



REPUBLIC OF KENYA



KENYA LAW
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**Okombe v Republic (Criminal Appeal 249 of 2018)
[2025] KECA 158 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 158 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 249 OF 2018
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
FEBRUARY 7, 2025**

BETWEEN

BENARD WERE OKOMBE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Kisumu
(D.S. Majanja, J) Dated 27th April, 2017 in HC CR. Case No. 36 of 2009)*

JUDGMENT

1. The Appellant, Benard Were, was charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that, on 24th September, 2009 at Rachar Sub-location of Rarieda, Siaya County, the appellant murdered George Otieno Odero. When the appellant was arraigned before the trial court, he pleaded not guilty to the charge. After a full trial, the appellant was convicted of the charge and sentenced to suffer death.
2. The appellant was aggrieved by his conviction and sentence. He filed an appeal to this Court against the same. However, during the hearing of the appeal, the appellant abandoned his appeal on conviction and instead opted to challenge only the sentence. It is the appellant's assertion that the mandatory death sentence that was imposed on him was unconstitutional and illegal. The appellant amplified this ground of appeal in his written submissions filed in Court prior to the plenary hearing of the appeal.
3. The appellant took issue with the statement made by the trial court to the effect that its hands were tied and that the only sentence that could have been meted out in the circumstances was the mandatory



death sentence. The appellant cited the case of Victor Owich Mbogo vs. Republic [2020] eKLR where this Court held:

“Lastly, we turn to consider the sentence. Since the delivery of the judgment of the High Court, the Supreme Court case of Francis Karioko Muruatetu & another vs Republic (supra) has found that the mandatory death sentence prescribed for the offence of murder by section 204 of the penal Code to be unconstitutional. It is for this reason that the appellant sought for review of the death sentence imposed on him. In the circumstances, we set aside the death sentence imposed by the High Court and substitute, therefore, a custodial sentence of imprisonment for a term to be determined by the High Court.”

4. The appellant further submitted that the trial court did not take into account the period of seven (7) years that he was in remand custody prior to his conviction. The appellant urged us to invoke section 333(2) of the Criminal Procedure Code and take into account the time that he was in remand custody prior to his conviction and sentence. The appellant pleads with this Court to take into consideration the fact that he is remorseful, is a first offender and was a young man at the time the offence was committed. He is repentant. The appellant pleaded with this Court to exercise leniency on him and take into consideration that he has been in lawful custody for the past fourteen (14) years.
5. On his part, the respondent conceded partially to the appeal. In his submissions before Court, the respondent agreed with the appellant that indeed the finding on sentence made by the trial court to the effect that the only sentence available on conviction in a murder trial was death sentence was a misdirection. However, the respondent observed that the sentence meted on the appellant by the trial court was before the Supreme Court rendered its decision in Francis Karioko Muruatetu & another Vs. Republic [2017] eKLR.
6. The respondent, however, urged us to take into consideration the circumstances under which the appellant killed the deceased, particularly the fact that the killing was premeditated, violent and brutal. The respondent was of the view that the nature of the injuries inflicted on the deceased calls for severe punishment from the Court. The respondent pointed out that at the time of the fatal attack, the deceased was defenceless, lay prone on the ground and was begging for his life. The deceased's entreaties were however met with deaf ears. The respondent proposed that the appellant serves a custodial sentence of thirty (30) years imprisonment as an appropriate punishment.
7. The respondent concedes that indeed the appellant was entitled, pursuant to section 333(2) of the Criminal Procedure Code to have the period that he was in remand custody from 25th September 2009 to 17th April, 2017 when he was convicted taken into account.
8. In this appeal, the only issue for determination is whether the sentence meted on the appellant was legal. The principles guiding this Court on appeal in deciding whether or not to interfere with the sentencing discretion of the trial court was addressed by this Court in the case of Benard Kimani Gacheru vs. Republic [2000] eKLR thus:

“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 materials, or acted on the wrong principle.”



9. The respondent has conceded to the fact that the trial court erred in stating that it had no discretion to award any other sentence other than the death sentence. The respondent further conceded that the trial court erred when it did not take into consideration the period that the appellant was in remand custody prior to his conviction as mandated by section 333(2) of the Criminal Procedure Court. With these concessions, the only remaining task, really, is to determine what sentence is to be meted out on the appellant.
10. We agree with the respondent that the manner in which the appellant set upon the deceased and fatally injured him while he was laying prone on the ground and the nature of injuries sustained by the deceased clearly showed that the attack was premeditated, violent, brutal and meant to cause the death of the deceased. Despite the appellant's plea that his mitigation be considered i.e that he is a first offender; that he is remorseful and regrets the deed; that he was young and should be given a second chance of life, this Court is of the considered view that an appropriate custodial sentence is called for to meet the ends of justice.
11. In the premises, therefore, the appeal partially succeeds.
- The sentenced of death imposed upon the appellant by the trial court is hereby set aside and substituted by a sentence of thirty (30) years imprisonment. The sentence shall take effect from 25th September, 2009 when the appellant was arraigned before the trial Court. It is so ordered.

Dated and delivered at Kisumu this 7th day of February, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.

