



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)

CRIMINAL APPEAL NO. 10 OF 2018

BETWEEN

FARAJI KONDE KAZUNGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (M. Muya, J.) dated 23rd March, 2016

in

H.C.C.R.C. No. 55 of 2012)

JUDGMENT OF THE COURT

1. The appellant, Faraji Konde Kazungu, was charged, alongside three other accused persons, with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that the appellant, and the three co-accused persons, on 4th October 2012 at Mtomondoni open ground at Mtwapa Township Kilifi County within the Coast region murdered Police Constable Harrison Maitha Mweni.

2. Following a protracted trial before the High Court at Mombasa (***M. Muya, J.***) in which 21 prosecution witnesses testified, the appellant was found guilty of the offence and convicted in a judgment delivered on 23rd March 2016. He was sentenced to death. His co-accused persons were acquitted. The appellant has challenged the conviction and the sentence.

The evidence

3. The facts are that on 4th October 2012, a youth group, Bahari Youth Development, whose objectives include poverty eradication and education, had convened a public rally at Mtomondoni open grounds Mtwapa for purposes of a youths' education fund. Among the guests, who at the material time were seated at the podium waiting to address the rally, were Hon. Amason Jeffer Kingi (PW7) who at the time was a cabinet minister in the Ministry of Fisheries and currently the Governor, Kilifi County, and retired Justice Steward Madzayo (PW13) the current senator, Kilifi County.

4. While the meeting was in progress, PW6, Nzai Naweni (not real name) a youth leader was on his feet on the microphone giving his speech at about 3.00 p.m., when a stranger, whom he could not identify, emerged and interrupted the meeting, got hold of the microphone before proceeding to where Hon. Kingi and Hon. Madzayo were seated on the dais. PW6 saw the stranger draw a panga from his clothes and heard him say, "*Pwani si Kenya*", and then saw him cut Hon. Madzayo on the head. Suddenly, other men, armed with pangas, emerged and PW6 heard one of them say that they had cut the wrong person whereupon Hon. Kingi took cover under the table. His bodyguard, the deceased, was cut on the head and arms and fell down. Pandemonium ensued. Stones, chairs and tables were thrown as members of the public attacked the attackers. In the milieu, three of the attackers were killed.

5. Hon. Kingi (PW7) was seated behind the high table at the dais when PW6 was addressing the gathering. He saw a young man attempt to wrestle the microphone from PW6. There was commotion. He then saw other young men approach the high table. He saw a panga being brandished. He heard shouts, "*kill them*" while others shouted "*don't kill.*" His bodyguard, Harrison Maitha Mweni, the deceased, pushed him behind. He escaped to a nearby house from where he was subsequently rescued. Later in the day, he went to see his bodyguard in hospital but found that he succumbed to the injuries and died. He also visited Hon. Madzayo at Aga Khan Hospital where he was receiving

treatment.

6. Hon Madzayo (PW13) recalled that he was at the rally at about 3.00 p.m. on 4th October 2012 seated alongside Hon. Kingi, amongst other leaders, when young men interrupted the meeting and crowded the dais claiming to be members of MRC opposed to holding of elections and ordered that the meeting should stop saying that “*there would be no elections carried in the region*” and that “*children would not be allowed to sit for exams.*” Suddenly, he saw the young men remove pangas from shukas. There was a stampede. Somebody pointed at him saying “*this is Kingi*”; he then saw a young man holding a machete. He decided to run to save his life. He stood, turned back and attempted to run towards a bodyguard who had removed his gun. He could not recall what happened thereafter as he passed out and woke up in hospital at about 2.30 a.m., the following morning with injuries. He stated that the bodyguard’s hand was chopped off and his head was slashed.

7. Earlier on that day, of 4th October 2012, Kenga Katana (PW5) a trader and a resident of Kilifi left his place of work at about midday to buy and take food to his child at nursery school. On his way back, at about 2.00. p.m., he passed Mtomondoni grounds, Mtwapa where he found tents pitched and people were waiting for Hon. Kingi to arrive. He decided to go back to his place of work where he found his neighbour, Ngunza Rere, a cobbler, whom he described as physically handicapped with a group of about 10 youths administering an oath with water.

8. According to PW5, at his neighbour’s place he saw each of the youths being equipped with a panga which they hid in their clothes; that Ngunza Rere, who was opposed to elections being held in Mombasa was saying that Hon. Kingi was telling people to vote and that he would be punished; that on learning that Hon. Kingi had arrived at the meeting venue, Ngunza Rere unleashed the youth to proceed to the meeting venue. According to PW5, the appellant, who was well known to him was among the youth he saw taking oath and being equipped with a panga. He followed them for about 200 meters as they went to the venue of the meeting and then decided to warn people not to attend the meeting and to report the matter to the police.

9. PW5 went on to say that at the police station he wanted to report in secrecy but the officers at the reception could not hear of it. He decided to get the number for the OCS who was away in Nairobi who then referred him to the Deputy OCS, Inspector Christine Ramadhan (PW4) to whom he gave the information and returned to his place of work.

10. On returning to his place of work, he found Gunza Rere was at his place of work. “*Two minutes later Faraj [the appellant] came running to Gunza Rere place and asked him whether he had heard what they had done Gunza Rere said that he had heard Faraji left.*” PW5 later went to the open grounds and found that one Omaru Kijuje and one Matano and another person had been killed by members of the public. He then returned to his place of work and found Gunza Rere having closed his place of work and escaped. He went and reported to the police.

11. Inspector Christine Ramadhan (PW4), Deputy OCS Mtwapa Police Station was at the police station on 4th October 2012 when she received the report of the attack. She called for reinforcement and proceeded to the scene at Mtomondoni open grounds in the company of many other police officers. At the scene the officers found the deceased had been cut and was bleeding profusely. They also found three bodies of persons who had been lynched by members of the public. They recovered blood stained pangas, which they took as exhibits, as well as a pistol that belonged to the deceased, the body guard of Hon. Kingi.

12. Police Constable Enos Kasisi (PW2) was among the police officers who rescued Hon. Kingi some 800 meters from the scene while Police Constable Nesor Yunis (PW1) assisted in the retrieval of the bodies and in taking them to Coast General Hospital. Sergeant Michael Odour (PW16) took photographs of the dead bodies at the scene which he produced as exhibits at the trial.

13. On 6th October 2012, based on information given to him that a suspect in the murder of the deceased had been seen at Kilifi Stage, Police Constable Samuel Kamiti (PW18) proceeded there with other police officers and arrested the appellant. They escorted him to his house and on searching, they found, in the ceiling, a blood stained pair of brown boots and a blue shirt, a manifesto titled “*Baraza la Jamhuri ya Mombasa*” for Mombasa Republican Council (MRC), a military short trouser and a Nokia 3310 phone, all of which were produced at the trial as exhibits. They prepared an inventory of the recovered items which was countersigned by Corporal Ochola (PW21) the investigating officer as well as by the appellant.

14. Police Constable Joseph Ngatia (PW20) was also among the police officers who went to the scene. He stated that he was at the police station on 4th October 2012 at about 3.25 p.m. when information was received at the station that a political meeting at Mtomondoni open grounds had been disrupted by MRC adherents armed with pangas. He saw bodies of dead persons at the scene. He was also involved in rescuing Hon. Kingi from where he had sought refuge.

15. According to him (PW20) they later got information that a group of people, including the appellant, had been seen at Ngunza Rere’s stall taking oath before the attack; that the appellant was then found at a bus stage where they arrested him and escorted him to his house. He supported the testimony of PW18 that at the house, they found hidden in the ceiling a blood-stained shirt, a blood-stained pair of boots, army short pants, MRC manifesto, and a Nokia phone; that an inventory of the recovered items was prepared which the appellant also signed. The blood-stained boots and shirt were forwarded to the Government analyst for examination.

16. Other witnesses who testified regarding the alleged oath-taking at Ngunza Rere’s were Penina Kalama Katana (PW8) a café operator neighbouring Ngunza Rere’s shop and whose kiosk and that of Ngunza Rere’s is divided by a plywood wall, who said that the appellant was well known to her as he was her customer; Seline Nawanyala (PW9) a cook at a café neighbouring the shop of Ngunza Rere, a cobbler where they used to store utensils, stated that on the material day, Ngunza Rere addressed many youths, but she did not witness any oath-taking.

17. Corporal James Ochola (PW 21), the investigating officer, also went to the scene on 4th October 2012 and found people running helter-skelter. Three members of the public had been killed during the rally. Together with PW 20, they were directed by their commander to commence investigations. They got information from Kenga Katana, (PW5) that one Ngunza Rere, a cobbler and chairman of MRC Mtwapa

had organized the attack at Mtomondoni grounds; that he mentioned that the appellant, and his co accused were amongst those who had gathered at Ngunza Rere's place after which the arrests were made; that they went to the appellant's house and conducted a search and recovered from the ceiling a pair of blood stained safari boots, a light blue shirt which was also blood stained; they also recovered a manifesto booklet for MRC, a pair of military shorts and a defective mobile phone. A search certificate was prepared which the appellant also signed.

18. PW21 stated further that on 6th October 2012, in an endeavor to establish whether there was a link between the appellant and the murder, with the appellant's concurrence, he was taken to hospital where his blood sample was taken. Blood samples were also taken from the blood-stained shoes and the shirt recovered from the appellant's house and also from the deceased and all the samples submitted for forensic examination to the Government chemist.

19. Chief Inspector Bathorah Nyachallo, (PW15) the OCS Mtwapa was at the police station after the arrest of the appellant. He informed the appellant of the intention to have DNA conducted and proceeded to Coast General Hospital with the appellant on 19th October 2012 where blood samples were taken with the consent of the appellant. The samples were taken to the Government analyst alongside the things recovered from his house.

20. Lawrence Ogunda (PW14), the Principal Chemist Mombasa received blood samples of the deceased Harrison Maitha Mweni, the blood-stained shoes and shirt recovered from the appellant's house, and blood sample of the appellant with a request to identify whether they had a match. He established, through DNA profiling, that the blood samples recovered from the deceased matched the blood type found on the shoes and the shirt. He produced his report to that effect.

21. Dr. Ngali Nabuko (PW12), a consultant pathologist at Coast General Hospital, conducted the post mortem on the deceased. He also took blood samples at the request of the police. The body was identified by the deceased's wife, Elina Martha Naweru (PW3) and Kelvin Nankasamu Kaingu (PW10). The deceased's left hand had been severed at the wrist joint and the remaining stump was bandaged. The deceased had lost a lot of blood. He had deep cut wounds on the head, 13 cm long ascending to the skull and another 16 cm long extending to the skull and brain and other cuts. He formed the opinion that the cause of death was sharp traumatic injury to the brain with bleeding following multiple sharp trauma injuries to the head and upper limb. He produced the post mortem report.

22. The trial court found that the prosecution had made out a case requiring the appellant to answer. In his defence, the appellant stated that he hails from Kaloleni and operates a boda boda business; that he was arrested on 6th October 2013; that he does not know the deceased and on the material day he was not at Mtomondoni but later heard that thugs had attacked people during a public rally at Mtomondoni. He denied being amongst the youth that had attacked members of the public at the rally.

23. He stated that he was on duty on 6th October 2012 at Kilifi Stage when four men appeared and asked for Faraji. That he identified himself and was arrested without offering any resistance; was handcuffed and one of the officers took his phone, wallet and his house and motor bike keys without being told the reason for his arrest; that he was placed inside a government vehicle, a Land Rover, where he saw shoes and clothes; that they went to his house, he showed the officers the keys and they entered the house; that on searching they found nothing after which he was taken to the police station and asked about Ngunza Rere but he denied any knowledge of him.

24. On cross examination, he confirmed that he knew PW8 as he used to be her customer at her food stall but reiterated that he did not know Ngunza Rere; he denied that the shoes and the shirt with the blood stains belonged to him maintaining that he does not wear shoe size 10 but 7; that his house has no ceiling and that he was cheated to sign a certificate indicating that the items were recovered from his house.

25. After reviewing the evidence, the trial Judge was satisfied that the forensic evidence placed the appellant at the scene of crime and concluded that the prosecution had proved its case against the appellant to the required standard but acquitted the appellant's co-accused.

26. The appellant has challenged that judgment on grounds that the offence was not proved to the required standard; that the judge erred in failing to find that evidence was collected improperly in violation of the Constitution and the Evidence Act; and that the sentence is harsh and manifestly excessive

Submissions

27. Urging the appeal before us, Miss. A. Otieno, learned counsel for the appellant submitted that the evidence of PW5 on which the trial judge relied to conclude that the appellant was at the scene of crime is unreliable considering that the appellant's co-accused, who were also mentioned by PW5 as having been present, were acquitted on the basis of alibi; that PW5 could not have been at the scene of crime as he stated that he had gone to the police station to make a report of oath-taking that was allegedly going on; that nobody identified the appellant as one of the attackers and no identification parade was conducted; that the conduct of the appellant after the alleged crime was committed was inconsistent with his guilt as he was arrested at his place of work the day after and made no effort to escape.

28. Regarding the blood stained shoes and clothing allegedly recovered from his house that linked him to the crime, counsel submitted that reasonable doubts were raised in that the appellant asserted that he found the same in the police vehicle; that in any event it was not established that the shoes belonged to him as they were of a different size than his; that he should have been asked to wear the shoes to see if indeed they were his size.

29. Furthermore, counsel submitted, the blood samples were improperly obtained from the appellant in violation of Articles 50(2)(c), 50(4) of the Constitution and Sections 25(A), 26 and 29 of the Evidence Act; that there is no evidence that the samples were taken willingly; it was submitted that no court order allowed the investigating officer to collect the samples or items belonging to the appellant. Reference was made to the decision of the High Court in *Antony Muriithi vs. O. C. S. Meru Police Station & 2 others [2012] eKLR* for the proposition that evidence improperly obtained should not be admitted.

30. Regarding sentence, it was submitted that considering the appellant is aged 41 years, has young children, is sole breadwinner and has no criminal record, the sentence imposed is harsh and excessive and should be substituted with the time served as he has been in custody since his arrest on 6th October 2012.

31. Opposing the appeal **Mr. Ketoo** learned Senior Prosecution Counsel submitted that the ingredients of the offence of murder were proved; that it was established that the deceased died as a direct consequence of the appellant's act, who, among other persons armed themselves with pangas, hid the same in their persons and then attacked the rally goers.

32. It was submitted that although there was no eye witness, there was circumstantial evidence pointing to the guilt of the appellant; that PW5 placed the appellant at the scene of crime; that there was a positive match of blood samples taken from the shoes and clothing recovered from the appellant's house with that of the deceased; that the appellant willingly signed the certificate with the inventory of the items recovered from his house and cannot claim they were not recovered from his house. Counsel contended that a court order was not required before the blood samples were taken and the question of improperly obtained evidence does not arise.

33. It was submitted further that the ingredient of malice aforethought was also established as the appellant armed himself with weapons capable of inflicting grievous harm and which ultimately caused death.

34. Regarding the sentence, counsel submitted that the Court may reconsider the death sentence imposed.

35. In reply, counsel for the appellant referred to the decision of this Court in ***Joan Chebichii Sawe vs. Republic [2003] eKLR*** for the proposition that to support the conviction on basis of circumstantial evidence, such evidence must irresistibly point to the appellant to the exclusion of all others which is not the case here.

Analysis and determination

36. On a first appeal such as this, the Court is required to analyse and re-evaluate the evidence adduced before the trial court and to draw its own conclusions bearing in mind that it neither saw nor heard the witnesses. As the Court stated in the often-cited case of ***Okeno vs. Republic [1972] EA 32***:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence.”

37. Mindful of that duty, three issues arise for determination. First, is whether the prosecution proved its case to the required standard. Second, is whether blood samples taken from the appellant constituted illegally obtained evidence, and third, is whether we should interfere with the sentence imposed by the trial court.

38. As to whether the prosecution proved its case to the required standard, it is imperative, in order to sustain a conviction for the offence of murder for the prosecution to prove the fact of death of the deceased; the cause of death and proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person; and that the unlawful act or omission was committed with malice aforethought.

39. There is no dispute that the deceased, Police Constable Harrison Maitha Mweni, a body guard to Hon. Kingi, was attacked at Mtomondoni open grounds at Mtwapa Township, Kilifi County on 4th October 2012 when a public rally was disrupted by marauding youths, and he was attacked and thereafter died from the injuries inflicted on him at that rally. PW12, the pathologist who performed a post mortem on the deceased, concluded that the deceased died due to sharp traumatic brain injury with hemorrhagic shock following multiple sharp trauma injury to head and left upper limb.

40. What is in contention is whether the appellant was amongst the attackers. Nobody actually saw the appellant strike the deceased or participate in the attack that resulted in the death of the deceased. His conviction was based entirely on circumstantial evidence. In ***Rex vs. Kipkerig Arap Koske [1949] 16 EACA 135***, the Court held that to sustain a conviction against an accused person based on circumstantial evidence, such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. The evidence should point to the accused as having committed the offence he stood convicted of and to no other person. See also ***Simoni Musoke vs. R [1958] EA 715***.

41. In ***Sawe vs Rep [2003] KLR 364***, this Court expressed that:

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4.

5.

6.

7. ***Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.***

42. In the present case, evidence was led that on the material day, that a group of youths assembled at the shop of a cobbler who was said to be the chairman of Mtwapa Branch of MRC and to whom different witnesses referred by the names Buzarere or as Ngunza Rere. His neighbour, PW5 (Kenga Katana) saw Buzarere (Ngunza Rere) administering oaths on the youth and arming them with pangas. In PW5's own words:

"I decided to get to know what was happening. I could tell what was happening inside. The door was open. The time was 3 pm. The man called Ngunza rere is a cripple (Physically disabled). Each person was being given a panda (sic) in hiding it in his trouser. Ngunza Rere was saying that Hon. Kingi was telling people to vote and they were against people voting. He would be punished. Ngunza Rere received a call afterwards he saw Hon. Kingi had arrived they go and do the job. He told the first to go in a group but to follow each other. They left followed (sic) them. I managed to identify Omari Kifuya brother of Nawange the area chief who is now deceased. The other was Faraji the other one is Angani (Nickname). I don't know his other name..."

He then went on to say:

"...I had known Faraji for a long time he has been employed by Gunza Rere. He was a motor cycle driver. I used to see Guasha at Gunze Reres place who they used to meet. Fele has a relative who operates near our place. The fourth one is Angani is second in command to Gunze Rere (Cobra). They all took the water Gunze Rere was administering. They were each given a panga. Each had a ribbon placed on the head. It is only one of the (2nd accused) Guashe whom I did not know his name before I had decided to follow them for a distance of 200 meters. They got mixed up with other people going to the meeting. I went and informed my friends not to attend the meeting. I went also and reported the matter to the police."

43. PW5 stated further that after reporting the matter to the police he returned to his place of work and found that Gunza Rere was at his place of work; that a few minutes later the appellant "came running to Gunza Rere place and asked him whether he had heard what they had done" and that after Gunza Rere confirming that he had heard, the appellant left.

44. Under cross examination, PW5 maintained that he witnessed an oath being administered on the youths gathered at Gunze Rere's place "and each was being handed over a panga"; that thereafter he went to report that there would be an attack at the ministers meeting; that he knew the accused persons by their names before the incident and they also knew him, except the 2nd accused; and that "I am the one who gave the names of the suspects to police."

45. Based on that testimony, the appellant was undoubtedly a person who was known to PW5. PW5 was clear that the appellant was among the persons he saw being equipped with pangas by his neighbour Ngunza Rere and subsequently proceed to the public rally.

46. There were many people who witnessed the violence unleashed at the public rally. PW6 was in the process of giving his speech at the rally when a man approached the dais, produced a panga and declared that "Pwani si Kenya" and proceeded to cut retired Justice Stewart Madzayo PW13 with the panga. PW 6 saw other men armed with pangas emerge and heard one say that they had cut the wrong person; that Hon. Kingi, the main target of attack, went under the table, but his bodyguard, the deceased, was cut on the head and arms and he fell down; and that members of the public began to attack the attackers three of whom were killed.

47. Beyond the evidence that the appellant and his co-accused persons participated in the oathing at Ngunza Rere's place and were equipped with pangas, there was no other evidence linking the appellant's co accused to the death of the deceased. In relation to the appellant, however, there was other corroborating evidence of PW18 and PW20 which was that upon his arrest, the appellant accompanied the arresting police officers to his house where blood stained shoes and shirt were recovered. Although the appellant denied that the blood stained shoes and shirt were recovered from his house claiming that he found them in the police vehicle, he signed the inventory of recovered items but claimed in his defence, without expounding, that he "was cheated to sign" and was not told that it would be produced in court.

48. As already noted, based on the testimony of PW12 and PW14, an analysis of the blood samples taken from the deceased and those taken from the shoes and shirt recovered from the appellant's house matched. In that regard, the trial Judge stated:

"DNA generated from the three exhibits matched that which was generated from blood samples of the deceased. Which means that the first accused had come into contact or close proximity with the deceased. There is no evidence to the effect that he was in a rescue mission or he was one of the guests at the dais. The evidence before the court is that he had been seen at an oathing ceremony no far from where the rally was being held. That he was a member of MRC under the chairmanship of Buzarere who was against holding of general elections and the sitting of National Exams which teaching went contrary to those held by the politicians at the rally. There was a meeting of minds in a consensus at the oathing ceremony and those oath takers that proceed to the rally were already psyched and had the common intentions to kill or cause grievous harm"

49. We respectfully agree. In our view, the circumstances cumulatively form a complete chain pointing irresistibly to the conclusion that the appellant was among the attackers at the public rally where severe injuries were inflicted on the deceased and from which he subsequently died. Section 21 of the Penal Code provides that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. In our view, there is cogent evidence from which the trial court drew the inference of the appellant's guilt.

50. As regards the ingredient of malice aforethought, Section 206 of the Penal Code provides:

“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.”***

51. It was established that the appellant was amongst those who, with common intention, armed themselves with pangas and descended upon the dais at the public rally intending to harm Hon. Kingi and in the process injured the deceased who received severe injuries on his head and his arm severed. As already indicated, the post mortem on the deceased, confirmed that the deceased died due to sharp traumatic brain injury with hemorrhagic shock following multiple sharp trauma injury to head and left upper limb. There was clearly an intention to cause grievous harm and as stated by this Court in Dickson Mwangi Munene & another vs. Republic [2014] eKLR:

“As stated, either of these acts, intentional or reckless, constitutes malice aforethought under Section 206 of the Penal Code which is the mens rea of the crime of murder.”

52. As regards the complaint that evidence was improperly admitted, Article 50 (4) of the Constitution provides that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice. Although counsel for the appellant submitted that no evidence was led to show that the blood samples were taken from the appellant willingly, there was the testimony of Chief Inspector Nyachallo, PW15, the OCS Mtwapa Police Station, who testified that he informed the appellant of the intention to have DNA testing done; that they proceeded to Coast General Hospital where the samples were taken on 19th October 2012 with *“the consent and approval of the suspect.”* A certificate in that regard was produced before the trial court without objection. No suggestion was made in the cross examination of that witness that the appellant did not consent to samples being taken. There is accordingly no merit in this complaint.

53. Consequently, the appeal against the conviction is devoid of merit.

54. On sentence, the trial Judge had this to say:

“The accused person has been treated as a first offender. The court has taken into consideration that he is a family man. The offence of murder carries a mandatory sentence of death. The first accused is sentenced to suffer death as per law provided.”

55. In Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR the Supreme Court held that the mandatory nature of sentence under Section 204 of the Penal Code which denies the court the opportunity to pass a lesser sentence even after considering an accused’s mitigation was unconstitutional. The Supreme Court stated:

“Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.”

56. Evidently, the trial Judge in this case considered that his hands were tied. Beyond seeking leniency and stating that he is a family man, the appellant does not appear to have been remorseful. Considering the cruel manner in which the deceased was killed, a severe custodial sentence is called for. We are however inclined to interfere with the death sentence. We hereby set aside the death sentence and substitute therefor imprisonment for a term of 40 years from the date the initial sentence was passed on 23rd March 2016. To that extent only we allow this appeal.

57. In conclusion therefore, the appellant’s appeal on conviction fails and is hereby dismissed. His appeal on sentence succeeds with the result that the death sentence is hereby set aside and substituted with a custodial sentence of 40 years from the date of initial sentence on 23rd March 2016.

Dated and delivered at Nairobi this 24th day of April, 2020.

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPTY REGISTRAR