Owala v Republic (Criminal Appeal 356 of 2019) [2025] KECA 718 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KECA 718 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 356 OF 2019

HA OMONDI, LK KIMARU & WK KORIR, JJA

APRIL 25, 2025

BETWEEN

MATHAYO OTIENO OWALA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kisumu (Chemitei, J.) dated 2nd November, 2015, in HC. CRA. No. 53 of 2011)

JUDGMENT

1. This is a first appeal arising from the judgment of the High Court of Kenya at Kisumu (Chemitei, J.) delivered on 2nd November, 2015, in Criminal Case No. 53 of 2011. The appeal is against sentence only.

2. A brief background of this appeal is that the appellant was charged before the High Court with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence alleged that on 5th September, 2011, at Dienya East Sub-Location, Gem District, within Nyanza Province, the appellant murdered David Omondi Osuga.

3. The appellant denied the charge after which a full trial ensued, with the prosecution calling seven witnesses, while the appellant elected to give an unsworn statement in his defence. After full trial, the appellant was found guilty as charged. Upon his conviction, the appellant was sentenced to death as was then provided by law.

4. In his appeal before us, the appellant challenges the death sentence awarded by the trial court. It was the appellant's submission that the trial court, in awarding the sentence, noted that at the time, the mandatory penalty for persons convicted of the offence of murder was death. The appellant relied on the decision of the Supreme Court in Francis Karioko Muruatetu & another v Republic [2017] eKLR, stating that the apex court found that the mandatory nature of the death sentence as provided under

Section 204 of the [*Penal Code*](https://new.kenyalaw.org/akn/ke/act/1930/10) is unconstitutional. On the basis of the said decision, the appellant urged us to set aside the death sentence awarded by the trial court, and substitute it with a custodial one, bearing in mind the appellant's mitigation before the trial court. Counsel for the Appellant, Mr. Omondi, was of the view that a custodial sentence of fifteen (15) years was appropriate, considering the circumstances of the case.

5. The appeal on sentence was conceded by the State. Learned State Counsel, Mr. Okango, noted that the trial court did not exercise its sentencing discretion, as it was bound by the then prevailing mandatory death sentence. He was of the view that the appellant's death sentence ought to be substituted by a term sentence. It was his submission that the offence committed by the appellant was heinous and brutal, and that the deceased was a young man in his late 20s, who had his whole life ahead of him. He urged that, in light of the aggravating factors in this case, a custodial sentence of twenty-five (25) years would be ideal.

6. We have carefully considered the record of appeal, the submissions by both parties, and the law. This is an appeal against the sentence. The only issue arising for our determination is whether the sentence meted upon the appellant by the trial court is sound in law.

7. Section 379 (1) (a) & (b) of the *Criminal Procedure Code* provides for this Court's jurisdiction to entertain an appeal against sentence from the High Court. The said section provides thus:

> " 379. Appeals from High Court to Court of Appeal.
>
> 1. A person convicted on a trial held by the High Court and sentenced to death, or to imprisonment for a term exceeding twelve months, or to a fine exceeding two thousand shillings, may appeal to the Court of Appeal:
>   a. against the conviction, on grounds of law or of fact, or of mixed law and fact;
>   b. with the leave of the Court of Appeal, against the sentence, unless the sentence is one fixed by law."

8. The conditions upon which the appellate court may interfere with the sentence of a trial court were set out in the case of Bernard Kimani Gacheru vs. Republic [2002] eKLR where this Court held as follows:

> " 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 states is shown to exist."

9. As stated earlier in this judgment, the appellant based his appeal on the Supreme Court's decision in Francis Karioko Muruatetu (supra), in which the Supreme Court declared the mandatory nature of the death penalty for the offence of murder unconstitutional, and struck down Section 204 of the *Penal Code*, to the extent that it prescribed a mandatory death sentence upon conviction for murder. This decision is binding on this Court. In the premises, the appellant is deserving of a re-consideration of his sentence.

10. We have taken into account the submissions by both parties. We have also considered the appellant's mitigating circumstances. The appellant was a first offender. He expressed his remorse for the loss of life to the family of the deceased and urged that he has been rehabilitated in the period that he has been in prison.

11. According to the facts of the case, the appellant and the deceased were involved in a fight, during which the deceased fell down, and the appellant cut him using a panga. According to the postmortem report, the appellant cut off the wrist of the deceased's right-hand in one clean cut, and further inflicted deep cut wounds on his right hand, left wrist and left leg. The deceased died due to shock and loss of blood. It is our view that the deceased suffered a painful death. The attack by the appellant was executed in such a vicious and brutal manner. It was not justified any circumstances.

12. In view of the foregoing, we find that the offence was aggravated.

    Considering the decision of the Supreme Court in the Muruatetu case (supra), the manner in which the offence was committed, and all the surrounding circumstances, we hereby set aside the death sentence imposed upon the appellant by the trial court. We substitute it with a custodial sentence of twenty (20) years imprisonment, effective from the date of the appellant's arraignment before the trial court. For avoidance of doubt, the sentence will be calculated from 12th September, 2011, when the appellant was arraigned before the High Court.

13. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL, 2025.

H.A OMONDI

.... JUDGE OF APPEAL

L. KIMARU

.... JUDGE OF APPEAL

W. KORIR

.... JUDGE OF APPEAL

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

DEPUTY REGISTRAR