



REPUBLIC OF KENYA



KENYA LAW
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**Ouma & another v Republic (Criminal Appeal 131 of 2020)
[2025] KECA 1063 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1063 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 131 OF 2020
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
JUNE 13, 2025**

BETWEEN

MICHAEL OUMA 1ST APPELLANT

PETERLIS KUNGU 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at
Kisumu, (Maina, J) dated 3rd November, 2016 in HCCRC No 33 of 2013)*

JUDGMENT

1. Michael Ouma and Peterlis Kungu, “the appellants”, were charged with the murder of Boaz Otieno Ndong’a, an offence under Section 203 as read with Section 204 of the *Penal Code*. The information alleged that on 19th July, 2013, at Kotetini Village, Karando “A” Sub-location, Kisumu North District within Kisumu County, the appellants murdered one, Boaz Otieno Ndong’a, (“the deceased”). Both appellants entered a plea of not guilty but following a full trial, they were convicted of the offence, whereupon they were sentenced to death.
2. The appellants being aggrieved by the judgment proffered this appeal by way of memorandum of appeal dated 11th February, 2025. In the said memorandum, the appellants’ main complaint against the High Court judgment is limited to sentence. They allege that the trial court erred in law by sentencing them to death since its mandatory nature was declared unconstitutional by the Supreme Court in the case of *Francis Karioko Muruatetu & Others v Republic* [2017] eKLR.
3. The appeal came before us for hearing on our virtual platform on 12th March, 2025. When called out, Mr. Mirembe, learned counsel appeared for the appellants whereas Mr. Okango, learned Assistant Director of Public Prosecutions was present for the respondent.



4. Counsel for the appellants, through his written submissions dated 11th February 2025, raised the issue that the trial court imposed the death sentence without exercising discretion, contrary to the landmark decision in *Francis Karioko Muruatetu* (*supra*). Counsel submitted that the Supreme Court in that case held that Section 204 of the *Penal Code*, which prescribes a mandatory death sentence for the offence of murder, was unconstitutional to the extent of its mandatory nature. While appreciating that the death penalty is still lawful, it should only be imposed as a discretionary maximum penalty.
5. The appellants further submitted that the trial court failed to consider the time the appellants had spent in custody prior to sentencing, a period spanning over 11 years. Counsel argued that this oversight contravened Section 333(2) of the *Criminal Procedure Code*, which requires courts to meaningfully account for the time already served in remand custody. He cited the decision in *Ahamad Abolfathi Mobammed & Another v Republic* [2018] eKLR, for the proposition.
6. Additionally, counsel referred to the case of *Chai v Republic* [2022] KECA 495 (KLR), for the proposition that courts have in the past substituted life sentences or mandatory death penalties with custodial sentences. In this case, the Court of Appeal reduced a life sentence to 25 years. Counsel urged us to follow this precedent, having taken into account 14 years already spent both in remand and in prison.
7. Mr. Okango, on the other hand, submitted that the trial court's decision to impose the death sentence was consistent with the legal framework at the time. Counsel nonetheless acknowledged the jurisprudence arising from the Supreme Court's decision in *Francis Karioko* (*supra*), which declared the mandatory nature of the death penalty imposed in murder offences unconstitutional. Counsel however added that the court did not outlaw the death penalty out rightly, retaining it as a discretionary maximum punishment.
8. Counsel submitted that the sentencing in this case occurred on 3rd November 2016, prior to the Supreme Court's decision aforesaid. Therefore, the trial court's decision to impose the death sentence under the then-prevailing legal position was valid. He further noted that the trial court had recorded mitigation presented on behalf of the appellants at the time, in which they simply requested leniency without providing individualized personal circumstances from each appellant.
9. It was submitted that effective re-sentencing requires the court to consider mitigation tailored to each individual, given that criminal culpability and mitigation are personal. He submitted that the mitigation recorded in the trial proceedings was insufficient to enable this Court to exercise its sentencing discretion appropriately under the current legal framework.
10. In conclusion, counsel conceded that the mandatory death sentence imposed in this case should be set aside. However, he proposed that the matter be remitted to the High Court for a re-sentencing hearing, during which the appellants' individual mitigation could be fully recorded and considered. This, he argued, would allow for a just and appropriate sentence in line with the principles of the Muruatetu decision.
11. Upon review of the record, submissions by the appellants and the respondent, this is our take: In Muruatetu case, the Supreme Court of Kenya declared that the mandatory nature of death sentence under Section 204 of the *Penal Code* was unconstitutional, as it stripped courts of discretion in imposing an appropriate sentence based on the specific circumstances of each case. While the death penalty remains lawful as a discretionary maximum sentence, courts are required to conduct individualized sentencing hearings, factoring in mitigation and the unique circumstances of both the offence and the offender. This principle has been reinforced in subsequent cases, such as *William Okungu Kittiny v Republic* [2018] eKLR, which emphasized the importance of judicial discretion



in sentencing, and *Abamad Abolfathi Mohammed & Another v Republic* (*supra*), where this Court reiterated the necessity of considering time spent in custody prior to sentencing in line with Section 333(2) of the *Criminal Procedure Code*.

12. In the present case, the trial court sentenced the appellants to death as prescribed in Section 204 of the *Penal Code*. It is clear from the record that the High Court did not conduct an individualized sentencing hearing or give due consideration to the appellants' personal mitigation, which represents a significant procedural oversight. Mitigation is a vital component of the trial process, as required by Sections 216 and 329 of the *Criminal Procedure Code*, which mandate the court to consider such evidence as it deems necessary to determine an appropriate sentence for a convicted person.
13. The failure to consider mitigation denies the court the opportunity to evaluate critical factors such as the appellants' personal circumstances, any expression of remorse, and other considerations vital for determining a proportional and just sentence.
14. Historically, courts have not routinely conducted hearings as part of the sentencing process. However, with the introduction of the Sentencing Policy Guidelines, this practice has become mandatory, aligning with International and Regional Sentencing Standards.
15. In *Joseph Njuguna Mwaura & 2 Others v Republic* [2013] KECA 541 (KLR), this Court in reference to *Godfrey Ngoto Mutiso v Republic* [2010] KECA 487 (KLR), had this to say:

“The import of this decision is that mitigation is now required to determine the appropriate sentence in cases where there had been convictions for capital offences. In effect, the holding in this case introduced sentencing discretion to judicial officers in murder cases. Decisions by this Court are generally binding, but we do have the power to depart from those decisions where we consider that in the circumstances, it is correct to do so. The Court will also not follow a case that it considers per incuriam.”

16. It is common for appellate courts to set aside sentences imposed by trial courts where the sentencing process was not accompanied by a reasoned ruling based on statutory pre-sentencing considerations.
17. The issue of setting aside death sentences in murder cases and remitting them to the High Court for re-sentencing, due to lack of individualized mitigation, has been addressed in several cases. Still in *Muruatetu case*, the Supreme Court emphasized the need for individualized sentencing hearings where mitigating factors such as the offender's circumstances, remorse, and potential for rehabilitation are considered. It further reinforced that re-sentencing hearings must include submissions from both the prosecution and defence, as well as victim impact statements, and take into account factors like the offender's age, character, and potential for reform. These principles were echoed in *Dickson Mwangi Munene v Republic* [2019] eKLR, where this Court held that cases sentenced under the now-invalid mandatory framework should be remitted to the High Court for re-sentencing, allowing the accused to present personal mitigation. Similarly, in *Chai v Republic* [2022] KECA 495 (KLR), the appellate court emphasized the need for proportional sentences by setting aside a life sentence and imposing a 25-year term after considering mitigating factors. Additionally, in *Abamad Abolfathi Mohammed & Another v Republic* (*supra*), this Court too highlighted the requirement under Section 333(2) of the *Criminal Procedure Code* to account for the time spent in custody before sentencing. Collectively, these cases stress the importance of procedural fairness and ensuring that mitigation is specific to each accused person, necessitating the remittance of such matters to the High Court when individualized mitigation has not been conducted.
18. Having said as much, we do make an order that this matter be and is hereby remitted to the High Court for a re-sentencing hearing, where the appellants will have an opportunity to present their personal



mitigation, and the court will thereafter determine an appropriate sentence in line with constitutional principles and established jurisprudence. Thus, the appeal on sentence succeeds to that limited extent.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF JUNE, 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

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H. A. OMONDI

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

