



REPUBLIC OF KENYA



KENYA LAW
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**Opiyo v Republic (Criminal Appeal 112 of 2020)
[2025] KECA 1423 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1423 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 112 OF 2020
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
JULY 31, 2025**

BETWEEN

JACOB ODERO OPIYO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at
Kisumu (D.S. Majanja, J) dated 25th July, 2017 in HCCR No. 19 of 2015)*

JUDGMENT

1. The appellant, Jacob Odero Opiyo, was the accused person in the trial before the High Court in Kisumu, Criminal Case No. 19 of 2015. He was charged with three (3) counts of murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the information were that on 12th December, 2014, at West Katieno Location, Seme Sub Location in Kisumu County, the appellant murdered his son Abraham Ochieng Odero (1st Deceased) and on 31st March, 2015 and at the same location the appellant murdered his parents Jane Aoko Odero (2nd Deceased) and Dan Opiyo Odero (3rd Deceased).
2. The appellant pleaded not guilty to the charge and a fully- fledged trial ensued. At the conclusion of the trial, the learned judge convicted the appellant and sentenced him to death.
3. The appellant was aggrieved by that decision and has lodged the present appeal against sentence only. In his Memorandum of Appeal, the appellant raised a single ground of appeal, that he was fully seeking refuge in the provisions of Articles 165[3][a][b], 159[2][a][b] and 22[4] of *the Constitution* of Kenya 2010 bearing in mind the Supreme Court's decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR.



4. The appeal was argued by way of written submissions by both parties. During the virtual hearing, learned counsel, Mr. Okoyo appeared for the appellant, whereas learned Assistant Director of Public Prosecutions prosecution, Mr. Okango, appeared for the respondent.
5. It is submitted for the appellant that the instant appeal is based on sentence and since the appellant opted not to make his plea in mitigation at the trial court, the trial court sentenced him to the mandatory death sentence as per the law. The appellant urges the Court to allow the appeal and remit the file back to the trial court for purposes of resentencing.
6. In reply, the respondent acknowledges that indeed the mandatory nature of the death sentence was declared unconstitutional. However, the death sentence in the exercise of a court's discretion is still a valid sentence.
7. The respondent further submits that while the appellant prays that the matter be remitted back to the High Court for mitigation, an appeal is not a ground for an appellant to get a second bite at the cherry. The appellant was given an opportunity to mitigate and he opted not to say anything, and the Court noted that. The respondent prayed that the Court quashes the mandatory death sentence and looking at the circumstances of the offence, it proceeds and meets out a discretionary death sentence.
8. Having carefully considered this appeal, the submissions and the law, the appellant has restricted his appeal to the issue of sentence only. In effect, he is urging this Court to remit the matter back to the High Court due to his failure to mitigate.
9. The evidence leading to the conviction and sentence was that the appellant who had been away from home following the murder of his child, (1st deceased), in December 2014, under circumstances which suggested that he had a hand in the death, returned to his parents' home in March 2015. In the evening of 31st March 2015, his sister Roseline Adhiambo who testified as PW3 saw him prancing around the compound. The appellant's niece Fena Awino Opiyo (PW5), saw the appellant enter his parents' house while armed with a piece of timber, which he used to strike the 2nd and 3rd deceased, thereby inflicting fatal injuries. He then escaped, but was later arrested.
10. Upon conviction, the record shows that on being called out to present his plea in mitigation, the appellant opted to remain silent. In his judgment, the learned judge observed as follows;

“The accused, Jacob Odero Opiyo was convicted on two counts of murder of his parents, Jane Aoko Odero and Dan Opiyo Odero. He has elected to say nothing in mitigation. The sentence for murder is one and is death. According, (sic) I sentence the accused to death for the murder of Jane Aoko Odero and Dan Opiyo Odero. However, since the death sentence cannot be carried out twice, the sentence for Dan Opiyo Odero on the third count is held in abeyance. Right of Appeal explained.”
11. The respondent, therefore, concedes to the appellants' request that matter be remitted back to the trial court, for a re- sentence hearing where the appellant's mitigation will be recorded and considered.
12. The appellant was sentenced to death. In the premises, the appellant is deserving of a re-consideration of his sentence. The respondent has rightly conceded the appeal against the mandatory death sentence imposed on the appellant. Since the appellant's mitigation is not on record, we find it appropriate, and direct that this matter be remitted to the High Court for mitigation and resentencing. To this extent the appeal succeeds and is allowed.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY, 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

