IN THE COURT OF APPEAL

AT NAIROBI

CORAM: M'INOTI, MURGOR & KANTAI, J.JA)

CRIMINAL APPEAL NO. 123 OF 2019

BETWEEN

AGGREY MANG'ONG'O AMUGUNE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of Nairobi High Court at Nairobi (J. Lessit, J),

delivered on 15th *September, 2016 in High Court No. 21 of 2013)*

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JUDGMENT OF THE COURT

Aggrey Mang'ong'o Amugune, the appellant, was charged with the offence of Murder contrary to ***section 203*** as read with ***section 204*** of the **Penal Code**. The particulars of the offence are that;

Count I -on 24th October, 2011, at South C Estate within Nairobi County, jointly with others not before court he murdered ***Amina Falzdin (Amina)*** and on ***Count II***- on the same day, jointly with others not before court, he murdered ***Mohamed Afzal Raspot (Afzal),*** both of whom we will also refer to as ***"the two deceased".***

Briefly, the facts are that, ***Mohamed Anwar Fazal Din PW 1 (Anwar),*** a retired Pakistani industrial worker woke up early on the morning of 24th October, 2011 to say his prayers in his house at South C. His house servant Aggrey Mang'ong'o, the appellant arrived at the house to begin his work at 9.00 a.m. He had worked for him 3 days a week for two weeks, cleaning the house, and washing the utensils and clothes. At 12.55 p.m, Anwar left for the mosque leaving his brother, Afzar and sister, Amina in the house. When he returned at 2.00 p.m. he noticed that the house was unusually quiet, and that his food was not on the table as usual. He entered the kitchen and saw some chapati flour mixture that his sister was to cook on the table. Concerned that there was a problem, he walked towards the bedrooms where he heard very heavy breathing in his sister's room. He opened the door, and found his brother lying on the floor, and his sister on the bed. Both of them were bleeding heavily and were in a critical condition. Blood was all over the room, on the floor and splattered on the walls and ceiling. The appellant was not in the house.

Anwar ran outside to call for help, but as none was forthcoming from his neighbours, he went to his brother's house about 10 plots away (about 100 meters), and asked the guard at the gate to get his brother, ***Mohamed Amaz Sufian PW 3*** to rush over to his house. When his brother arrived, Anwar gave him his car to take his sister to South C Medical Centre, while someone else took his brother to Mater Hospital. Soon after he was informed that the two had passed away on arrival at the hospital. Later Police from Nyayo Stadium Police post visited his house, and when asked, he stated that he had not checked if anything was stolen, but he noticed that his sister's Laptop was missing. He was informed later that the appellant had been arrested and charged with the offence.

On cross examination, he stated that apart from his sister and brother, ***Levi Remigio Vereva PW 2***, *(Remigio Vereva)* a Kenyan Goan also lived with them; that Remigio Vereva had left the house at 11.30 a.m that morning; that they did not have a watchman, but the house had a lockable gate, and all of them, except the appellant, had their own set of keys. The appellant would normally work from 9.00 a.m to 5.00 p.m and his sister would usually instruct him on his duties.

Remigio Vereva, corroborated Anwar's evidence that the appellant was in the house at 11.30 a.m when he (Remigio Vereva) left. On his return at 6.30 p.m he returned found the gate of the compound open which was very unusual, and some Muslim woman at the gate who told him "pole, pole" meaning "we are sorry'. Upon entering, he found blood on the floor and walls downstairs and in the upstairs rooms, and he

was informed that the two deceased who were critically wounded had been taken to hospital where they had died. He confirmed that the appellant had worked for them for a short time on Mondays, Wednesdays and Saturdays, - three days a week. ***Mohamed Amaz Sufian PW 3*** also corroborated the evidence of Anwar and Remigio Vereva that the appellant worked for them.

When ***Dr. Muriuki Ndegwa, PW 12,*** conducted a postmortem of the two deceased soon after the attack, he found that Amina had deep cuts on the head and Afzal had multiple bruises and cassations on the face, head and upper arms. Their clothes were blood stained. Dr. Ndegwa concluded that in both cases, their death was caused by severe head injuries due to blunt force trauma.

Musau Mulinge, PW 4, a security guard at the gate of Matero Estate reported on duty on 23rd October, 2011. He remained on duty until 1.00 p.m the following day as there was no one to replace him. He saw Anwar proceed to the mosque. He stated that the estate had two gates, and that vehicles could enter and leave the compound through either gate; that the location of the gates made it difficult to see where people were going or when they left. He would therefore not know who entered Anwar's compound on the material day. On being cross examined, he stated that he did not know the appellant or who killed the deceased persons.

Pastor Geoffrey Maina Ndobe, PW 5, resided and run a kindergarten at Kawangware. He stated that, on 25th October, 2011 at around 7.00 a.m, Derickson Khamati, a youth leader, told him that the appellant requested him (Pastor Maina) to call him. Using Derickson's phone he called the appellant, who said that he was in Westlands and required assistance as he was stranded. On reaching Westlands, the appellant told him that some people of Asian origin had hired him to transport cocaine to Wilson Airport at a cost of Kshs 3,000. He did the job but was not paid. He said his boss threatened to shoot him, and chased him from the home at South C or South B where he worked, and as he was leaving, he saw a piece of wood outside the house which he picked up and used to hit the boss and his son, whereupon he ran away.

Pastor Maina stated that he had known the appellant for about three years having met him at Calvary Holiness and Restoration church; that when he advised the appellant to report to police that his life was in danger, the appellant had flatly refused claiming that he feared retribution from his boss; that the appellant had also told him that he had a job at the New Msafiri Café, and was to report on duty that day; that he also requested for assistance to relocate from the plot where he was living, to a place on Wanyee Road in Kawangware, and that he had assisted the appellant relocate to a house situated behind Kenya Bus (KBS) A terminus; that five (5) days later, the appellant informed him that he was travelling to his rural home in Western Kenya, and that he remained there for 1 ½ months; that he returned toward end of December, 2011. He later heard that the appellant was arrested at the church.

On cross examination, he denied driving his car to South C on 24th October, 2011 or that he had assisted the appellant kill the deceased or that his church was involved in devil worship, or that they killed people and drank their blood. He admitted that he was initially arrested and charged with robbery with violence for the attack on the two deceased, as the appellant had implicated him, but the case against him was a withdrawn, and the appellant was immediately re-arrested and charged with murder in this case.

DCIO James Manuni, PW 7, a Superintendent of Police stated that he was in charge of CID Langata Division in Nairobi County, and that on 24th October, 2011, he received a report that a robbery had taken place at South C; and that Amina and Afzal were attacked and had been taken to hospital. Accompanied by PC Charo and driver PC Murei, he proceeded to the South C. Clinic where he was informed that Amina had died on admission. He saw her body which had two deep cuts on the left and right side of the head, and she was covered in blood. They proceeded to Mater Hospital where they found that Afzal had also died on admission; that he too had deep cuts on both sides of the head and left arm; that thereafter, Anwar took them to his house in South C, the scene of the murder where he saw that the ground floor corridor and Amina's bedroom were full of blood, the bedroom had been ransacked, and things were scattered all across the room.

The witness stated that when they went upstairs, there was blood on the walls which appeared as if someone with blood on their hands was holding the walls as they were being dragged; that Afzal's bedroom upstairs had blood splashed all over the floor and walls; that the bathroom next to his bedroom gave the impression that someone had tried to wash blood off themselves. The drawers of Anwar's bedroom were ransacked and the room was in disarray. ***P.C. Livingstone Lihanda, PW 9,*** documented the scene through photographs.

DCIO Manuni stated that he interviewed Anwar who gave him the name of the employee, who worked for them who they treated as a suspect since he had disappeared from the scene and could not be traced; that Anwar also gave him a payment schedule that the appellant had signed indicating his name and identity card number as: "*ID No. [xxxx] and name Aggrey Mang'ong'o"*; that they obtained the appellant's details from the National Registration Bureau in November, 2011 which indicated that the appellant was from Kakamega District, Ikolomani Location, Kalulumi village; that with this information, three officers led by ***PC Hilary Kamuyu PW10*** visited the appellant's rural home where they were told he resided at Kawangware Estate, in Nairobi; that they were given his mobile number 0728 276286; that they also visited his mother's home, and did not find him there, but they obtained a photograph of the appellant to assist them identify him; that the mobile number enabled Safaricom, the service provider supply data that indicated that the appellant was in Kawangware on 28th November, 2011; that when they went to his house but found it empty; and a visit to the appellant's Pentecostal Church also in Kawangware did not yield any results.

It was only after requesting the assistance of flying squad to locate him in March 2011, that ***IP Peter Michuki PW11*** and ***Cpl. Absalom Malea PW 13*** traced the appellant to Kawangware Holiness church where he was arrested on 13th September 2012 and charged with the murder of the two deceased, 11 months after the incident had occurred.

The appellant stated in his defence that he lived in Kawangware and worked as a preacher and was also a casual labour in the two deceased's home in South C Estate where on Mondays, Wednesdays and Saturdays, his work was to clean the compound, wash three vehicles, and organize a store, and was paid Kshs. 300 per day; that his sister, ***Leonida Lienk Amugune DW5*** *(Leonida Amugune)* informed him that she had found him a job and that on Monday 24th October, 2011, he reported on duty at South C at 8.00 a.m; that Anwar opened the gate for him, and he immediately went to Amina, the lady who employed him to inform her that he had another job at the Msafiri Hotel and was required to report there at 11.am, even though he would normally leave work between 3.00 p.m and 4.00 p.m after completing his work; that his employer told him to wash the compound before leaving, an instruction with which he complied.

The appellant further stated that at 11.00 a.m, he informed Amina that he was leaving, and he left Anwar, Amina, and Afzal in the house; that he came later to learn about the deceased's death when police went to his church and arrested himself and Pastor Maina; that he was charged with robbery with violence and soon after and remanded at Industrial Area Prison and later charged with murder.

He confirmed that he had worked for six days over a period of 2 weeks 3 days per week; that since he did not have a key to the gate, he would ring a bell to enter or leave the compound; that he never entered the house, and was alone when he reported on duty that day.

On cross examination, he stated that Anwar did not find him there at 2.00 p.m. He denied murdering the two deceased in order to get money and denied going into hiding.

The evidence of ***Florence Amugune Biombo DW2***, the appellant's mother and ***Nelson Allero Amugune DW4*** the appellant's brother were on the attempts by the police to locate the appellant at his rural home, whilst ***Enock Nansala Mauzu PW3*** stated that the appellant was arrested on 13th September 2012 at the Calvary Holiness and Restoration church.

The final defence witness was the appellant's sister, Leonida Amugune who stated that on 24th October 2011, she had asked her former boss whether there was position in which her brother the appellant could be employed; that the following Saturday, the caretaker advised her of a job opening at New Msafiri Hotel, opposite Coast Bus, and that he was to report the following Monday; that on the appointed Monday, she met with the appellant and took him to the hotel where she had left him working.

In its judgment, the High Court *(Lessit, J.*) found the appellant guilty and sentenced him to death as by law prescribed. The appellant was aggrieved and has brought this appeal on grounds set out in a supplementary memorandum of appeal thus; that the learned judge reached a finding of culpability on the appellant's part in a case wholly dependent on circumstantial evidence without corroboration; that the learned judge accepted evidence that had not been canvassed by the parties; in failing to properly evaluate the prosecution and defence evidence; in failing to appreciate the contradictions and conflicts in the prosecution's evidence; in failing to analyse and evaluate the mode of the appellant's arrest; in failing to observe that ***section 200*** of the ***Criminal Procedure Code*** was not complied with; and in failing to take into account the appellant's defence and alibi evidence.

The appellant filed written submissions which were highlighted by ***Mrs. Nyamongo***, learned counsel for the appellant, via a virtual platform owing to the Covid- 19 Pandemic, where counsel begun by submitting that Anwar's evidence showed that the incident occurred on 24th October 2010; that the appellant only worked on Mondays, Wednesdays and Saturdays, and that 24th October 2010 was a Sunday and therefore the appellant would not have been at work on that day; that furthermore, Anwar indicated that he had gone to the mosque for one hour, between 1.00 p.m and 2.00 p.m, and that it was not possible for the appellant to have killed both deceased in the span of one hour.

It was submitted that the case was poorly investigated, as the Investigating Officer did not establish when or why Anwar returned from Pakistan, that he did not know whether any items were missing from the house, yet he claimed that certain items were missing; that Remigio Vereva a Goan retiree also resided in the same house, and it his business in the house was unknown; that further the guard at the gate did not have a proper record of vehicles entering and leaving the compound or where they were going, and therefore anyone could have visited the house on the material day.

In response, ***Ms. Matiru*** learned counsel for the State submitted that the appellant caused the deceased's death; that he worked there; that on the material day Anwar had left the two deceased who were in good health with the appellant; that after they sustained severe injuries he disappeared for 11 months, which pointed to his guilt.

Mrs. Nyamongo's reply was that the appellant did not disappear, he was remanded in Industrial Area Prison as he had been charged with the offence of robbery with violence. He was later found in Kawangware.

We start by reminding ourselves that sitting as a first appellate court in this appeal, we are to evaluate the evidence afresh and arrive at our own independent conclusion. In so doing, we make provision for the fact that the trial Court has had the advantage of hearing and seeing the witnesses. See: ***Kiilu & Another vs Republic (2005) 1 KLR 174.***

We are duly guided as we consider the issues for determination which are; i) whether the learned judge erred in finding that the circumstantial evidence established that the appellant was guilty of the offence of murder; ii) whether the learned judge failed to properly evaluate the evidence to the required standard by taking into consideration the contradictions and conflicts in the prosecution's evidence; iii) whether the learned judge failed to analyse and evaluate the mode of the appellant's arrest; iv) in failing to take into account the appellant's defence and alibi evidence; and v) whether the trial court failed to comply with ***section 200*** of the ***Criminal Procedure Code***.

To begin with, we find this allegation that ***section 200*** of the ***Criminal Procedure Code*** was not complied with to be fallacious as the record shows that on 3rd March 2015, the court recorded the following;

> **"Matter partly heard by Muchemi, J who has since been transferred. Section 201 (1) of the Criminal Procedure complied with.**
>
> **Accused opts to have case proceed from where previous judge left off, accused also does not wish to recall (sic) any witness for cross examination. Case to proceed from where previous judge left off. Six witnesses to go."**

Clearly, when the appellant was provided with the opportunity to apply to recall witnesses or to have case start afresh, but he chose proceed instead. It is therefore not true that the trial court failed to comply with ***section 200*** of the ***Criminal Procedure Code*** and we find the complaint to be without basis.

We next turn to determine whether the circumstantial evidence proved to the required standard that the appellant was responsible for the murder of the deceased, the prosecution must demonstrate that the prerequisites for murder were established beyond reasonable doubt. ***Section 203*** of the ***Penal Code*** defines these prerequisites as; (i) the death of the deceased and the cause of that death; (ii) that the appellant committed the unlawful act which caused the death of the deceased; (iii) and that the appellant had malice aforethought, as required by ***section 206*** of the ***Penal Code,*** when the offence was committed.

The fact of the death of the two deceased is not in dispute, as evidenced by the post mortem report of ***Dr. Peter Muriuki Ndegwa, PW12,*** that indicated that they both died from severe head injury due to blunt force trauma. It is therefore not in doubt that the two deceased died and that the cause of death was severe head injury due to blunt force trauma.

As to whether it was the appellant that was responsible for the death of the two deceased, the leaned judge concluded that;

> **"I find that the prosecution has established that the accused was at the scene of crime on the day the offence was committed, that he had the opportunity to commit the offence and that he made his exit after PW1 left him with the deceased alive and well. By the time PW1 returned the accused had disappeared and both deceased had been fatally wounded…"**

In the case of ***Makau & Another vs Republic [2010] 2 EA 283,*** this Court described circumstantial evidence as;

> **"Circumstantial evidence is evidence of surrounding circumstances from which an inference may be drawn as to the commission of a criminal offence. It has been held in previous decisions of this and other courts that such evidence may in some cases prove a fact with the accuracy of mathematics."**

And in the case of ***Abanga alias Onyango vs Republic, Cr. App. No. 32 of 1990*** this Court identified the conditions of the circumstantial evidence necessary to point to the accused person, and to no other person, as the perpetrator of the offence as follows;

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a 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."**
>
> (See also ***Sawe v. Republic [2003] eKLR)***.

In considering whether the circumstantial evidence adduced established that the appellant murdered the deceased, when Remigio Vereva left the house at 11.30 am, Anwar, the two deceased, and the appellant were in the house. It was Anwar's evidence that when he left for the mosque at 1.00 p.m. the appellant was still in the house with the two deceased. The appellant also confirmed that he was in the house, but he stated that he left at 11.00 a.m. This evidence in effect placed the appellant at the scene, but owing to his assertion that he left the house at 11.00 a.m the question arises as to whether he was at any time alone with the deceased on the material day.

In reaching a finding on the issue, the learned judge concluded that, *"…the accused was on duty and reported to work at the home of the deceased persons in the morning in question as expected. He worked that morning up to afternoon at the time PW1 left him with the two deceased…"* We agree with the judge's conclusion, but would add that there is other evidence that is supportive of the findings. A payment schedule meticulously prepared by Amina, showed that upon receipt of his dues, the appellant would sign the payment schedule.

If indeed he left at 11.00am after informing Amina he was leaving, the payment schedule does not disclose that he signed for his final dues. We would have expected a record of payment on the final day, duly acknowledge by the appellant, if indeed the he left his employment amicably. There was no such record.

Thereafter, when Anwar left for the mosque he remained alone with the two deceased in the house, whereupon he seized the opportunity to assault and critically injure them, and sneak out undetected. We are therefore satisfied that the evidence placed the appellant in the house alone with the deceased after Anwar left for the mosque at 1.00pm.

On the argument that the appellant did not have keys to the gate and never entered the house, there is nothing in the evidence that suggests that once he entered the gate he was barred from accessing the rest of the house. We find that this issue lacks merit and we accordingly dismiss it.

In his defence, the appellant merely stated that he left Anwar's house at 11.00 a.m since Leonida Amugune , his sister had found him another job at the Msafiri Hotel, where he was to report at 11.00 a.m. and that when he left, Amina and her brother were alive and well. Like the trial court, we do not consider his defence to be credible. In rejecting the appellant's defence, the learned judge also found fundamental discrepancies regarding the date he was allegedly supposed to start his new employment. After considering Leonida Amugune's evidence, the judge observed;

> **"Regarding the job, the accused called DW 5 his sister. DW 5** ***testified that she first approached her former boss on the 24th October, 2011 asking for a job opportunity for the accused. She said that the former boss told her there was no job but on a Saturday following 24th*** **October, he went to her place and told her that there was a job at a hotel called Msafiri which was available the following Monday. If DW 5's evidence is analysed, it means that the accused started work in his new job on the Monday after 24th** ***October because DW 5 was sure in her evidence that she started to look for a job for the accused on the 24th. That being the case, DW5's evidence does not assist the accused as it appears the dates she gave do not tally with those given by***

the accused"

But the discrepancies in the date and time he reported to the new Msafiri Hotel do not end there. Pastor Maina stated that the appellant had told him that he was to report on 25th October 2011, yet this was not the date of the attack. And that is not all, though the appellant claimed he was to report to the Msafiri hotel at 11.00 a.m, by his own admission, he was still in Anwar's house at 11.00 a.m. Why was he still there when he should have already reported to his new place of work? Clearly, the date when he was to report to his new job remained elusive, and in all cases, bore no relevance to the material date. It becomes apparent that the evidence that he reported to a new job was a hoax that was plainly incapable of dislodging the prosecution's case or of coming to the appellant's aid, and the learned judge rightly rejected it.

The same could be said of the alibi evidence that he was remanded at Industrial Area prison awaiting trial. The record shows that, he was charged and remanded in custody on 14th September 2012, which was long after the offence was committed, and after the arduous search the prosecution undertook that culminated in his arrest 11 months later.

That said, we have reanalyzed and reevaluated the evidence, and are satisfied that the circumstantial evidence the prosecution produced indeed established beyond doubt that the appellant was the last person to have been in the company of the two deceased before they were found critically injured by Anwar; that the absence of a proper discharge from employment by Amina meant he did not leave at 11.00am, but pointed to his having been in the house after Anwar left for the mosque, hence providing him with sufficient opportunity to violently assault the two deceased prior to leaving the house; that he escaped hurriedly from the house without anyone, including the guards at the two gates, seeing him, with the knowledge that Anwar would be returning for his lunch at about 2.00 p.m, and thereafter went into hiding, eluding arrest for several months; that, the circumstantial evidence formed a chain so complete as to unwaveringly point to the appellant as the person responsible for the murder of the two deceased.

Regarding the complaint that the trial judge failed to analyse the mode of the appellant's arrest, we have not been provided with any basis for this allegation, but in the judgment the trial court had this to say on the arrest;

> **"I find that the prosecution has shown the effort they put in and the length they went in order to arrest the accused person. They also demonstrated that the accused moved from Nairobi to the Rift and later Western before returning back to Nairobi to a different house. The police were only able to arrest him in church. I am satisfied that the accused went into hiding soon after the incident. I am satisfied that the accused conduct of going into hiding after the incident was evidently the conduct of a guilty mind".**

Much as the appellant denied going into hiding after the death of the two deceased, our reassessment of the evidence of DCIO Manuni, PC Hilary Kamuyu**,** IP Peter Michuki and Cpl. Absalom Malea, who were involved in the intense search for the appellant, discloses that it took significant effort, time and industry on the prosecutions' part to locate and trace the appellant leading the learned judge to conclude, and rightly so, that his disappearance and hiding and subsequent arrest 11 months later were actions that quintessentially portrayed a guilty mind.

On the submission that the date the offence occurred was a Sunday and not a Monday, it would seem that this arose from the trial court's proceedings where in the evidence of both Anwar and Remigio Vereva the trial judge recorded the offence as having occurred on *'24th October 2010'*. Yet the charge sheet and all the other evidence indicated that the offence took place on 24th October 2011.

In our view, it is not uncommon for a date in the proceedings to be erroneously recorded, and dependent on the circumstances of each case, such error would not necessarily be fatal. In this case, since it was not disputed that the offence occurred on 24th October 2011, and all the evidence was with reference to the 24th October 2011, we consider that the error was not fatal, and in any event, it would be curable under ***section 382*** of the ***Criminal Procedure Code***. Accordingly the complaint is dismissed.

We next turn to consider whether the appellant cause the death of the deceased with malice aforethought. Malice aforethought can either be direct or indirect depending on the facts of each case at the trial. In the case of ***Republic vs Tubere S/O Ochen*** **[*1945] 12 EACA 63*** it was explained that*:*

> **"An inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack".**

The evidence shows that the two deceased met with a gruesome and grizzly death. At the South C Clinic, DCIO Manuni saw that Amina had two deep cuts on the left and right side of the head. Her clothes were full of blood. At the Mater Hospital, he saw that Mohammed's body also had deep cuts on both sides of the head and left arm. When he visited the scene together with PC Hilary Kimuyu, they found blood all over, Amina's bedroom, and on the corridor. There were also blood stains smeared on the walls of the stairs. PC Kamuyu stated, *"I traced blood from the bathroom in the bedroom and that blood went downstairs showing a person heed (sic) wall and stairs with blooded hands…It appeared that an injured person was pulled downstairs along the staircase and the sign was trail of blood on the stair case."* Blood was splattered all over in Afzar's bedroom, and his bathroom was full of blood, as if the perpetrator had tried to wash off blood before leaving. Dr. Ndegwa who conducted the post mortem report opined that both deceased died from severe head injury caused by blunt force trauma.

The nature of injuries sustained by the deceased and the manner in which their blood was splattered all over the house leaves us in no doubt of the malice aforethought employed by the appellant that was intended to cause grievous harm or even the death of the deceased. On this basis malice aforethought was positively established.

Having so found, we are satisfied, as was the trial court that the prosecution proved its case to the required standard that the appellant was responsible for the murder of the deceased, and in so finding we uphold the conviction.

Finally, having convicted the appellant, the trial court sentenced him to death on both counts. In so doing, the trial court stated, *"I have*

considered Section 204 of the Penal Code which provides for the offence of murder contrary to section 203 of the Penal Code. It is a mandatory sentence for which the court has no discretion." Since then, the Supreme Court in ***Francis Karioko Muruatetu & Another vs Republic [2017] eKLR,*** has declared the mandatory death sentence to be unconstitutional, though it did not declare the death sentence to be unconstitutional.

Notwithstanding that we were not requested to review the sentence, we note that in its ruling, the trial court observed that the appellant specifically instructed his counsel not to mitigate on his behalf, and he did not himself mitigate. This was despite the brutal and callous murder of the two deceased brother and sister. In view of the appellant's unwillingness to mitigate and the clear absence of remorse, and taking into account the factors and circumstances of the case, we find that a review of the sentence of death to be unnecessary.

Accordingly, the appeal is unmerited and is hereby dismissed.

Dated and Delivered at Nairobi this 25*th* day of September, 2020.

K. M'INOTI

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR