



**Dimba & another v Republic (Criminal Appeal 3 of 2020)  
[2025] KECA 540 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 540 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 3 OF 2020  
HA OMONDI, LK KIMARU & WK KORIR, JJA  
MARCH 21, 2025**

**BETWEEN**

**GEORGE OLUOCH DIMBA ..... 1<sup>ST</sup> APPELLANT**

**CHARLES OWINO OTIENO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Ruling of the High Court of Kenya at Kisumu  
(H.K. Chemitei, J.) dated 13th November, 2013 in HCCRC No. 37 of 2010)*

**JUDGMENT**

1. George Oluoch Dimba and Charles Owino Otieno, the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars in the information were that on 20th August, 2010 at Ligenga sub-location, Ugenya District within Nyanza Province, the appellants murdered George Ajode Nyabar (the deceased).
2. The appellants pleaded not guilty to the charge, and the matter proceeded to trial, where the prosecution called 8 witnesses. The appellants were placed on their defence, and upon considering the evidence, the trial judge found them guilty, convicted, and sentenced them to the then mandatory death sentence.
3. Being dissatisfied, the appellants have now appealed to this Court against the sentence which they framed as follows:

“That the learned Judge erred by imposing a harsh and excessive sentence taking into account the mandatory nature of the death sentence was declared unconstitutional.”



4. In support of the appeal, the appellants contend that the learned judge failed to consider the principles of sentencing when meting out the death sentence. They assail the sentence imposed for being a mandatory death sentence which has since been declared unconstitutional by the Supreme Court in *Francis Karioko Muruatetu & Another vs. Republic* (2017) eKLR.
5. In urging the Court to grant a non-custodial sentence, it is submitted learned counsel Ms. Omollo that the appellants have reformed and are well rehabilitated, having undertaken several courses while in custody. That in sentencing the appellants, the Court did not consider the time the appellants spent in custody during trial.
6. In reply, the respondent through learned Senior prosecution counsel, Mr. Okango, conceded that in sentencing the appellants, the trial court did not exercise its discretion properly. Relying on the Supreme Court decision in case of *Francis Karioko Muruatetu & Another vs. Republic* [supra], the respondent conceded to the setting aside of the mandatory death sentence and imposing of an appropriate custodial sentence. In resentencing the appellants, the respondent urged the Court to consider the principles set in *Muruatetu* case, the Judiciary Sentencing Guideline and the appellants' mitigation. The respondent submitted further that since the record does not indicate whether the trial court heard the appellant's mitigation, the matter be remitted back to the High Court for mitigation and resentencing.
7. Having carefully considered the ground of appeal, the respective submissions and the record, the only issue for determination is whether the sentence meted on the appellant was legal.
8. It is now settled that sentence is a matter that rests in the discretion of the trial court and that sentence must depend on the facts of each case. On appeal, such as this, the court will not easily interfere with sentence unless it 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.
9. The position was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola s/o Owoura vs. Reginum* (1954) 21 270 as follows:

“The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.”
10. The principles guiding this Court on appeal in deciding whether or not to interfere with the sentencing discretion of the trial court were 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.”



11. The respondent concedes that the sentence is for setting aside as it was imposed before the seminal decision in Francis Karioko Muruatetu Case (supra). In that decision, the Supreme Court declared the mandatory aspect of death sentence under section 204 of the Penal Code unconstitutional, hence unshackling trial courts to conduct sentence hearings and impose an appropriate sentence after a conviction for the offence of murder. Learned Senior Prosecution Counsel, Mr. Okango, on behalf of the respondent points out that:

“unfortunately, while the sentencing ruling (page 36 of the record) states that the court heard their mitigation, the same is not evident on record. Hence we humbly submit that this Court is not sufficiently availed the appellant’s mitigation to enable it to give an appropriate sentence.”

It is on account of this that we are urged to remit this matter to the High Court for re-sentencing hearing, where each appellants’ mitigation will be recorded; that just as criminal responsibility is individual, mitigation cannot be general; and each convict/appellant ought to give his/her own mitigation.

12. In sentencing the appellants and after receiving their mitigation, the learned Judge ruled that:

“The accused persons were convicted for murder on 18-10-2012. This court has heard their mitigation. They are generally middle-aged with young families. However, having been found guilty of the offence, there is only one option and that is death sentence.

...

Consequently, I shall proceed to sentence the two accused persons to suffer death as provided under Section 203 of the Penal Code.”

13. In the present case, the learned Judge considered himself constrained by the mandatory sentence provided in the statute and, indeed, the law stood as such at the time. From the record, the appellants were sentenced on 13th November, 2016. As at that time, the prevailing jurisprudence was that the death penalty under section 204 of the Penal Code was mandatory. However, this appeal comes in the backdrop of the Supreme Court’s decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR, which declared the mandatory nature of the death sentence under section 204 of the Penal Code unconstitutional. The appellants are, therefore, entitled to benefit from this development of the law, as such, the appeal against the sentence is therefore merited.

14. What, then, is the appropriate step for the appellants in the circumstances of this case? As pointed out by counsel for the respondent, the record does not show what each person stated in mitigation, whether the observation regarding their youthfulness was information offered by themselves, or whether it was on account of an assessment done by the learned judge. We are thus in agreement that the best option is to remit this matter to the High Court so that the appellants may present their plea in mitigation, and an appropriate sentence be pronounced. We so order.

**DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2025.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**L. KIMARU**



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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR

