Nyaga v Republic (Criminal Appeal 40 of 2018)
[2025] KECA 2131 (KLR) (5 December 2025) (Judgment)

Neutral citation: [2025] KECA 2131 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 40 OF 2018

W KARANJA, S OLE KANTAI & A ALI-ARONI, JJA

DECEMBER 5, 2025

BETWEEN

VINCENT GIKUNDI NYAGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court at Meru (R.P.V. Wendo, J.) delivered by Hon. Mr. Justice Mabeya on 21{{^st}} March, 2018 in H.C. CRC. NO. 25 of 2009)

JUDGMENT

1. This is a first appeal from the judgment of the High Court at Meru where the appellant, Vincent Gikundi Nyaga was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It turned out in the evidence that on 15th February, 2009 at Inkothine Sub-location in the Imenti South District, the appellant murdered his own 2½ year old son Jeff Gitonga Gikunda. He was convicted after a trial before Wendo, J. and was sentenced to death by Mabeya, J. on 21st March, 2018. He filed this appeal and when it came up for hearing before us on 18th June, 2025 his learned counsel Miss Susan Nganga informed us that the appellant was abandoning the appeal on conviction and was only pursuing the appeal on sentence.

2. The Supplementary Memorandum of Appeal drawn by M/s. S. N. Nganga & Co. Advocates has only one ground of appeal to the following effect:

    1. THAT the Appeal is only against the death sentence that was meted against him by the trial court since the Appellant does not wish to challenge his conviction. The mandatory death sentence meted on the Appellant should be reviewed in light of the Supreme Court decision in Francis Karioko Muruatetu & Another VS Republic (2016) (sic)."

3. The appellant in his written submissions which were highlighted by his counsel at the hearing pleads for the Court's mercy for the sentence to be reviewed from the death sentence to a term of imprisonment, and reliance is had on the decision of the Supreme Court of Kenya in Francis Karioko Muruatetu & Another v Republic [2016] eKLR, where it was held that the mandatory sentence of death in sections 203 and 204 of the Penal Code deprives courts of their unfettered jurisdiction to exercise discretion and impose appropriate sentence on a case to case basis.

4. The appellant submits that he is remorseful having committed the offence against the deceased who was his son out of anger emanating from marital frustrations; that he had already spent 15 years in custody where he has reformed and taken responsibility for his actions; that he wanted to plead guilty at the trial; that he is now 62 years old.

5. What, then, were the circumstances that led the appellant to the predicament he finds himself in?

6. Alice Nkirote (PW1), the mother of the deceased, testified that she had been married to the deceased and they had two children including the deceased who was 2½ years old at the time of the unfortunate incident. They had separated two years hence after many incidents of battery; she lived with the deceased. On 15th February, 2009 she received word from the appellant that she should deliver the deceased to him because he wanted to buy the boy clothes. She obliged by delivering the boy and was accompanied in that mission by her friend Lilian Kanyua. Because they did not find the appellant at his house they went to the appellant's brother's home (Joseph Mwingwa - PW2) where they found the appellant. After some time, she asked the appellant why he wanted her to leave the child with him:

> "...He told me to leave his child there or else he kills me. I left the child there and me and Lilian ran back home..."

7. The next day she went looking for the child but did not find him and when she asked PW2's wife where the child was she was informed that the appellant had removed the child from

8. PW2's home at 11 p.m. on the pretext that he was taking back the child to his mother (PW1). As days went by without finding the boy PW1 decided to involve her parents, the local administration and the police. The police informed her that the appellant had made a report that he had surrendered the child back to his mother. This led to the appellant's arrest when he took police to the place where he had killed the child, wrapped it in 2 sacks and dumped it in a pit latrine from where it was recovered.

9. That version of events was corroborated by PW2.

10. Dr. Mwangi Maria, who produced a post-mortem report on behalf of Dr. Isaack Macharia (the latter was also called on application by the appellant) testified that the deceased was 2½ years old, the body was moderately decomposed; there was a light noose around the neck made of a piece of clothing. Internally, there were multiple fractures to the peridural bones, fracture of the cervical 1, 2, 7, 3; spinal cord injury was found at the level of C1, 2 & 3 and cause of death was head and cervical spinal injuries and strangulation.

11. As we have seen, the appellant was convicted; sentenced to death and this appeal is on sentence only.

11. After being convicted counsel for the appellant addressed the trial court in mitigation stating that due to the Francis Karioko Muruatetu) case (supra the court could not mete out death sentence as it had

discretion; that the appellant was a first offender; was 45 years old when arrested; had separated from his wife and that he had lost a child- the deceased:

> " ...aged 2½ years. The accused was angered, slapped the child. It was crying at the time and he wanted to discipline the child. He is remorseful. Consider rehabilitation mete out a lenient sentence."

12. Mabeya, J. considered that mitigation and this is what he said in his presentencing remarks:

> " ...However, I have noted the circumstances under which the offence was committed. That the accused lured his estranged wife to surrender to him a 2½ years old child whom he savagely eliminated from this world and dumped remains in a pit latrine. I do not think that a merciless father like the accused deserves mercy from this court..."

13. He sentenced the appellant to death on 21st March, 2018.

14. Counsel for the appellant refers us to Francis Karioko Muruatetu (supra), a decision we know about and which Mabeya, J. appears to have been aware of as he looked at the circumstances of the murder before him and decided to mete out the death sentence.

15. The Supreme Court of Kenya stated in Francis Karioko Muruatetu (supra), that the death sentence was still a lawful sentence in Kenya; it was the mandatory nature of the wording in section 204 of the Penal Code that was declared unconstitutional.

16. We agree with the written submissions by the respondent that a trial Judge has discretion to impose a death sentence taking into account aggravating factors, mitigation, personal circumstances of the convict and victim impact statement or any other extenuating circumstances.

17. This Court had this to say on meting out sentences in Bernard Kimani Gacheru v Republic [2002] eKLR:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

18. We agree with Mabeya, J. that the death sentence was well deserved. A father who misleads his wife to surrender their 2½ year son so that he can butcher him and proceeds to do so by strangling and inflicting fractures of the skull and other fractures on the helpless child is a beast undeserving of living with ordinary members of the society. He does not deserve any mercy.

19. The appeal is devoid of merit and is accordingly dismissed.

DATED AND DELIVERED IN NYERI THIS 5TH DAY OF DECEMBER, 2025.

W. KARANJA

JUDGE OF APPEAL

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S. ole KANTAI

JUDGE OF APPEAL

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ALI-ARONI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR