



REPUBLIC OF KENYA



KENYA LAW
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**Opiyo v Republic (Criminal Appeal 29 of 2018)
[2025] KECA 823 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 823 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 29 OF 2018
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
MAY 9, 2025**

BETWEEN

SAMUEL OTIENO OPIYO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Siaya,
(J.A. Makau, J.) dated 26th January, 2017 in HCCRC No. 59 of 2015)*

JUDGMENT

1. Samuel Otieno Opiyo, the appellant, 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 2nd July, 2015 at Gula village in Ugunja Sub-County, the appellant murdered Merrab Awuor Masawa.
2. The appellant pleaded not guilty to the charge and a fully-fledged hearing ensued. At the conclusion of the trial, he was convicted as charged and mandatorily sentenced to death as per the law at that time.
3. The appellant was aggrieved by his conviction and sentence. He filed an appeal to this Court against both the conviction and sentence.

However, at the plenary hearing, 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. Relying on the case of Francis Kariokor Muruatetu & Another vs. Republic (2017) eKLR, it was submitted for the appellant that owing to the emerging jurisprudence, the trial court erred in meting a death sentence upon the appellant without due regard to the mitigating factors.



4. It was further submitted that the Supreme Court case of Francis Karioko Muruatetu & Another vs. Republic (*supra*) found the mandatory death sentence prescribed for the offence of murder by section 204 of the *Penal Code* to be unconstitutional.
5. The appellant further submitted that the appellant is remorseful, a first offender and was a young man at the time the offence was committed and urged the court to substitute the death sentence with 20 years' imprisonment.
6. On his part, Mr. Okango learned prosecution counsel for the respondent conceded to the appeal on sentence. In his submissions, the respondent agreed with the appellant that indeed the finding on sentence made by the trial court was to the effect that the only sentence available on conviction in a murder trial was the death sentence. 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.
7. The respondent, urged the Court to take into consideration the aggravating factors, particularly the fact that the deceased was a defenceless senior citizen aged over 70 years who ordinarily posed no threat to the appellant. The respondent was of the view that the age of the victim is an aggravating factor so are the nature of the injuries inflicted on the deceased which calls for severe punishment from the Court. The respondent proposed that the appellant serves a custodial sentence of twenty-five (25) years imprisonment as an appropriate punishment.
8. This being a first appeal, it is settled that on a first appeal, the Court has a duty to scrutinize the evidence as stated in, *Okeno vs. Republic* [1972] EA 32 that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). 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 draw its own 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, see *Peters v. Sunday Post*, [1958] E. A. 424.”

9. Having considered the record, the contending oral and written submissions made before the Court, and the law, the only issue for determination is whether the sentence meted on the appellant was legal.
10. 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.”



11. Similarly, in *Ahamad Abolfathi Mohammed & Another vs. Republic* [2018] eKLR it was stated that:

“sentence is essentially the exercise of discretion as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.”
12. The appellant raises issue with the mandatory nature of the death sentence imposed upon him. That in imposing the said sentence, the trial court failed to consider the appellant’s mitigating factors. In his determination, the learned judge stated thus;

“I have considered the accused mitigation through his counsel and that he is a first offender...
I have also considered the circumstances with which the offence was committed and the nature of the offence. The accused stands convicted of the murder charge which attracts a death sentence and no other sentence is provided by law for such offence. I accordingly sentence the accused to suffer death.”
13. The respondent conceded to the fact that the trial court did not exercise its discretion to award any other sentence other than the death sentence.
14. As submitted by the respondent, the manner in which the appellant set upon the deceased and fatally injured her 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 that he is a first offender, is very remorseful and that he was young at the time of the commission of the offence, an appropriate custodial sentence is called for to meet the ends of justice.
15. In the premises, therefore, the appeal partially succeeds. The sentence of death imposed upon the appellant by the trial court is set aside and substituted by a sentence of twenty-five (25) years imprisonment. We take note that the appellant was in remand custody during the period of trial which period must be taken into account when computing the sentence; thus, in keeping with the provisions of section 333 (2) of the *Criminal Procedure Code*, we direct that the sentence to take effect from 21st October, 2015 when the appellant was arraigned before the trial Court.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF MAY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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



Deputy Registrar

