction.

57. The appellants have asked this Court, should it not find merit in their appeal against conviction, to consider their sentence on the basis of the decision in *Muruatetu*. In *John Gitau Gachiri vs Republic* (2019) eKLR, this Court stated as follows:

“19. As regards sentence, the trial Judge sentenced the Appellant to death. counsel for the Appellant has urged the Court to re- consider this sentence in light of the Supreme Court decision in *Francis Karioko Mwaruatetu & another versus Republic & 5 others (supra)*. In that decision, the Supreme Court declared the mandatory aspect of the death sentence as provided under section 204 of the *Penal Code*, to be unconstitutional. What this means is that a Judge who finds an accused person guilty of murder has the discretion to impose any sentence, death penalty being the severest sentence that can be imposed.”

58. The Supreme Court in *Muruatetu* did not declare the death penalty in Kenya unconstitutional. What it declared unconstitutional was the mandatory nature of the sentence for the offence of murder under section 204 of the *Penal Code*. Accordingly, as this Court observed in *John Gitau Gachiri vs Republic (supra)*, whether this Court will interfere with the trial court’s exercise of discretion to impose the death penalty will depend on the circumstances of each case.

59. In this case, the appellants were given an opportunity to mitigate, which they did through their respective counsel. The trial court considered their mitigation. However, it noted the cruel manner in



which the deceased met his death and concluded that the appellants deserved the death penalty. Having considered the circumstances of this case and the savage manner in which the appellants attacked the deceased, leading to his death, we are not satisfied that the trial court erred in sentencing the appellants to death as prescribed under section 204 of the *Penal Code*. We are cognisant, however, of the fact that though the death penalty remains in the *Penal Code*, it has not been executed in the last 37 years. Those on death row in this country have routinely had their death sentences commuted to life imprisonment.

60. In the result, we dismiss the appeal on conviction and allow the appeal on sentence to the extent only of setting aside the sentence of death, substituting therefor an order that the appellant shall serve a term of life in prison.

DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF DECEMBER, 2022

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

