IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GATEMBU, MURGOR & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO 10 OF 2016

BETWEEN

BEN MUCHERA MWABI……..…. APPELLANT

AND

REPUBLIC…….…… RESPONDENT

(An appeal from the judgment and order of the High Court of Kenya at Migori (Majanja, J.) made on 16th November 2015

in

H.C.Cr. C No 29 of 2014)

****

JUDGMENT OF THE COURT

Background

1. This is a first appeal from the judgment of the High Court, (Majanja, J.) delivered on 16th November 2015 in which **Ben Muchera Mwabi**, (the appellant) was found guilty and convicted of the charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

2. The particulars of the offence were that on 11th day of February 2012 at Keguka village in Ngege sub-location in Migori County, he murdered **Morris Omondi Otiego** (the deceased).

3. In brief, the prosecution evidence was that **Philip Omondi Achieng (Philip)**, testified that on 11th February, 2012 he received a telephone call from the deceased's brother, **Joseph Ndiege Otiengo (Joseph)** at about 11am who informed him that the deceased had been abducted in Ogembo, Kisii and requested him to contact the Criminal Investigation Department (CID) at Migori to report the incident. It was **Philip's** further evidence that he knew the deceased as an accountant at Migori District Hospital and that the deceased had stayed with him for a while when he started working at the hospital; that he proceeded to Migori Police Station and arrived at about 1:00pm where he found the Police Station locked, whereupon he left the station. Upon his return to the Police Station, he noticed the appellant ahead of him making a statement which bore a striking similarity to what he **(Philip)** was about to report. The appellant claimed that he had found an intruder in his house with his wife and that his neighbors had threatened to beat up the intruder. **Philip** went back to the CID officers to inform them of this development which prompted the Officer Commanding Station (OCS) and two other officers to proceed to the scene. **Philip** testified that he remained at the police station until about 3:00pm when a taxi carrying the deceased and some women passengers drove into the station; that he entered the vehicle and took the deceased to hospital. It was **Philip's** further testimony that the deceased was admitted at Migori District Hospital, but was later transferred to Aga Khan Hospital in Kisumu where he succumbed to his injuries; and that he attended the post mortem examination.

4. **Ivonne Adhiambo Olendi (Ivonne)** was the deceased's sister in law. It was her testimony that she was at her house on the material day when her husband, **Paul Ochieng Otieno** arrived at their home and asked her whether she and the deceased had spoken to which she responded in the negative. She tried to call the deceased on several occasions without success. The deceased eventually answered her call at around 2:00pm and she overheard someone direct the deceased to request for Kshs 10,000.00 to facilitate him to be taken to the hospital. **Ivonne** and her husband, **Paul** decided to report the matter to the police whereupon they proceeded to Macader Police Station but were referred to Migori Police Station. At 5:00pm, they received news from the deceased's brother, **Joseph Ndege Otiego** that the deceased had been taken to the hospital, and subsequently succumbed to his injuries.

5. **Susan Aoko Ongei (Susan)** was at the time working at the Migori Level 4 Hospital. It was her testimony that on the material day, at about 2:00pm she was on her way to town and on passing by Paris Bar, she found about 7 to 9 people surrounding a young man lying on the ground at the gate of Paris Bar; that she recognized the man lying down as an accountant who was working at the hospital; that she called for help from her workplace, but finding that it was not forthcoming, she hailed a taxi to take the deceased to the hospital. Two women who were at the scene with the deceased accompanied her and dropped off at Migori Police Station, while **Susan** and the deceased proceeded to Migori hospital where they arrived at about 7:00pm; and that the next morning she was informed that the deceased had succumbed to his injuries.

6. **Joseph Ndiege Otiego (Joseph),** the deceased's brother testified that he was in Nyakach on the material day at about 10:00am when he tried to call the deceased, without success; that he subsequently received a phone call from the deceased's wife, **Irene**, who informed him that a person she did not know had telephoned her to inform her that her husband, the deceased had been admitted at Ogembo Hospital; that she tried to call back the person who had earlier called her, and the deceased as well, without success. It was **Joseph's** further testimony that he requested his friend, **Philip** to contact the CID at Migori to trace the calls made to **Irene**; that he made his way to Migori Hospital and upon arrival that evening, he found that the deceased had been beaten, was bleeding from the nose and mouth, and had several injuries on his body; and that the deceased succumbed to his injuries later that evening on the way to the Aga Khan Hospital.

7. **Moses Ayodo Otieno (Moses)** testified that on the material day he was attending to his video show business near the Paris Bar; that he noticed two ladies who claimed that they had heard some commotion in the neighborhood the previous night; that before 2pm he saw the appellant coming out of his house with another person and head towards the road; that the appellant looked disturbed; that at about 4:00pm he went outside and found a crowd of about 100 people and the deceased was lying on the corridor, unconscious; that the appellant's wife and a lady who was accompanying her were both seated and looked composed. Moses further testified that, his aunt, **Susan** subsequently arrived at the scene and upon recognizing the deceased as her colleague at Migori Hospital, she hailed a taxi to take him to the hospital. In cross examination, **Moses** testified that the previous night, at about 9:30pm he had seen the deceased walking from the toilet to the appellant's house while the appellant was away on night duty.

8. **Dr. Peter Asava, (Dr. Asava)** a pathologist based at the Kakamega County General Hospital conducted a post mortem on the body of the deceased. In his examination, he observed that the deceased had various internal and external injuries. Based on his examination, he concluded that the cause of death was "a brain and head injury due to assault".

9. Inspector **David Mutegi (Inspector Mutegi)** who was the investigating officer, testified that on the material day at about 3:20pm, the appellant went to Migori Police Station and reported that a man was being subjected to mob justice because he had been caught in a compromising position with the appellant's wife in their home; that he proceeded to the scene, accompanied by **Chief Inspector Waswa** and **Corporal Kwalia**; that on their way there they encountered a taxi travelling at a very high speed, and that *boda boda* (motor cycle) riders nearby signaled to them to indicate that the victim was in the taxi *en route* to the hospital. It was **Inspector Mutegi's** further testimony that they followed the taxi which stopped at the Police Station where two women were dropped off; that he went to the hospital and confirmed that the deceased had been admitted in critical condition.

10. It was **Inspector Mutegi's** further evidence that in the course of his investigation, he established that the appellant had found the deceased with his wife at about 5:00am that morning in the appellant's house; that the deceased had stayed in the appellant's home from 5:00am until about 2:00pm; that he concluded that the appellant had assaulted the deceased during this time, and based on this, he charged the appellant with the offence of murder.

11. When the appellant was put on his defence, he gave an unsworn statement, and called no witnesses. He stated that on the material day, he was working as a security guard in Migori Township. He left his workplace early as he was not feeling well and arrived at his home at 7:50 am where his wife opened the door dressed only in a *lesso* while she usually wore a night dress. The appellant further stated that he noted that his wife looked scared and that the curtain that separated their single room was moving. Upon opening it, he found a naked man trying to put on his trousers. As the appellant was questioning him, the intruder pulled out a knife and threatened the appellant which scared him and he went outside and raised an alarm. Four neighbors responded to his distress call and together, they went into the appellant's house. The four people advised him to report the matter to the police, and he left them in his house. He arrived at the Police Station and waited from 12:30pm until 3:00pm when the OCS arrived with two other officers. As they headed to his house at Paris Centre, they met with a taxi and it turned out that members of the public had subjected the deceased to mob justice, and that he was being taken to the hospital. The appellant and the police officers returned to the police station where he was detained and later charged with the deceased's murder. He denied being involved in assaulting the deceased or being responsible for his death.

12. After receiving this evidence, the trial court found that the appellant had found the deceased in his house. The trial court held that the prosecution evidence proved that the deceased was assaulted in the appellant's house prior to the appellant presenting himself at Migori Police Station. After considering the appellant's defence, the trial court discounted the appellant's version of events as untrue and inconsistent with the evidence. Further, the trial court considered that the injuries inflicted on the deceased were multiple and aimed at causing grievous harm or killing the deceased. The court found the appellant guilty of murder and convicted and sentenced him to death.

13. Aggrieved by that decision, the appellant filed this first appeal raising twelve grounds of appeal impugning the judgment of the trial court *inter alia* for: erroneously shifting the burden of proof from the prosecution; failing to consider that the prosecution evidence was inconsistent, contradictory and incomplete as it did not avail various key witnesses; wrongly addressing itself on the question of circumstantial evidence; making a decision that was not supported by the prosecution evidence; and failing to consider his defence.

Submissions by counsel

14. These grounds were expounded on in the appellant's written submissions which were highlighted orally during the plenary hearing of this appeal. The appellant was represented by 3 learned counsel, **Mr. Mose Nyambega, Mr. Joseph S. Ondari and Mr. Ben Nyanga Aduol. Mr. Nyambega**, submitted that the evidence relied upon by the trial court was weak as there was no direct evidence that the appellant had ever assaulted the deceased, and as the prosecution failed to avail key eye witnesses, such as the appellant's wife who could have shed light as to what happened to the deceased. In counsel's view, the failure to avail these witnesses indicated that their evidence could have been

adverse to the prosecution's case.

15. Counsel further submitted that the trial court erred by relying on weak circumstantial evidence to convict the appellant. In counsel's view there were exculpatory facts that were compatible with his innocence; the prosecution's case was mainly circumstantial and none of the witnesses who testified saw the appellant assaulting the deceased. Counsel contended that there was ample evidence from the witnesses, many of who saw a crowd of people at the Paris Centre area, that the deceased was a victim of mob justice. Counsel urged us to consider the appellant's defence that he left the deceased in his house with four people and the evidence of the prosecution that at some point there were more than 100 people around the Paris Centre which in counsel's view raises doubt as to the appellant's guilt.

16. **Mr. Nyambega** also claimed a violation of the appellant's right to fair trial under **Article 50** of the Constitution as the trial court failed to consider the appellant's defence. Counsel contended that had the trial court applied itself to the appellant's defence, the only result would have been an acquittal.

17. Counsel submitted that the evidence adduced against the appellant was flawed and was not sufficient to sustain the conviction; that the ingredients for the offence of murder had not been conclusively proved and based on this urged us to accord the appellant the benefit of doubt.

18. **Mr. Nyambega's** final submission was on the sentence meted out on the appellant. Counsel submitted that the trial court did not take into account the fact that the appellant had been provoked. Counsel urged that should we consider that the conviction was merited, then we should find the sentence imposed by the trial court to be excessive in the circumstances.

19. Opposing the appeal, the respondent, through **Mr. Kakoi**, the Principal Prosecution Counsel, conceded that the evidence that led to the conviction of the appellant was mainly circumstantial. Counsel submitted that this evidence was clear and cogent, and it led to the irresistible conclusion that it was the appellant who murdered the deceased. Counsel further submitted that the complaint that the prosecution failed to call key witnesses was properly considered by the trial court, and urged that nothing ought to turn on this issue at this stage.

20. On the sentence that was imposed on the appellant, counsel conceded that in light of current jurisprudence, the sentence merited re-consideration. **Mr. Kakoi** and urged us to reduce the sentence in view of the decision of the Supreme Court in ***Francis Karioko Muruatetu & another v Republic [2017] eKLR (Petition 15 of 2015)*** (**the Muruatetu case**). **Determination**

21. We have considered the record, the submissions, the authorities cited and the applicable law, keeping in mind this Court's duty on a first appeal. This duty was elucidated in ***Mark Oiruri Mose v Republic [2013] eKLR (Criminal Appeal No. 295 of 2012)*** where this Court stated as follows:

> ***"It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."***

See ***Okeno V Republic [1972] EA32.***

22. To prove the offence of murder, the prosecution must prove three crucial ingredients. The first is the fact of the death of the deceased: the second is that the cause of the death of the deceased was due to an unlawful act or omission on the part of the accused person; and thirdly that the said unlawful act was committed with malice aforethought. (See ***Milton Kabulit & 4 others v Republic [2015] eKLR (Criminal Appeal No. 340 of 2012***).

23. The fact of the death of the deceased is not in dispute. The evidence of **Dr. Peter Asava** was that the deceased died as a result of the injuries that he sustained during an assault. The question is who caused the deceased fatal injuries? And did the person have malice aforethought? There was no eye witness to the commission of the offence. The evidence to answer this question was mainly circumstantial.

24. In the case of ***Muchene v Republic [2002] 2 KLR 367*** this Court held of circumstantial evidence that:

> ***"1. It is trite law that where a conviction is exclusively based on circumstantial evidence such conviction can only be properly upheld if the Court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the appellant but also that there exist no co-existing circumstances which could weaken or destroy such inference.***
>
> ***2. It is settled law that the burden of proving facts which justify the drawing of such inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains as such."***

25. In ***Erick Odhiambo Okumu vs Republic [2015]*** eKLR, this Court referred to ***Ernest Abang'a Alias Onyango vs Republic*****, (supra),** where the Court identified the following as the threshold which circumstantial evidence must meet to justify a conviction:

> ***(i) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.***
>
> ***(ii) The circumstances should be of definite tendency, unerringly pointing towards guilt of the accused.***
>
> ***(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.***

26. We bear in mind the above principles in analysing the circumstantial evidence before us. In determining the question who caused the deceased the fatal injuries, the main issues of determination are whether the inculpatory facts were established against the appellant and if so, whether the facts pointed irresistibly to the appellant and were inconsistent with no other explanation other than the guilt of the appellant.

27. Which pieces of circumstantial evidence did the prosecution rely on to prove the case against the appellant? The circumstantial evidence against the appellant was anchored on several factors and the evidence of several witnesses. From the evidence on record, time was an important factor for the prosecution to prove the case against the appellant. **Ivonne** claimed to have spoken to the deceased at about 2:00pm. The appellant's counsel submitted that this testimony should be disregarded as there was no corroboration, by way of call records to show that this witness actually spoke to the deceased. While this may be the case, we note that the appellant himself placed the deceased at his house on the material day when he testified that when he arrived at his home at 7:50am he found the deceased in a state of undress. The appellant further claimed that upon realising that an intruder was in his house, he raised alarm and four neighbours responded and shortly thereafter the appellant left for the Police Station to report the incident. If the appellant's version of events is to be believed, this means that he went to Migori Police Station at some point in the morning hours on the material day.

28. However, the prosecution evidence showed a contrary position: First, **Philip** who went to the police station at the behest of the deceased's brother, **John**, where he found the appellant making his report to the police after 1pm. **Moses**, the appellants neighbour, testified that he saw the appellant walk towards the road at the Paris Centre at about 2pm. **Inspector Mutegi** who received the report from the appellant testified that he made his report of an intruder being in his house at 3:20pm. From the evidence, the appellant went to the Police Station in the afternoon of the material day.

29. In ***Ernest Abanga alias Onyango V Republic*** (Criminal Appeal No. 32 of 1990), this Court held that:

> ***"When an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available evidence."***

30. The fact that the appellant claimed to have gone to the police station in the morning yet the record shows that he went there in the afternoon, we find that this lie provides corroboration to other independent available evidence that the appellant murdered the deceased.

31. From the record, the deceased and the appellant were in the same house from around 7:50 am until 2:00pm on the material day when the appellant was seen walking out of the house to Paris Centre. During that time, the deceased sustained injuries out of an assault that led to his death. As there is evidence that the deceased was in the appellant's company at the time of the assault, then it fell on the appellant to explain how the deceased suffered those injuries. **Section 111(1)** of the **Evidence Act** casts an evidential burden on an accused person to prove any facts that are especially within his knowledge.

32. **Section 111(1)** of the **Evidence Act** provides as follows:

> ***"111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:***
>
> ***Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:***
>
> ***Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defenced creates a reasonable doubt as to the guilt of the accused person in respect of that offence."***

33. In ***Rafaeri Munya alias Rafaeri Kibuka v Reginam (1953) 20 EACA 226*** the predecessor to this Court observed as follows:

> ***"The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disproved or disbelieved become of substantive inculpatory effect.***
>
> ***This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available evidence."*** *[Emphasis supplied].*

See*:* ***Douglas Thiongo Kibocha versus Republic [2009] eKLR.***

34. From the facts that have been established, we find that the incriminating facts against the appellant were cogently established, and the facts taken together form a complete chain that leads to the inescapable conclusion that the appellant was the person or one of the persons who inflicted the injuries that led to the death of the deceased.

35. In his defence, the appellant denied assaulting the deceased, and stated that he had already left the house for the police station, implying that the other members of the public may have been responsible for beating up the deceased. As we have stated above, the account that the appellant gave, that he went to the police station on the morning of the material day after finding the deceased in his house, was untrue. The prosecution proved beyond reasonable doubt that the appellant was at the scene of crime at the time when the fatal injuries were inflicted

upon the deceased. In addition, there was no evidence given by any of the witnesses to suggest that the appellant was assaulted anywhere else other than in the deceased's house. **Section 111(1)** of the **Evidence Act** creates a rebuttable presumption and in the absence of an explanation from the appellant, we find that the circumstantial evidence leads to the conclusion that it was the appellant who assaulted the deceased in his home and then went to the police station that afternoon in a bid to try and absolve himself. We therefore agree with the sentiments of the trial court that:

> ***[22] "The law is clear that the burden of proof always rests on the prosecution to prove the case against the accused beyond any reasonable doubt. The accused does not have a duty or burden to establish his own innocence but there are instances when the law places a duty on the accused to explain certain facts particularly those peculiarly within his own knowledge.***
>
> ***[23] Where the accused fails to offer any reasonable explanation as to how the deceased came to suffer multiple injuries in his room, the court is entitled to presume certain facts under section 119 of the Evidence Act which provides:-"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."***

36. We now turn to consider whether the second ingredient of the offence of murder was present. On this issue, the learned Judge stated as follows:

> ***"[32] the injuries inflicted on the deceased were multiple, vicious and aimed at parts of the body where the intention was to cause grievous harm or to kill the deceased. These are the kind of injuries inflicted with, "[a]n intention to cause the death of or to do grievous harm to any person, whether the person is actually killed or not" within the meaning of Section 206(a) of the Penal Code."***

The nature of the injuries inflicted on the deceased could only have been inflicted by a person bent on causing the death or grievous harm to the victim**.**

37. **Section 206** of the Criminal Procedure Code provides for malice aforethought in the following terms:

> ***"206. Malice aforethought shall be deemed to be established by evidence proving anyone 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."***

38. As testified by **Dr. Asava** the deceased had internal stomach bleeding, a brain injury as well as various injuries all over the body. From the evidence on record, the learned Judge did not err when he found that the assault on the deceased was intended to cause him grievous harm, and therefore constituted malice aforethought.

39. Our consideration of the circumstantial evidence tendered by the prosecution leads us to the conclusion that the appellant was responsible for the assault on the deceased, and that he did so with malice aforethought.

40. The appellant urged us to consider that he was provoked into the assault. We do not agree. As noted by the trial court, the deceased specifically denied assaulting the deceased, and the circumstances in this appeal could not be said to have provoked the appellant into assaulting the deceased, particularly because it is apparent that the deceased and the appellant were together in his house for a long period of time, from morning until around 2:00pm when **Moses** observed the appellant leaving his house.

41. We have considered the appellant's complaint that the prosecution did not call a number of witnesses in support of its case. The uncalled witnesses included the appellant's wife who was said to be present in the house when the appellant found the deceased there, and was also at Paris Centre with the deceased by the time **Susan** arrived at the scene and took the deceased to the hospital.

42. **Section 143** of the Evidence Act provides that:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

The responsibility of the prosecution is to call witnesses who are sufficient to prove its case. In this appeal, the prosecution called sufficient number of witnesses to prove that the appellant committed the crime for which he is charged. In ***Keter v Republic [2007] EA 135***, this Court held:

> ***"That the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses are sufficient to establish the charge beyond reasonable doubt."***

43. Regarding the appellant's claim that the prosecution failed to call the appellant's wife to testify, **Section 127** of the **Evidence Act** provides as follows:

> **"Section 127**
>
> **(2) In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:**
>
> **Provided that:**
>
> **(i) the person charged shall not be called as a witness except upon his own application;**
>
> **(ii) save as provided in subsection (3), the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;**
>
> **(iii) the failure of the person charged (or the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution."**

44. In ***Simon Nchore Onyiego v Republic*** ***[2020] eKLR*** this Court stated as follows:

> ***" Only if called by the accused person himself is a spouse competent to testify in a criminal trial unless the charge be one of bigamy or an offence under the Sexual Offences Act or in respect of an act or omission affecting the person or property of the spouse or the children of either of them, is the spouse both competent and compellable, and not otherwise…This special evidential rule is meant to protect the sanctity of marital communication and confidences between spouses in recognition of the unique bond that exists between spouses where there is total vulnerability and an opening of hearts one to the other. To breach that immunity would be to unleash an improper collateral attack on the right to accused persons to remain silent. It would be a dangerous assault on that notion were the matters heard and observed in the marital space to be used against spouses in criminal trials."***

Accordingly, the trial court did not err when it held that the appellant's wife was a competent but not a compellable witness and an adverse inference could not therefore be drawn from the fact that she was not called to testify.

45. From the foregoing, we are satisfied that the offence of murder was proved beyond reasonable doubt against the appellant and that the trial court properly directed itself in convicting the appellant. In the premises, the appeal against conviction fails.

46. As regards sentence, this being a first appeal, the Court is at liberty to consider whether the trial court properly exercised its discretion in sentencing the appellant. We note that the appellant was sentenced to death under **Section 204** of the Penal Code that provides that ***"Any person convicted of murder shall be sentenced to death***". The respondent conceded that the sentence imposed on the appellant was severe and urged us to consider reducing the sentence in line with the decision of the Supreme Court in ***Francis Karioko Muruatetu & another v Republic*** ***[2017] (supra)*** (the Muruatetu case) in which the Supreme Court held that:

> ***"…Section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."***

47. In view of the decision in **the Muruatetu case** we deem it fit to consider the circumstances of this case. We have observed that the appellant was a first offender and that in mitigation he prayed for leniency as he is young and married with young children. The learned Judge, while sentencing the appellant stated that the law provided only one sentence and sentenced him to death. In keeping with recent jurisprudence, we hereby set aside the death sentence imposed on the appellant. In the circumstances, we find that a sentence of twenty-five (25) years imprisonment would meet the ends of justice.

48. The upshot of the above is that the appeal against conviction is dismissed and the appeal against sentence is allowed. Accordingly, the sentence of death is set aside and in substitution therefor the appellant is sentenced to twenty-five (25) years imprisonment with effect from 16th November, 2015 when he was sentenced.

Dated and delivered at Nairobi this 22nd day of May, 2020.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR