IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MURGOR, SICHALE & KANTAI, J.JA)

CRIMINAL APPEAL NO. 119 OF 2018

BETWEEN

ALEXANDER MBEVO MUTEMI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the sentence and conviction of the High Court of Kenya at Garissa in Criminal Case NO. 18 of 2013 by Hon. George Dulu dated and delivered on 23rd November, 2017

****

JUDGMENT OF THE COURT

Alexander Mbevo Mutemi, ***the appellant***, was charged with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the **Penal Code** ***Laws of Kenya***. The particulars of the offence are that on the 14th day of November, 2013 at Kavililo village, Nzauni location in Mwingi West District within Kitui County, he murdered ***Stella Makaa Makuthu (the deceased).***

On 14th November, 2013 at 2.00 p.m. ***Daniel Mbithi Mutinda, (PW1)*** *(Daniel)* who worked as a supervisor at Target Supermarket in Mwingi town was informed by the appellant, who also worked in the same supermarket, that he was feeling unwell and required permission to go to the hospital. Since the supermarket was busy, Daniel requested the appellant to wait until their work eased before proceeding to take time off. At about 3.00 p.m. Daniel's colleagues notified him of the appellant's absence, and he stated further that the appellant did not return to his duties, and that after 3 days, he recorded a statement with the police. According to Daniel, on that day the appellant was wearing a red t-shirt.

Ruth Katembo Makethu, (PW2), *(Ruth)* an electrician was at a garage at Mwingi town on 14th November, 2013 at about 4.00 p.m, when the appellant, who was her sister Stella, (the deceased's) boyfriend requested her to find him a motorcycle rider to take him to Kavililo as he had a parcel to deliver to AIC Kavililo which was about 30 minutes away. Ruth requested ***Muumbo Itumo (PW 3)*** *(Muumbo)*, to take him to Kavililo, and on his return to Mwingi, Muumbo informed Ruth that he had dropped the appellant off at AIC Kavililo, and that he had given him Kshs. 50 to bring to her. After that, Ruth tried 3 or 4 times to telephone Stella, but did not receive any response from her.

On her way home from Mwingi, at about 5.00 p.m., Ruth's cousin Kitembu Mutua informed her that something had happened to her sister, Stella. When she went to the scene, she found her sister 's body lying on the ground about 250 meters from their home with injuries on the hands and left shoulder to the neck. Her phone and a kitchen knife lay next to her. A red t-shirt bearing the words '*Manchester United'*, similar to one the appellant had worn was also recovered.

Earlier that afternoon, ***Judy Mbete Katembo, (PW 4),*** *(Judy)* another of Stella's sister, had seen Stella returning home from her school in Mwingi. As they talked, her phone was ringing persistently, but she did not pick it; that Stella told her that the calls were from a boyfriend, Alex with whom they had differed, which was why she did not want to answer the phone; that when she eventually picked his call, Stella had told him not to visit her, but after conversing with Alex, she left to meet him at Kavililo.

Sera Copion Nyawa, (PW 6,) *(Sera)* and ***Nguyo Mwangangi, (PW 7,)*** *(Nguyo)* were residents of Migwani. They had both seen Stella that afternoon walking in the direction of Bazaar town with a young man whom they did not know, but who was wearing a red t-shirt.

At around 5.00 p.m the screams of ***Mwikali Muli John (PW 8,)*** *(Mwikali)* also a resident of Kavililo, who had gone to fetch water at the Kaiveti stream, alerted members of the public of her discovery of Stella's body lying on the road to the stream. She was dead and her clothes were soaked in blood. On receiving the news of Stella's death, Judy, Sara, Nguyo and Muumba visited the scene where Stella's body lay

with stab wounds. They also saw her phone and a kitchen knife lying next to her.

Mukuthu Katembo, (PW5,) Stella's father attended the post mortem together with James Kitheka Katembu his brother, which was performed by ***Dr. Gerald Mutisya (PW 9,)*** who was in charge of Migwano Sub- District Hospital. He reported that she had suffered external injuries comprising several stab wounds first on the right side of the neck, where two major vessels were injured. A stab wound was on her forearm, and a main artery was injured. There were two stab wounds on the right side of her breast, and a fourth stab wound to the center of her abdomen. A fifth stab wound was visible on her left thigh. He formed the opinion that her death was caused by organ failure due to shock from excessive bleeding from the stab wound; that the most probable weapon was a knife.

CI James Kariuki, (PW 11,) received a telephone call from the Chief of Nzauni location informing him that a body was discovered along a foot path at Kavililo village. Accompanied by PC Leting and PC Kireri, he went to the scene where he saw the deceased's body with multiple injuries on the hands, chest stomach and thigh. He searched the scene and recovered a t-shirt, knife and phone near the body.

Cpl. Tunai Gilbert Keitany, (PW 16,) *(Cpl Tunai)* then took photos of the body which were documented by ***Cpl Livingstone Katui (PW 14).*** The phone, kitchen knife and t-shirt were analysed by ***Elizabeth Waithira Oyego, (PW12,)*** a Government Analyst, whereupon she concluded that the blood stains found on the kitchen knife were indicative of a match with that of the deceased's blood sample. ***IP Joseph Leruk, (PW 15,)*** a data analyst and fraud detective produced the appellant's and the deceased's mobile phone records and prepared a certificate as required by law.

Deputy DCIO Mwingi Charles Marangu, (PW13,) received the appellant's confession. In brief the confession stated that, after he (the appellant) had seen one Nino Longupaye in Mwingi town with the deceased,he had called the deceased severally but she did not pick her phone; that after getting permission from his supervisor to go to the hospital, he armed himself with a knife which he bought from the Mwingi market, *"…to defend himself"*. At about 4.00 p.m. he boarded a vehicle for Migwani, and from there, took a boda boda to Kavililo; that he met with Stella, and later found himself running away. There was no mention of Nino in the confession. The DCIO clarified that in the confession, the appellant only admitted arming himself with a knife which he had bought in Mwingi township market.

Upon receiving information that the appellant worked at Target Supermarket in Mwingi Township, Cpl. Tunai proceeded to the supermarket, but did not find him there, but they were given the names of his father, a teacher at Mililuni Primary school whom he met and requested for his assistance to trace the appellant. On 16th November, 2013 at 9.00 a.m, his father and brother reported to the police station with the appellant who wrote a confession statement where he admitted that the t-shirt and knife were his, and that he had bought the knife on 14th November, 2013 at Mwingi township market. He said the deceased was initially his girlfriend though they had disagreed. The appellant had stated that he paid her college fees, but she had fallen in love with a college mate, Nino Lengupaye, and that when he tried to resolve the issue, they had disagreed and he had stabbed and left her at the scene where she died.

Cpl. Tunai also called Nino Lengupaye to ascertain his whereabouts on the material day; that Nino informed him that he traveled to Nanyuki that day and produced a bus ticket and a lodging receipt as proof; that he had taken both receipts from Nino who denied having a relationship with the deceased. He further stated that he did not call Nino to testify as his evidence would not have provided any further assistance, given that he had traveled to Nanyuki on that day. He concluded that the motive for killing the deceased arose out of a love triangle misunderstanding where the deceased and the appellant were girlfriend and boyfriend, and where the appellant believed that the deceased no longer loved him, but was in love with Nino Lengupaye.

In his defence the appellant denied the charge. He knew the deceased, who was a trainee teacher at Mwingi Technical College near Mwingi Town as his girlfriend. On 13th November, 2013, after her college, she passed the supermarket with one Nino who had bought 'Fair and Lovely' cream; that Nino had warned him to stop loving the girl or he would kill him; that the next day at 4.00 p.m he met Stella, near her home in Migwani, and because they had met on the road, he had suggested that they go to the stream nearby; that as they walked, he saw Nino coming fast towards them holding something that looked like a knife in his hand causing him to try and escape with the deceased, but he ran off faster and left her behind. He did not know what happened to her thereafter. He later heard that she had died, and that the police were looking for him.

On cross examination; the appellant denied buying a knife. He also denied planning to kill Stella and stated that he intended to marry her, but she had told him that she had developed a relationship with Nino and that they were together the previous day. Referring to the confession statement, he said that he had no reason to be annoyed that Stella had a college boyfriend, because Stella loved him, as much as he loved her. He conceded that he did not report to anybody that he saw Nino running towards them with a knife.

Festus Nzoka Mwisyo, (DW 2,) a welder in Mwingi stated that he knew the appellant and Stella, and that on 14th November 2013, the appellant came to him in Mwingi and told him that he wanted to see Stella, that later another person, whom he did not know asked him if he knew Stella. He learnt later that Stella had died.

Upon hearing the evidence and the submissions of prosecution and 2 defence witnesses, the trial court *(Dulu, J.)* found the appellant guilty as charged and sentenced him to death as by law prescribed.

The appellant was aggrieved by the conviction and sentence, and appealed against that decision on the grounds that the evidence having been heard by two different judges led to a miscarriage of justice; that the learned judge shifted the burden of proof to the appellant when he concluded that the appellant *"properly and meticulously planned"* to commit the crime; that the learned judge erred in relying on circumstantial evidence, and in convicting the appellant on evidence that was not supportive of a conviction; and finally, on the sentence, whether the mandatory sentence of death should be reviewed.

Learned counsel ***Mr. Musili*** holding brief for Mr. E. Mutua for the appellant adopted the appellant's written submissions in their entirety during the initial hearing in accent of the Covid-19 pandemic wherein it was contended that material prejudice due to non-compliance with ***section 200*** of the ***Criminal Procedure Code*** was occasioned to the appellant, as the proceedings showed that S. Mutuku, J. recorded the

evidence of PW1 to PW8, and thereafter Dulu, J. recorded the evidence of PW9 to PW16, and convicted the appellant; that since the circumstantial evidence of PW1 to PW8 was recorded by Mutuku, J, as the convicting judge, Dulu, J did not have an opportunity to see or hear or ascertain the witnesses' credibility, and in so doing wrongly convicted the appellant. Counsel relied on the case of ***Abdi Aden Mohammed vs Republic [2017] eKLR*** for the assertion that the requirement of ***section 200*** of the ***Criminal Procedure Code*** was necessary to ensure that the trial magistrate or judge must hear the case to conclusion since it is important when rendering the judgment to take into consideration the demeanor of the witnesses.

Counsel further complained that when applying ***section 200*** of the ***Criminal Procedure Code***, Dulu, J. overlooked counsel for the appellant, and instead directly asked the appellant whether he wished to recall the witnesses to testify; that in so doing, the trial judge adopted an incorrect procedure, particularly as the appellant was represented by counsel, and secondly, that the decision of whether the trial should proceed from where it stopped or whether it should commence *denovo* was not a decision that rested with the accused person.

Next it was submitted that, the ingredient of malice aforethought was not proved since it was not demonstrated that the appellant properly and meticulously planned the incident. It was further submitted that the call data log and the short text messages were insufficient to show that the close relationship between the appellant and the deceased had broken down.

Turning to the circumstantial evidence, the appellant asserted that it did not satisfy the threshold of an inference of guilt since in the defence, the appellant testified that the offence was committed by one Mr. Nino Lengubaye who was a lover of the deceased whom he (the appellant) had seen with her on the same day near the supermarket where the deceased worked; that despite this evidence, the prosecution failed to call this witness to testify.

It was also submitted that the evidence surrounding the red t-shirt was contradictory and inconsistent, as the witnesses testified that the appellant was wearing a red t-shirt but none of the witnesses described it as comprising the words *'Manchester United'*; that therefore, it was erroneous for the trial court to conclude that the deceased was at the crime scene because his t-shirt was found there, particularly as there was no evidence to show that the t-shirt bearing the words *'Manchester United'* belonged to the appellant.

Concerning the confession, it was submitted that it was not tested during the trial, even though there was no objection with respect to its production; that since it was retracted, it ought to have been corroborated by other prosecution witness evidence.

Relying on the case of ***Kalume Fondo Gona vs Republic [2018] eKLR***, the appellant concluded that circumstantial evidence was not proved as the chain of evidence was broken by the possibility that a disclosed third party may have committed the offence, and therefore the facts and circumstances did not point solely to the appellant's guilt.

On the allegation that the learned judge shifted the burden of proof to the appellant, it was contended that this was evinced by the statements in the judgment that, *"It is only the accused who connects Nino to the offence of murder. In my view this is unconvincing"*, and that *"His t-shirt was found there and he does not explain how the t-shirt remained there'*, and *"He himself made an admission to the police that he was involved in the killing'*, and lastly, that, *"The accused, though he said that it was Nino who attacked him and the deceased did not report the alleged attack to anybody including his relatives or relatives of the deceased whom he knew well."*

Finally, the appellant complained that the decision was harsh and excessive, and on the basis of the Supreme Court decision of ***Francis Karioko Muruatetu & Another vs Republic [2017] eKLR,*** it was submitted that since the trial court imposed a mandatory death sentence on the appellant which was unconstitutional, it should be reviewed.

On its part the respondent opposed the appeal. ***Mr. Hassan Abdi*** learned counsel for the respondent submitted in brief that there was no other co-existing circumstance that broke the chain in the circumstantial evidence; that the appellant's evidence of the presence of Nino at the crime scene was not supported by any other witness evidence, and as a consequence, the introduction of Nino into the defence at that late stage was an afterthought.

We have considered the record, the rival oral and written submissions and the law. This is a first appeal and the duty of a first appellate court of re-evaluating the evidence and giving an appellant a re-hearing of the case has been set out severally by this Court. For instance, in ***Okeno vs Republic [1972] EA 32,*** this Court stated thus as regards our mandate as a 1st appellate Court:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination …… and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions …….. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses …."***

As such, the issues for consideration are;

i) whether the conduct of the trial by two judges occasioned a miscarriage of justice;

ii) whether the offence of murder was proved beyond reasonable doubt;

iii) whether the circumstantial evidence met the threshold requirements that were supportive of the appellant's guilt;

iv) whether the learned judge fell into error by shifting the burden of proof to the appellant; and

v) whether the sentence was punitive and excessive.

We begin by interrogating whether there was a miscarriage of justice in two judges having participated in the conduct of the trial. ***Section 200*** of the ***Criminal Procedure Code*** deals with situations where an accused person may be convicted on evidence that was partly recorded by one magistrate and partly by another. The substance of the complaint in this ground is that the first judge Mutuku, J heard and recorded the evidence of the 1st to 8th witness and was succeeded by Dulu, J, who did not hear the crucial testimonies of these witnesses. Second, it is alleged that the succeeding judge called upon the appellant and not his counsel to determine whether the case should begin *de novo*, or for the witnesses to be recalled.

Addressing the issue of when a succeeding magistrate or judge takes over the proceedings, ***section 200 (3)*** states;

> ***"Where a succeeding magistrate (or Judge) commences the hearing of proceedings and part of the evidence has been recorded by hispredecessor, the accused person may demand that any witness be resummoned and reheard, and the succeeding magistrate (or judge) shall inform the accused person of that right."***

The record disc loses that when Dulu, J. took over the proceedings PW1 to PW8, had testified; that, the learned judge pointedly asked the appellant in the presence of his advocate, Mr. Kinyua whether he wished the trial to proceed from the stage reached by Mutuku, J. The appellant responded;

> ***"I ask the case to proceed from where it stopped. I do not wish to recall witness."***

The court thereafter ordered that the case to proceed from where it had reached.

It is evident that after the court notified him, it was the appellant's prerogative to apply to recall the witnesses, but he chose not to. His advocate who was also present had the same opportunity, but chose to remain quiet. He cannot now turn around and fault the court for informing the appellant of his rights as required by law and for complying with the letter and spirit of the provision. We reject this ground.

The next issue is whether the circumstantial evidence proved the offence of murder to the required standard. For this purpose, 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.

In addressing the question of whether the deceased died, the learned judge stated that;

> ***"The deceased was alive at Kavililo area in Migwani on 14th November 2013. It was in the evening around 4 p.m that she left her home never to come back again alive. Her body was seen about 5.00 p.m by a woman PW8 Mwikali Muli who was going to fetch water. It was lying on the foot path with stab wounds. The woman screamed, members of the public came to the scene and the police were called and they came, and took the body to Migwani mortuary. Post mortem was conducted on 16th November 2013 by PW9 doctor Gerald Mutisya and the body was identified by the father and uncle. The cause of death was established by the post mortem doctor as organ failure due excessive bleeding from injuries which were visible externally.***

The learned judge's summation of the events, with which we agree, clearly captures the prosecution witnesses' evidence that showed that the deceased died on the afternoon of 14th November 2013. She had been stabbed, and was found lying on a foot path near a stream where Mwikali had gone to fetch water. Besides the post mortem report from Dr. Mutisya, that concluded that her death was caused by organ failure due to shock from excessive bleeding from the stab wound; that the most probable weapon was a knife, several of the prosecution witnesses who knew the deceased well visited the murder scene and saw her lying dead on the footpath.

As to whether the appellant was responsible for the deceased death, the learned judge concluded that based on the circumstantial evidence, the factors surrounding the deceased's death all pointed to the appellant as perpetrator.

In reevaluating the evidence, it is not disputed that none of the witnesses who testified actually saw the appellant murder the deceased. We therefore agree with the learned judge that the appellant's guilt would be determined by circumstantial evidence, which should take into consideration whether all the facts and circumstances pointed to his guilt.

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

> ***"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."***

In the case of ***Abanga alias Onyango vs Republic, Cr. App. No. 32 of 1990*** this Court identified the conditions to be ascertained that would 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)***.

Daniel's evidence is that the appellant left his work place in Mwingi for Migwani at about 3.00 p.m on the 14th November 2013. On reaching Migwani he requested Ruth to assist him hire a motorbike rider to take him to Kavililo to deliver a parcel to AIC Church, Kavililo. Ruth requested Muumbo to take him, and he was dropped off at the gate of AIC Kavililo Church. Shortly thereafter, Sara a housewife who was attending a meeting for women and girls saw him walking with the deceased in the direction of Bazaar town. The young man was wearing a red t-shirt. Nguyo also saw them together. Soon thereafter Mwikali's screams alerted the villagers of the deceased's body lying on a footpath near the stream. The deceased had been stabbed, and her phone, a knife and a red t-shirt were lying nearby. The young man she was with had disappeared.

As to whether the young man with the deceased was the appellant, in his defence the appellant admitted that the deceased was his girlfriend and that he had intended to marry her. It was his evidence that on the material day after the deceased agreed to meet him near her home in Migwani he stated, *"I took a vehicle up to Migwani. I met her…We met on the road. At the road I told her because it was on the road, I suggested we go to a stream. As we walked towards the stream, I saw Nino coming fast panting…".* It can therefore be concluded that the appellant was in the company of the deceased near the stream just before she died and where her body was later recovered.

Who was the last person to be seen with the deceased? The appellant's case is that one Nino Lengubae was also in Migwani on the material day, and as he walked with the deceased towards the stream, Nino, the man with whom the appellant thought the deceased was having a relationship, came towards them carrying what seemed to be a knife; that as they escaped from Nino the deceased was left behind, and he did not know what happened to her thereafter.

But his evidence that Nino was at the murder scene is at odds with the findings of Cpl. Tunai Keitani, who questioned Nino and concluded that Nino would not assist the trial in any way, since he, (Nino) was in Nanyuki on the day in question, and had given Cpl. Keitani a bus ticket and a hotel boarding receipt as proof of his whereabouts that day.

The learned judge was not convinced with the appellant's explanation of Nino's presence at the murder scene, and concluded that, *"It is only the accused who connects Nino to the offence of murder."* In other words, with Nino having explained that he was in Nanyuki on the material day, and no other evidence pointed to his presence in Kavililo, and more particularly by the stream where the appellant had suggested to the deceased that they should walk, it leaves the appellant as the last person to have been in the company of the deceased that afternoon, and therefore the person responsible for the deceased's death.

The evidence surrounding the t-shirt recovered close to the deceased's body together with her phone and knife further buttresses our conclusion. Notwithstanding, the appellant's admission to owning the red t-shirt that was recovered at the scene, all the witnesses who saw the appellant with the deceased that afternoon recall that he was wearing a red t-shirt. The recovery of a red t-shirt at the murder scene placed a rebuttable presumption on him to explain how his t-shirt came to be there, but no such explanation was forthcoming. We therefore find that his complaint that the learned judge wrongly concluded that the red t-shirt with the words '*Manchester United'* that was recovered belonged to the appellant yet, none of the witnesses stated that the red t-shirt he was wearing had the words *'Manchester United'* to be misleading as, whether the words '*Manchester United'* appeared on the red t-shirt or not did not detract from the fact that all the witnesses who saw him in the company of the deceased that day saw him wearing a red t-shirt, which red t-shirt was recovered close to where the deceased was stabbed. We therefore find this complaint to be without merit.

The knife found at the scene is also worthy of note. Though he retracted his confession that he armed himself with the knife, he stated in his defence that Nino chased them with a knife. When the fact that a knife that was used as the murder weapon was found at the scene, is considered together with our finding that Nino was not present at the scene, it leaves the appellant, and not Nino or any other person as the last person to have been in the company of the deceased, as the person who was carrying the knife that was used to stab and kill the deceased.

We find the allegation that the learned judge shifted the burden of proof by inferring that Nino's presence in Kavililo was unconvincing to be unfounded. The prosecution's evidence showed that Nino's explanation as to his whereabouts was that he was in Nanyuki on that date, and therefore the claim of and alleged attack by him was woefully implausible, and merely an unsuccessful attempt to displace the strong culpatory evidence against him. Furthermore, since it was not reported to the police, such allegations can only be but an afterthought.

Finally, as to whether malice aforethought on the appellant's part was established, it was contended that the learned judge, wrongly concluded that malice aforethought was established, since the appellant's actions were intended to cause death or grievous bodily harm.

The appellant declared the deceased to be his girlfriend, whom he intended to marry, but he had since learnt that she no longer wished to carry on their relationship as she had turned her attention to someone else. On the material day, the appellant was unhappy that the deceased had refused to speak to him when he tried severally to call her but, when she eventually took his call, he convinced her to meet him. After they met, he took her to a secluded place, they disagreed and he stabbed her and left her. Shortly thereafter, she was found dead. The postmortem evidence that the cause of death was by organ failure due to shock from excessive bleeding from the stab wound, and that the most probable weapon was a knife is consistent with the fact that she was stabbed that afternoon.

The appellant's actions were clearly those of a jilted lover who was angry with his girlfriend for daring to dump him for another man. He plotted to kill her, and viciously and vindictively carried out his mission by stabbing her to death. The appellant must have known that stabbing the deceased with a knife would cause her grievous harm or kill her, thereby establishing malice aforethought in accordance with

section 206 (b) of the ***Penal Code***.

As was with the learned judge, we too are satisfied that the circumstantial evidence adduced by the prosecution indeed proved beyond reasonable doubt, that the appellant was the last person to be seen in the company of the deceased and had the opportunity to viciously and maliciously stab her several times and leave her for dead. Without doubt, the circumstantial evidence formed a chain so complete that it pointed to the appellant as responsible for her murder. In view of the aforegoing we uphold the conviction for the offence of murder.

Having found him guilty, the trial judge sentenced the appellant to death upon concluding that, *"The offence of Murder however carries a mandatory death sentence and this court has not discretion in the matter."* The mandatory death sentence having been declared unconstitutional by the Supreme Court in ***Francis Karioko Muruatetu & Another*** ***(supra),*** and the appellant being a first offender, and having shown that he was remorseful, and pleaded for leniency in mitigation, we would substitute the death sentence with a custodial sentence of 30 years' imprisonment from the date of conviction in the High Court.

Accordingly, we dismiss the appeal against the conviction, but allow the appeal against sentence. We set aside the death sentence imposed by the trial court and substitute therefor a custodial sentence of 30 years' imprisonment from the date of conviction by the High Court.

It is so ordered

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

A.K. MURGOR

…….....

JUDGE OF APPEAL

F. SICHALE

…….....

JUDGE OF APPEAL

S. ole KANTAI

…….....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR